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I. INTRODUCTION

The United States Constitution explicitly grants the judiciary branch the power to resolve controversies between United States citizens and foreign governments. The Constitution also grants power over general foreign relations issues to the executive branch. Despite the potential for judicial decisions to interfere with executive foreign policy, guidelines for resolving any disputes or inconsistencies are not addressed in the Constitution. This omission has resulted in uncertainty that continues to this day.

The Constitutional division of authority was not a major issue in the early republic. The common law doctrine of sovereign immunity allowed courts to refuse to rule upon any potentially disruptive situations. Traditionally, most international issues fell clearly within the executive power over military conflict and foreign diplomacy. However, as governments expanded the breadth of their activities, venturing into areas previously occupied only by private commercial concerns, the line distinguishing private and public entities became increasingly blurred. As a result, the United States court system was pressured to allow plaintiffs to pursue grievances against foreign governments, particularly in cases of issues too insignificant to warrant action by the executive branch. Tension has developed over which branch of government should take precedence when potential conflicts arise.

In 1976, the United States Congress attempted to alleviate the tension between the executive and judicial branches. In enacting the Foreign Sovereign Immunities Act of 1976 (FSIA), Congress intended to establish clear standards by which courts could resolve
questions of sovereign immunity. The FSIA "establishes a comprehensive framework for determining whether a court . . . may exercise jurisdiction over a foreign state." Unfortunately, the effectiveness of the FSIA has been hampered by a lack of specific definitions for key terms, which has led to inconsistent results. For example, the Eighth Circuit Court of Appeals accepted jurisdiction over an employment contract between a United States citizen and Iraq only a year after the Circuit Court for the District of Columbia rejected jurisdiction over a similar contract with Saudi Arabia.

In 1992, the United States Supreme Court moved toward resolving these problems with the FSIA. In a unanimous decision in Republic of Argentina v. Weltover Inc., the Court adopted a definition of "commercial activity" which appeared to liberally expand subject matter jurisdiction in sovereign immunity cases. This decision promised not only to settle many of the differences among lower courts, but also to expand significantly the ability of U.S. courts to hear cases involving foreign nations.

However, less than a year later in Saudi Arabia v. Nelson, the Supreme Court seemed to lose its certainty as to the application of the FSIA. In Nelson, a divided court refused to expand subject matter jurisdiction to hear a case involving the government of Saudi Arabia.

This Note will analyze Saudi Arabia v. Nelson. It will begin with a discussion of the key concepts in the Court's determination, and will then give a brief history of the events and court rulings leading up to the Nelson decision, including an examination of sovereign immunity just prior to Nelson as evidenced by the Supreme Court's ruling in Weltover. In this context, this Note will examine Nelson's relevant facts and the Court's analysis. Finally, this Note will attempt to provide possible reasons for the court's ruling.

10. Id. at 2166. The definition of "commercial activity" lies at the heart of any consideration of sovereign immunity because it is when sovereigns are engaged in "commercial activity" that they lose their immunity.
12. Id.
II. HISTORY

Historically there have been two types of sovereign immunity: absolute immunity and restrictive immunity.

A. Absolute Immunity

The doctrine of sovereign immunity is basically a modern formulation of the historic declaration that "[t]he king can do no wrong."\textsuperscript{13} By the close of the eighteenth century, the concept that a sovereign was immune from prosecution or suit was firmly established in the English courts.\textsuperscript{14} The doctrine was adopted by the fledgling American courts along with much of the English common law.

The concept of foreign sovereign immunity was first considered by the United States Supreme Court in 1812 in \textit{The Schooner Exchange v. M'Faddon}\.\textsuperscript{15} In M'Faddon, Chief Justice Marshall ruled that each sovereign had full jurisdiction within its territory except where jurisdiction was waived over certain activities of foreign sovereigns as part of foreign relations.\textsuperscript{16} Marshall's opinion would come to form the basis of the "absolute immunity" theory of foreign sovereign immunity.

