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THE ILL-FATED EMPLOYEE: FOREIGN SOVEREIGN IMMUNITY IN EMPLOYMENT DISPUTES AND A LEGISLATIVE HISTORY THAT HAS SWALLOWED THE TEXT OF THE STATUTE

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ABSTRACT

The United States contains hundreds of embassies and consulates operated by foreign sovereigns that maintain a presence in the United States. These embassies and consulates are staffed by citizens of the foreign sovereign as well as citizens of the United States or other countries. When these employees sue their foreign-state employers in the district courts of the United States, issues of sovereign immunity may prevent them from bringing their suits. The Foreign Sovereign Immunities Act ("FSIA"),[1] *passed by Congress in 1976, grants foreign states immunity from jurisdiction of the courts of the United States unless one of the enumerated exceptions applies, one of which is the commercial exception. In the context of employment disputes, circuit courts have had difficulty applying consistent analyses to determine if the foreign-state employer should receive immunity from the suit. The latest consequence of this inconsistency is* Merlini v. Canada,[2] *in which the First Circuit effectively held that Canada was subject to the requirements of Massachusetts's workers' compensation statutes, despite the fact that Canada already has a legislatively-created workers' compensation system applicable to its embassies and consulates across the world. This Note will argue that circuit courts have relied too heavily on a legislative history of the FSIA that is often inconsistent with the text of the statute, and that additionally is inconsistent with Supreme Court jurisprudence of the FSIA commercial exception.*

1. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611 (2018).
2. 926 F.3d 21, 25 (1st Cir. 2019).

I. INTRODUCTION

The primary functions of consular missions include protecting countries' interests within the borders of other countries, negotiating with other countries, reporting conditions and developments in other countries, and promoting productive and amicable relationships with other states.[3] The United States has approximately 1,461 consulates of foreign countries.[4] In Washington D.C. alone, there are 176 embassies of foreign sovereigns.[5] These numbers are constantly fluctuating, as foreign governments change their intentions and adjust their presence in the United States.[6] Though foreign sovereigns rely primarily on their own citizens to staff these missions, they often employ citizens of the receiving state and citizens of other sovereigns.[7] Foreign sovereigns,[8] however, are generally immune from suit in the courts of the United States, which creates complications when disputes between employer and employee arise.[9]

Sovereign immunity is a doctrine of international law which prevents courts from exercising jurisdiction over a state.[10] Recognized by the United States Supreme Court in 1812,[11] sovereign immunity was codified

3. Vienna Convention on Diplomatic Relations art. 3, ¶ 1, Apr. 18, 1961, 23 U.S.T 3227, 500 U.N.T.S. 95.

4. *United States Embassies and Consulates*, EMBASSYPAGES, https://www.embassypages.com/usa (last updated Feb. 26, 2021).

5. *Id.*

6. *See* U.S. DEP'T OF STATE, FOREIGN CONSULAR OFFICES IN THE UNITED STATES ii (2016).

7. *See, e.g.*, *Local Employment in U.S. Embassies and Consulates*, U.S. DEP'T OF STATE: CAREERS REPRESENTING AM., https://careers.state.gov/work/foreign-service/local-employment/ (last visited Feb. 28, 2021); *Working for British Embassy Washington*, GOV.UK, https://www.gov.uk/world/organisations/british-embassy-washington/about/recruitment (last visited Feb. 28, 2021); *Job Opportunities at the Embassy*, GOV. OF CAN., https://www.canadainternational.gc.ca/austria-autriche/offices-bureaux/jobs-travaux.aspx?lang=eng (last updated Feb. 25, 2019).

8. Foreign sovereign refers to a country which is not the United States. Throughout this Note, a foreign sovereign may be referred to as "foreign state," "foreign country," and, when referencing a foreign sovereign which employs a plaintiff in a suit, a "foreign-state employer."

9. 28 U.S.C. § 1604 (2018).

10. William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 257 (1997).

11. Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 136–37 (1812) ("The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that

in 1976 under the Foreign Sovereign Immunities Act (FSIA).[12] The FSIA provides that a foreign state will enjoy immunity from the jurisdiction of the courts of the United States unless one of the specified exceptions, provided in 28 U.S.C. §§ 1605–1607, applies.[13]

Issues of sovereign immunity have consistently arisen in employment law,[14] as federal courts of the United States must often consider issues arising out of a foreign state's employment of persons.[15] These employees are often citizens of the United States, but the issue has arisen where a foreign state recruits employees from third-party countries to work at an embassy in the United States.[16] Typically, cases implicating the overlap between employment law and sovereign immunity involve a United States citizen, formerly employed by a foreign sovereign to work in a consulate, embassy, or in some other capacity, alleging unlawful conduct by the foreign sovereign which harmed the employee during the course of his or her employment.[17] Employees across a wide range of industries, including a hospital systems engineer employed by a foreign government to work in a foreign country,[18] an accountant managing the financial affairs of an embassy in Washington D.C.,[19] and a contracted security agent of a royal family[20] have brought

absolute and complete jurisdiction within their respective territories which sovereignty confers.").

12. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611 (2018).

13. 28 U.S.C. § 1604 (2018).

14. *See, e.g.*, Richard L. Garnett, *The Perils of Working for a Foreign Government: Foreign Sovereign Immunity and Employment*, 29 CAL. W. INT'L L.J. 133 (1998) [hereinafter Garnett, *Perils*].

15. *Id.*

16. *Compare* Butters v. Vance Int'l, Inc., 225 F.3d 462, 464 (4th Cir. 2000) (American security employee brings suit against foreign-state employer), *with* El-Hadad v. United Arab Emirates, 496 F.3d 658, 661 (D.C. Cir. 2007) (citizen of Egypt is recruited in Egypt to work for the U.A.E.'s embassy in Washington, D.C. and brings employment suit against employer). In one case, a citizen of Japan brought an employment suit against her employer, the Tokyo Metropolitan Government, for her treatment while an employee in New York City representing Tokyo. Kato v. Ishihara, 360 F.3d 106, 109 (2d Cir. 2004).

17. *See, e.g.*, Figueroa v. Ministry for Foreign Affs. of Swed., 222 F. Supp. 3d 304, 308–09 (S.D.N.Y. 2016).

18. Saudi Arabia v. Nelson, 507 U.S. 349, 351–52 (1993).

19. *El-Hadad*, 496 F.3d at 661.

20. *Butters*, 225 F.3d at 464. The court here held that under an agency theory, the privately contracted security company could receive sovereign immunity provided that it was acting as an agent of the foreign sovereign in the conduct which gave rise to the suit. *Id.* at 466. *See generally* Abigail Hing Wen, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538 (2003) (discussing and examining the impact of allowing the FSIA to shield American companies from liability under an agency theory).

cases against their foreign-state employers. The employees in these actions have brought suits for discrimination,[21] wrongful termination,[22] sexual harassment,[23] and battery,[24] among others.[25] In response, the foreign states have claimed immunity, leaving it to the courts to determine whether sovereign immunity is applicable under the FSIA.[26]

United States courts considering sovereign immunity in the context of an employment action have so far failed to find a consistent application of the commercial exception.[27] The problem derives partially from a legislative history which has influenced courts to consider only the position or status of the employee when resolving the issue of sovereign immunity, but such emphasis on the position or status is difficult to apply under the commercial exception of the FSIA.[28]

This Note will argue that rather than focus on only the status of the employee, courts should instead consider these issues in the same manner as any other case under the commercial exception to the FSIA, and that this approach would offer more consistent outcomes and align the analysis of this issue with the commercial exception as a whole. Additionally, this Note will show a clear need for further clarity from the Supreme Court on how these cases should be analyzed, as the current state of the law has left employees and foreign-state employers with varying rights across different jurisdictions in the United States. Finally, this Note will propose two alternative solutions, one involves congressional legislation to clarify the role of sovereign immunity in employment-related suits,[29] while the other calls for the inclusion of

21. *See, e.g.*, *Figueroa*, 222 F. Supp. 3d at 308–09.
22. *See, e.g.*, *El-Hadad*, 496 F.3d at 662.
23. *See, e.g.*, Kato v. Ishihara, 360 F.3d 106, 109 (2d Cir. 2004).
24. *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349, 352–55 (1993).
25. *See infra* Part VII.B.
26. *See, e.g.*, Merlini v. Canada, 926 F.3d 21, 25 (1st Cir. 2019).
27. *See El-Hadad*, 496 F.3d at 669 n.2 ("Not all circuits approach these questions as we do."); *see also* Richard Garnett, *Precarious Employment? Varying Approaches to Foreign Sovereign Immunity in Labor Disputes*, 51 INT'L LAW. 25 (2018) [hereinafter Garnett, *Precarious Employment*]. In his article, Professor Garnett conducts a survey of the various approaches American courts have taken to this issue, finding that Courts in the United States have settled on four tests to determine whether an employment is commercial within the meaning of the FSIA. *Id.* at 26–27. Professor Garnett then concludes that "an approach that balances [a foreign sovereign's immunity and an employee's rights] objectives and, in particular, provides justice to employees whose work is largely indistinguishable from that in the private or commercial spheres, is surely the best way forward." *Id.* at 46.
28. *See* H.R. REP. NO. 94-1487, at 16 (1976).
29. *See infra* Part X.B.

choice-of-law provisions in employment contracts, a solution which has been raised by at least one scholar and accepted in two cases.[30]

II. JUDICIAL AND LEGISLATIVE HISTORY OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

Until the mid-twentieth century, foreign states generally received absolute immunity from the jurisdiction of courts of the United States.[31] This changed when the Supreme Court in 1940, found that a foreign state's immunity depended on the interests of the United States in foreign relations, and left it largely to the State Department to determine whether immunity was to be given to a foreign state in any particular case.[32] The State Department thereafter adopted the restrictive theory of sovereign immunity, balancing a foreign state's sovereign immunity with the right of an individual to seek redress in court.[33] The restrictive theory of sovereign immunity provides an exception to sovereign immunity from cases which arise out of a state's conduct which is "private" or "commercial" in nature, as opposed to those that are "governmental" or "sovereign" in nature.[34]

In 1976, partially in response to the difficulty of having an entity of the Executive Branch—the State Department—make jurisdictional determinations for the Judicial Branch, Congress passed the FSIA.[35] The

30. *See infra* Part X.C; *see also* Garnett, *Precarious Employment*, *supra* note 27, at 26–27; Ashraf-Hassan v. Embassy of Fr., 185 F. Supp. 3d 94, 100–01 (D.D.C. 2014); Dahman v. Embassy of Qatar, 364 F. Supp. 3d 1, 3–4 (D.D.C. 2019).

