Foreign Governments in Contempt?
A Case for Limiting the Contempt Power
Under the Foreign Sovereign Immunities Act

Shearman & Sterling Student Writing Prize in
Comparative and International Law,
Outstanding Note Award

The Foreign Sovereign Immunities Act (FSIA) governs suits against foreign governments in the federal and state courts. The contempt power is a core judicial competency for maintaining efficiency and enforcing orders. As currently enacted, the FSIA does not prohibit use of the contempt power against foreign governments. However, the Act’s structure, the quasi-punitive nature of judicial contempt sanctions and the fact that such sanctions are nearly per se unenforceable under the FSIA’s statutory terms render use of this power inconsistent with the constitutional allocation of the foreign affairs powers. Because contempt sanctions cannot be effectively enforced in FSIA cases, they are reduced to judicial statements of disapproval regarding the conduct of a foreign government. Such statements are the province of the executive branch. This Note argues that the contempt power should be restricted under the FSIA and presents three potential methods for achieving this result: judicial abstention, executive statements of interest and legislative restriction. This proposed restriction will help prevent potential foreign policy complications with only a minimal impact on the historical power of the judiciary and the rights of plaintiffs.
INTRODUCTION ................................................................. 179

I. THE NATURE OF THE CONTEMPT POWER AND THE
STRUCTURE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT .. 181

A. The Contempt Power ................................................... 181
   1. The Source and Authorization of the Contempt
      Power ........................................................................ 181
   2. The Blurred Distinction Between Civil and
      Criminal Contempt .................................................. 185
   3. The Core Functions of Contempt Sanctions .......... 186

B. The Foreign Sovereign Immunities Act ................. 188
   1. The Development of Foreign Sovereign Immunity
      in the United States .................................................. 188
   2. Establishing Jurisdiction Under the Foreign
      Sovereign Immunities Act ....................................... 189
   3. Execution and Attachment of Sovereign Assets
      Under the Foreign Sovereign Immunities Act ....... 191
   4. The Foreign Sovereign Immunities Act Permits
      Liability Without Remedy ..................................... 192

II. THE AVAILABILITY AND PROPRIETY OF THE CONTEMPT
POWER IN FOREIGN SOVEREIGN IMMUNITIES ACT CASES ...... 193

A. The Foreign Sovereign Immunities Act Does Not
Preclude the Use of the Contempt Power ...................... 194
   1. Circuit Courts Divide on the Relationship
      Between Power and Enforceability ......................... 194
   2. Legislative History: Distant Contemplation of
      Contempt .................................................................. 196

B. Civil Contempt Sanctions in FSIA Cases are Nearly
Per Se Unenforceable .................................................. 198

C. Unnecessary Tension in the Foreign Relations
Separation of Powers .................................................. 203
   1. The Foreign Policy Separation of Powers and the
      “Sole Organ Doctrine” .............................................. 203
   2. Interference in the Conduct and Communication
      of Foreign Relations ................................................. 205

III. RESTRICTING THE CIVIL CONTEMPT POWER IN FSIA CASES . 210

A. Proposals for Judicial, Executive and Legislative
   Solutions ................................................................. 210
   1. Judicial Abstention From Contempt Orders
INTRODUCTION

Foreign governments can be sued in the United States. Recognizing that these suits impact foreign relations, Congress enacted the Foreign Sovereign Immunities Act (FSIA)\(^1\) to clarify the circumstances in which they are permitted and to codify the restrictive theory of sovereign immunity.\(^2\) Essentially, the FSIA strikes a balance between the desire to afford foreign sovereigns special respect and ensuring access to justice for aggrieved parties. Against this balance, does a court properly seized of jurisdiction over a foreign sovereign defendant have the power to hold that defendant, a foreign government, in contempt? Three Courts of Appeals have recently addressed this question and the results have not been unanimous.

This question was most recently brought to bear in *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, where the Court of Appeals for the District of Columbia Circuit upheld a district court order levying monetary contempt sanctions against the Democratic Republic of Congo.\(^3\) The court reasoned that FSIA ju-

---

2. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–90 (1983) (discussing the historical background of the FSIA); H.R. Rep. No. 94-1487, at 13 (1976) (“[The provisions of FSIA are] conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.”).
risdiction imparts the standard forms of authority that a court otherwise possesses under a more traditional source of jurisdiction. More directly, it noted that “there is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court’s inherent contempt power.”4 Similarly, in Autotech Technologies v. Integral Research & Development Corporation, the Court of Appeals for the Seventh Circuit held that the contempt power remains unaffected by the FSIA, which controls jurisdiction alone.5 These two opinions issued notwithstanding the prior decision of the Court of Appeals for the Fifth Circuit in Af-Cap, Inc. v. The Republic of Congo, determining that the FSIA bars contempt orders, in the form of monetary sanctions, because the statute does not “present a situation in which [such an order] could stand.”6

The availability of the contempt power in FSIA cases is a narrow but significant issue. Contempt is considered a key judicial competency, deemed inherent in a court’s jurisdiction.7 However, when applied against a foreign sovereign, the power directly implicates foreign relations. Contempt orders issue from the judiciary and may thus create conflict with the separation of powers scheme relating to the conduct of foreign relations.8 Because the FSIA renders contempt sanctions against foreign sovereign defendants nearly per se unenforceable, they are reduced from tools in furtherance of the judicial power to federal statements of disapproval concerning the conduct of a foreign government.9 This situation yields tension between the value of the contempt power to the judiciary and aggrieved plaintiffs, and the executive interest in preserving a unitary voice for the conduct of foreign relations.10

This Note argues that although the FSIA does not prohibit the use of the contempt power against foreign sovereign defendants, the

---

4. Id. at 378 (citing Autotech Techs. v. Integral Research & Dev. Corp., 499 F.3d 737, 744 (7th Cir. 2007)).
5. Autotech Techs., 499 F.3d at 744 (“Once a court is entitled to exercise subject matter jurisdiction over the suit, it has the full panoply of powers necessary to bring that suit to resolution and to enforce whatever judgments it has entered.”).
7. See infra Part I.A.1.
8. The theory of separation of powers is rooted in historical, textual and structural analyses of the United States Constitution’s intentional division of roles and responsibilities among the three branches of the federal government. See infra text accompanying notes 140–42.
9. See infra Part II.B.
10. See infra Part II.C.
Act’s structure, the quasi-punitive nature of contempt sanctions and 
the unique circumstance that such sanctions are nearly *per se* unen-
forceable render such use inconsistent with the constitutional allocation of power over foreign affairs. Therefore, it should be restricted. Such restriction will help prevent potential foreign policy complications with only a minimal impact on the historical power of the judi-
ciary and the rights of plaintiffs.

Part I evaluates the nature of the contempt power and the 
structure of the FSIA. Part II examines the interaction of the FSIA 
with the contempt power, addresses the tension among the circuit de-
cisions and discusses how contempt orders against foreign sovereign 
defendants adversely impact separation of powers considerations in 
foreign relations. Part III proposes three approaches to restricting the 
contempt power under the FSIA and evaluates how such a restriction 
would affect the judiciary, plaintiffs and the political branches.

I. THE NATURE OF THE CONTEMPT POWER AND THE STRUCTURE OF 
THE FOREIGN SOVEREIGN IMMUNITIES ACT

This Note directly addresses the nexus of the contempt power 
and the FSIA. A basic background in both areas of law is necessary 
to evaluate the core question, and is useful in understanding why a 
contempt sanction can be an offensive instrument in foreign relations. 
First, this section provides general background about the source and 
authorization of the contempt power, explains the blurred distinction 
between the two general forms of contempt—criminal and civil—and 
analyzes the functions of civil contempt sanctions. Second, this sec-
tion describes the history and structure of the FSIA, paying particular 
attention to the provisions governing immunity of sovereign assets 
from execution to satisfy judgments.

A. The Contempt Power

1. The Source and Authorization of the Contempt Power

Contempt occurs when an order is disobeyed, proceedings are 
interrupted or a party or person behaves in a way that offends the de-
corum, dignity or authority of the court.11 In sum, contempt is a

11. See Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 345 
(2000) (providing a concise description of the contempt power in U.S. courts and tracing the 
evolution of civil contempt jurisprudence to the Supreme Court’s decision in *United Mine*
“disregard of judicial authority.” 12 Taken from a functional perspective, contempt is a power adopted by courts and other official bodies to “coerce cooperation, and punish criticism or interference.” 13 The contempt power is well established in Anglo-American common law; however, it is not a necessary tool in developed legal systems. For example, European civil law jurisdictions do not have an equivalent of contempt. 14

Contempt law in the United States derives from English common law where disobedience of a writ issued under the King’s seal was an offense. 15 It was well established in early American jurisprudence that the power to punish for contempt automatically vested in the courts. 16 In Ex parte Robinson, the Supreme Court affirmed that the contempt power was inherent in the federal judiciary absent any specific legislative enactment. 17 Demonstrating its strong belief in the power’s inherent nature, the Court declared that “[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.” 18 It is now well accepted that the contempt power in-

---

12. 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2960 (2d ed. 1995) (“A contempt of court consists of the disregard of judicial authority. A court’s ability to punish contempt is thought to be an inherent and integral element of its power and has deep historical roots.”).


14. Id. at 2.

15. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 284 (Wayne Morrison, ed., Cavendish Publishing Ltd. 2001) (“The principle instances, of either sort, that have been usually punishable by [contempt], are chiefly . . . disobeying the king’s writs issuing out of the superior courts . . . .”); GOLDFARB, supra note 13, at 11–16.

16. In United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812), the Supreme Court first stated the rule that federal courts may only hear claims based on statutes or legislative grants of authority—in other words, that there is no federal common law of crimes. In establishing this early precedent, however, the Court noted a clear exception for the contempt power, which was found to vest in the courts absent any need for specific statutory authorization. The Court established that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . . To fine for contempt—imprison for contumacy—enforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.” Id.

17. Ex Parte Robinson, 86 U.S. 505, 510 (1873) (“The power to punish for contempts is inherent in all courts . . . .”).

18. Id.
FOREIGN GOVERNMENTS IN CONTEMPT?

While the contempt power is ultimately recognized as an inherent judicial power, it has been the subject of legislative action and debate dating to the Judiciary Act of 1789. Here, Congress codified the federal courts’ power “to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before [the court].” Beyond an appeal to judicial discretion, the Act neither provided direction as to the conduct that constituted contempt, nor defined any procedures necessary before the imposition of a sanction. This early statute preserved the English common law approach, including the ability to find a “constructive contempt.” The use of this power created a strongly negative public reaction, which resulted in the Act of March 2, 1831. Here, Congress exercised its powers over the federal courts to limit the forms of conduct subject to the contempt power, effectively removing a court’s ability to find and enforce constructive contempt. This Act continues to form the core of the legislative restriction of the contempt power, and is codified—in much the same language as the original statute—at 18 U.S.C. § 401.

The limitations of 18 U.S.C. § 401 represent the most direct legislative involvement in the contempt power. However, Congress has defined, permitted, and limited the use of contempt in a series of substantive and procedural laws. Among others, enactments affecting the power include the rules of criminal procedure, the rules of civil procedure, the civil discovery mechanisms, judicial proce-

---


22. See GOlfARF, supra note 13, at 20. A constructive contempt is one occurring outside the proceedings, such as the publication of a letter critical of the judge, a judicial ruling or an improper collateral attack on a judgment. Id.

23. Id. See also Livingston, supra note 11, at 357–59.


25. See FED. R. CRIM. P. 42 (requiring notice for criminal contempt proceedings and preserving a limited ability for judges to summarily punish criminal contempts).

26. See, e.g., FED. R. CIV. P. 45(e) (permitting the district courts to hold persons who fail to obey subpoenas in contempt); FED. R. CIV. P. 70(e) (allowing courts to hold a disobedient party in contempt for failure to perform a specific act).