Over the next century, M'Faddon was cited by courts facing sovereign defendants. Implicit in Marshall's ruling was the need for the judiciary to defer to the executive whenever issues concerning foreign relations arose.\textsuperscript{17} Eventually, the M'Faddon holding developed into a rule prohibiting subject matter jurisdiction over cases involving foreign sovereigns.\textsuperscript{18}

B. Restrictive Immunity

The most tangible difference between the "absolute" theory and the "restrictive" theory of sovereign immunity is that, as denoted by its name, the latter theory does not guarantee sovereigns absolute immunity. Rather, the restrictive theory delineates certain categories of governmental activity that are not granted immunity. If a foreign gov-

\begin{itemize}
\item \textsuperscript{15} 11 U.S. (7 Cranch) 116 (1812).
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).
\item \textsuperscript{18} Id.
\end{itemize}
ernment engages in these activities it may be required to answer in court for its actions.19

Paralleling absolute immunity, the doctrine of restrictive immunity originated in European domestic dealings.20 In the late nineteenth and early twentieth centuries, as European governments nationalized railroads and other important industries, it became increasingly difficult to determine whether injured parties should be entitled to recover damages in suits against these government-owned companies or whether sovereign immunity prohibited recovery.21 In response to inevitable tort claims and contractual disputes, European courts developed a system to impose liability on governments acting in a "private" capacity while granting them immunity for purely "public" activities.22 Like absolute immunity, the doctrine of restrictive immunity was applied by European governments before it made its way to the United States.23

In 1952, in response to the trends in Europe, the United States State Department issued the "Tate Letter" declaring its adoption of the restrictive theory of immunity in its dealings with foreign sovereign governments.24 Since the U.S. courts routinely deferred to the State Department on issues of sovereign immunity, the courts effectively adopted the restrictive theory as well.25 Unfortunately, the Tate Letter failed to enunciate criteria for distinguishing when immunity should be denied or upheld. The result was confusion and inconsistency.26

The lack of consistency eventually led the Supreme Court to question the effectiveness of the existing system. In Alfred Dunhill of London, Inc. v. Republic of Cuba,27 the Court expressed skepticism

19. "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." Saudi Arabia v. Nelson, 113 S. Ct. at 1483 (White, J., concurring) (quoting Bank of United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824)).
20. Dellapenna, supra note 14, at 57.
21. Id.
22. Id. at 58.
24. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), in 26 DEP'T ST. BULL. 984 (1952).
26. Id. at 488.
toward the continuing value of requiring the judiciary to rely on the executive when determining matters of sovereign immunity. Conflicts between the two bodies had developed when potential defendant nations had used foreign relation pressures to force the State Department into granting immunity. This is exactly what happened in Dunhill. A sovereign defendant had been granted immunity by the State Department, but the State Department had failed to issue an executive opinion on immunity before the judiciary had decided that sovereign immunity did not extend to the matter at hand.

C. The Foreign Sovereign Immunities Act

In 1976, in an attempt to address the lingering inconsistencies in the system, Congress passed the Foreign Sovereign Immunities Act (FSIA). Congress's intention was to give courts more discretion in determining whether they had subject matter jurisdiction over foreign sovereigns. Under the act, the immunity of foreign governments is assumed and must be affirmatively disproven for subject matter jurisdiction to exist. The FSIA establishes specific exceptions to the general rule of sovereign immunity. If one of the exceptions applies, the court must determine whether the sovereign nation has "substantial contacts" with the United States in order to establish subject matter jurisdiction. Unfortunately, the FSIA's lack of clear definitions has led to varying interpretations resulting in inconsistencies.

D. The Commercial Activity Exception

The FSIA provides that immunity will not be afforded in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." Known as the commercial activity exception, this clause provides the primary means by which parties may bring foreign sovereigns to court. Prospective plaintiffs

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28. Id. at 715 (Powell, J., concurring).
29. Verlinden, 461 U.S. at 487.
30. See Dunhill, 425 U.S. 682.
32. H.R. REP. No. 1487, supra note 5, at 12.
34. Id. § 1605. In Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), the Court determined that subject matter jurisdiction over a foreign sovereign must be determined according to the FSIA. Id. at 493-94. If none of the FSIA exceptions apply, there is no subject matter jurisdiction. Id.
36. Id. § 1605(a)(2).
37. Weltover, 112 S. Ct. at 2164.
must establish all the requisite elements of this exception in order to satisfy subject matter jurisdiction. The lack of clear definitions in the FSIA has made satisfaction of these elements an area of contention.  