31. *See* David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1452–53 (1983). The principle of state immunity was first stated in American case law in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). State immunity derives from the British common-law rule that "the King can do no wrong." Stanwood R. Duval, *Sovereign Immunity, Anachronistic or Inherent: A Sword or a Shield?*, 84 TUL. L. REV. 1471, 1472 (2010).

32. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945) ("[T]he court will inquire whether the ground of immunity is one which it is the established policy of the [State D]epartment to recognize.").

33. *See* Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Att'y Gen. Philip B. Perlman (May 19, 1952), *reprinted in* 26 U.S. DEP'T OF STATE BULL. 984, 985 (1952). While foreign state immunity is now governed by statute under the FSIA, courts often consider the State Department's opinion in the interpretation of the FSIA and its application to a particular case. *See* Merlini v. Canada, 926 F.3d 21, 29 (1st Cir. 2019) (considering the State Department's argument in regard to the immunity of Canada in the claim).

34. Fredric A. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE J. INT'L L. 1, 15–16 (1976).

35. H.R. REP. NO. 94-1487, at 7 (1976) ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch,

FSIA officially codified the restrictive theory of sovereign immunity,[36] under which a foreign state will receive immunity from the courts of the United States unless one of the exclusions in 28 U.S. §§ 1605, 1607, 1610, or 1611 applies.[37] The FSIA attempts to strike a balance between acts by a government which are sovereign in nature, for which states receive immunity from suit, and those that are private in nature, for which the foreign states does not receive immunity.[38] This is referred to as the *jure imperii/jure gestionis* distinction.[39]

III. THE COMMERCIAL EXCEPTION

The commercial exception is the FSIA's most significant exception to sovereign immunity.[40] It provides that immunity from suit will not be given to the foreign state for claims

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[41]

thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often-crucial decisions are made on purely legal grounds and under procedures that insure due process.").

36. *Id.* ("[T]he bill would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law.").

37. *Id.* at 15; *see also* 28 U.S.C. § 1604 (2018).

38. H.R. REP. NO. 94-1487, at 14.

39. *See* Weber, *supra* note 34, at 18 ("[C]ustomary international law no longer prescribes sovereign immunity from judicial process in municipal courts in matters that are 'private,' 'commercial,' or *jure gestionis* in character. International law does require immunity in actions based on 'governmental,' 'sovereign,' or *jure imperil* acts, however.").

40. Brittenham, *supra* note 31, at 1440 ("Perhaps the most significant exception permits suit to be brought for claims that arise from the 'commercial activity' of a foreign state having sufficient contacts with the United States for that forum to invoke its jurisdiction.").

41. 28 U.S.C. § 1605(a)(2) (2018). Because the large majority of cases which consider the commercial exception between employees and foreign-state employers arise out of relationships in the United States, the most relevant clause of 1605(a)(2) is the first clause. *See, e.g.*, El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–64 (D.C. Cir. 2007) (relying on the first clause in the considering the application of the commercial exception to an employment dispute).

The Supreme Court in *Saudi Arabia v. Nelson*[42] set forth the framework for considering whether the activity falls under the commercial exception.[43] First, the Court "identif[ies] the particular conduct on which the [plaintiff's] action is 'based' for purposes of the Act."[44] In that inquiry, "a court should identify that 'particular conduct' by looking to the 'basis' or 'foundation' for a claim."[45] This has been described as determining the "gravamen" of the complaint.[46]

Once the gravamen of the complaint is determined, the court then asks whether the conduct qualifies as "commercial activity" within the meaning of the FSIA.[47] The Act itself states that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[48] Although the Act itself does not define "commercial,"[49] the determination of whether conduct is commercial or not has then hinged on the *jure imperii/jure gestionis* distinction, which distinguishes private and sovereign conduct.[50] This, however, is not a question of purpose, as the Court in *Republic of Argentina v. Weltover*[51] stated:

> [B]ecause the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose" . . . the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce."[52]

42. 507 U.S. 349 (1993).
43. *Id.* at 356–59.
44. *Id.* at 356.
45. OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 33 (2015) (quoting *Nelson*, 507 U.S. at 357).
46. *OBB,* 577 U.S. at 33–34.
47. *Id.* at 37.
48. 28 U.S.C. § 1603(d) (2018).
49. *Nelson*, 507 U.S. at 356–59 ("If this is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it "leaves the critical term 'commercial' largely undefined." (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992))).
50. *Nelson*, 507 U.S. at 359–60.
51. 504 U.S. 607.
52. *Id.* at 614 (emphasis omitted) (citation omitted).

While the Supreme Court has acknowledged the difficulty in differentiating between the "purpose" of a foreign state's conduct and the "nature" of the conduct,[53] it has nevertheless stated that a foreign state engages in commercial conduct "where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'"[54]

IV. THE COMMERCIAL EXCEPTION & EMPLOYMENT

The legislative history of the FSIA is not completely silent on how a court should consider employment disputes between sovereigns and employees.[55] The legislative history provides that:

> The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents . . . would be among those included within the definition.[56]

The legislative history additionally states that "the employment of diplomatic, civil service, or military personnel" would be sovereign, rather than commercial, in nature.[57]

In at least some suits, then, the legislative history indicates that Congress intended the duties and status of the employee to weigh on the issue of whether the conduct on the part of the foreign sovereign is "commercial" within the meaning of the exception.[58] As a result, office workers and those who hold menial jobs generally have access to federal

53. *Nelson*, 507 U.S. at 361 ("We did not ignore the difficulty of distinguishing '"purpose" (*i.e.*, the reason why the foreign state engaged in the activity) from "nature" (*i.e.*, the outward form of the conduct that the foreign state performs or agrees to perform' . . . ." (quoting *Weltover*, 504 U.S. at 617)).

54. *Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614).

55. H.R. REP. NO. 94-1487, at 16 (1976).

56. *Id.* The legislative history addresses employment again in the context of the commercial exception, stating an '"act performed in the United States in connection with a commercial activity of the foreign state elsewhere,' . . . might include . . . the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country." *Id.* at 19.

57. *Id.* at 16.

58. *See id.*; *see also* El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–64 (D.C. Cir. 2007).

courts for suits arising from their employment, while diplomats or military personnel do not have similar access.[59] This distinction is known as the civil servant distinction.[60] Important to note, however, is that the legislative history fails to state precisely which positions qualify an employee as a civil servant and which do not, and whether a court should follow a foreign state's definition of a civil servant or the Unite State's definition of a civil servant.[61]

Federal courts have sometimes given little regard to this language in their decision-making. While some circuits make the civil servant distinction the central issue in the analysis,[62] one circuit found that the civil servant distinction is "merely [an example] of the broader distinction made in the text of the FSIA between activities that are by nature 'commercial' and those that are not . . . the central inquiry in th[e] case."[63] Other circuit courts factor it into their analysis, but are careful not to hinge the entire issue of sovereign immunity on the status of the employee.[64] Thus, the legislative history has done little to aid circuit courts in the application of the FSIA to employment claims, which has resulted in inconsistent application across federal courts.[65]

V. FOREIGN APPROACHES TO SOVEREIGN IMMUNITY & EMPLOYMENT DISPUTES

Throughout the Twentieth Century, as trade grew across the world and sovereign nations began to expand into areas traditionally reserved

59. *See El-Hadad*, 496 F.3d at 663–64. The use of the language of the legislative history here has not only been confined to cases brought by former employees. Abdulla v. Embassy of Iraq, No. 12-2590, 2013 WL 4787225, at *5 (E.D. Pa. Sept. 9, 2013). There, the court looked at the nature of anticipated employment for a plaintiff bringing suit against a foreign sovereign for allegedly breaking a contract in which the foreign sovereign was to pay the tuition of the plaintiff in exchange for post-graduation employment with the sovereign. *Id.* at *5–6.

60. *See El-Hadad*, 496 F.3d at 663–64.

61. *See generally* H.R. REP. NO. 94-1487 (1976).

62. Holden v. Canadian Consulate, 92 F.3d 918, 921 (9th Cir. 1996) ("We adopt the standard suggested by the legislative history, that is, employment of diplomatic, civil service or military personnel is governmental and the employment of other personnel is commercial. Because private parties cannot hire diplomatic, civil service or military personnel, such hiring is necessarily governmental."); *see also* Segni v. Com. Off. of Spain, 835 F.2d 160, 165 (7th Cir. 1987) (analyzing a case under the framework of the legislative history and looking at whether the employee is a civil servant to determine if immunity would apply to his claim).

63. Kato v. Ishihara, 360 F.3d 106, 111 (2d Cir. 2004).

64. *See El-Hadad*, 496 F.3d at 664.