27. See FED. R. CIV. P. 37(b) (permitting district courts to employ the contempt power
dure for recalcitrant witnesses and delegations of authority to administrative agencies. 

In 1989, a contentious child-custody case in Washington, D.C. led to the enactment of the District of Columbia Civil Contempt Imprisonment Limitation Act, amending the federal City Code to limit prison sentences for civil contempt in child custody cases. This enactment is a demonstration of congressional willingness to restrict the contempt power, notwithstanding its inherent status, when there is a perceived injustice or a concern about the policy ramifications of its unrestricted use.

Early legal and constitutional commentators believed that restrictions on contempt and other inherent judicial powers are within congressional authority. The Supreme Court has generally acknowledged congressional authority to regulate the contempt power, but deems it so “essential to the administration of justice” that it can neither be “abrogated nor rendered practically inoperative.”

While suggesting a limit on Congress’ power to restrict contempt, the Court “has been relatively silent on any hard boundaries.” One as a sanction for failure to obey court orders in discovery).

28. See 28 U.S.C. § 1826 (2006) (“[T]he court, upon [the refusal of a witness to provide testimony as ordered], may summarily order his confinement . . . .”).


32. In a statement on the floor of the House of Representatives, the lead sponsor of this legislation argued that “‘contempt’ is, in fact, a threat designed by the court, designed to encourage compliance [sic] with the court’s order. The judge, in effect, says in a civil contempt case like this, ‘comply or else.’ [The Elizabeth Morgan] case illustrates the potential for abuse of a civil contempt power.” 135 CONG. REC. H5842-02 (Sept. 21, 1989) (statement of Rep. Wolf).

33. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1758 (3d ed. 1858) (“[I]n all cases where the judicial power of the United States is to be exercised, it is for congress alone to furnish the rules of proceeding . . . and the mode in which the judgments . . . shall be executed.”); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 301 n.b (describing the Act of March 2, 1831, eliminating constructive contempts, as “a very considerable, if not injudicious abridgement of the immemorially exercised discretion of courts in respect to contempts,” but nevertheless recognizing its validity).


35. Id. at 66.

36. See Benjamin H. Barton, An Article I Theory of the Inherent Powers of the Federal
suggested boundary seeks to protect the fundamental “spheres of activity” necessary to the exercise of the Article III judicial power.\textsuperscript{37} This view places more control over contempt in the courts themselves. Another looks to Article I and asks whether the restriction is a necessary and proper means for achieving a constitutionally permissible end—such as constituting inferior federal courts, or regulating affairs with foreign nations.\textsuperscript{38} In Chambers v. NASCO, the Court noted that “the inherent power of lower federal courts can be limited by statute and rule,”\textsuperscript{39} because these courts “were created by act of Congress.”\textsuperscript{40} This suggests institutional support for the Article I approach within the judicial branch. Whichever of these theories may ultimately prevail, it remains true that “the Court has never invalidated a congressional act limiting the contempt power . . . .”\textsuperscript{41} Of course, this form of analysis can only speak to the limited set of restrictions Congress has enacted—those defining the scope of conduct subject to contempt and requiring certain procedural safeguards for contempt proceedings.

Ultimately, the contempt power is an assumed judicial authority, which, over time, has become so well accepted that it is deemed to be inherent in a court’s jurisdiction. Nevertheless, it is not beyond political checks, and it now stands as a legislatively recognized power.\textsuperscript{42}

2. The Blurred Distinction Between Civil and Criminal Contempt

Judges have significant authority to set the terms of orders and punishment for contempt.\textsuperscript{43} In exercising this power, the courts have created a complex body of governing law.\textsuperscript{44} The primary dis-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 39 (citing A. Leo Levin & Anthony G. Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 30 (1958)).
\item Id. at 38–39.
\item Id. (citing Ex Parte Robinson, 86 U.S. 505, 511 (1873)).
\item See Barton, supra note 36, at 44.
\item Id. at 46 (“The power of contempt is now well defined and heavily regulated by Congress.”).
\end{enumerate}
\end{footnotesize}
tinction in the field is between civil and criminal contempts. Only civil contempt is directly at issue in FSIA cases. However, the Supreme Court describes the boundary between civil and criminal contempt sanctions as “blurred”45 and “somewhat elusive.”46 Because criminal and civil contempts are difficult to separate, use of a civil contempt sanction almost always includes penal attributes.47 When used against a foreign sovereign defendant, any action that is penal in nature deserves close inspection.

In *United Mine Workers of America v. Bagwell*, the Court specifically explained how the civil-criminal contempt dichotomy applies in the context of fines.48 If the fine can be prevented by compliance, it is purgable and thus civil.49 While purgable fines are considered civil, the Court has stated that *per diem* fines, those accruing until the contemnor complies with an affirmative court order, are a “close analogy to coercive imprisonment.”50 Thus, while the Court has squarely determined that contempt fines can be civil in nature, it recognizes that civil and criminal contempts are closely related—if not inseparable. In other words, civil contempt sanctions are quasi-punitive.

3. The Core Functions of Contempt Sanctions

The contempt power generally serves three core functions: coercing compliance with court orders, compensating parties injured by non-compliance and reinforcing the independent power of the judiciary.

The first function of civil contempt is coercing compliance

---


46. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 830–31 (1994) (“Underlying the somewhat elusive distinction between civil and criminal contempt fines . . . is what procedural protections are due before any particular contempt penalty may be imposed.”).

47. *See Hicks*, 485 U.S. at 635 (“In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both . . .”); *see also Cordray, supra* note 44, at 441–442.

48. *See Bagwell*, 512 U.S. at 830–31. Imprisonment is not available in FSIA cases because the defendant is either a government, an agency or a corporation—entities that cannot be imprisoned, but which are subject to fines. *Id.*

49. *Id.* at 829.

50. *Id.* In the principal cases discussed below, *per diem* contempt fines were issued against the foreign sovereign defendants.
with court orders. A party that has decided to flout a judicial decree may decide that the costs of continued non-compliance—brought to bear through a contempt sanction—outweigh the benefits. In this situation a rational party may choose to re-engage in the judicial process. The second function is compensating aggrieved parties. For example, if a party violates an injunction designed to enforce the terms of a contract, the court may order the non-compliant party to pay fines to the injured party equal to the cost of the harm caused by the non-compliance. In so doing, the contempt sanctions simultaneously serve to mitigate the damage to the injured party and to remove the benefits of non-compliance. These two functions, to be functions, assume that the contemnor will pay the fines—either voluntarily or by the adverse attachment of assets. Absent the power of enforcement, the fines would lose their coercive and compensatory capacities.

The third core function of contempt is enforcing the independence of the courts. Enforcement of judicial orders is often dependent on historical societal respect for the judiciary and, when necessary, enactments by Congress and enforcement by the executive branch. The contempt power is among the few tools that the judiciary can independently employ to secure compliance with its orders. Federal courts view the underlying purpose of the power as preventing “disobedience to the orders of the Judiciary.” The Supreme Court has registered a clear concern that, without contempt power, the courts would become “impotent, and what the Constitution now fittingly calls the ‘judicial power of the United States’ would be a mere mockery.”

51. See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1958) (noting that the judicial power to state the law has been historically respected as an “indispensable feature of our Constitutional system.”). See generally Steven G. Calebresi & Kevin H. Rodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153 (1992) (synthesizing debate about the relationship between the Constitution, the executive and the judiciary).

52. Young v. U.S. ex rel Vuitton et Fils S.A., 481 U.S. 787, 798 (1987) (“The underlying concern that gave rise to the contempt power . . . was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of the trial.”) (citing Bessette v. W.B. Conkey Co., 194 U.S. 324, 333 (1904)). See Ex parte Robinson, 19 Wall. 505, 510 (1873) (“[T]he contempt power is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.”) (emphasis added).

53. Young, 481 U.S. at 796 (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911)).
B. The Foreign Sovereign Immunities Act

1. The Development of Foreign Sovereign Immunity in the United States

The Foreign Sovereign Immunities Act (FSIA) provides the sole basis for personal and subject-matter jurisdiction over a foreign sovereign, agency or instrumentality in the United States. The Act’s purpose was to clarify standards for suing a foreign state in the courts of the United States and to codify the circumstances when a foreign state is not entitled to sovereign immunity. Prior to the Act, foreign sovereign immunity determinations were a function of judicial philosophy combined with the case-specific opinions of the State Department.56

Sovereign immunity from the jurisdiction of other states is a well-established principle of international law. In the United States, this principle was first recognized in The Schooner Exchange, which determined that the equality of sovereign powers, in addition to a need for reciprocal respect, supported extending immunity to a French military vessel. The immunity recognized in The Schooner Exchange was not absolute. Rather, the courts evaluated the character of the challenged activity to determine if it was sovereign in nature, effectively adopting a doctrine of restrictive sovereign immunity. Over time, the doctrine shifted to a position of absolute immunity for foreign sovereign entities. However, judicial reliance on the executive branch for sovereign immunity determinations created

57. Id.
58. See The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); see also H.R. REP. NO. 94-1487, at 8.
ated political complications and consequently provided a low level of predictability for plaintiffs and foreign sovereigns alike. Thus, in 1973 the Department of Justice, the Department of State and the House Judiciary Committee began drafting the FSIA with the goal of increasing predictability in jurisdictional questions involving foreign governments and other instrumentalities.

A principal purpose of the FSIA was to codify the restrictive view of sovereign immunity, “which extend[s] immunity to a foreign state for its public acts, but not for its commercial acts.” Under this approach, immunity is reserved for acts taken by sovereigns in their sovereign capacities—the acts of states qua states. A second principal purpose was restricting the role of the State Department in the jurisdictional aspects of immunity decisions. The Act sought to “transfer the immunity determination from the executive branch to the judicial,” with the intent of reducing the foreign policy effects of jurisdictional immunity determinations—rendering them questions of law, not of policy. The Act also brought United States procedure for granting foreign sovereign immunity into line with generally accepted international practice. The history of the FSIA demonstrates that international normalization was a core motivation for its enactment.

2. Establishing Jurisdiction Under the Foreign Sovereign Immunities Act

When a foreign sovereign, agency or entity is named as a defendant, the FSIA governs both subject-matter and personal jurisdiction—necessary predicates to any suit. Subject-matter jurisdiction vests in the federal courts by mere virtue of the foreign sovereign de-

---

61. See Connors, supra note 59, at 212.
65. Id. See also 28 U.S.C. § 1602 (2006) (“Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”).
66. H.R REP. NO. 94-1487, at 9 (1976) (“In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts.”).
fendant’s presence in the case. However, a sovereign remains outside a court’s subject-matter jurisdiction when there is no exception from the presumption of immunity, described in the next paragraph. Personal jurisdiction is a function of the subject-matter jurisdiction determination. It exists whenever the sovereign is not immune from subject-matter jurisdiction, and otherwise within the court’s personal jurisdiction pursuant to controlling law. In other words, the ability to bring a foreign sovereign into court is conditioned upon proof that the sovereign is not entitled to immunity.

The FSIA employs a general presumption of immunity from jurisdiction for foreign sovereigns. However, this presumption does not extend to claims when the underlying conduct falls within one of seven statutory exceptions. These seven exceptions are the sole grounds for obtaining jurisdiction over a foreign sovereign defendant. The courts may not entertain claims outside these parameters.

While primarily jurisdictional, the FSIA also alters the standard rules of procedure and liability for foreign sovereign defendants.

---

67. See 28 U.S.C. § 1330(a) (“The district courts shall have original jurisdiction . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . .”); see also Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 491–92 (1983) (holding that the grant of subject-matter jurisdiction to the federal courts, notwithstanding the fact that the underlying claims were governed by state law, is within the confines of Article III jurisdiction because claims against foreign sovereigns impact U.S. foreign relations such that the issue “arises under” federal law).