1. Nature Versus Purpose of the Activity

From the inception of the restrictive theory of sovereign immunity, a vital distinction has existed between the public and private capacities of sovereigns. The FSIA refers to commercial rather than private activity and requires that the type of activity be “determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” Congress defined “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act.” As evidenced by the Court’s decision in Verlinden B.V. v. Central Bank of Nigeria, courts were given significant leeway in drawing the line between the nature and the purpose of an activity.

Prior to the Supreme Court’s decision in Republic of Argentina v. Weltover Inc., lower courts had difficulty establishing a consistent working definition of commercial activity. Courts recognized that the close relationship and fine distinctions between the nature and purpose of an activity made it difficult to determine which aspects of a case were relevant for consideration. For example, the Seventh Circuit Court of Appeals denied immunity where the Spanish government was involved in the seemingly public activity of employing a marketing agent, while the Fifth Circuit Court of Appeals upheld immunity where the national bank of Nicaragua had committed the mundane commercial act of stopping payment on a check.

2. Contacts with the United States

To qualify for subject matter jurisdiction under the FSIA, a plaintiff must base his cause of action on a commercial activity that has either been “carried on” or has had a “direct effect” in the United States. The FSIA defines these terms as requiring that an activity

38. Id. at 2165.
41. Id.
42. 461 U.S. 480 (1983).
43. Segni v. Commercial Office of Spain, 835 F.2d 160, 164 (7th Cir. 1987).
44. Id.
45. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985).
have "substantial contacts with the United States." However, the legislative history of the FSIA suggests that not only must the contacts be "substantial," they must also be "foreseeable" to satisfy subject matter jurisdiction.

The lower courts split over which standard should be applied: the milder standard requiring only "substantial" contacts, or the stricter standard requiring both "substantial" and "foreseeable" contacts. Prior to the Court's decision in Weltover, the stricter standard seemed to be gaining prominence. The only sure way to satisfy the FSIA was to demonstrate that the activity in question had occurred primarily within the United States.

3. "Based Upon"

The FSIA requires that a prospective plaintiff's cause of action be "based upon" a qualifying commercial activity. As with the other key terms, the lower courts varied dramatically on how this requirement should be interpreted. At their most permissive, some courts held that "based upon" merely required that the foreign sovereign conduct regular business in the United States. On the other hand, the Seventh Circuit Court of Appeals in Santos v. Compagnie Nationale Air France ruled that "based upon" was satisfied only if actual elements of the commercial activity at issue occurred within the United States.

Before the Supreme Court's decision in Nelson, several courts had adopted the "nexus" test. This test required a court to direct its attention to the relationship between the cause of action and the specific commercial activity, rather than upon any general activity of the defendant. This approach required courts to find connections between the foreign government's commercial activity and the United States as well as between the commercial activity and the plaintiff's cause of action.

47. Id. § 1603(e).
51. 934 F.2d 890, 893 (7th Cir. 1991).
53. Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380 (5th Cir. 1980).
E. Republic of Argentina v. Weltover Inc.

In 1992, in Republic of Argentina v. Weltover Inc., the Supreme Court had the opportunity to address many of the contentious issues that had arisen under the FSIA. The case arose from the Argentinean government’s program of insuring securities by guaranteeing exchange rates in order to facilitate foreign investment. When Argentina attempted to postpone payment of those securities, three non-U.S. based corporations filed a breach of contract action in a United States District Court based solely on the fact that New York City had been named as one of four possible sites for payment of the insurance. Despite the tenuous nature of this contact with the United States, both the district and circuit courts ruled in favor of subject matter jurisdiction. In a unanimous decision, the Supreme Court upheld these rulings.

Belying the seeming complexity of the issue, the Court showed no hesitation in finding that Argentina’s actions qualified as “commercial activity” under the FSIA. Argentina argued strongly that its actions were public in nature because its government had been motivated by uniquely public concerns. The Court, even while accepting currency stabilization as a legitimate public purpose, refused to consider the element of purpose in making its determination. According to the Court’s opinion, whenever “a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions” qualify as “commercial” under the FSIA. The Court looked to the nature of the activity and found that the nature of issuing securities more closely matched the actions of a private player than a public regulator.