65. *See id.* at 669 n.2.

for private actors, an increasing number of countries adopted the restrictive theory of sovereign immunity.[66] Today, foreign states either apply an exception similar to the commercial exception of the FSIA or expressly state the applicability of sovereign immunity in suits arising out of employment by a foreign sovereign.[67]

In the United Kingdom, any employee who is a "member of a diplomatic or consular mission" is unable to bring a suit against their employer, which includes "administrative and technical staff."[68] Professor Garnett argues that this "effectively eviscerate[s]" the employment rights of embassy and consular employees, preventing them from bringing suit to seek redress against their employer for unlawful conduct.[69] Unlike other countries which distinguish between the proximity of the employment to sovereign actions or the type of claim which is being brought when making sovereign immunity determinations, the United Kingdom bars all claims of employees.[70]

Other countries have taken an approach closer to that of the United States.[71] For example, Canada similarly permits an individual to bring suit against a foreign sovereign where the foreign sovereign has engaged in "commercial activity."[72] The Supreme Court of Canada, however, has

66. Nathan J. Schmalo, *Is the Restrictive Theory of Sovereign Immunity Workable?*, 17 STAN. L. REV. 501, 502 (1965) ("As international trade increased and governments expanded into what had previously been private spheres, courts in many countries began to modify the absolute doctrine of sovereign immunity.").

67. *See* Richard Garnett, *The Rights of Diplomatic and Consular Employees in Australia*, 31 AUSTL. J. LAB. L. 1, 7 (2018) [hereinafter Garnett, *Australia*]. Professor Garnett's article, along with other articles written by him, delve into the various approaches that countries take in employment disputes involving foreign state employers. *See id.*; *see also* Richard Garnett, *The Precarious Position of Embassy and Consular Employees in the United Kingdom*, 54 INT'L & COMPAR. L.Q. 705 (2005) [hereinafter Garnett, *United Kingdom*]. For a survey of the application of foreign state immunity in cases involving dismissed embassy or consular staff across twenty-seven jurisdictions, see JULIA BROWER, CTR. FOR GLOB. LEGAL CHALLENGES, STATE PRACTICE ON SOVEREIGN IMMUNITY IN EMPLOYMENT DISPUTES INVOLVING EMBASSY AND CONSULAR STAFF (2015).

68. Garnett, *Australia*, *supra* note 67, at 4.

69. Garnett, *United Kingdom*, *supra* note 67, at 706–07.

70. *See id.* at 713–14. In a criticism of the British model, Professor Garnett notes:

> While the international law trend appears in favour of loosening immunity in the majority of mission employment disputes, the UK position remains excessively protective of foreign State employer interests. It is frankly hard to understand why the British Government places so little weight on protecting its own local labour force as against the need for comity and good relations with foreign States.

Id. at 718.

71. *See generally* BROWER, *supra* note 67, at 3 ("In the majority of countries surveyed (twenty-three), . . . courts will exercise jurisdiction over at least some claims by dismissed low-level embassy or consular employees.").

72. State Immunity Act, R.S.C. 1985, c S-18 (Can.).

indicated that whether the sovereign enjoys immunity could rely on the type of claim and whether the plaintiff alleges only a claim arising out of an employment contract, such as unpaid wages, or a claim which required the court to look further into the management practices of the consulate or embassy, like unfair employment dismissal.[73] A survey of twenty-seven countries, not including the United States, found that twenty-three of the twenty-seven countries permitted jurisdiction in cases over dismissed low-level embassy or consular employees.[74]

VI. PREVIOUS RESEARCH ON EMPLOYMENT AND SOVEREIGN IMMUNITY

Previous research on this topic comes from Professor Richard Garnett. Professor Garnett has produced two articles that survey sovereign immunity in the United States as it relates to those employed at consulates, embassies, and the like.[75] Professor Garnett's first major article on the topic was published in 1998.[76] The article focused primarily on other countries' employment of United States citizens in embassies in either the United States or in other countries.[77] Professor Garnett's first article concluded that:

> The general picture which emerges from the United States approach to immunity in employment matters is that a distinct line has been drawn between claims arising from employment which took place in the United States, for which immunity should, in general, be denied, and those actions involving work abroad, for which immunity should be retained.[78]

Professor Garnett credited this reliance on a territorial connection to the United States, rather than the nature of the employer or duties of the employee, on the FISA's "great[er] emphasis on territorial nexus between the claim and the United States."[79] Professor Garnett then recommended

73. United States v. Pub. Serv. Alliance of Can., [1992] 2 S.C.R. 50, 77 (Can.) (noting that while an action falling under the employment contract may indicate that the commercial exception should apply, "the right to dismiss an employee without notice for security reasons is a sovereign attribute of the relationship").

74. *See* BROWER, *supra* note 67, at 3.

75. *See generally* Garnett, *Precarious Employment*, *supra* note 27; Garnett, *Perils*, *supra* note 14.

76. *See* Garnett, *Precarious Employment*, *supra* note 27, at 25.

77. *See* Garnett, *Perils, supra* note 14, at 172–73.

78. *Id.* at 171.

79. *Id.*

that the FSIA be amended to reflect the approach in the United Kingdom, which explicitly exempts actions arising from employment contracts which are signed in the United Kingdom or take place in whole in the United Kingdom from sovereign immunity.[80]

Professor Garnett's second article, published in 2018, notes a shift in American jurisprudence towards the particular inquiry that Professor Garnett advocated for in his first article.[81] Essentially, Professor Garnett found that there are three approaches that courts use to address this issue: (1) nature of the employer, (2) nature of the duties and role of the employee, or (3) the nature of the claim to determine whether the employment is commercial, and thus whether the sovereign employer is entitled to immunity.[82] This differs from the "nexus" approach Professor Garnett found that courts looked to in his first paper,[83] and towards an approach more reliant on the legislative history of the FSIA.[84] As discussed further on in this Note, this also marks a departure from the commercial exception traditionally applied to cases.[85] Garnett, after analyzing the different approaches he found in his research, concludes that "[a]n approach that balances [foreign-state employers' and employees'] often-opposing objectives and, in particular, provides justice to employees whose work is largely indistinguishable from that in the private or commercial spheres, is surely the best way forward."[86]

Where this Note seeks to provide further clarity on this topic is to focus on the legislative history's influence across different circuit courts to discern the areas in which circuits split on the issue. This Note then looks at a recent case which came out of the First Circuit, which adopted another circuit's test with possible substantial implications. This Note then compares these varying tests to the test as laid out by the Supreme Court, to see how circuit courts have departed from the Supreme Court's test in employment disputes.

80. *Id.*
81. *See generally* Garnett, *Precarious Employment*, *supra* note 27.
82. *See id.* at 39–44.
83. Garnett, *Perils*, *supra* note 14, at 171.
84. Garnett, *Precarious Employment*, *supra* note 27, at 30.
85. *See infra* Part VII.
86. Garnett, *Precarious Employment*, *supra* note 27, at 46.

VII. CASE LAW

A. The Supreme Court

The only case in which the Supreme Court considered a disgruntled former employee bringing suit against a sovereign employer is *Saudi Arabia v. Nelson*.[87] Nelson, the plaintiff, was a monitoring systems engineer hired from the United States to work in Saudi Arabia for a hospital owned and operated by the Saudi government.[88] During his employment, he was arrested and tortured in the custody of agents of the Saudi government.[89] In prison, he was subjected to overcrowded confinement, rat infestation, beatings by Saudi agents, and was only permitted open-air access once a week.[90] Nelson brought suit in federal district court, alleging various torts, including battery, unlawful detainment, and wrongful arrest, along with negligently failing to warn him of the dangers of his employment, specifically that he could be subject to criminal charges if he exposed a safety hazard.[91]

In finding that the commercial exception did not apply to the circumstances in Nelson's case, the Supreme Court concluded that the conduct which gave rise to the complaint was sovereign in nature,[92] because the detention and treatment of Nelson while in Saudi Arabia's custody was a part of the police powers of the foreign state, powers which are inherently sovereign.[93] The Court did not consider the nature of the employment and whether Nelson was a civil servant,[94] but instead looked

87. 507 U.S. 349 (1993).

88. *Id.* at 351–52. The Foreign Sovereign Immunities Act provides immunity for state instrumentalities if they can be considered an "organ" of the foreign state. 28 U.S.C. § 1603(b)(2) (2018). For an analysis of what constitutes an organ of a foreign state for purposes of immunity under the FSIA, see Michael A. Granne, *Defining "Organ of a Foreign State" Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1 (2008).

89. *Nelson*, 507 U.S. at 352–53. The arrest was likely in response to Nelson uncovering conditions in the use of the equipment which posed a fire hazard and endangered the lives of patients. *Id.* at 352.

90. *Id.* at 353.

91. *Id.* at 353–54.

92. *Id.* at 361.

93. *Id.* at 362 ("Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce.").

94. *See id.* at 361. This will prove especially relevant in cases considered by the appellate courts like *Merlini v. Canada*, in which the court considered only the duties of the employee and failed to look to the facts and conduct by the sovereign which gave rise to the suit. 926 F.3d 21, 30–31 (1st Cir. 2019).

to the nature of Saudi Arabia's conduct which Nelson alleged gave rise to the suit.[95]

In concurrence, Justice White raised the FSIA's legislative history, noting that it states that the "employment . . . of laborers, clerical staff or marketing agents" should be considered commercial activity within the meaning of the statute.[96] According to Justice White, this language "virtually compel[s]" the conclusion that Saudi Arabia's conduct falls within the definition of commercial for the purposes of the exception.[97] Of note, the concurrence looks at the "operat[ion of] a hospital" and the "retaliatory action" as the conduct of Saudi Arabia, rather than the detention and torture of Nelson, which was what the majority saw as conduct of sovereign character.[98] Justice White stated that he was "at a loss as to what exactly the majority believes petitioners have done that a private employer could not," believing that a private employer operating in the marketplace could just have easily retaliated against a whistleblower by calling in a group of thugs or even enlisting the help of the police.[99] Rather, Justice White believed that the hospital's conduct in calling upon the police and its role in the detention and torture of Nelson should fall within the commercial exception.[100] Justice White ultimately agreed with the majority because the Saudi Arabia's conduct was not "carried on in the United States."[101]

95. *Nelson*, 507 U.S. at 361–62.

96. *Id.* at 365 (White, J., concurring).

97. *Id.*

98. *Id.* at 365–66.