68. See 28 U.S.C. § 1330(b) (“Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made . . . .”).

69. See 28 U.S.C. § 1604 (2006) (“[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 of this chapter.”) (emphasis added).

70. See 28 U.S.C. §§ 1605(a), 1605A (2006) (Immunity does not extend if: (1) the sovereign has explicitly or impliedly waived immunity; (2) the underlying conduct is a commercial activity; (3) the underlying conduct involves property taken in violation of international law or (4) immovable property in the U.S. acquired non-commercially; (5) the claim is based on the tortious, non-discretionary conduct of an agent or employee; (6) the action is brought in relation to an arbitral proceeding in which the sovereign is a party, or; (7) if the claim is related to terrorism and the sovereign is a designated state sponsor thereof).

71. See, e.g., Youming Jin v. Ministry of State Sec., 475 F. Supp. 2d 54, 64–67 (D.D.C. 2007) (dismissing, sua sponte, all but two claims brought against the People’s Republic of China because the pleadings did not establish that the dismissed claims satisfied any of the FSIA immunity exceptions).
The Act specifically prohibits application of punitive damages.\textsuperscript{72} It also provides a greater amount of time for answering complaints, for responding to service of process and sets different rules for perfecting service.\textsuperscript{73} Furthermore, the Act alters traditional joinder of claims and supplemental jurisdiction analysis.\textsuperscript{74} So, while textually stating that foreign states “shall be liable in the same manner and to the same extent as a private individual under like circumstances,”\textsuperscript{75} the Act actually demands that foreign sovereign defendants receive certain forms of different treatment in the courts of the United States.

3. Execution and Attachment of Sovereign Assets Under the Foreign Sovereign Immunities Act

Under the FSIA, sovereign immunity is not limited to jurisdiction over actions establishing a foreign sovereign’s liability. The Act also provides immunity from attachment and execution of a sovereign’s assets within the United States. Essentially, the FSIA bifurcates the immunity determination into two stages—immunity from jurisdiction and the immunity of assets for attachment and execution.\textsuperscript{76} Given this, even when a plaintiff has obtained a final judgment for damages, a remedy is only available to the extent that the law allows sovereign assets to be attached and executed.

Section 1609 of the FSIA provides a blanket grant of immunity to a foreign sovereign’s assets. The threshold requirement for defeating this immunity is that the asset in question be used for commercial activity.\textsuperscript{77} After demonstrating an asset’s commercial nature, it must then fit into one of seven specific statutory exceptions from


\textsuperscript{76} For a current and thorough explanation of the bifurcated structure of the FSIA, see Walters v. Indus. & Commercial Bank of China, Ltd., 651 F.2d 280, 286–90 (2d Cir. 2011).

\textsuperscript{77} 28 U.S.C. § 1610(a) (2006) (“[Foreign sovereign assets] used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . .”).
immunity. The exceptions to asset-immunity are dependent on the character of the underlying action in which the foreign sovereign’s liability was established—this statutory trait is crucial to the argument that contempt sanctions are nearly per se unenforceable.

4. The Foreign Sovereign Immunities Act Permits Liability Without Remedy

The bifurcation of immunity from jurisdiction and immunity from asset-attachment creates a situation in which FSIA claims may result in a “right without a remedy.” The courts accept this reality. The two modes of immunity are not mutually inclusive, such that a plaintiff may establish liability for a claim without the concurrent ability to execute a judgment by attaching the sovereign defendant’s assets. The leading case on point is De Letelier v. Republic of Chile, where the Second Circuit Court of Appeals determined that Congress, acting against international norms of sovereign immunity, was willing to allow unenforceable judgments. The court found that Congress’ intent was sufficiently clear to overcome the canon of statutory interpretation that laws should not be construed as unenforceable.

In De Letelier, the plaintiffs obtained a judgment of compen-

78. 28 U.S.C. § 1610(a)(1)–(7) (2006) (Assets are not immune from execution if: (1) the sovereign has waived immunity, (2) the property was used for the same commercial activity as the underlying claim, (3) the property was taken in violation of international law and a prior judgment so established, (4) the property is immovable in the U.S. and the judgment established plaintiff’s rights therein, (5) the property is contractual collateral for an insurance policy, (6) the property is to be attached to satisfy an arbitral award, or (7) the judgment relates to a claim for which the sovereign defendant is not immune because the defendant is a designated state sponsor of terror under 28 U.S.C. § 1605A).

79. See discussion infra Part II.B.


81. Id.

82. See FG Hemisphere Assoc., LLC v. Democratic Republic of Congo, 637 F.3d 373, 377 (D.C. Cir. 2011) (“The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution.”) (citing De Letelier, 748 F.2d at 798–99).

83. De Letelier, 748 F.2d at 798 (noting that the court was heavily influenced by Congress’ express intent to bring United States practice into line with foreign practices and the contemporaneous passage of similar European legislation).

84. Id.
satory damages against Chile and the Chilean National Airline for the assassination of an ambassador in Washington, D.C., but found that there was no concurrent right to attach the airline’s assets to execute the judgment. The court recognized that it came to its decision “arduously” as it left a seriously aggrieved plaintiff without the ability to collect on the judgment.\textsuperscript{85} However, the court felt compelled to decide in favor of immunity because of Congress’ express desire to afford protection to foreign sovereign property.\textsuperscript{86}

In sum, while one of the expressed purposes of the FSIA was to increase plaintiffs’ ability to obtain remedy against foreign sovereigns,\textsuperscript{87} the Act does not guarantee that judgments against them can be enforced.

II. THE AVAILABILITY AND PROPRIETY OF THE CONTEMPT POWER IN FOREIGN SOVEREIGN IMMUNITIES ACT CASES

Three Courts of Appeals have addressed whether the FSIA prohibits courts from employing the contempt power against foreign sovereign defendants. The District of Columbia and Seventh Circuits have held that the contempt power is unaffected by the Act,\textsuperscript{88} whereas the Fifth Circuit has held that a “contempt order is not permissible under the FSIA.”\textsuperscript{89} Evaluating this split and the legislative history of the FSIA, this Part first argues that the availability of the contempt power is not precluded by the Act. Next, it evaluates how civil contempt sanctions function, as applied, in FSIA cases, determining that they are nearly \textit{per se} unenforceable. It asserts that, while litigation has been limited to the question of the power’s availability, the real concern should be the propriety of its use. Lastly, this Part argues that the use of the contempt power in FSIA cases creates an unnecessary tension in the foreign policy separation of powers, because, as applied in a FSIA case, contempt orders and sanctions are reduced to \textit{judicial statements} about the conduct of a foreign sovereign.

\begin{itemize}
\item \textsuperscript{85} Id. at 791.
\item \textsuperscript{86} Id. at 798.
\item \textsuperscript{87} See H.R. REP. NO. 94-1487, at 8 (1976) (reporting that prior to FSIA, foreign states were absolutely immune from execution of property).
\item \textsuperscript{88} FG Hemisphere Assoc., LLC v. Democratic Republic of Congo, 637 F.3d 373 (D.C. Cir. 2011); Autotech Techs. LP v. Integral Research & Dev. Corp., 499 F.3d 737 (7th Cir. 2007).
\item \textsuperscript{89} Af-Cap, Inc. v. Republic of Congo, 462 F.3d 417, 430 (5th Cir. 2006).
\end{itemize}
A. The Foreign Sovereign Immunities Act Does Not Preclude the Use of the Contempt Power

1. Circuit Courts Divide on the Relationship Between Power and Enforceability

The FSIA is primarily a jurisdictional statute. While it alters certain procedures with respect to foreign sovereign defendants, the Act is textually silent regarding the contempt power. The issue of the power’s availability was first raised in Af-Cap, Inc. v. Republic of Congo, where the Fifth Circuit held that a “contempt order is not permissible under the FSIA.” The court based its holding exclusively in construction of the FSIA’s asset-immunity and enforcement provisions. Noting that contempt orders may be unenforceable, the court concluded that the district court was without the authority to issue them. Because monetary sanctions are not among the FSIA’s restricted methods for attaching or executing the property of foreign sovereigns—and therefore cannot be enforced—the court reasoned that contempt orders imposing such sanctions are barred. In effect, the court determined that the FSIA “bars” use of the contempt power because it prevents enforcement of the orders.

The Seventh Circuit reached an opposing conclusion of law in Autotech Technologies LP v. Integral Research & Development Cor-

90. See supra Part I.B.2.
91. See Autotech Techs., 499 F.3d at 744 (“Nothing in the text of the FSIA comes close to suggesting that the FSIA was designed to abrogate or limit this essential power, or even that a separate jurisdictional showing is necessary for a contempt proceeding that arises within a case properly brought under the FSIA.”).
92. See Af-Cap, 462 F.3d at 430. This conflict dates to a 1985 loan default. After two decades of litigation, a turnover order issued against Congo. The Congolese government informed the district court that it would not comply. The court then issued contempt sanctions in the amount of $10,000 per day. Congo appealed the underlying order and the contempt sanctions.
93. Af-Cap, 462 F.3d at 428 (“A review of the relevant sections, § 1610 and § 1611, shows that they do not present a situation in which the order could stand. Those sections describe the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included. Therefore, in issuing the contempt order, the district court relied on an erroneous conclusion of law.”).
94. Id. The Af-Cap court’s holding on the availability of the contempt power in FSIA cases has not been cited as persuasive by any district court or court of appeals. While the Seventh and District of Columbia Circuits have declined to extend its holding on the same question of law, it remains precedent in the Fifth Circuit.
Here, the sovereign defendant—a corporation wholly owned by the Government of Belarus—argued that the FSIA did not authorize federal courts to enter contempt sanctions against it. The court disagreed and determined that jurisdiction over a suit affords a court “the full panoply of powers necessary to bring that suit to resolution and to enforce whatever judgments it has entered.” The court’s rationale is firmly based in the notion that the contempt power flows from jurisdiction. Disagreeing with Af-Cap, the court found that the statutory execution and attachment provisions are structurally separate from the provisions establishing a court’s jurisdiction over a claim and the parties—they serve only to restrict the court’s remedial and enforcement powers. Ultimately, the court noted that it would require “clear guidance” from Congress before it would conclude that it lacked authority to use the contempt power in an action “for which subject matter jurisdiction has been established.”

In FG Hemisphere Associates, LLC v. Democratic Republic of Congo, the District of Columbia Circuit held that contempt sanctions are available under the FSIA. In its opinion the court clearly distinguished between the “authority question”—whether the FSIA precludes contempt orders ab initio—and the “enforcement question”—whether such an order may be enforced, which it noted “could prove problematic.” This distinction is crucial. Like the court in Autotech Technologies, the FG Hemisphere court focused on the jurisdictional inherence of the contempt power, and registered polite, but clear, disagreement with the Fifth Circuit’s Af-Cap decision. The court noted that the Fifth Circuit determined the availabil-

95. Autotech Technologies LP v. Integral Research & Development Corp., 499 F.3d 737 (7th Cir. 2007). A contract dispute arose from an exclusive licensing deal. The dispute was settled and an order set to enforce the contract. The order permitted the district court to retain jurisdiction in order to enforce its terms. The plaintiff alleged that defendant was noncompliant and moved for contempt. An order for $5,000 per day issued in 1997. In 2006, the plaintiff moved for a judgment on the contempt sanctions that could be executed in foreign jurisdictions. The judgment issued and the defendant appealed the underlying contempt order.

96. See Autotech Techs., 499 F.3d at 744.

97. See supra Part I.A.1.

98. See Autotech Techs., 499 F.3d at 745.


100. Id. at 375.

101. Id. at 377–78 (“[Contempt] power runs with a court’s jurisdiction . . . and jurisdiction here is undeniable.”).
ity of the contempt power based on the potential of enforceability, but found this to be an improper mode of analysis in its own decision.  