Even more dramatic was the ease with which the Court ruled that Argentina’s activities had a “direct effect” in the United States. The Court dismissed any consideration of “substantial” or “foreseeable” contacts, considering these concerns baseless and not required by the

55. Id. at 2163-64.
56. Id. at 2164.
57. Id.
58. Id. at 2165.
59. Id. at 2166-68.
60. Id. at 2167.
61. Id.
62. Id. at 2166.
63. Id. at 2167.
FSIA. Instead, the Court held that the mere possibility that money might pass through New York as part of this transaction was enough to satisfy the contact requirement.

Although the Weltover decision failed to address the meaning of "based upon," it still represented the greatest potential expansion of federal subject matter jurisdiction since the Tate Letter. The unequivocal wording of the decision and its unanimous support suggested a Court committed to that expansion.

III. SAUDI ARABIA v. NELSON

Considering the dynamic nature of the Weltover decision and the brief time that elapsed between it and Nelson, the Supreme Court could have applied Weltover to resolve quickly the questions presented by Nelson. Yet, the Nelson decision reflects very little of Weltover. It is neither unanimous nor concise and even its legal underpinnings are different. This section will examine the facts behind Nelson and the issues the Supreme Court addressed in its opinion.

A. Facts and Case History

In 1983, Scott Nelson responded to a recruitment drive by the Hospital Corporation of America (HCA). HCA was an independent U.S. corporation under contract with the Saudi Arabian government to recruit employees for the King Faisal Specialist Hospital in Riyadh, Saudi Arabia. Mr. Nelson was interviewed in Saudi Arabia and later signed an employment contract in Florida.

Employed as a monitoring systems engineer, Mr. Nelson was responsible for inspecting equipment and improving safety. He began work in March of 1984, and during the course of his duties he discovered safety hazards which he repeatedly reported to the hospital's offic-
cials over a period of several months.\textsuperscript{71} He also reported the hazards to an investigative commission of the Saudi Arabian government.\textsuperscript{72} The hospital’s officials told him to ignore the hazards.\textsuperscript{73} On September 27, 1984, Mr. Nelson was arrested by Saudi Arabian agents and imprisoned.\textsuperscript{74} While in jail, Mr. Nelson alleged that he was subjected to torture and other indignities without due process of law.\textsuperscript{75} He was finally released upon the personal request of a United States Senator.\textsuperscript{76}

Mr. Nelson and his wife filed suit against the Saudi Arabian government in the United States District Court for the Southern District of Florida.\textsuperscript{77} His complaint alleged that the hospital and the Saudi Arabian government had committed various intentional torts.\textsuperscript{78} Also included in the complaint was the charge that the defendants negligently failed to warn Mr. Nelson of the dangers inherent in their offer of employment.\textsuperscript{79} Nelson’s wife based her complaint on derivative injuries she sustained from the defendants’ actions.\textsuperscript{80}

The District Court dismissed the case for failure to establish subject matter jurisdiction under the FSIA.\textsuperscript{81} The District Court was not overly concerned with deciding whether “commercial activities” were involved.\textsuperscript{82} Rather, the court focused on the lack of a sufficient nexus between those activities and the Nelsons’ causes of action.\textsuperscript{83}

On appeal, the Eleventh Circuit Court of Appeals reversed.\textsuperscript{84} Despite the involvement of a traditionally public organization, the Saudi Arabian police, the court of appeals ruled that the Nelsons’ causes of action were sufficiently connected with the commercial activities to satisfy the FSIA.\textsuperscript{85} The court of appeals found that “the detention and torture of Nelson are so intertwined with his employ-

\textsuperscript{71. Id.} 
\textsuperscript{72. Id.} 
\textsuperscript{73. Id.} 
\textsuperscript{74. Id.} 
\textsuperscript{75. Id.} 
\textsuperscript{76. Id.} 
\textsuperscript{77. Id.} 
\textsuperscript{78. Id. at 1475-76.} 
\textsuperscript{79. Id. at 1476.} 
\textsuperscript{80. Id.} 
\textsuperscript{81. Id.} 
\textsuperscript{82. Id.} 
\textsuperscript{83. Id.} 
\textsuperscript{84. Nelson v. Saudi Arabia, 923 F.2d 1528, 1536 (11th Cir. 1991).} 
\textsuperscript{85. Id.}
ment at the Hospital, . . . that they are ‘based upon’ his recruitment and hiring.86

B. The Supreme Court’s Ruling

In a considerable departure from its position in Weltover, a divided Court reversed the circuit court of appeals and refused to find sufficient grounds for exerting subject matter jurisdiction over the government of Saudi Arabia.87 In contrast to Weltover’s liberal treatment of “direct effect,” the Nelson majority adopted a conservative interpretation of the “based upon” requirement.88 The majority also seemed to retreat from the liberal interpretation of “commercial activity” found in Weltover.89 Thus, the Court’s true position in this area is unclear.