99. *Id.*

100. *Id.* at 367 ("[Nelson's complaint] alleges that agents of the *hospital* summoned Nelson to its security office because he reported safety concerns and that the *hospital* played a part in the subsequent beating and imprisonment. Thus, even assuming . . . that the role of the official police somehow affected the nature of petitioners' conduct, the claim cannot be said to 'rest entirely upon activities sovereign in character.'") (White, J., concurring) (citations omitted).

101. *Id.* at 364. In cases in which the commercial exception is applied, the court must consider whether commercial conduct is sufficiently connected to the United States for courts of the United States to exercise jurisdiction over it. *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992). Because most of the employments considered in this Note either take place in the United States or have a clear connection to the United States, this issue does not arise often in these cases.

B. Circuit Courts

1. District of Columbia Circuit

The District of Columbia Circuit created a two-step test for application of the commercial exception to suits arising out of employment relationships.[102] The D.C. Circuit set forth its rule for considering sovereignty in employment actions in *El-Hadad v. United Arab Emirates* in 2007.[103] The action was brought by a citizen of Egypt, employed by the United Arab Emirates ("U.A.E.") to work as an accountant in the U.A.E.'s embassy in Washington, for breach of an employment contract and defamation.[104] The Court relied heavily on the legislative history to find that if El-Hadad was a civil servant of the U.A.E., then the inquiry stops there and the U.A.E. is immune from the suit.[105] If El-Hadad is not a civil servant, then the court asks an additional question: if the work the employee was performing was "quintessentially governmental" work.[106] The Court stated, "'[t]he operative question is whether El-Hadad was a member of the U.A.E.'s civil service' and 'the ultimate question . . . is whether El-Hadad's employment constituted commercial activity.'"[107]

In creating this test, the court relied heavily on the legislative history of the FSIA.[108] In effect, the court abandons the analysis created in *Saudi Arabia v. Nelson*,[109] which requires the court to look to the particular conduct of the employer which gave rise to the suit, not only the characteristics of the employment, in favor of an analysis which stops

102. *See* El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–64 (D.C. Cir. 2007).

103. *Id.* at 661.

104. *Id.* at 661–62. During his employment as an accountant, El-Hadad "exposed the embezzlement and helped with the subsequent investigation." *Id.* at 661. He was later baselessly accused of "financial impropriety in connection with the very embezzlement he had exposed" and thereafter fired and fined for financial impropriety. *Id.* at 661–62.

105. *Id.* at 663–64.

106. *Id.*

107. *Id.* at 664 (quoting El-Hadad v. United Arab Emirates, 216 F.3d 39, 34 (D.C. Cir. 2000). The determination of whether an employee is a civil servant is one that has proved difficult for circuit courts, as what may constitute a civil servant in the United States may not to a foreign-state employer. *Id.* at 664–65. In *El-Hadad*, the D.C. Circuit applied a five-part test laid out in a previous case which was part of the *El-Hadad* litigation. *Id.* at 665. Under the five-factor test, the court asks: (1) how the foreign-state employer defines civil service; (2) whether the contractual agreement is a "true" contract or agreement or is instead based off of the laws of the foreign state; (3) the nature of the employment relationship between the two parties; (4) the nature of the employee's work; and (5) the relevance of the employee's nationality to the case. *Id.*

108. *Id.* at 663–65.

109. 507 U.S. 349, 361–62 (1993).

and ends at the status and duties[110] of the employee.[111] If the employee is a civil servant of the foreign state, the foreign state is immune from actions arising out of that employment.[112] If the employee is not, then the court asks the additional question of whether the work performed by the employee is "quintessentially governmental."[113]

2. Second Circuit

The Second Circuit, in a number of cases it has considered on foreign sovereign immunity in employment-related suits, takes a remarkably different approach than the District of Columbia Circuit in considering employment actions and the FSIA.[114]

The Second Circuit initially laid out its rule for application of the commercial exception to employment actions in *Kato v. Ishihara*.[115] The case was brought by a former employee of the Tokyo Metropolitan Government ("TMG"), who alleged that she was sexually harassed while employed by the TMG in New York City.[116] The employee had public servant status under Japanese law and worked in the sale and promotion of Japanese products in New York City at the time of the alleged sexual harassment.[117] The plaintiff argued that although she was a civil servant

110. "Status and duties" is a phrase used in the context of employment disputes against foreign-state employers first used by Professor Garnett. *See* Garnett, *Precarious Employment*, *supra* note 27, at 26. I borrow that phrase throughout this Note.

111. *See El-Hadad*, 496 F.3d at 663–64.

112. *Id.*

113. *Id.* at 664. In a string of district court decisions, the Fifth Circuit seems to have adopted the *El-Hadad* two-step analysis of suits brought by employees against their foreign-state employers. *See* Brakchi v. Consulate Gen. of Qatar, No. H-17-1926, 2018 WL 6622553, at *3 (S.D. Tex. Oct. 1, 2018); Harmouche v. Consulate Gen. of Qatar, 313 F. Supp. 3d 815, 820–21 (S.D. Tex. 2018); Lian Ming Lee v. Taipei Econ. & Cultural Representative Off., No. 4:09-cv-0024, 2010 WL 786612, at *2 (S.D. Tex. Mar. 5, 2010) ("The Court finds the approach of the D.C. Circuit persuasive. The two-stage approach addresses the immunity inquiry from several important perspectives, in particular by taking into account a foreign government's own categorization of its employees, and by not doing away entirely with the core statutory question of whether the relevant activity is commercial or governmental in nature."), *vacated on other grounds*, No. 4:09-cv-0024, 2010 WL 2710661, at *3 (S.D. Tex. July 6, 2010).

114. *Compare El-Hadad*, 496 F.3d at 664–65 (stating that if the employee is part of the foreign sovereign's civil service, the employment is non-commercial and the foreign sovereign will be immune from the action), *with* Kato v. Ishihara, 360 F.3d 106, 111 (2d Cir. 2004) (stating that the legislative history discussing the duties of the employee was not to be strictly followed and that a more fact-dependent analysis into the cause of action was needed).

115. 360 F.3d 106.

116. *Id.* at 109.

117. *Id.*

under Japanese law, her employment was a "commercial" activity which fell under the commercial exception to the FSIA because her duties were primarily the promotion of Japanese commerce in the United States.[118]

The Second Circuit began its analysis by noting that "[t]he 'civil service' and 'marketing agent' categories of employment [in the legislative history of the FSIA] are . . . merely examples of the broader distinction made in the text of the FSIA between activities that are by nature 'commercial' and those that are not-the central inquiry in this case."[119] In the Second Circuit, the fact that an employee is a civil servant under the laws of the foreign sovereign does not mean that the commercial exception does not apply, and the court must look to the duties of the employee and the facts of the case to determine whether conduct of the employer which gave rise to the suit is commercial in nature.[120] This test directly contrasts with the test applied by the D.C. Circuit, which stated that once it is determined that an employee is a civil servant, the commercial exception will not apply.[121]

The Second Circuit, however, then went on to find that the commercial exception did not apply despite the employee's duties consisting primarily of the promotion of Japanese commerce.[122] The Court stated that "the fact that a government instrumentality . . . is engaged in *the promotion of commerce* does not mean that the instrumentality is thereby engaged in *commerce*. The promotion abroad of the commerce of domestic firms is a basic—even quintessential—government function."[123] This finding, that the promotion of commerce in the United States is not commercial in nature but governmental, additionally runs contrary to decisions in other circuit courts which have found that where the duties of the employee primarily involve the promotion of products or services of the foreign sovereign, the nature of the employment is commercial and the exception will apply to suits brought arising out of the employment.[124]

118. *Id.*

119. *Id.* at 111.

120. *Id.* (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992)).

121. El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–64 (D.C. Cir. 2007) ("[I]f [the employee] is a civil servant, our analysis stops for we have determined that [the foreign sovereign] is immune from [the employee's] suit.").

122. *Kato*, 360 F.3d at 112 ("We . . . hold that [the Tokyo municipal government] was not involved in 'commercial activity' under the FSIA when it provided general business development assistance, including product promotion, to Japanese businesses seeking to engage in commerce in the United States.").

123. *Id.*

124. *See* Segni v. Com. Off. of Spain, 835 F.2d 160, 165 (7th Cir. 1987) (finding that the employment of the plaintiff in the "Commercial Office" of Spain in a role in which the

The Second Circuit and its district courts have applied the *Kato* test in several other cases which followed. In *Figueroa v. Ministry of Foreign Affairs of Sweden*,[125] a court in the Southern District of New York found that an "Office Clerk/Chauffer" of American citizenship employed in the Swedish Mission to the United Nations could not bring suit against Sweden for personal injury, retaliation, and discrimination arising out of his employment because the plaintiff's job duties were "sufficiently intertwined with the [sovereign's governmental] function."[126] The court relied on case law from other circuits to find that a full-time limousine driver's duties as an employee of a foreign consulate, embassy, or mission were sufficiently "intertwined" with the governmental functions of the foreign sovereign that the employment would not be subject to the commercial exception.[127] The court additionally relied on the governing law section of the employment contract, which provided "a special body of statutory law for 'Locally Engaged Non-Swedish Staff at Swedish Missions Abroad,'" to find support that the employment of Figueroa was intertwined with the governmental functions of the Swedish mission.[128]

In *Hijazi v. Permanent Mission of Saudi Arabia*,[129] the Second Circuit found that the commercial exception did not apply where an employee whose duties primarily include taking notes at meetings, researching, writing memoranda, and speaking on behalf of the mission on one occasion, brought suit against her foreign-state employer for sexual harassment, retaliation, and other discriminatory conduct.[130] In *Oussama El Omari v. Ras Al Khaimah Free Trade Zone Authority*,[131] the Second Circuit, applying the *Kato* test, found the commercial exception

primary duties are "product marketing" was commercial activity under the FSIA); *see also* Holden v. Canadian Consulate, 92 F.3d 918, 921–22 (9th Cir. 1996) (citing *Segni*, 835 F.2d at 161) (finding that because the plaintiff's duties were "primarily promoting and marketing" and the plaintiff "was not involved in any policy-making and was not privy to any governmental policy deliberations" that the plaintiff's "employment is more analogous to a marketing agent" and therefore "the nature of [the plaintiff's] work . . . is regularly done by private persons" and therefore falls within the commercial exception to the FSIA).