The contempt power is assumed to flow from a court’s jurisdiction over a case and the parties. The enforcement provisions of the FSIA only govern the immunity of foreign sovereign assets, not the court’s jurisdiction over the case where the assets are in issue. Given this, the Af-Cap decision appears incorrect as a matter of law. While the enforcement provisions of the FSIA may inhibit the usefulness of the contempt power, they do not preclude it.

2. Legislative History: Distant Contemplation of Contempt

The cases above recognize that Congress can limit the availability of contempt. However, the FSIA is textually silent on the issue. To determine whether Congress intended a limitation, the courts have turned to the Act’s legislative history. The term “contempt” appears only once in the House Report accompanying the final bill presented to President Ford for signature. In context, it appears as a question of enforceability, not of the court’s initial power

102. Id. at 379 (“[I]t does seem to us that the Fifth Circuit accepted the government’s litigating effort to conflate the power to impose a contempt sanction with the authority to enforce it . . . .”); Id. at 379 n.2 (“The government requests that we give deference to its conclusion that the FSIA does not permit a court to enforce a contempt sanction. But that is not the issue before us . . . .”).

103. These principal cases represent the only circuit court opinions directly addressing whether the contempt power is available in FSIA cases.

104. See FG Hemisphere, 637 F.3d at 378 (“Although Congress can limit that authority, it must do so through a clear and valid legislative command, a command that will not be lightly assumed.”) (internal quotations and citations omitted); Autotech Technologies LP v. Integral Research & Dev. Corp., 499 F.3d 737, 745 (7th Cir. 2007) (“We would need much more clear guidance from Congress than we have before we could conclude that a court had no jurisdiction to entertain contempt proceedings in an action brought under the FSIA for which subject matter jurisdiction has been established.”); Af-Cap, Inc. v. Republic of Congo, 462 F.3d 417, 428 (5th Cir. 2006) (suggesting that Congress established the only methods for attachment and execution in FSIA cases and did not include monetary contempt sanctions).

105. The term “contempt” does not appear in any of the FSIA’s statutory sections, in original or amended form. See Autotech Techs., 499 F.3d at 744 (“Nothing in the text of the FSIA comes close to suggesting that the FSIA was designed to abrogate or limit this essential power . . . .”); FG Hemisphere, 637 F.3d at 378 (“[T]here is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court’s inherent contempt power.”).

to issue contempts.\footnote{107}

While generally silent about contempt, the legislative history discusses legal mechanisms that may impliedly employ the power. The \textit{FG Hemisphere} court noted that the history “demonstrates that Congress kept in place a court’s normal discovery apparatus in FSIA proceedings.”\footnote{108} The House Report specifically mentions the remedies provided by Rule 37 for unjustified failure to make discovery—this rule notes a court’s ability to engage the contempt power.\footnote{109} Thus, it appears that Congress contemplated, though perhaps in a distant manner, that the contempt power would remain intact after the FSIA came into force.\footnote{110} At the least, the history evinces no intent to prohibit courts from applying the power in cases arising under the FSIA.

In sum, the background of the FSIA demonstrates that the contempt power was at most a distant consideration. The Act is silent about the power, and as a jurisdictional statute, it is probably best read as following the general principle that the contempt power flows from the exercise of jurisdiction.

Appearing as amicus curiae in both \textit{Af-Cap}\footnote{111} and \textit{FG Hemisphere},\footnote{112} the State Department took this historical awareness and ar-
gued that, because FSIA contempt orders are unenforceable, a district court errs when such orders issue. It is not wholly clear whether the Department argued that unenforceability renders a court without the power to issue contempt or merely counsels against it as a matter of policy. The *FG Hemisphere* court found the Department’s position “quite confusing, conflating a contempt order . . . with an order enforcing such an award through execution.” It does seem fair, however, to treat the argument as going to a court’s initial ability to apply the contempt power. Essentially, because contempt orders are rendered unenforceable by the jurisdictional structure of the FSIA, the power itself does not truly exist. After all, the functions of the contempt power can only bear fruit if the court’s commands are enforceable. The *FG Hemisphere* court was not persuaded by this implied argument and held firmly to the belief that, unless limited through a “clear and valid legislative command,” contempt follows jurisdiction, enforceability notwithstanding. Though the focus on unenforceability failed to persuade the court that the contempt power is prohibited under the terms of the FSIA as a matter of law, it forms the basis of a strong policy argument to which this Note now turns.

### B. Civil Contempt Sanctions in FSIA Cases are Nearly Per Se Unenforceable

In *Af-Cap, Autotech Technologies*, and *FG Hemisphere*, the Courts of Appeal restricted their analyses to whether the FSIA precludes a district court’s power to issue a contempt sanction against a foreign sovereign defendant. While the district courts had issued contempt orders, there had been no attempt to collect the sanctions they contained. But what would happen if a collection attempt was made? Using the facts from *FG Hemisphere*, this section runs a hypothetical analysis of whether contempt sanctions can be collected under the terms of the FSIA. It determines that, with an exception


116. *In Autotech Technologies*, the plaintiff petitioned the district court for a writ of execution for the accrued civil contempt sanctions. The plaintiff had identified assets in foreign countries and sought to make collection attempts in those jurisdiction via the writ. While this demonstrates the beginning of a collection attempt, it was not to be brought under the laws of the United States.
for an extremely well-crafted waiver of immunity from asset-execution, civil contempt sanctions are *per se* unenforceable in FSIA cases.

In *FG Hemisphere*, the district court obtained jurisdiction pursuant to FSIA section 1605(6), the exception to immunity for enforcing an arbitral award. The award was rendered in response to a breach of contract. The Democratic Republic of Congo (DRC) did not appear to challenge enforcement of the award and a default judgment issued. Judgment in hand, the plaintiff then moved to execute. Because the FSIA limits the types of assets that can be seized from a foreign sovereign, FG Hemisphere initiated discovery to “identify the DRC’s commercial property in the United States.” The district court established a discovery plan requiring the DRC to identify its assets. After an incomplete response, FG Hemisphere moved for a civil contempt order and sanctions under Rule 37.

The district court established that the DRC’s responses “fell woefully short of compliance,” and subsequently held the DRC in contempt. The court provided the DRC with thirty days to comply with its discovery obligations, after which time it would face sanctions, payable to the plaintiff, of “$5,000 per week, doubling every four weeks until reaching a maximum of $80,000 per week.” The sanction would accrue until the defendant complied with the discovery order.

As of January 10, 2012, the fines have accrued to $10.4 million. Civil contempt proceedings are considered part of the action that is the source of the contempt order, thus the action to collect as of January 10, 2012 it had been 147 weeks since the contempt order was issued. Accounting for the 30-day grace period, the total fines are calculated as follows: $(4(5,000) + 4(10,000) + 4(20,000) + 4(40,000)) + (147-20)(80,000) = 10,460,000.}

117. See *FG Hemisphere*, 637 F.3d at 375.
118. *Id.*
119. *Id.* at 376.
120. *Id.*
123. *Id.* at 3.
124. *Id.*
125. As of January 10, 2012 it had been 147 weeks since the contempt order was issued. Accounting for the 30-day grace period, the total fines are calculated as follows: $(4(5,000) + 4(10,000) + 4(20,000) + 4(40,000)) + (147-20)(80,000) = 10,460,000.
fines could be brought on the existing docket, without needing to plead separate grounds for jurisdiction under the FSIA.127 This, however, is where the simplicity appears to end. In order to collect the sanctions through the execution of assets, FG Hemisphere would be faced with the FSIA’s general grant of immunity to foreign sovereign assets. The underlying contempt sanctions stem from the DRC’s initial refusal to disclose the nature of its assets in the United States. Thus, the plaintiff is faced with a circular barrier to executing the contempt sanctions: collection is prevented on the same grounds that prevented collection of the original arbitral award.

The challenge of collecting civil contempt fines is not limited to cases where the foreign sovereign defendant’s assets are unknown. Even if the assets were matters of public record such that no discovery was necessary, a plaintiff would encounter immunity-based barriers to execution. The FSIA only allows execution of foreign sovereign assets that satisfy one of the specific exemptions to the blanket grant of asset immunity.128 By their very nature, civil contempt sanctions satisfy none.

Section 1610(a)(2) exempts from immunity property used for the commercial activity upon which the underlying claim is based. However, claims to collect contempt sanctions are not based on commercial activity. By definition, they are based on a party’s conduct during judicial proceedings and litigation,129 Neither can prop-

127. See First City, Texas-Houston, N.A. v. Rafidain Bank, 281 F.3d 48, 49 (2d Cir. 2002) ("[B]ecause jurisdiction under the FSIA existed to decide the underlying litigation involving a loan agreement and letters of credit, the FSIA continues to confer jurisdiction for proceedings in aid of that money judgment.").

128. See supra Part I.B.3.

129. This assumes that litigation is not a commercial activity, and that contempt sanctions within any such litigation are therefore not “based on” commercial activity. In the FSIA context, at least, there is strong support for this assumption in Supreme Court precedent. In Saudi Arabia v. Nelson, 507 U.S. 349 (1993), the Court evaluated the meaning of the term “based on” in the FSIA’s commercial activity exception: “[a state is not immune in any case] in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . .” Noting that Congress used both the terms “based on” and “in connection with” relating to commercial activity, the Court determined that “[t]he only reasonable reading of [based on] calls for something more than a mere connection with, or relation to, commercial activity.” Id. at 358 (emphasis added). Applying its newly minted standard, the Court reasoned that commercial activity (the sovereign defendant’s recruitment and training of an employee) could not stand as the activity a claim is “based on” when the actual claim is a tort later committed by the defendant-employer (battery and false imprisonment during the course of employment). In the FSIA context, litigation is not a commercial activity because it must always follow an occurrence before the suit is filed. Thus, it is merely connected with, or related to, an
PROPERTY be executed under the exemptions from asset-immunity provided in sections 1610(a)(3) or (4). This is so because civil contempt sanctions do not derive from “judgments establishing rights in property,” but only arise from judgments establishing contempt. A civil contempt sanction cannot arise from a contractual obligation; it may only stem from a party’s offense to a court. Consequently, section 1610(a)(5) is not applicable. Lastly, a civil contempt sanction is not a judgment based on an arbitral award, and therefore cannot permit execution under 1610(a)(6).

Aside from voluntary payment of the contempt fines, the only remaining option for executing a compensatory contempt order against a sovereign defendant is waiver under section 1610(a)(1). The FSIA allows waiver of sovereign immunity, both for jurisdiction and execution, to be made explicitly or by implication. Whether waiver has occurred is therefore highly dependent on the terms of the agreement, if explicit, and entirely determined by the sovereign defendant’s specific conduct, if by implication. For the purposes of collecting contempt sanctions, courts will likely require an explicit waiver to specifically contemplate the execution and attachment of the foreign sovereign’s property. This follows from the general underlying commercial activity. In the FG Hemisphere example, the arbitration award underlying the suit is based on a contract between the plaintiff and the sovereign defendant. See text accompanying notes 117–21. Moreover, the “based on” structure of the commercial activity exception should prevent “litigation” from being treated as the actual commercial activity—there must be some antecedent to the litigation in the first place.

The FSIA was amended by the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 341 (2008), to limit and clarify conditions for sovereign immunity rights of designated state sponsors of terrorism. See 28 U.S.C. § 1605A (2008). This Note does not address these provisions of the FSIA. The terrorism exceptions indicate congressional intent to subject state sponsors of terror to expanded civil liability—beyond that traditionally recognized by the sovereign immunity doctrine. See 28 U.S.C. § 1605A(a)(2). Additionally, suits against state sponsors of terror are much less likely to create tension in the foreign policy separation of powers—the executive branch bears responsibility for determining which foreign governments are designated as state sponsors of terror. See 22 U.S.C. § 2371 (2006). Designation by the executive effectively removes the harm to the consistency of foreign policy that otherwise ensues from judicial use of the contempt power in a FSIA case.