1. “Commercial Activity”

The definition of what constitutes “commercial activity” lies at the heart of any consideration of foreign sovereign immunity. In Weltover, the Supreme Court expanded the definition of “commercial activity” to apply to areas previously considered immune from prosecution.90 The Court’s willingness in Weltover to infringe upon traditionally public activities blurred the delineation between public activities which are afforded immunity and private actions which are not. The majority ruling in Nelson re-establishes definite lines between the public and private sectors.

Writing for the majority, Justice Souter side-stepped rather than reversed the Weltover result. Citing Weltover, he used the “nature” over “purpose” analysis to support his argument that whatever the motivation behind it, Saudi Arabia’s use of its police force to detain Mr. Nelson was a public act.91 Distinguishing Nelson from Weltover, Justice Souter argued that whereas Argentina “merely dealt in the bond market in the manner of a private player,”92 Saudi Arabia was exercising powers “peculiarly sovereign in nature.”93 At the heart of the majority’s ruling is the determination that these (and presumably

86. Id.
87. Nelson, 113 S. Ct. at 1481.
88. Id. at 1477-78.
89. Id. at 1478-79.
91. Nelson, 113 S. Ct. at 1479.
92. Id.
93. Id.
other) "peculiarly sovereign" powers remain outside the subject matter jurisdiction provided by the FSIA.

Justices White, Blackmun, and Stevens, in a mixture of concurrences and dissents, rejected the majority's refusal to include Saudi Arabia's use of police forces as "commercial activity." Justices Blackmun and White argued that the majority opinion is flawed because it fails to examine how the police officers were used. In an analogy to repressive labor practices, Justice White suggested that the Saudi Arubians used governmental police forces against Nelson in the same way unscrupulous employers use hired hooligans. Under this analysis, any activity taken by a sovereign which could be duplicated by private citizens is a "commercial activity" open to liability in United States courts.

2. "Based Upon"

The FSIA requires that a plaintiff's cause of action be "based upon a commercial activity" to qualify for subject matter jurisdiction. Under the majority view in Nelson, it is an extremely important distinction that some governmental activities are "commercial" while others are "peculiarly" governmental and thus immune from suit. The activity that serves as the basis for a cause of action could determine whether subject matter jurisdiction exists.

In presenting their case, the Nelsons argued that their legal complaints were based on a variety of activities. Some of these, including employee recruitment, were described in the Congressional report accompanying the FSIA as "commercial activity." If the Court could have been convinced to accept these activities as the proper basis for subject matter jurisdiction, the majority's refusal to find police activity to be commercial might have been circumvented. The Nelsons could have jettisoned any questionable basis and proceeded purely on legitimate "commercial activities."

Justice Souter and the majority refused to accept the Nelsons' arguments in this area. Dispensing with the nexus text and other estab-

94. Id. at 1481-84, 1487-89.
95. Id. at 1482-83.
96. Id. at 1483.
97. Id.
100. Id. at 1475-76.
lished methods of determining whether a cause of action is “based upon” a certain activity, Justice Souter chose instead to focus on the definitions of the words. Applying the “natural meaning of the phrase” the majority concluded that Nelson’s recruitment and subsequent employment with the hospital were not the basis for Nelson’s actions. Justice Souter admitted that other activities may have played an essential role in leading up to Nelson’s injuries, but asserted that only the imprisonment was the actual cause of those injuries. Consequently, the Nelsons’ case failed to satisfy the test for subject matter jurisdiction over foreign sovereigns because it was based solely upon a “peculiarly” public activity immune from suit under the FSIA.