125. 222 F. Supp. 3d 304 (S.D.N.Y. 2016).

126. *Id.* at 315.

127. *Id.*

128. *Id.* at 315–16. The Court concluded that "[u]nder *Kato*, the plaintiff's employment was non-commercial because the defendants were engaged in a governmental function, and the plaintiff's employment was intertwined with that function such that it too should be properly considered governmental." *Id.* at 316 (citing Kato v. Ishihara, 360 F.3d 106, 113 (2d Cir. 2004)).

129. 689 F. Supp. 2d 669 (S.D.N.Y.), *aff'd*, 403 F. App'x 631 (2d Cir. 2010).

130. *Id.* at 671, 675.

131. No. 16 Civ. 3895, 2017 WL 3896399 (S.D.N.Y. Aug. 18, 2017), *aff'd sub nom.,* El Omari v. Kreab (USA) Inc., 735 F. App'x 30 (2d Cir. 2018).

inapplicable in the case of a dismissed CEO of a company owned by one of seven emirates of the United Arab Emirates.[132] The Court determined that both the nature of the employer was governmental and that the duties of the employee were sufficiently intertwined with that of the employer.[133]

In a case not brought by an employee of the foreign sovereign, but nevertheless relevant to this consideration, the Second Circuit considered a negligent supervision claim against an agent of the Republic of Indonesia brought by a private party in the United States, alleging that the negligent supervision of an employee enabled that employee to commit "commercial reinsurance fraud" while in the United States.[134] There, the court "easily conclude[d]" that the foreign state's "acts of providing basic health insurance to Indonesia's workforce and monitoring employers' compliance with the governmental mandate under the national social security program" were sovereign in nature.[135] Because the provision of health care by national mandate was essentially sovereign in nature, the court held, the nature of the "hiring, supervision, and employment" of the employees at the insurer was non-commercial, and the commercial exception did not apply.[136]

The decision in *Jamsostek* is important because it shows the difference in tests applied by courts once the suit is not brought by *the employee* of the sovereign. *Jamsostek* considered the conduct of an agent of a foreign-state in regard to one of its employees.[137] However, because the suit was not brought by the former employee of the foreign sovereign, the court was free to look at the conduct of the employer which actually gave rise to the suit, rather than only the nature of the employment of the individual, and such characteristics as the status and duties of the employee.[138] The court thus applied the commercial exception as it is applied to other cases, simply because the suit was brought by someone other than an employee.[139]

132. *Id.* *8–9.
133. *Id.*
134. Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek, 600 F.3d 171, 174 (2d Cir. 2010).
135. *Id.* at 178.
136. *Id.*
137. *Id.* at 174.
138. *See id.* at 178.
139. *See id.* at 179–80.

3. Ninth Circuit

The Ninth Circuit's test occupies a middle ground between the D.C. Circuit and the Second Circuit, not looking only at the civil servant status of the employee but weighing the status and duties of the employee heavily.

The Ninth Circuit addressed a case brought by a former employee employed as a "Commercial Officer" in the Canadian Consulate in San Francisco.[140] When the consulate was closed, the plaintiff and other employees were laid off.[141] In place of the Consulate, a smaller satellite office was opened which only had one "Commercial Officer," and a younger and less-experienced male was chosen for the position.[142] The plaintiff brought suit alleging, among other things, sex and age discrimination, and the defendant-sovereign argued that the court lacked jurisdiction because the commercial exception did not apply.[143]

The Ninth Circuit found that the commercial exception applied and that the district court therefore had jurisdiction over the action.[144] The Court noted two factors of the employment relationship which persuaded it to find the commercial exception to apply.[145] First, the Court noted that the plaintiff was not a civil servant, as she did not compete for an examination for the position, did not receive the same benefits as a member of the Canadian Foreign Service, and was closely monitored by consulate staff.[146] Second, the Court noted that the plaintiff's role as an employee was "primarily promoting and marketing" and that she was not involved in "any policy-making and was not privy to any governmental policy deliberations."[147] Referencing the legislative history, the Court concluded that the plaintiff's employment was "more analogous to a marketing agent" and that it was therefore commercial in nature.[148] In a subsequent opinion, and again relying on the legislative history of the FSIA, the Ninth Circuit found the duties of an employee as a "spymaster" to be essentially governmental in nature, meaning the commercial action was not applicable to the action brought by the employee.[149]

140. Holden v. Canadian Consulate, 92 F.3d 918, 920 (9th Cir. 1996).
141. *Id.*
142. *Id.*
143. *Id.* at 919–20.
144. *Id.* at 922.
145. *Id.* at 921–22.
146. *Id.* at 921.
147. *Id.* at 922.
148. *Id.* at 921–22.
149. Eringer v. Principality of Monaco, 533 F. App'x 703, 704–05 (9th Cir. 2013). In *Eringer*, the Ninth Circuit noted that the list found in the legislative history of "diplomatic,

These findings contradict those in *Kato* in the Second Circuit, in which the court found that the promotion of Tokyo commerce in the United States was a "quintessential . . . government" function.[150] The two cases dealt with employees with the same job duties—promoting the commerce of their sovereign employer—but one circuit court found the duties to be "quintessential[ly] . . . government[al]"[151] while the other found them to be analogous to a "marketing agent."[152] In a similar case, relied on by the Ninth Circuit in *Holden v. Canadian Consulate*,[153] the Seventh Circuit found that an employee with essentially the same duties as those in *Holden* and *Kato* was engaged essentially in "product marketing" and that the commercial exception applied to the hiring.[154] Simply put, there is no consensus on how the fact that an employee's duties consist primarily of marketing a foreign sovereign's commerce and economic opportunity should weigh in the determination of whether the employment falls within the commercial exception, with circuits reaching directly conflicting conclusions on the issue.[155]

4. Fourth Circuit

The Fourth Circuit, though not examining as many cases brought under the FSIA as the D.C., Second, and Ninth circuits, has had an equally difficult time in consistently applying the commercial exception to employee-brought suits. In the Fourth Circuit, the commercial exception was held not to apply to an employment relationship involving a female contracted security employee who was refused a promotion solely on the basis of her gender because it was "unacceptable under Islamic law," and that citizens of Saudi Arabia, the sovereign involved in the case, would "consider it inappropriate."[156] The Fourth Circuit's

civil service or military personnel" as employments which are governmental in nature was an exemplary, not exhaustive, list of such employments. *Id.*

150. Kato v. Ishihara, 360 F.3d 106, 112 (2d Cir. 2004).

151. *Id.*

152. *Holden*, 92 F.3d at 922.

153. *Id.* at 921–22.

154. Segni v. Com. Off. Spain, 835 F.2d 160, 164–65 (7th Cir. 1987).

155. *Compare Holden*, 92 F.3d at 920, 922 (finding that employment in the commercial marketing department to weigh in favor of the employment falling within the commercial exception), *and Segni*, 835 F.2d at 165–66, *with Kato*, 360 F.3d at 112 (finding the employee whose primary duties involved marketing the commerce of Tokyo to be quintessentially governmental).

156. Butters v. Vance Int'l, Inc., 225 F.3d 462, 464 (4th Cir. 2000). Generally, the courts that have heard cases involving drivers and security personnel have tended to find the employment relationship not to fall within the commercial exception. *See id.* at 465; Figueroa v. Ministry of Foreign Affs. of Swed., 222 F. Supp. 3d 304, 315 (S.D.N.Y. 2016);

rationale for this finding is that the security of the Royal Family is an action which goes to the "core of a nation's sovereignty."[157]

A Seventh Circuit District Court considered the employment of various employees performing essentially clerical tasks who brought action under the Age Discrimination in Employment Act ("ADEA") claiming they were discriminated against based on their age.[158] While noting the plaintiffs engaged in essentially commercial conduct, the court relied on the management of the employees to determine that "[m]aking decisions about what tasks employees perform, how much they are paid, or how they are treated in the workplace does not implicate concerns 'peculiar to sovereigns.'"[159] The court continued that "[t]hese are decisions that parties in the private sector make everyday [sic]."[160] While reaching the conclusion that the activity by the foreign sovereign fell within the commercial exception, it is interesting that the court noted that the *treatment of the employees*, and not the duties of the employees, is what the suit was based upon.[161] This result can be contrasted with *Segni v. Commercial Office of Spain*,[162] a decision in the Seventh Circuit where the district court is located, which looked to the duties of the employees to find that the commercial exception applied.[163] In a case brought against a foreign sovereign for the "negligent hiring" of "thugs" to intimidate the plaintiffs, a District of Columbia District Court determined that the hiring of the thugs to implement a national policy was inherently sovereign and not commercial.[164]

Crum v. Saudi Arabia, No. Civ.A. 05-275, 2005 WL 3752271, at *3 (E.D. Va. July 13, 2005). *See also* Garnett, *Precarious Employment*, *supra* note 27 at 35–36 (noting the special consideration given to these cases and noting *Crum* and *Figueroa*'s reliance on *Vance* to find this to be exempt from the commercial exception).

157. *Butters*, 225 F.3d at 465. The court did not consider that the prejudice against the female employee was based solely on the religion and norms of the foreign sovereign, motivations which are arguably sovereign in nature. *See Butters*, 225 F.3d at 462. This is likely because the motivations or reasons for an action are not relevant, only the nature of the act under consideration. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992).

158. Shih v. Taipei Econ. & Cultural Representative Off., 693 F. Supp. 2d 805, 806–09 (N.D. Ill. 2010).

159. *Id.* at 811.

160. *Id.*

161. *Id.*

162. 835 F.2d 160 (7th Cir. 1987).

163. *See id.* at 165.