See H.R. Rep. No. 94-1487, at 22 (establishing that waiver of asset-immunity is governed by the same principles that apply to waivers of immunity from jurisdiction).

See Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1022–23 (9th Cir. 1987) (holding that the consulate waived immunity, by implication, by signing a lease that specifically contemplated court allocation of attorney’s fees).

principle of law that explicit waivers must demonstrate that the waiving party knowingly relinquished a legal entitlement. Furthermore, because the FSIA clearly separates the provisions governing these two stages, it would not be consistent with the structure of the Act to find that a general waiver of jurisdictional immunity also waives the immunity of assets.\textsuperscript{134}

Where courts have found explicit waivers of sovereign immunity from execution, the underlying contracts have specifically addressed that procedural device.\textsuperscript{135} To permit collection upon contempt sanctions, the terms of an explicit waiver may need to evidence the parties' contemplation of a very broad asset-immunity waiver, not one limited to particular forms of claims. For example, a traditional agreement to waive immunity for the purposes of conflicts or judgments “arising out of or relating to” the underlying contract may be insufficient because contempt sanctions arise from and relate to the subsequent litigation.\textsuperscript{136}

The FSIA asset-immunity provisions effectively render contempt sanctions against foreign sovereign defendants unenforceable in the courts of the United States. Neither is it likely that plaintiffs will be able to collect on U.S. court contempt sanctions in foreign jurisdictions where the sovereign may have assets subject to execution under local law. This stems from a traditional judicial refusal to enforce foreign penal and public laws. In international practice, the courts of “no country execute the penal laws of another . . . .”\textsuperscript{137}

\textsuperscript{130}9, 1311–12 (11th Cir. 2000) (finding the use of the term “attachment” in a shipping contract waiver clause to evince “clear and unambiguous intent” of the sovereign defendant to waive the asset immunity); World Wide Minerals, Ltd. v. Republic of Kazakhstan, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (holding that a foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so).

\textsuperscript{134} See Autotech Techs. LP v. Integral Research & Dev. Corp., 499 F.3d 737, 744–45 (7th Cir. 2007).

\textsuperscript{135} See Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229, 234 (“The Borrower . . . expresses and irrevocably waives any such right of immunity (including any immunity from the jurisdiction of any court or from any execution or attachment in aid of execution prior to judgment or otherwise) . . . .”); FG Hemisphere Assoc., LLC, v. Republic of Congo, 455 F.3d 575, 581 (5th Cir. 2006) (“In the loan agreement, the Congo expressly waived its right to immunity from execution.”).

\textsuperscript{136} Contracting parties might include a waiver clause in a litigation fees agreement with additional language such as: “The [foreign sovereign entity] agrees to waive and forgo any defense of sovereign immunity for the purposes of attorneys’ fees, litigation costs, and judicially ordered payments, including, but not limited to, fines or sanctions.”

\textsuperscript{137} See The Antelope, 23 U.S. 66, 122–23 (1825); see also William S. Dodge, \textit{Breaking the Public Law Taboo}, 43 HARV. INT'L L.J. 161, 174–76 (2002) (positing three justifications for such prohibitions: (1) enforcing foreign law is burdensome, (2) it may
FOREIGN GOVERNMENTS IN CONTEMPT?

This prohibition extends from actual criminal laws to civil actions with penal characteristics. In United States practice, civil contempt orders possess penal characteristics—a contempt’s civil classification does not wholly remove its punitive function. Thus, a foreign court is unlikely to give effect to a U.S. contempt order—even if reduced to a judgment—as it would require that court to enforce a penal action arising under U.S. law.

The asset-immunity provisions of the FSIA render contempt orders nearly *per se* unenforceable. This strips contempt orders of the primary features that make them useful to the judicial system—they carry no coercive or compensatory value. A sovereign defendant’s conduct is unlikely to change when it cannot be injured by the sanction, and an aggrieved party cannot be made whole by uncollectable damages. Thus, unenforceability reduces a contempt order from a tool that protects the administration of justice to a statement of disapproval concerning the conduct of a foreign sovereign. Stripped of coercive or compensatory force, what remains is a quasi-punitive order and public statement, issued by the judiciary, asserting that a foreign sovereign’s behavior and conduct is improper and offensive to the United States judicial system—a constitutionally co-equal branch of the United States Government.

C. Unnecessary Tension in the Foreign Relations Separation of Powers

1. The Foreign Policy Separation of Powers and the “Sole Organ Doctrine”

The separation of powers is among the defining aspects of the United States Federal Government. The Constitution entrusts each branch with certain responsibilities and powers. The legislature bears responsibility for creating law, the executive enforces and administers the law, and the judiciary is generally entrusted with adjudicating legal disputes. While the federal government is well recognized as the entity responsible for the conduct of the nations’ foreign relations, there has long been debate as to whether the executive or

yield offense to foreign states, and (3) enforcement could violate the foreign state’s sovereignty).


140. The federal government’s responsibility for foreign relations does not derive from
legislative branch is ultimately supreme in that field.\textsuperscript{141} None, however, contend that it is the judiciary.\textsuperscript{142}

In fact, the federal judiciary recognizes its responsibility to avoid interference with the formulation or execution of foreign relations policy—even when doing so requires abstention from a case it is otherwise competent to hear.\textsuperscript{143} The political question doctrine, for example, compels abstention from deciding issues concerning matters that have "been committed by the Constitution to another branch of government"\textsuperscript{144} on the theory that the judicial power does not extend to passing judgment on "how the executive, or executive officers, perform duties in which they have a discretion."\textsuperscript{145} Similarly, the Act of State Doctrine requires courts to abstain from inquiries into the validity of the acts of a foreign sovereign taken on its own territory, because this action might "imperil the amicable relations between governments and vex the peace of nations."\textsuperscript{146} Of course, these doctrines do not require courts to abstain from cases where foreign policy is merely implicated, which would remove a broad range of cases from their jurisdiction. Rather, they specifically target actions that may cause interference with the political branches’ formulation and execution of policy.\textsuperscript{147}
While both the executive and legislative branches possess the power to formulate foreign policy, the executive is said to possess the sole power of conducting that policy and communicating with foreign nations. This belief vests in the “sole organ doctrine,” drawn from a speech made by then-Representative John Marshall,\textsuperscript{148} and incorporated into modern jurisprudence in the Supreme Court’s \textit{Curtiss-Wright} decision.\textsuperscript{149} The doctrine asserts that the executive branch—through the President—is the “sole organ of the federal government in the field of international relations.”\textsuperscript{150} The doctrine hinges on the belief that conducting foreign policy is inherently complex, requiring consolidation into the branch that has comparatively greater knowledge in the field and that can communicate with a single voice.\textsuperscript{151} The notion that the executive should be the sole organ allowed to speak “on behalf of the United States” dates to the Washington administration, where Congress noted that “the Constitution left the whole business [of communication]” in the Presidency.\textsuperscript{152}

2. Interference in the Conduct and Communication of Foreign Relations

Under the terms of the FSIA, contempt sanctions are effectively reduced to statements about the conduct of the foreign sovereign. In effect, a court issues a declaration stating that the sovereign which touches foreign relations lies beyond judicial cognizance.

\begin{itemize}
\item \textsuperscript{148} John Marshall, 10 \textit{ANNALS OF CONG.} 613 (1800), \textit{reprinted in} 18 U.S. (5 Wheat.) Appendix 3, 26 (1820).
\item \textsuperscript{149} United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).
\item \textsuperscript{150} \textit{Id.} at 320.
\item \textsuperscript{151} See Prakash & Ramsey, supra note 141, at 321 (“Notwithstanding its fonts of foreign relations authority, Congress lacked the general power to communicate with foreign nations. Accordingly, by virtue of the Executive Power Clause, the President enjoyed this residual and significant executive authority.”); see also Louis Fisher, \textit{The “Sole Organ” Doctrine, in Studies on Presidential Power in Foreign Relations} 10–11 (2006).
\item \textsuperscript{152} See Prakash & Ramsey, supra note 141, at 319–20 (quoting Sen. Oliver Ellsworth, 5 \textit{ANNALS OF CONG.} 32 (1796)). For a reasoned critique of the sole organ doctrine, see Jack L. Goldsmith, \textit{Federal Courts, Foreign Affairs, and Federalism}, 83 \textit{VA. L. REV.} 1617, 1688–90 (1997) (asserting that control of the federal voice in foreign relations is “replete with struggles between the statute-makers, the treaty-makers, the President, and sometimes the courts”). The \textit{Curtiss-Wright} decision has been subject to criticism as well, though this does not necessarily strike at the legitimacy of the sole organ doctrine, which predates the decision by more than a century. See, e.g., Michael D. Ramsey, \textit{The Myth of Extraconstitutional Foreign Affairs Power}, 42 \textit{Wm. & MARY L. REV.} 379 (2000) (critiquing \textit{Curtiss-Wright}).
\end{itemize}
entity has failed to follow the judicial laws of the United States or that the sovereign’s actions have offended the court. Moreover, these statements are issued by Article III judges, representatives of a co-equal branch of government. Contempt orders in FSIA cases should properly be seen as federal government statements about the conduct of a foreign state, which issue from a branch of the government that is neither permitted to formulate policy nor, accepting the sole organ doctrine, empowered to communicate the views of the United States. Such orders may cause interference with the centralized conduct of foreign relations as envisioned by the separation of powers.

It must be noted that the near *per se* unenforceability of contempt orders in FSIA cases is not the ultimate reason why they may interfere with the conduct of foreign relations. Arguably, interference with executive control would certainly also occur if contempt orders could be enforced. Were the orders enforceable not only would they represent potentially offensive non-executive communications, but they would effectuate the seizure and transfer of a sovereign’s assets. It is ultimately the *existence* of the contempt order itself that is the source of the foreign relations concern. Of course, if the orders were legally enforceable they would retain the functions that have long been associated with the contempt power and could be more defensible. However they are not enforceable, and even in this weakened state they remain capable of interfering with the conduct of foreign affairs.

The overarching concern about contempt orders in FSIA cases is the creation of diplomatic tension, or as the State Department has stated, the “likelihood that such an order will be viewed by the foreign state as a suggestion of purposeful wrongdoing, and an of-


154. It is also possible for FSIA cases to be heard in state courts. 28 U.S.C. § 1330(a) vests the federal district courts with original jurisdiction over civil actions against foreign sovereigns, but does not divest state courts of their concurrent jurisdiction. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the Court held that this grant was within the bounds of Article III “arising under” jurisdiction. Thus, when a FSIA suit is filed in state court, the sovereign defendant has the ability to remove the action to the federal system. See 28 U.S.C. § 1441(d). If the sovereign defendant did not remove the case and a contempt order issued from a state court, the executive’s sole conduct of foreign relations would be equally impaired. Additionally, it could be argued that the state court has encroached on the vertical separation of powers by engaging in actions affecting the conduct of foreign relations.
fense to the dignity of the foreign State.” Such orders have the potential to “offend diplomatic niceties,” and may interfere with the United States’ current or future diplomatic relations. At its core, diplomacy is based on the relationships between states, and the branch charged with conducting that diplomacy should generally be allowed to control government statements that could create tension in those relationships. There are three primary ways that contempt orders can cause diplomatic tensions, interfering in the conduct of foreign relations.

First, civil contempt sanctions can generally complicate the diplomatic relationship between the United States and the foreign sovereign. Consider, for example, the implications for the United States’ relationship with the Democratic Republic of Congo in *FG Hemisphere*. The underlying objective in this suit, like several others in recent years, was collection of debts from defaulted loans and contracts. On April 26, 2011, the United States and the DRC signed a $1.8B bilateral debt cancellation agreement that reflects the United States’ commitment to the “DRC’s long-term economic and social development.” As the State Department was working to forgive the sovereign’s debt, a federal court issued a contemporaneous contempt sanction for the DRC’s failure to comply with orders that similar debts be paid. The contempt order here has the potential to create a mixed message, and to deprive the executive branch of its ability to act as the sole representative of the U.S. government.