Several of the Justices writing independent opinions disagreed with the majority on this point. Justices White and Blackmun chose to apply the nexus and substantial contacts test but agreed with the majority’s holding. In writing his dissent, Justice Stevens expressed his agreement with Justice White’s results in this area, but failed to explain which test he favored. These opinions suggest that the old methods of determining what activity a course of action is “based upon” have been disposed of in favor of Justice Souter’s new definitional approach.

3. Failure to Warn

Related to both of the previous issues, Justices Kennedy, Blackmun, and Stevens specifically disagreed with the majority’s refusal to remand the case for further consideration based on Nelson’s claim that the defendants negligently failed to warn him of the inherent dangers in their employment offer. Justice Souter dismissed the claim as “merely a semantic ploy” that if allowed to go forward could seriously weaken the protections afforded foreign sovereigns by the FSIA. Justice Souter argued that “failure to warn” could be used to recast any claim to circumvent restrictions imposed by the FSIA. In

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103. Id. at 1477-78.
104. Id. at 1478.
105. Justice Kennedy agreed with the majority on this issue but dissented on other grounds.
106. Nelson, 113 S. Ct. at 1484. Justice White based his concurrence with the majority on his belief that Nelson’s imprisonment lacked sufficient nexus with the United States to qualify for subject matter jurisdiction.
107. Id. at 1488-89.
108. Id. at 1484.
109. Id. at 1480.
110. Id.
his dissent, Justice Kennedy suggested that Justice Souter's reasons for rejecting the claim were improper and irrelevant to the situation. Justice Kennedy, joined by Justices Blackmun and Stevens, argued that the failure-to-warn claim fully satisfied the FSIA requirements established by the majority and should have been allowed to proceed.

IV. THE POSSIBLE REASONS BEHIND THE NELSON DECISION

In a comparison of Weltover and Nelson, there seem to be many factual similarities. Despite these similarities and the closeness in time of the two cases, the Court moved from a unanimous position in favor of expanding subject matter jurisdiction over foreign sovereigns to a fractious opinion opposing it. Such a dramatic change suggests the court had good reasons for its shift in position. The Court may have been motivated by an unresolvable difference of facts, a need to reassess the effects of Weltover, an opportunity to address a larger jurisdictional issue, or simply the recognition of modern political realities. Unfortunately, the Court failed to explain the motivations behind its analysis.

A. Distinguishable Facts

Despite the factual similarities between the two cases, and although the Court itself did not choose to include this distinction in its analysis, Nelson involves complicated issues not present in Weltover. Any consideration of the liability of a foreign sovereign for actions by its police forces would require the court to become embroiled in the debate over international human rights. Further, the necessity of considering trans-border employment rights complicates the issues. The Supreme Court may have foreseen the complexities of these issues and decided to dismiss this case to keep United States courts out of these controversies.

B. Weltover Went Too Far

The majority in Nelson may have decided that the Weltover decision expanded subject matter jurisdiction over foreign sovereigns too far and too fast. After Weltover, lower courts applied its holding to find jurisdiction over otherwise questionable cases. Following the rul-

111. Id. at 1484-87.
112. Id.
ing in Nelson, a considerable number of lower courts have dismissed cases for lack of jurisdiction.

Antares Aircraft, L.P. v. Federal Republic of Nigeria, originally decided in 1991, provides a perfect example. The Second Circuit Court of Appeals dismissed for lack of subject matter jurisdiction a case for damages resulting from the impoundment of an airplane in Nigeria because the case's only connection to the United States was nominal ownership of the airplane by American citizens. The Supreme Court vacated the Antares decision following Weltover. Upon reconsideration after the Nelson decision, the Second Circuit Court of Appeals again dismissed the case. While the majority did not cite Nelson, Judge Altimari, writing in dissent, cited Weltover as the major reason why subject matter jurisdiction should have been upheld.

C. Reapplication of "Minimum Contacts" Protection

To gain access to United States courts, a plaintiff must establish not only subject matter jurisdiction but also that the defendant has sufficient "minimum contacts" to be subject to personal jurisdiction. When a foreign sovereign is the defendant, the practical requirements of international relations virtually guarantee that minimum contacts will be satisfied. The Supreme Court recognized this fact in Weltover. The result is foreign sovereigns are effectively deprived of the protections usually afforded by the doctrine of personal jurisdiction.