164. Youming Jin v. Ministry of State Sec., 557 F. Supp. 2d 131, 141 (D.D.C. 2008) ("The defendant ministries' mandate to implement China's policy and its authority to hire 'thugs' is not of the nature that may be exercised by private citizens participating in the marketplace . . . .").

VIII. THE FIRST CIRCUIT AND *MERLINI*

A. Introduction

Merlini v. Canada[165] came as a matter of first impression for the First Circuit having not considered an employment dispute under the commercial exception before.[166] The case provided an opportunity to look at points of divergence that are common in cases considering the commercial exception: (1) the determination of what a suit is "based upon" for purposes of the exception, and (2) the determination of exactly what constitutes "commercial" conduct for purposes of the exception.[167]

B. Facts

Cynthia Merlini was employed as an administrative assistant in the Canadian Consulate in Boston, Massachusetts.[168] In January 2009, Merlini tripped over an unsecured electrical cord during the course of her employment and was injured.[169] After the injury, Merlini was paid her full salary pursuant to the Canadian national compensation system, which governs the compensation of employees at Canadian consulates across the world.[170] In October 2009, however, Canada determined that Merlini was fit to work and, again pursuant to the Canadian national compensation system, ceased paying her.[171] Merlini then brought suit in Massachusetts state court, alleging Canada failed to be "insured" within the meaning of Massachusetts workers' compensation laws, and was therefore strictly liable for the harm done to Merlini.[172] First, the state

165. 926 F.3d 21 (1st Cir. 2019).
166. *See id.*
167. 28 U.S.C. § 1605(a)(2) (2018).
168. *Merlini*, 926 F.3d at 23.
169. *Id.*
170. *Id.* at 23–24; *see also* 28 U.S.C. § 1605(a)(2) (2018).
171. *Merlini*, 926 F.3d at 24. Merlini could have appealed the decision in Canadian administrative court, which would have required appealing in Canada, but instead elected to bring suit in Massachusetts state court. *Id.*
172. *Id.* Under Massachusetts law, the failure to be insured by an employer makes any suit by an employee for workers' compensation a strict liability suit against the employer. MASS. GEN. LAWS ANN. ch. 152, § 66 (West 2020). An employer can generally satisfy this requirement by obtaining qualified health insurance or being "self-insured" within the meaning of the statute. *Merlini*, 926 F.3d at 26. To be self-insured, Massachusetts requires the employer to submit an application which contains a statement of the employer's assets and liabilities, a payroll of the preceding fiscal year, and a description of the nature of the business. MASS. GEN. LAWS ANN. ch. 152, § 25A(2) (West 2020). Additionally, the self-insured employer must submit a deposit in trust or a bond, the amount set by the

court dismissed, finding that it did not have jurisdiction under the Foreign Sovereign Immunities Act.[173] Merlini then went to the federal district court, which found that it too did not have jurisdiction over Canada under the Foreign Sovereign Immunities Act.[174] Merlini then appealed to the First Circuit Court of Appeals.[175]

C. First Circuit Determination

In its decision, the First Circuit adopted the *El-Hadad* test for employment actions brought under the commercial exception, and determined that the gravamen of her complaint—her employment with Canada in a menial capacity—was essentially commercial in nature and that the commercial exception applied.[176] The Court rejected the argument raised by Canada and the U.S. Department of State as *amicus curiae* that Canada's legislatively-created workers' compensation system, which provided workers' compensation to all employees of Canadian embassies and consulates throughout the world, was governmental in nature, or that it formed the basis of the complaint.[177] Instead, the court only looked at the relationship between Merlini and Canada, and that her roles as a clerical employee made her employment fall into the commercial exception.[178]

The dissent in *Merlini* rejected the majority's confinement of the analysis to Canada's employment of Merlini and the roles of Merlini as an employee.[179] Rather than the employment of Merlini forming the gravamen of the complaint, the dissent argued that it was "the sovereign decision by Canada to enact and administer its own compensation scheme, including for all workers at consulates, that is the basis for plaintiff's claim of injury."[180] The dissent additionally criticized the majority's interpretation of the legislative history of the FSIA as dictating that "any dispute about post-employment compensation for workplace injuries is within the exception for commercial activity."[181] In this case, the dissent argued, it was Canada's "sovereign choice" to create

Massachusetts, and be submitted to audits of the liabilities of the employer. MASS. GEN. LAWS ANN. ch. 152, § 25(2)(a)-(b) (West 2020).

173. *Merlini*, 926 F.3d at 24–25.
174. *Id.* at 25.
175. *Id.* at 23.
176. *Id.* at 30–31.
177. *Id.* at 32–33.
178. *Id.* at 31.
179. *Id.* at 41 (Lynch, J., dissenting).
180. *Id.*
181. *Id.* at 44.

a "comprehensive workers' compensation scheme," and this is "precisely 'the type of action' that a 'regulator,' not a private employer, engages in."[182] The dissent pointed out that, because of the Canadian statute governing the issue, "Canada, as Merlini's employer, was prohibited by law from purchasing local Massachusetts insurance."[183] Further, it was not the failure to be insured that constituted Canada's conduct which gave rise to the suit because that failure derived from the sovereign choice of Canada.[184]

The majority and dissent split on the point of what constituted the gravamen of Merlini's claim. While the majority believes that "Merlini's claim is no different from the claims that other employees have brought against private business employers that . . . have not insured themselves [under Massachusetts workers' compensation laws],"[185] the dissent believed that the gravamen of Merlini's claim is Canada's decision to create a "comprehensive workers' compensation scheme."[186] The majority's decision relies on the legislative history of the commercial exception to find that the nature of the employment of Merlini is the only relevant question as to the applicability of the commercial exception.[187] The dissent asks the court to look to more than the nature of the employment and into the particular conduct which the suit arises out of.[188] Essentially, the majority and dissent disagree on what the suit is "based upon."[189]

IX. EFFECTS WHICH HAVE ARISEN FROM CIRCUIT INCONSISTENCY AND THE LEGISLATIVE HISTORY

As is clear from *Merlini* and other cases, the vague language of the FSIA commercial exception has led to considerable headache in determining whether conduct by a foreign state falls within the commercial exception.[190] At least in the case of employment disputes

182. *Id. (*quoting Republic of Argentina v. Weltover Inc., 504 U.S. 607, 614 (1992)). The dissent argues that "the [Canadian statute] sets forth what the government of Canada has determined, in its sovereign discretion, to be the appropriate comprehensive workers' compensation scheme for all of its federal employees, at home and abroad." *Id.* at 42.

183. *Id.* at 42.

184. *Id.* at 41–42.

185. *Id.* at 36 (majority opinion).

186. *Id.* at 44 (Lynch, J., dissenting).

187. Merlini v. Canada, 940 F.3d 801, 802 (1st Cir. 2019) (Lynch, J., dissenting).

188. *See* Merlini, 926 F.3d at 41–42 (Lynch, J., dissenting).

189. *Id.* at 42–43.

190. Julie Nadine Bloch, Commentary, *Looking to the Gravamen of the Claim: The Commercial Activity Exception of the FSIA*, 51 N.Y.U. J. INT'L L. & POL. 621, 621–22 (2019)

against foreign sovereigns, differences between circuits have occurred on two fronts. The first is a separation in circuit courts' jurisprudence in how to determine what activity the suit is "based upon."[191] Because the legislative history emphasizes the position of the employee, the majority of courts have relied upon only that when determining what a suit is "based upon" in consideration of the commercial exception.[192] Other courts have argued that the legislative history's consideration of employee titles and roles is more exemplary of what a court might consider commercial activity and is not the exhaustive consideration in employee disputes.[193] Others have looked to the activity of the employer to consider whether its activity is sovereign or commercial,[194] or the political processes which might have led to the foreign sovereign being susceptible to the suit.[195] This led to the split between the majority and dissent in *Merlini*.[196]

This can be compared with other cases which consider a foreign sovereign's employment relationship with a party, but the suit is not brought by the employee.[197] In these cases, courts generally do not stop the consideration with the status and duties of the employee, but instead look further into the conduct by the sovereign which gave rise to the suit.[198] The legislative history does not limit the applicability of the employment distinctions to only those suits brought by employees.[199] Thus, it is not clear why claims involving employment of an individual are treated differently when brought by the employee or a third party.[200] It's relevant, however, to note that in the only suit brought by a former employee of a foreign state to reach the Supreme Court, the Court

("[the FSIA] leav[es] U.S. courts to trek through muddy waters in an attempt to answer the seemingly simple question of when to strip a foreign state of its immunity.").

191. *Id.* at 626–28. 28 U.S.C. §§ 1604, 1605(a)(2) (2018).

192. *See, e.g.*, El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–64 (D.C. Cir. 2007).

193. *See* Kato v. Ishihara, 360 F.3d 106, 110–11 (2d Cir. 2004); *see also Merlini*, 926 F.3d at 41–42 (Lynch, J., dissenting).

194. *See Kato*, 360 F.3d at 114.

195. *See Merlini*, 926 F.3d at 43, 48 n.11 (Lynch, J., dissenting).

196. *Id.* at 39–40 (Lynch, J., dissenting).

197. *See* Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek, 600 F.3d 171, 174 (2d Cir. 2010).

198. *See* Youming Jin v. Ministry of State Sec., 557 F. Supp. 2d 131, 141–42 (D.D.C. 2008).