The ability of a contempt order to generally complicate diplomatic relations does not turn on the language a specific contempt order employs. A review of FSIA contempt orders demonstrates that district court judges appear cognizant of the order’s policy implica-


156. *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (“A contempt order offends diplomatic niceties even if it is ultimately set aside on appeal.”).


tions and choose language accordingly.\textsuperscript{159} It is the finding of contempt \textit{itself} that creates the potential for offense—the declaration that a sovereign’s conduct is worthy of penalty or sanction.\textsuperscript{160} Nor is it relevant that the contempt order issues against a foreign sovereign with which the United States does not have positive diplomatic relations.\textsuperscript{161} Even if the order is consistent with U.S. foreign policy, it may interfere with the conduct of that relationship—this is the ill which adherence to the sole organ doctrine seeks to prevent.

Second, civil contempts can create diplomatic tension because they are likely to be received by the foreign sovereign as a punitive sanction in disregard of the sovereign equality of states. Notwithstanding their primary categorization, contempt sanctions carry both criminal and civil characteristics.\textsuperscript{162} The distinction is further blurred in FSIA cases. Because of the near \textit{per se} unenforceability of orders, the defining aspects of civil contempt sanctions—coercion and compensation—are lacking. The FSIA prohibits awarding punitive damages against a foreign sovereign state.\textsuperscript{163} This prohibition was included in recognition of the international law precept that states are exempt from punitive damages arising under foreign laws.\textsuperscript{164} The Supreme Court has even analogized civil contempt fines to coercive imprisonment.\textsuperscript{165} Consequently, a foreign sovereign could rationally

\textsuperscript{159} An excellent example is found in Judge Lamberth’s opinion in \textit{Agudas Chasidei Chabad of U.S. v. Russian Federation}, 798 F. Supp. 2d 260 (D.D.C. 2011), framing the decision to require a show cause hearing before deciding whether to impose contempt sanctions in the language of diplomacy, with specific and equal concern for the positions of the Russian Federation, the plaintiffs, and the State Department.

\textsuperscript{160} In 2009, a bill to “prevent speculation and profiteering in the defaulted debt of certain poor countries” by corporations like the \textit{FG Hemisphere} plaintiff was introduced to the House of Representatives. The bill’s sponsors specifically found that, “[L]itigation in the courts of the United States, which has, and continues to have, a negative effect on the foreign relations of the United States [includes attempts] to have foreign states held in contempt of court . . . .” H.R. 2932, 111th Cong. § 2(10) (2009).

\textsuperscript{161} The Islamic Republic of Iran, for example, has been a named defendant in many FSIA cases. \textit{See}, e.g., \textit{Taylor v. Islamic Republic of Iran}, 811 F. Supp. 2d 1 (D.D.C. 2011) (arising out of the 1983 Beirut Marine Corps barracks bombing). No diplomatic relationship formally exists, but the United States continues to engage in quasi-diplomatic activity.

\textsuperscript{162} \textit{See supra} Part I.A.2.


\textsuperscript{164} Under long-standing international practice, punitive damages are usually not assessed against foreign states. \textit{See Damages}, 5 \textsc{Hackworth, Digest of International Law} § 19, at 723–26.

view a contempt order as a punitive action,\textsuperscript{166} and take offense to the United States’ exercise of punitive authority.

The sovereign equality of states is well established in the modern theory of international law. The restrictive approach to sovereign immunity contemplates that there are limited situations in which this equality can be set aside absent harm to the international order. However, a foreign sovereign’s participation in a judicial proceeding is not among those limited situations. As a party to litigation, a sovereign’s conduct reflects the actions of the state in its sovereign capacity—in judicial proceedings it does not act commercially, or in any other way that the restrictive view deems a proper forfeiture of immunity. Therefore, when a court issues a contempt order based on conduct in litigation, it is rationally seen as a judgment on the sovereign’s sovereign behavior, deeming it inadequate. The State Department asserts that a sovereign’s initial refusal to comply with a court order may indicate that it has determined “that a U.S. court lacks power to control its conduct.”\textsuperscript{167} Against this determination, subsequent contempt is likely to be seen as insistence that the United States has the power to control the sovereign notwithstanding the principle of equality.

Third, civil contempt sanctions against foreign sovereigns can create diplomatic tensions because they are available in the United States courts despite an international trend banning them.\textsuperscript{168} For example, the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property prohibit sanctions against foreign sovereigns’ conduct in judicial proceedings.\textsuperscript{169} While the United States is not a party to either convention, the State Department recognizes that they reflect international practice.\textsuperscript{170} Moreover, a number of foreign nations have enacted sovereign immunity standards that specifically ban monetary sanctions against foreign sovereigns.\textsuperscript{171}

\textsuperscript{166}. In \textit{Agudas Chasidei Chabad of U.S. v. Russian Federation}, 798 F. Supp. 2d 260, 273 (D.D.C. 2011) the District of Columbia District Court recognized the potential for diplomatic offense, noting that concerns for due process were “heightened given the involvement of foreign powers and the ‘coercive’ nature of civil contempt.”


\textsuperscript{168}. See \textit{id.} at 21–25.

\textsuperscript{169}. \textit{Id.}

\textsuperscript{170}. \textit{Id.}

\textsuperscript{171}. \textit{Id. See also infra} notes 208–10 and accompanying text.
III. RESTRICTING THE CIVIL CONTEMPT POWER IN FSIA CASES

This Note has argued that the FSIA does not prohibit a court’s use of the contempt power once seized of jurisdiction. However, contempt orders are nearly *per se* unenforceable, and consequently are reduced to statements of disapproval concerning the conduct of the foreign sovereign. Because the executive is entrusted with the sole power to communicate the foreign relations position of the United States, the issuance of such contempt orders creates unnecessary tension in the foreign relations separation of powers scheme. The final Part of this Note argues that this could be alleviated in several ways: categorical judicial abstention from the contempt power against foreign sovereign defendants, deference to executive statements of interest concerning the propriety of contempt or direct legislative restriction of the contempt power under the FSIA. Moreover, these solutions would have only a marginal impact on the courts and plaintiffs, and would provide benefit to the government and the maintenance of the separation of powers.

A. Proposals for Judicial, Executive and Legislative Solutions

1. Judicial Abstention From Contempt Orders Against Foreign Sovereign Defendants

The contempt power is a function of judicial discretion, employed when a judge believes it necessary to punish misbehavior or to coerce a party’s compliance. 172 This discretion would allow courts to categorically abstain from the contempt power in FSIA cases. 173 However, this approach seems unlikely. Commentators note that judicial abstention in the foreign affairs context is often guided by the factors applied in the political question doctrine. 174 While this doc-

---


173. The scholarship on judicial abstention in foreign affairs cases focuses on judicial abstention from hearing a claim or case as a question of justiciability. In this context, the term abstention is used only with respect to a court’s decision whether to employ the contempt power.

trine is not directly applicable to a court’s remedial or inherent powers—it applies to the justiciability of an entire case or individual claim\textsuperscript{175}—it serves as a useful framework for evaluating how a court might decide whether to abstain.

Assuming that the political question doctrine has been expanded “beyond its purposes” in foreign policy cases,\textsuperscript{176} even an expansive application of the doctrine does not strongly support abstention from contempt. The first three \textit{Baker} factors lend little, if any, support to abstention. The decision whether a contempt order should issue is expressly committed to the judiciary, contempt standards are established by the judiciary, and the decision to use the contempt power is certainly not a determination “clearly for nonjudicial discretion.”\textsuperscript{177} Courts applying an expanded view of the doctrine tend to favor the last three factors in their analyses.\textsuperscript{178} Two of these factors provide somewhat stronger support for abstention. First, because contempt orders are transformed into statements about the sovereign’s conduct, their use may express “lack of the respect due”\textsuperscript{179} to the executive’s control of the conduct of foreign policy. Second, issuing a contempt order could create embarrassment as a “multifarious pronouncement”\textsuperscript{180} on a foreign relations question. Although each \textit{Baker} factor is individually sufficient to allow abstention, the Court cautions that they “are probably listed in descending order of both importance and certainty.”\textsuperscript{181} So, while a court disposed to abstain from issuing an order against a foreign sovereign could certainly support its decision through the \textit{Baker} factors, the doctrine does not necessarily compel that result.

In addition to the \textit{Baker} analysis, a court’s discretionary dec-

\begin{thebibliography}{99}

\bibitem{175} See, e.g., \textit{Lane v. Halliburton}, 529 F.3d 548, 559 (5th Cir. 2008) (“[T]he purpose of the political question doctrine is to bar \emph{claims} that have the potential to undermine the separation-of-powers design of our federal government.”) (emphasis added).

\bibitem{176} \textit{The Political Question Doctrine, Executive Deference, and Foreign Relations}, 122 \textit{Harv. L. Rev.} 1193, 1194 (2009).


\bibitem{178} Harvard Law Review, \textit{supra} note 176, at 1196.

\bibitem{179} \textit{Baker}, 369 U.S. at 217.

\bibitem{180} \textit{Id}.


\end{thebibliography}
sion to abstain from issuing contempts in FSIA cases will likely be influenced by concern for maintaining judicial independence.\textsuperscript{182} Both the \textit{FG Hemisphere} and \textit{Autotech Technologies} courts were quick to defend the inherent nature of the power at the suggestion that it was not available to the district courts below. On balance it does not seem likely that courts would adopt a self-imposed ban on use of the contempt power in FSIA cases. However, decisions of this sort from the Courts of Appeal or the Supreme Court, though unlikely, would certainly be very effective in preventing the identified harm.

2. Executive Statements of Interest and Judicial Case-Specific Deference

Courts might be more willing to abstain from issuing contempt orders in FSIA cases through deference to the case-specific position of the executive branch. Historically, the Supreme Court has “pointedly refused to cede to the executive branch control over cases touching upon foreign affairs.”\textsuperscript{183} Justice Douglas believed that “absolute deference in such cases would render the court ‘a mere errand boy for the Executive Branch’”\textsuperscript{184} and Justice Brennan argued the State Department’s views “cannot be determinative.”\textsuperscript{185} In the 2004 term, however, the Court issued a pair of decisions suggesting that the executive branch’s expressed foreign policy position may merit deference on a case-by-case basis.\textsuperscript{186}