In Asahi Metal Industry Co. v. Superior Court, decided in 1987, a plurality of the Supreme Court held that foreign corporations could only be subjected to personal jurisdiction if they "purposefully directed" products to the court's forum. As a result, foreign corporate defendants could only be held liable in U.S. courts if they knowingly and purposefully chose to expose themselves to that liabil-

114. Id.
116. Antares, 999 F.2d at 37.
117. Weltover, 112 S. Ct. at 2169. Justice Scalia asserted that Argentina had "purposefully avail[ed] itself of the privilege of conducting activities within the [United States]" by "issuing negotiable debt instruments denominated in U.S. dollars and payable in New York and by appointing a financial agent in that city." Id.
119. Id. at 112.
ity.\textsuperscript{120} In ruling that certain activities essential to governing a nation (such as police) are "peculiarly" public in nature and thus not "commercial activities,"\textsuperscript{121} the Nelson majority effectively extended the protection of Asahi to foreign sovereigns. Significantly, the Nelson majority represents the remaining members of the Asahi plurality joined by subsequent appointees to the Court.

Under Nelson, foreign sovereigns like Saudi Arabia will not be stripped of their immunity for engaging in activities essential to the day-to-day governing of their nation. Rather, nations will only sacrifice their immunity if, like Argentina, they knowingly and purposefully choose to involve themselves in non-essential "commercial activities."

\section*{D. Political Reality}

It is noteworthy that in recent years no major ally of the United States has been required to submit to the jurisdiction of the United States Supreme Court against its will. Certainly, the Supreme Court's willingness to extend subject matter jurisdiction over Argentina, but not over Saudi Arabia (particularly, soon after the Gulf War) can not be entirely coincidental. Responsible courts must recognize that whatever Congress may have intended to accomplish with the FSIA, foreign sovereign immunity is integrally linked with foreign diplomacy.\textsuperscript{122} The courts may no longer have to answer to the executive branch on this issue, but they can ill afford to ignore it either.\textsuperscript{123}

\section*{V. CONCLUSION}

Since the Supreme Court issued its decision, a variety of courts have cited Nelson regarding a diverse assortment of factual situations. Several circuit courts of appeal have cited the Nelson decision in support of upholding sovereign immunity in cases ranging from sales to foreign air forces to the kidnapping of an American citizen by a foreign government.\textsuperscript{124} The Ninth Circuit Court of Appeal, however, 

\begin{itemize}
  \item 120. Id. at 109.
  \item 121. Nelson, 113 S. Ct. at 1479.
  \item 122. Justice Souter cited to State Department practices to support the accuracy of his analysis. Id. at 1480 n.5.
  \item 123. In Pullman Constr. Indus. v. United States, 23 F.3d 1166 (7th Cir. 1994), the Seventh Circuit cited Nelson in support of the assertion that the FSIA was "designed to promote harmonious international relations." 23 F.3d at 1169.
  \item 124. United World Trade v. Mangyshlankneft Oil Prod. Ass'n., 33 F.3d 1232 (10th Cir. 1994) (involving contractual disputes over oil sales from Kazakhstan); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994) (involving breach of a contract by the
ruled that it had subject matter jurisdiction over a wrongful death action against a corporation owned by the Mexican government. The scope of *Nelson* was broad enough to even merit consideration by the United States Tax Court.

Whatever else it does, the disparity between the decisions in *Republic of Argentina v. Weltover Inc.* and *Saudi Arabia v. Nelson* highlights the continuing problems with the FSIA. Enacted in an atmosphere that favored reducing the power of the executive branch, it may represent an ill-considered solution. Certainly, there is no reason to believe that *Nelson* represents the Supreme Court's final word on the matter. It can only be hoped that the next time Congress addresses this issue, it will take the time to define more completely its intentions.

Bolivian air force); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994) (involving a hostage suing his kidnappers for noncommercial torts).


126. *Exxon Corp. v. Commissioner*, 66 T.C.M. (CCH) 1707 (1993) (holding oil-related transaction with Saudi Arabia was subject to sovereign immunity because the Saudi Arabian government had the power to nationalize the industry).

127. The FSIA was a contemporary of the War Powers Act. Both pieces of legislation could not have avoided being affected by the power struggle between the legislature and the executive surrounding the fall of the Nixon Administration.