199. H.R. REP. NO. 94-1487, at 16 (1976).

200. *Compare Merlini*, 926 F.3d at 32–33 (looking at only the fact that Merlini was employed in a clerical capacity to determine if the commercial exception applied), *with Jamsostek*, 600 F.3d at 176–77 (looking at the functions of the employer to determine the nature of the employment to find that the commercial exception did not apply because the employer functioned more as a regulator in the market than a participant in it).

declined to narrow the focus to only the status and duties of the employee, rather than the particular conduct which gave rise to the suit.[201]

Courts additionally disagree in the weight given to the civil service status of the employee. The District of Columbia and Ninth Circuits hold that if the employee has civil servant status, the commercial exception does not apply.[202] The Seventh and D.C. Circuits treat it as a strong indicator that the employment is not commercial.[203] Finally, the Second Circuit treats the civil servant status as merely exemplary, and takes in other factors like the duties of the employee and the functions of the employer.[204] Even circuits which have relied on the civil servant distinction have found it difficult to determine if an employee is a member of the civil service.[205]

Additionally, splits between courts arise in the determination of what, exactly, constitutes commercial activity. Commentators have noted the tautological definition of commercial activity provided by the FSIA.[206] One example of this is one court finding the promotion of a sovereign's commerce to be a "basic—even quintessential—governmental function" while others have found it to be analogous to that of a "marketing agent" and therefore well within the commercial exception.[207] Additionally, courts have peculiarly found that the employment of drivers, as opposed to other employments of relatively menial jobs, to be sovereign in nature.[208] The rationale for this distinction is often the close proximity drivers have with members of a foreign sovereign's consular or embassy

201. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 358–59 (1993).

202. *See* El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–64 (D.C. Cir. 2007); Holden v. Canadian Consulate, 92 F.3d 918, 921 (9th Cir. 1996).

203. Segni v. Com. Off. of Spain, 835 F.2d 160, 165 (7th Cir. 1987).

204. Kato v. Ishihara, 360 F.3d 106, 110–11 (2d Cir. 2004). Professor Garnett concluded that there are four tests applied by courts to determine if the employment of an individual is "commercial" within the meaning of the statute. Garnett, *Precarious Employment*, *supra* note 27 at 25–26.

205. *See, e.g.*, *El-Hadad*, 496 F.3d at 664 ("There is no definition of 'civil service' in the [FSIA] or its legislative history . . . and there are dangers in borrowing or analogizing to get one.").

206. Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 499 (1992) ("Unfortunately, the FSIA supplies a tautological definition of 'commercial activity' as 'either a regular course of commercial conduct or a particular commercial transaction or act.'" (quoting 28 U.S.C. § 1603(d) (1988))).

207. *Compare Kato*, 360 F.3d at 112, *with Holden*, 92 F.3d at 921, *and Segni*, 835 F.2d at 165.

208. Figueroa v. Ministry of Foreign Affs. of Swed., 222 F. Supp. 3d 304, 315 (S.D.N.Y. 2016); *see also supra* note 131 and accompanying text.

staff.[209] But if proximity is a relevant consideration, then the employment of live-in maids and certain clerical staff working closely with embassy and consular staff should fall outside the commercial exception, though no court has accepted this.[210]

Frustration over the vague and unilluminating definition of commercial activity in the FSIA is not limited to employment disputes. Commentators and courts have often complained of it, even calling for legislation to create a more bright-line rule.[211] However, part of Congress's intent in drafting the commercial exception was to provide courts "a great deal of latitude in determining what is a 'commerical [sic] activity.'"[212] The Supreme Court has noted that the burden is on the courts to define commercial within the meaning of the exception.[213]

A final effect of the split among circuits is the holding in *Merlini*.[214] The holding effectively "subjects over forty foreign consulates to the many variations in local and state laws that are contrary to matters that were determined by such countries' legislatures."[215] In many cases, the distinction between whether the commercial exception applies may turn on whether the foreign sovereign is acting as a "regulator" or "private participant" in the market.[216] It was not that Cynthia Merlini had no avenue to pursue her complaint against Canada or to appeal the decision not to provide her with workers' compensation, as Canada allowed her to appeal the decision.[217] What exposed Canada to suit was its legislative branch passing a law that required the consulate to provide its employees workers' compensation through a system that did not conform to

209. *See Figueroa*, 222 F. Supp. 3d at 315.

210. *See, e.g.*, Park v. Shin, 313 F.3d 1138, 1144–45 (9th Cir. 2002) (finding that the employment of a live-in servant fell within the commercial exception to the FSIA and that the employer was not immune from suit).

211. *See, e.g.*, Amelia L. McCarthy, *The Commercial Activity Exception – Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity*, 77 MARQ. L. REV. 893, 911 (1994) ("The changing world market, the increased role of the United States in the global economy, and the interests of justice—all demand that Congress amend the commercial activity exception. A clear, consistent, and confident message must be sent to the international community.").

212. H.R. REP. NO. 94-1487, at 16 (1976)), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

213. Saudi Arabia v. Nelson, 507 U.S. 349, 359 (1993) ("[Commercial] has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a 'commercial activity' is for purposes of the Act.").

214. Merlini v. Canada, 926 F.3d 21, 37 (1st Cir. 2019).

215. Merlini v. Canada, 940 F.3d 801, 802 (1st Cir. 2019) (Lynch, J., dissenting).

216. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) ("[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA.").

217. *Merlini*, 926 F.3d at 47 (Lynch, J., dissenting).

Massachusetts law requirements.[218] As the dissent points out, this is not exactly commercial activity.[219]

In sum, there are two primary effects that have developed due to courts' reliance on the legislative history in cases in which disgruntled employees have brought suit against a foreign-state employer. First, courts have looked at only the status and duties of the employee in determining whether sovereign immunity is applicable at the expense of other relevant considerations.[220] Second, even where the status or duties of the employee are relevant to the consideration, courts have been unable to develop a consistent set of factors to determine whether the employment is "commercial" or "sovereign" in nature.[221]

X. SOLUTIONS

General solutions to clarify the commercial exception, not specific to actions arising out of the employer-employee relationship, have been suggested before.[222] Circuit courts, additionally, have departed from the text of the statute in favor of the legislative history, and those which rely on the legislative history cannot find a consistent test to apply its requirements.[223] Canada's petition for certiorari to the Supreme Court after the First Circuit ruling against it in *Merlini v. Canada* was recently denied.[224] In doing so, the Court missed an opportunity to clarify both the determination of what a suit is "based upon" within the meaning of the statute as well as what characteristics of an employment make it "commercial" or "sovereign."[225] Effectively, a foreign sovereign or foreign-state employee's rights are not the same in the Second Circuit as they are in the Ninth and First Circuits,[226] and what may classify as commercial conduct by a foreign-state employer in the Seventh and

218. *Id.* at 35–36 (majority opinion).
219. *Id.* at 42 (Lynch, J., dissenting).
220. *See id.* at 31 (majority opinion).
221. *See* Garnett, *Precarious Employment*, *supra* note 27, at 25–26 (noting four tests currently being used in courts of the United States to determine if the employment is "commercial" within the meaning of the statute).
222. *See, e.g.*, McCarthy, *supra* note 211, at 911–12.
223. *See* discussion *supra* Section VII.
224. Canada v. Merlini, 140 S. Ct. 2804, 2804 (2020) (mem.).
225. *See* Petition for Writ of Certiorari at 11, Canada v. Merlini, 140 S. Ct. 2804 (2020) (No. 19-1101), 2020 WL 1479892, at *3–4.
226. *Compare* Kato v. Ishihara, 360 F.3d 106, 110–11 (2d Cir. 2004), *with* El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–64 (D.C. Cir. 2007).

Ninth Circuits is not the same as that which classifies as the same in the Second Circuit.[227]

In reconciling these splits, the Supreme Court should usher in a return to the language of the statute, and its jurisprudence in outlining the application of the commercial exception in any case in which it is at issue.[228] First, the Court should restate that the inquiry into what the suit is "based upon" requires a court to look to the "particular conduct" of the sovereign.[229] Or, put another way, what conduct by the foreign sovereign forms the "gravamen" of the suit?[230] Most specifically, this requires the court to look into "those elements . . . that if proven, would entitle the plaintiff to relief."[231] The Supreme Court has corrected circuit courts for simplifying this test before,[232] and should do so again here. The determination of what activity a suit is "based upon" for purposes of the commercial exception requires the court to look into the particular facts of the case and the suit brought by the employee, to "zero[] in on the core of [the] suit: the . . . sovereign acts that actually injured [the plaintiff]."[233] An analysis of these cases which stops at the duties and nature of the employment, without any consideration of other acts by the sovereign which may have given rise to the suit, is incompatible with Supreme Court jurisprudence of this analysis.[234] In cases like *Merlini*, in which it is the failure of the foreign sovereign to be insured under the requirements of the state, it is more than the fact of the employment and the duties of Cynthia Merlini which gave rise to the suit, but the failure by the Canadian embassy to be insured within the meaning of the Massachusetts statute.[235] The failure of courts to look past the duties of the employee makes what should be a nuanced consideration that analyzes the particulars of the suit and the circumstances that gave rise

227. *Compare* Holden v. Canadian Consulate, 92 F.3d 918, 922 (9th Cir. 1996) (finding that employment in the commercial marketing department to weigh in favor of the employment falling within the commercial exception), *and* Segni v. Com. Off. of Spain, 835 F.2d 160, 165–66 (7th Cir. 1987), *with Kato*, 360 F.3d at 112 (finding the employee whose primary duties involved marketing the commerce of Tokyo to be quintessentially governmental).

228. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 360–61 (1993) (outlining the current test applied for the commercial exception and requiring courts to look into the "particular" conduct engaged in by the foreign sovereign which gave rise to the suit).

229. *Id.* at 356–57.

230. OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 33–34 (2015).

231. *Nelson*, 507 U.S. at 357.

232. *OBB Personenverkehr*, 577 U.S. at 34.

233. *See id.* at 35.

234. *See Nelson*, 507 U.S. at 357.