In \textit{Republic of Austria v. Altmann}, the Court stated that the State Department’s opinions on the foreign policy implications of assuming jurisdiction over “particular petitioners in connection with their alleged conduct . . . might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”\textsuperscript{187} In a footnote in \textit{Sosa v. Alvarez-Machain}, the Court

\begin{itemize}
\item \textsuperscript{182} See supra Part I.A.1.
\item \textsuperscript{183} Beth Stevens, \textit{The Modern Common Law of Foreign Official Immunity}, 79 FORDHAM L. REV. 2669, 2712 (2011).
\item \textsuperscript{184} \textit{Id.} (quoting First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring)).
\item \textsuperscript{185} \textit{First Nat’l City Bank}, 406 U.S. at 790 (1972) (Brennan, J., dissenting).
\item \textsuperscript{187} Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004) (footnotes omitted). The Court noted that, in contrast to views on particular questions of foreign policy, the “United States’ views [on issues of statutory interpretation] . . . merit no special deference.” \textit{Id.} In keeping with the “narrowness” of its holding in \textit{Altmann}, see \textit{id.} at 700, the Court
\end{itemize}
suggested that when the State Department has filed statements of interest calling for dismissal, “there is a strong argument that the federal courts should give serious weight to the Executive branch’s view of the case’s impact on foreign policy.”\footnote{Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).} \footnote{While deference to the “greater suggestion” of abstaining from jurisdiction might logically include the “lesser suggestion” of abstaining from the contempt power, these two suggestions are actually quite distinct. If a court follows an executive branch request to dismiss a case, it cedes power over that case at the jurisdictional determination stage or soon thereafter. Here, little power over the parties has yet been exerted. However, the potential to employ the contempt power will not become evident until a case has significantly matured. At such a later stage, courts may be less willing to defer to the executive.} Taken together, the propositions set forth in Altmann and Sosa indicate that, under proper circumstances, courts should entertain the State Department’s request that a case be dismissed via an abstention doctrine. In other words, the Court has suggested that jurisdictional determinations may merit deference. As the contempt power is a function of jurisdiction, it might follow that the courts would also give deference to the executive’s view on its use.\footnote{FG Hemisphere Assoc., LLC v. Democratic Republic of Congo, 637 F.3d 373, 380 (D.C. Cir. 2011) (“[W]e only defer to [the government’s diplomatic considerations] if reasonably and specifically explained . . . .[t]he broad generic argument that the government offers here seems to us to be appropriately presented to Congress . . . . We do recognize that there could be circumstances in which particular pressing foreign policy concerns involving a defendant country could affect a court’s decision . . . .”).} The \textit{FG Hemisphere} court recognized that pressing foreign policy considerations \textit{could} influence a district court’s decision to issue a contempt order—so long as the concerns were timely presented by the government and “reasonably and specifically explained.”\footnote{See generally Kimberly Bredon, Remedial Problems at the Intersection of the Political Question Doctrine, The Standing Doctrine, and The Doctrine of Equitable Discretion, 34 \textit{Ohio N.U. L. Rev.} 523, 549 (2008) (describing the Third Circuit Court of Appeals’ rationale for overruling a district court’s political question dismissal because the government’s statement of interest did not demonstrate that a finding of justiciability would create a meaningful conflict or tension with the actions of the executive).} The demand for specific explanation likely takes root in the fact that the courts are reluctant, as they must be, to surrender power at the request of the executive, and will only do so when there is a cognizable conflict that should be prevented.\footnote{See generally Kimberly Bredon, Remedial Problems at the Intersection of the Political Question Doctrine, The Standing Doctrine, and The Doctrine of Equitable Discretion, 34 \textit{Ohio N.U. L. Rev.} 523, 549 (2008) (describing the Third Circuit Court of Appeals’ rationale for overruling a district court’s political question dismissal because the government’s statement of interest did not demonstrate that a finding of justiciability would create a meaningful conflict or tension with the actions of the executive).} But it is also true that prudential abstention doctrines are designed to avoid creating conflicts in the first place, suggesting that courts should think more broadly about
which statements of interest merit deference.\textsuperscript{192} In the contempt order context, the government’s policy concerns are very likely to be speculative—seeking to avoid potential damage to a diplomatic relationship without the capacity to specifically foresee the nature of that damage.\textsuperscript{193} Thus, in many FSIA cases, a statement of interest may not provide the requisite level of specificity required to convince a court to abstain. Ultimately, while there is evidence that case-specific deference has the potential to become a more widely accepted judicial practice, it presently appears insufficiently robust to ensure that contempt orders do not issue in FSIA cases—the choice remains firmly with the courts.

The case-specific deference approach is further subject to weakness because the State Department’s position concerning contempt sanctions in FSIA cases does not appear to be case-specific. The Department, under two administrations, has appeared in Courts of Appeals to argue against the use of the contempt power.\textsuperscript{194} The \textit{amicus} briefs filed in \textit{Af-Cap} and \textit{FG Hemisphere} are written in broad language, attacking the use of the contempt power under the FSIA as categorically impermissible. Because the executive’s position is that contempt orders should \textit{never} issue, requiring its appearance in each case to contest the issuance of an order seems an unnecessary burden on litigation resources. This is especially true if courts follow the \textit{FG Hemisphere} court’s dictum and require “reasonably and specifically” demonstrated foreign policy concerns.\textsuperscript{195}

Case-specific deference is more likely to be an adequate remedy if Congress affirmatively endorses the practice. A formal congressional statement that courts should defer to the expressed views of the executive would increase the likelihood of abstention in two

\textsuperscript{192} For example, the Court established the “potentiality of embarrassment” from multifarious pronouncements by various departments on one question,” as one of the factors a court must consider when determining whether to apply the political question doctrine. \textit{See} \textit{Baker v. Carr}, 369 U.S. 186, 217 (1962) (emphasis added).

\textsuperscript{193} \textit{See} Brief of the United States as Amicus Curiae in Support of Appellant at 3, \textit{FG Hemisphere Assoc.}, LLC v. Democratic Republic of Congo, 637 F.3d 373 (D.C. Cir. 2011) (No. 10-7046), 2010 WL 4569107, at *3 (“[T]he legal framework established by Congress for litigation against foreign states does not permit the enforcement of monetary contempt sanctions against a state. Imposing such sanctions could adversely affect our nation’s foreign relations . . . .”) (emphasis added).

\textsuperscript{194} The Department’s \textit{amicus} brief in \textit{Af-Cap} was filed on December 5, 2005. The Department’s brief in \textit{FG Hemisphere} was filed on October 26, 2010. These dates are respectively within the administrations of President George W. Bush and President Barack Obama.

\textsuperscript{195} \textit{FG Hemisphere}, 637 F.3d at 380.
ways. First, in “defining procedure in relation to cases and controve-
sersies” Congress is acting “within its delegated power over the ju-
risdiction of the federal courts.” In this, courts are compelled to
follow Congress’ direction, so long as it does not run against another
constitutional command. Second, the courts grant significant defer-
ence to the political branches when they act in concert within their
respective constitutional spheres of power. Congress, acting
through its power to establish inferior judicial tribunals, will endorse
deference to the executive as the procedural mechanism for determi-
ning whether contempt orders may issue in FSIA cases. The State
Department’s position will issue through the executive’s authority to
count foreign relations. In this posture, the statement of interest
would “be supported by the strongest of presumptions,” and it is
more likely that courts would follow its suggestion.

3. Directive Legislative Restriction of the Contempt Power under the
FSIA

A third approach to restricting the use of the contempt power
in FSIA cases is direct legislative restriction. Notwithstanding the
view that the contempt power is an inherent function of judicial au-
thority, such a restriction is entirely consistent with the Constitution’s
allocation of power over federal “inferior” tribunals to the legisla-
ture. The Supreme Court has repeatedly affirmed Congress’ au-
thority to restrict the remedies and equitable powers available in the
lower courts. The limiting principle on Congress’ authority is that
it may not “withdraw all effective remedial power,” an action that

197. See Jide Nzelibe, supra note 174, at 1003 (discussing the impact of Justice
Jackson’s Youngstown concurrence in the foreign affairs context).
198. Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579,
637 (Jackson, J., concurring).
199. See Cary v. Curtis, 44 U.S. 236, 245 (1845) (“[Courts] created by statute must look
to the statute as the warrant for their authority; certainly they cannot go beyond the statute,
and assert an authority with which they may not be invested by it, or which may be clearly
denied to them . . . . [T]he organization of the judicial power, the definition and distribution
of the subjects of jurisdiction in the federal tribunals, and the modes of their action and
authority, have been, and of right must be, the work of the legislature.”).
200. See Office of Legal Counsel, U.S. Dep’t of Justice, Constitutionality of Legislation
limit the equitable powers of the inferior federal courts in response to congressional inquiry
about the constitutionality of prohibiting “busing” as a desegregation remedy).
would alter the nature of “judicial power” as contemplated by the Constitution.\textsuperscript{201}

Because a core function of contempt is protection of judicial independence, the courts appear reluctant to voluntarily cede this power.\textsuperscript{202} Since the Act of March 2, 1831, there has not been major national legislation directly altering the scope of the contempt power. Consequently, there is little precedent indicating the permissible degree of legislative restriction.\textsuperscript{203} However, the proposed restriction is very narrow—only affecting the small set of cases arising under the FSIA. Additionally, the proposed restriction is directly related to foreign relations, a field consistently recognized as falling under the control of the legislative and executive branches.\textsuperscript{204} These factors suggest that the courts would accept and respect a Congressional restriction of the contempt power in FSIA cases. Moreover, the \textit{FG Hemisphere} and \textit{Autotech Technologies} opinions both indicate that congressional restriction of the power in these cases would be accepted if present.\textsuperscript{205}

Because the primary motivation for the restriction is preventing incidental interference with the executive’s conduct of foreign relations, and because the FSIA provides the sole basis for the exercise of jurisdiction over foreign sovereigns, the restriction should be enacted as an amendment to the FSIA. To serve its intended ends, the restriction must preclude courts from entering orders of contempt or monetary sanctions against foreign sovereigns. In effect, this would

\textsuperscript{201} Id.

\textsuperscript{202} See supra Part I.A.1.

\textsuperscript{203} Dating to \textit{U.S. v. Hudson & Goodwin}, 11 U.S. (7 Cranch) 32, 34 (1812), courts have indicated that the power to fine for contempt, in some unknown form “cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . . .”

\textsuperscript{204} See \textit{Verlinden B.V. v. Cent. Bank of Nigeria}, 461 U.S. 480, 493 (1983) (“By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.”) (emphasis added).

\textsuperscript{205} \textit{FG Hemisphere Assoc., LLC v. Democratic Republic of Congo}, 637 F.3d 373, 378 (D.C. Cir. 2011) (“Although Congress can limit [the inherent contempt authority], it must do so through a ‘clear and valid legislative command.’”); \textit{Autotech Technologies LP v. Integral Research & Dev. Corp.}, 499 F.3d 737, 745 (7th Cir. 2007) (“We would need much more clear guidance from Congress than we have before we could conclude that a court had no jurisdiction to entertain contempt proceedings in an action brought under the FSIA for which subject matter jurisdiction has been established.”). In \textit{FG Hemisphere}, the court suggested that the State Department’s policy arguments would be better presented to Congress—effectively inviting this proposal.
be an extension of the “extent of liability” provision codified in section 1606.

A secondary reason for the restriction is demonstrating the United States’ continued commitment to the international norms of sovereign immunity. For this reason, it is useful to examine how similar restrictions have been implemented in foreign law.206 The Australian Foreign State Immunities Act disallows fines and sanctions of the sort that result from a contempt order: “[a] penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State . . . to comply with an order made against the foreign State by a court.”207 Similarly, Canada’s State Immunity Act establishes that “no relief by way of an injunction, specific performance or the recovery of land or other property may be granted against a foreign state [unless the state consents in writing].”208 Both foreign acts operate, in effect, to preclude contempt orders from issuing—they prevent courts from ordering sanctions or specific performance to coerce compliance. Nevertheless, they do not textually address the contempt power. Because an order describing the foreign sovereign’s conduct as “contempt” is itself among the reasons that diplomatic tensions could arise, the United States Congress should go a step further and prohibit findings, orders or statements of contempt against foreign sovereign defendants. This would ensure that courts could not interpret the restriction as prohibiting contempt enforcement mechanisms, but not the exercise of the contempt power itself.209

206. The State Department’s amicus brief in FG Hemisphere used this form of comparative legal argument to explain why the FSIA should be read as restricting the contempt power. The brief addresses Australian and Canadian law, the two points of comparison also used in this section. See generally Brief of the United States as Amicus Curiae in Support of Appellant, FG Hemisphere Assoc., LLC v. Democratic Republic of Congo, 637 F.3d 373 (D.C. Cir. 2011) (No. 10-7046), 2010 WL 4569107. The department’s argument was rebuffed by the court. FG Hemisphere, 637 F.3d at 380 (“Although it may be true, as the government contends, that at least several countries have explicitly prohibited monetary sanctions against a foreign state for refusal to comply with a court order, that seems quite irrelevant because our Congress has not.”).

207. Foreign States Immunities Act 1985 (Cth.) s 34 (Austl.) (“A penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court.”).


209. In FG Hemisphere the court indicated a need for “clear statement” to abridge the contempt power. Because it is inherent, and guarded by Article III, Congress must speak with specificity. While it is likely that any legislative history surrounding a restriction
The Canadian Act includes two additional provisions that the United States Congress should consider in developing a contempt restriction for the FSIA. First, the Canadian Act draws a distinction between sovereign governments and their agencies, barring relief against the former but not the latter.\(^{210}\) This provision would contain the restriction to a subset of the cases falling within FSIA jurisdiction, demonstrating restraint and respect for the judiciary’s inherent power. Furthermore, it would limit the contempt restriction to cases where a foreign government is the defendant—situations in which contempt is more likely to cause diplomatic tension than those involving government corporations.\(^{211}\) Second, the Canadian Act allows for written waiver of the restriction on sanctions against sovereign defendants. Enacting such a provision in U.S. legislation would further limit its scope and permit parties contracting with sovereigns to negotiate for full access to a U.S. court’s traditional remedial powers. Because FSIA waiver is the one instance in which contempt orders are not unenforceable, Congress should leave it in place.

Direct legislative restriction would also provide Congress an opportunity to encourage the State Department to work with U.S. plaintiffs to find diplomatic means of settling disputes. The *FG Hemisphere* court recognized that plaintiffs in FSIA cases often face a daunting challenge in executing judgments, and otherwise “must rely on the government’s diplomatic efforts, or a foreign sovereign’s generosity, to satisfy a judgment.”\(^{212}\) The State Department has also noted its potential role in resolving disputes involving foreign sovereign defendants.\(^{213}\) Because a restriction of the contempt power ap-

---


\(^{211}\) As applied to the principal cases in this Note, the district courts would not have been permitted to issue contempt orders in *FG Hemisphere* or *Af-Cap*, where the defendant was the government in its sovereign capacity. But the district court in *Autotech Technologies* would have retained the power to issue contempt orders against the defendant state-owned corporation.

\(^{212}\) *FG Hemisphere Assoc.*, LLC v. Democratic Republic of Congo, 637 F.3d 373, 377 (D.C. Cir. 2011).

\(^{213}\) *See* Brief of the United States as Amicus Curiae in Support of Appellant at 16, *FG Hemisphere Assoc.*, LLC v. Democratic Republic of Congo, 637 F.3d 373 (D.C. Cir. 2011) (No. 10-7046), 2010 WL 4569107, at *27 (“[T]he United States Government may engage in diplomatic efforts on a plaintiff’s behalf to encourage the foreign state to pay.”).
pears to remove a tool in aid of plaintiffs, Congress should suggest that the State Department engage with further assistance.

Ultimately, direct congressional restriction may be the most effective of these three approaches. Judicial abstention appears to be a distant prospect on policy grounds. Deference to executive statements of interest appears to be stronger, but will require extensive litigation resources and is most likely to succeed only if Congress acts in approval of the process. Direct legislative restriction would establish a clear standard for the courts, require little upkeep by the State Department and ensure that congressional policy priorities continue to guide the statutory scheme governing foreign sovereign immunity in the United States.

B. The Impact of a Restricted Civil Contempt Power in FSIA Cases

1. Limited Impact on the Judiciary

Restricting the contempt power in FSIA cases would not change the status quo ante for the judiciary. As it stands, contempt orders issued in FSIA cases are unenforceable. In this, the contempt power does not serve to coerce compliance with orders in vindication of the courts’ authority. In fact, it can be argued that restricting the FSIA case contempt power actually bolsters respect for the judiciary by limiting the number of orders that can be openly defied.

A legislative restriction of contempt in FSIA cases would benefit the judiciary by removing a situation where courts must contemplate foreign affairs and politically sensitive issues. Absent this restriction, courts petitioned for contempt orders against foreign sovereigns must balance the foreign policy of the United States, the needs of the plaintiff and the ends of justice. Restricting contempt

214. Prior to the FSIA, the State Department would have engaged, if it saw fit, in the process of determining whether a sovereign defendant should receive immunity from the jurisdiction of the courts. This allowed the executive branch an opportunity to prevent a potentially problematic case from taking root in the first instance. The FSIA shifted the jurisdictional determination to the judiciary. Now, if the executive branch has a diplomacy or policy concern in a case that satisfies the FSIA, it must appear in open court (on briefs) and argue that the court should either apply a prudential abstention doctrine, or withhold a certain action (such as a contempt sanction). When presented with such a petition, a court is tasked with determining whether the executive has made a winning argument—it must determine whether the executive has demonstrated a sufficient foreign policy concern. Thus, the FSIA has effectively switched the separation of powers problem that was present before its implementation. See generally Todd Connors, The Foreign Sovereign Immunities Act: Using Separation of Powers Analysis to Guide Judicial Decision-Making, 26 LAW & POL’Y
in FSIA cases would prevent the need for the courts to evaluate foreign policy in this way. Furthermore, if the restriction derives from an act of Congress, the courts would be empowered to deny a motion for a contempt order without resting the decision wholly upon the expressed opinion of the executive branch.

2. A Neutral Impact on Plaintiffs: Establishing Justified Expectations

Because contempt orders in FSIA cases are effectively unenforceable, plaintiffs do not stand to lose much if the availability of the contempt power is restricted. As it currently stands, plaintiffs in these cases are neither receiving compensatory payment nor benefiting from a coercive pressure that advances their case.

There are no records of a case in which a contempt sanction was actually executed against or collected from a foreign sovereign defendant. However, in the principal cases above, the contempt orders were initiated on request of the parties-plaintiff. This suggests a perceived value in contempt orders notwithstanding their unenforceability. One potential value is the sense of empowerment, perhaps justice, that a plaintiff receives from judicial recognition that they have been wronged by the contumacious conduct of the opposing party. The mere possession of a contempt judgment is, in a certain sense, a victory for the plaintiff. The proposed restriction would eliminate this.

A second potential value of contempt orders in FSIA cases is that, while unenforceable in absolute terms, such orders may spur the foreign sovereign defendant to take action in the case—either appearing to participate on the merits or to contest the contempt order. For example, in First City, Texas-Houston, N.A. v. Rafidain Bank, the district court entered contempt sanctions against a bank that was allegedly the alter-ego of the Iraqi Central Bank—a foreign sovereign. The bank had been non-responsive to prior court action. When it resumed participation in the litigation, it did so in part to challenge the validity of the contempt order. In Richmark Corporation v. Timber Falling Consultants, the district court entered per diem contempt sanctions against a Chinese state-owned corporation for failure to comply in discovery. After the contempt order issued, the corporation received permission from the State Secrecy Bureau to partially

---

comply. It did so, simultaneously moving the district court to vacate the contempt sanctions. But, when contempt orders and sanctions are employed with the intent to spur a foreign sovereign into action, the plaintiff is effectively capitalizing on the fact that such orders are offensive foreign policy instruments. As demonstrated in the cases above, the foreign sovereigns engage in the litigation primarily to challenge contempt. This evidences the diplomatic tension that the restriction is intended to prevent in the first instance.

Lastly, the FSIA is recognized as creating the potential for a right without remedy.\(^\text{217}\) This occurs with contempt orders and sanctions—a court provides a right to the plaintiff, but the FSIA’s asset-immunity provisions preclude enforcement or collection. Congressional restriction of the contempt power in FSIA cases would prevent the creation of a right that cannot be remedied. By prohibiting courts from issuing contempt sanctions, Congress would adjust the law to reflect reality. In so doing, it would help future plaintiffs establish justified expectations about the boundaries of litigation in FSIA cases. If the restriction includes a waiver provision it would also encourage future contracting parties to craft legally sufficient waivers.\(^\text{218}\)

3. Benefit to the United States Government

Restricting the availability of the contempt power in FSIA cases resolves the chief concern that the orders will interfere in the conduct of foreign relations. Additionally, as there is an increasing trend in the international system banning monetary sanctions against foreign sovereigns, restriction would demonstrate the United States’ continued willingness to conform with prevailing international norms. While based in a rational policy objective, the direct legislative restriction approach would also provide an opportunity for the judiciary to revise and update its contempt power jurisprudence—addressing the extent to which Congress can limit the courts’ inherent power.\(^\text{219}\)

Ultimately, restricting the contempt power would demonstrate goodwill on behalf of the United States and prevent potential foreign policy complications. The action would have a marginal impact on the power of the courts, and is not likely to harm plaintiffs more than

\(^\text{217}\). See supra Part 1.2.B.

\(^\text{218}\). See supra notes 131–36 and accompanying text.

\(^\text{219}\). A plaintiff in a future FSIA case, unable to petition the court for contempt sanctions, is likely to challenge the legality and constitutionality of the restriction.
the unenforceability of contempt sanctions already does. On balance, it would be prudent for Congress to act in this area.

CONCLUSION

Foreign sovereigns can be sued in the United States. By enacting the restrictive view of foreign sovereign immunity in the FSIA, Congress has limited the potential for harm to foreign relations that would otherwise ensue from hailing foreign governments before U.S. tribunals. However, the Act does not account for use of the contempt power—an issue that was neither textually addressed nor shown significant consideration in the legislative history. This Note has established that the interaction of the FSIA and the contempt power reduces contempt sanctions and orders to statements concerning the sovereign conduct of foreign states. These statements have the potential to harm the conduct of foreign relations by infringing on the executive’s role as the sole organ for communications with foreign states, complicating diplomatic relations.

While the contempt power has been available in FSIA cases since the Act came into force, it should now be restricted as a preventative measure in order to avoid diplomatic difficulties before they arise. Among other concerns, the recent increase in sovereign debt default, or at least the threat thereof, indicates that suits against foreign sovereigns are likely to be on the rise. Moreover, the continually changing nature of world politics should motivate the government to implement a policy of prevention.

The very fact that this issue has become prominent in appellate litigation itself provides motivation for limitation. Foreign sovereigns have fought contempt orders in three federal Courts of Appeals, two of which held that there is no restriction on the use of the contempt power against them. Moreover, the State Department, the agency chiefly responsible for U.S. diplomacy, elected to appear in support of the foreign sovereigns’ position and was firmly rebuffed. Referring to the inherence of the contempt power, the Court of Appeals for the District of Columbia thoroughly rejected the State De-


221. See FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW, supra note 157, at 12 (“Over the past two decades, the geopolitical and geo-economic landscape has changed significantly. It is likely to continue to change in the years ahead.”).
partment’s “litigating effort” to persuade it that the FSIA prohibits use of the contempt power. This further demonstrates that contempt, as a power that protects the independence of the judiciary, is not likely to be voluntarily ceded. Thus, the State Department would do well to heed the FG Hemisphere court and present its policy arguments to Congress, seeking legislative change.

While the State Department has appeared in opposition of the contempt power in FSIA cases, Congress, the branch competent to establish procedures and rules for the inferior federal courts, has not spoken on the issue. Thus, until such an action alters the analysis, courts petitioned for contempt orders should take persuasive guidance from the FG Hemisphere court, finding that “the FSIA does not abrogate a court’s inherent power to impose contempt sanctions on a foreign sovereign.” However, when determining whether to issue an order as a matter of discretion, courts should actively consider the characteristics of contempt orders as applied under the FSIA that are discussed in this Note: the orders are nearly per se unenforceable, quasi-punitive, potentially offensive to foreign sovereigns and may frustrate diplomacy by interfering in the separation of powers.

Adam J. DiClemente*

223. See id.
224. Id.

* Executive Editor, Columbia Journal of Transnational Law; J.D. Candidate, Columbia Law School, 2013; B.A., American University, 2006. I would like to thank Professor Trevor Morrison for his excellent guidance and feedback during the research and writing of this Note. Special thanks, for a great range of valuable support and efforts, to Professors George Bermann, Kathryn Judge, Daniel Richman, Erin Ryan and Jason Solomon. The staff of the Journal has provided excellent commentary and correction—any remaining errors are my own. Above all, the deepest thanks to my family.