235. *See* Merlini v. Canada, 940 F.3d 801, 802, 803 n.4 (1st Cir. 2019) (Lynch, J., dissenting).

to it into a single, one-step test which forecloses consideration of relevant information outside the duties and status of the plaintiff's employment.[236]

It is worth re-emphasizing that courts examining only the duties and position of the employee bringing suit is based not on the statute, but the legislative history of the statute.[237] Reliance by courts on the legislative history of statutes has been criticized by commentators as not being accurate of the congressional intent of the statute, especially where the legislative history and the text of the statute conflict.[238] While the text of the statute and the legislative history do not directly conflict, they are often difficult to reconcile.[239] The legislative history's reliance on the position of the employee as a dispositive determination as to the application of the commercial exception has led courts to look exclusively to that question.[240] The text of the statute, and the Supreme Court's jurisprudence in its interpretation of the statute, require a much more "particular" examination of the facts underlying the suit, which may require the court to look outside the nature of the employment.[241] Simply put, if Congress intended for the question of whether a dispute between an employee and a foreign-state employer to stop and end at the status or duties of an employee, it likely would have included it in the statute. It did not,[242] so the correct inquiry must be flexible to include circumstances outside of the status and duties of the employee which weigh on whether the activity by the foreign-state employer which gave rise to the suit is commercial.

The Supreme Court could additionally provide context as to what constitutes commercial activity within the context of an employment relationship. Between circuits, confusion continues as to what is a commercial employment and what is not.[243] Supreme Court guidance as to what role the nature of the employer,[244] the duties of the employee,[245] the nature of the claim,[246] and the employee's status as a civil servant

236. *See* Merlini v. Canada, 926 F.3d 21, 31 (1st Cir. 2019).
237. *See* El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–64 (D.C. Cir. 2007).
238. NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 128–44 (2019).
239. *See Merlini,* 940 F.3d at 802 (Lynch, J., dissenting).
240. *See, e.g.*, *El-Hadad*, 496 F.3d 663–64.
241. *See* 28 U.S.C. § 1604; *see also* OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 33–34 (2015).
242. *See* 28 U.S.C. § 1605(a)(2) (2018).
243. *See supra* Part VII.B.
244. *See* Kato v. Ishihara, 360 F.3d 106, 112 (2d Cir. 2004).
245. *See* Holden v. Canadian Consulate, 92 F.3d 918, 921 (9th Cir. 1996).
246. *See* Shih v. Taipei Econ. & Cultural Representative Off., 693 F. Supp. 2d 805, 810 (N.D. Ill. 2010).

according to the laws of the foreign sovereign is much needed.[247] The D.C. Circuit's approach, which first asks whether the employee is a civil servant, and if not, whether it should nonetheless be commercial because of the duties of the employee, is flexible in its ability to consider both the status and the duties of the employee and has been noted by Professor Garnett as "point[ing] the correct way forward to resolving foreign sovereign employment disputes."[248]

A. Legislation

Calls for new legislation to clarify exceptions to sovereign immunity under the FSIA are not new.[249] If Congress believes that the important question in these cases is the status and duties of the employee, a bright-line rule indicating which employees are included and which are excluded would provide courts with needed guidance in making these decisions.[250] A complete bar on employee suits against foreign sovereign employers like that in England is not favorable as it provides employees, no matter how menial or disconnected from the sovereign duties of the employer they are, with no rights or remedies in bringing actions against their employer.[251]

Statutory guidance may prove difficult to provide if Congress wishes to maintain the requirement that courts look to the "particular" conduct of the foreign-state to determine if it is commercial.[252] In cases like *Saudi Arabia v. Nelson*[253] and *Merlini v. Canada*,[254] statutory language which determines immunity may prove as troubling as the legislative history has where the duties of the employee are not the only relevant

247. *See* Garnett, *Precarious Employment*, *supra* note 27, at 35–36 (noting courts have looked at the nature of the employment, the status and duties of the employee, the nature of the employer, and the nature of the claim to determine whether the employment is commercial).

248. Garnett, *Precarious Employment*, *supra* note 27, at 45; *see also* El-Hadad v. United Arab Emirates, 496 F.3d 658, 668 (D.C. Cir. 2007).

249. *See, e.g.*, McCarthy, *supra* note 211, at 911–13.

250. *See* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 781 (2008) ("[C]ourts have had difficulty fleshing out the somewhat vague language of the commercial activities exception—both in determining whether an activity is sufficiently commercial and whether a commercial enterprise is sufficiently connected with the United States to fall within the exception.").

251. *See* Garnett, *United Kingdom*, *supra* note 67, at 706.

252. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 356–57 (1993); OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 33 (2015).

253. *See Nelson*, 507 U.S. at 349.

254. Merlini v. Canada, 926 F.3d 21 (1st Cir. 2019).

considerations in deciding whether an exception to sovereign immunity should be provided.[255] Congress may be hesitant to create legislative rules that narrow the consideration of these cases to only a few characteristics where consideration of the particular facts of the case better determines whether the conduct that gave rise to the suit was "commercial" in nature.[256] Thus, if Congress pursues statutory rule-making to clarify the "muddy waters" of the FSIA,[257] it should carefully tailor any consideration of certain factors at the expense of excluding others which may be relevant to a court's consideration.

B. Employment Contracts with Governing Law Provision

Finally, employment contract provisions between foreign sovereign employers and their employees have been proposed by Professor Garnett as an effective means of establishing both the employee and employer rights in any litigation that could arise.[258] Presumptively, the employment contract would delineate which court and jurisdiction both the employer and employee are required to resolve disputes should the relationship lead either one to file a lawsuit against the other.[259] In at least one case, a court upheld a contract provision which abrogated the sovereign immunity of a foreign state in suits arising out of the employment relationship as a waiver of the foreign sovereign's immunity.[260] In another case, a court enforced a forum selection clause in an employment contract requiring any dispute to be settled by arbitration.[261] In an earlier opinion on that case, the court conducted an analysis of the immunity of the foreign sovereign.[262] Once it was determined that the FSIA did not bar the suit, the court conducted an

255. *See Nelson*, 507 U.S. at 361–62; *Merlini*, 926 F.3d at 40 (Lynch, J., dissenting).

256. *See Merlini*, 926 F.3d at 32–33.

257. Bloch, *supra* note 190, at 622.

258. *See* Garnett, *Precarious Employment*, *supra* note 27, at 46.

259. *See id.* at 45–46.

260. *See* Ashraf-Hassan v. Embassy of Fr., 40 F. Supp. 3d 94, 100–01 (D.D.C. 2014) (finding that a choice of law provision in an employment contract which designated United States law as the governing law subjected the foreign sovereign to the employment laws, including Title VII, of the United States); *see also* Ghawanmeh v. Islamic Saudi Acad., 672 F. Supp. 2d 3, 9–10 (D.D.C. 2009) (finding an implicit waiver where the contract executed by the parties expressly stated that the contract would be governed by the laws of the Commonwealth of Virginia).

261. Dahman v. Embassy of Qatar, 364 F. Supp. 3d 1, 3–5, 9 (D.D.C. 2019).

262. Dahman v. Embassy of Qatar, No. 17-2628 (JEB), 2018 WL 3597660, at *5–8 (D.D.C. July 26, 2018). The court, applying the two-step analysis of *El-Hadad*, held that the foreign-state employer's employment of the plaintiff in a role which specifically excluded him from civil service benefits as conduct within the commercial exception. *Id.*

analysis of the validity of the forum-selection clause.[263] If contract provisions are used, as Professor Garnett suggests, it should be recognized that bargaining power between a foreign-state employer and an employee will not often be equal.[264]

XI. CONCLUSION

In *Saudi Arabia v. Nelson*,[265] the Court considered a suit brought by a former employee of a foreign-state employer for acts committed by the foreign state during the course of the employment.[266] There, the court did not look to the status and duties of the employee as the legislative history of the commercial exception might instruct.[267] Rather, the Court looked to the "particular conduct on which the [plaintiff's claim] is 'based'" in consideration of the commercial exception.[268] Circuit courts which have looked only to the status and duties of the employee to determine the applicability of the commercial exception have done so at the expense of additional facts and circumstances which may weigh on the applicability of the commercial exception.[269]

Merlini v. Canada[270] represents the consequences of foreclosing this consideration to only the status and duties of the employee, finding that Canada was subject to the Massachusetts workers' compensation laws because of the status of the employee despite the reason for Canada's noncompliance being a legislatively-created national compensation system for employees at Canadian embassies and consulates across the world.[271] Even if it was clear that courts must look primarily to the status and duties of the employee in their analyses, circuit courts still disagree on what statuses and duties do and do not constitute "commercial activity."[272] Simply put, clarification is needed in both determining what a suit is "based upon" and in determining the relevant factors in consideration of whether a foreign state's conduct related to an employee is "commercial" within the meaning of the exception.[273]

263. *Dahman*, 364 F. Supp. 3d at 3–4.
264. Garnett, *Precarious Employment*, *supra* note 27, at 46.
265. 507 U.S. 349 (1993).
266. *Id.* at 356–59.
267. *See id.* at 356–57 (finding the legislative history to "offer[] no assistance" in determining what the phrase "based upon" means).
268. *Id.* at 356 (citing 28 U.S.C. § 1605(a)(2) (2018)).
269. *See supra* Part VIII.
270. 926 F.3d 21 (1st Cir. 2019).
271. *Id.* at 32–33.
272. *See supra* notes 196–200 and accompanying text.
273. *See supra* Part IX.

The best solution to this issue is to have the Supreme Court grant certiorari on a case brought by an employee against a foreign-state employer to make two clarifications to circuit courts. First, the determination of what a suit is "based upon" requires the court to consider the facts of the case and the complaint against the foreign-state employer and "zero[] in" on the gravamen of the complaint rather than foreclose the consideration to only the status and duties of the employee.[274] Second, where it is appropriate for the court to look to the status and duties of the employee, the Court needs to clarify this analysis and establish the role of the legislative history in this analysis.[275] If the Supreme Court fails to provide this guidance, congressional action could help create bright-line rules for courts making these determinations, but Congress should do so cautiously.[276] In the absence of either, foreign-state employers and employees should look to contractually negotiate their rights to better predict each party's rights in potential litigation arising out of the employment.[277]

274. *See* OBB Personenverkehr v. Sachs, 577 U.S. 27, 35 (2015).
275. *See* H.R. REP. NO. 94-1487, at 16 (1976).
276. *See supra* Part X.B.
277. *See supra* Part X.C.