

## COMMENT

### *Kilburn v. Libya*: Cause for Alarm?

In *Kilburn v. Libya*, the D.C. Circuit held that a plaintiff may turn to United States courts to seek recovery from a foreign nation for injuries suffered at the hands of a terrorist organization with which the foreign nation was affiliated—if actions taken by that foreign nation were a proximate cause of the plaintiff's injury.<sup>1</sup> *Kilburn* is part of an emerging pattern. Over the past ten years, Congress and the courts have made it increasingly easy for plaintiffs to secure compensation from foreign nations for injuries arising out of terrorist acts.<sup>2</sup> In particular, courts have liberally interpreted the state sponsor of terrorism amendment to the Foreign Sovereign Immunities Act of 1976 (FSIA), which permits plaintiffs to sue those nations designated as state sponsors of terrorism<sup>3</sup> for damages in U.S. courts.<sup>4</sup>

Yet *Kilburn* also broke with prior cases. *Kilburn* involved an unusual set of facts and resolved the questions they presented in atypical fashion. Prior to

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1. *Kilburn v. Libya*, 376 F.3d 1123, 1128 (D.C. Cir. 2004).
  2. See Jack Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, in *CIVIL LITIGATION AGAINST TERRORISM* 109 (John Norton Moore ed., 2004). For cogent criticisms of this expansion of the susceptibility of foreign sovereigns to suit, see Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 *BERKELEY J. INT'L L.* 71, 81 (1998); Keith E. Sealing, 'State Sponsors of Terrorism' Are Entitled to Due Process Too: *The Amended Foreign Sovereign Immunities Act Is Unconstitutional*, 15 *AM. U. INT'L L. REV.* 395, 397-98 (2000); and Daveed Gartenstein-Ross, Note, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 *N.Y.U. J. INT'L L. & POL.* 887, 888-89 (2002).
  3. The State Department has designated the following nations as state sponsors of terrorism: Cuba, Iran, Libya, North Korea, Sudan, and Syria. U.S. Dep't of State, *State Sponsors of Terrorism*, <http://www.state.gov/s/ct/c14151.htm> (last visited Dec. 11, 2005).
  4. 28 U.S.C. § 1605(a), (a)(7) (2000) ("A foreign state shall not be immune . . . [when] money damages are sought [from] a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act . . .").

*Kilburn*, most cases brought pursuant to the terrorism amendment had involved terrorist acts committed directly by a foreign nation or instigated by a foreign nation and committed by that nation's agent.<sup>5</sup> *Kilburn*, by contrast, involved damage done by a nonstate actor who received material support and resources from the defendant nation<sup>6</sup> but who was not its agent.<sup>7</sup> Moreover, prior to *Kilburn*, courts had seldom permitted plaintiffs to seek relief for injuries foreign nations had not specifically intended to cause.<sup>8</sup> Indeed, the United States, appearing as amicus curiae in *Kilburn*, asserted that it was not clear from existing case law that "the allegation of a foreign state's *general support* for the terrorist group that carried out the act of terrorism is sufficient to satisfy the statute."<sup>9</sup> The *Kilburn* court, by contrast, adopted a more relaxed, proximate cause standard for jurisdiction.<sup>10</sup>

This Comment argues that *Kilburn* is inconsistent with the FSIA scheme. I do not weigh the merits of the *Kilburn* causation standard on its own terms.<sup>11</sup> Rather, I contend that *Kilburn* will lead to extensive jurisdictional discovery. Permitting such discovery not only would create a disjunction between foreign sovereign immunity practice on the one hand and domestic sovereign immunity practice and international law on the other, but it also might frustrate Congress's goals in passing the terrorism amendment. I begin by explaining why the adoption of the *Kilburn* standard makes it more likely that courts will engage in jurisdictional discovery. In Part II, I elucidate the history of the FSIA and use that history to demonstrate why extensive jurisdictional discovery is incompatible with the FSIA. Finally, in Part III, I offer alternatives to the *Kilburn* standard.

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5. See, e.g., *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 112 (D.D.C. 2003) ("Iran was responsible for the selection of the target [and] provided much of the information for how to carry out the bombing." (internal quotation marks omitted)), *vacated*, 2005 U.S. Dist. LEXIS 32618, at \*13 (D.D.C. Dec. 14, 2005) (vacating the conclusions of law but affirming the findings of fact).
  6. See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 18 (D.D.C. 1998).
  7. *Kilburn v. Libya*, 376 F.3d 1123, 1125 (D.C. Cir. 2004) (finding that "a terrorist organization sponsored by Libya" tortured the plaintiff).
  8. See *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 97-98 (D.D.C. 2002).
  9. Brief for United States as Amicus Curiae in Support of Plaintiffs-Appellees at 10 n.4, *Kilburn*, 376 F.3d 1123 (No. 03-7117) (citations omitted and emphasis added).
  10. See *Kilburn*, 376 F.3d at 1128.
  11. Cf. Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41, 136-37 (2004) (arguing that the problem of "[s]tate sponsorship of international terrorism is . . . not effectively addressed by . . . the policies of the United States").

## I. KILBURN AND JURISDICTIONAL DISCOVERY

*Kilburn* is likely to provoke extensive jurisdictional discovery—discovery “[t]o determine whether the defendant is immune from suit.”<sup>12</sup> Such discovery is likely when the exception to sovereign immunity that the plaintiff wishes to invoke<sup>13</sup> is legally or factually difficult for her to justify or is susceptible to a defendant’s attack.

The FSIA lifts foreign sovereign immunity with respect to several different categories of action.<sup>14</sup> A prospective plaintiff must plead facts sufficient to fit her case into one of these categories.<sup>15</sup> In assessing whether a plaintiff has managed to do so, courts sometimes need only engage in straightforward legal analysis, as when the category the plaintiff invokes requires them to discern whether an alleged act constitutes torture.<sup>16</sup> Sometimes, however, courts have to parse complicated facts<sup>17</sup> or apply ambiguous legal standards.<sup>18</sup> The *Kilburn* holding—that plaintiffs need only plead proximate cause in order to invoke the court’s jurisdiction—will require courts to engage in complicated factual inquiries. For example, courts will have to follow convoluted money trails and understand the relationships between various terrorist cells.<sup>19</sup> Moreover, proximate cause is a more ambiguous legal standard than intent or knowledge, further complicating the judicial task.<sup>20</sup>

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12. Joseph M. Terry, Comment, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 66 U. CHI. L. REV. 1029, 1030 (1999); see also *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (holding that when a defendant challenges the factual predicate for a court’s assertion of jurisdiction, the court should order discovery).
  13. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (“[T]he FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts.”).
  14. For instance, a plaintiff may sue a foreign nation in connection with a commercial act performed in the United States. 28 U.S.C. § 1605(a)(2) (2000).
  15. See *Robinson v. Gov’t of Malaysia*, 269 F.3d 133, 141 (2d Cir. 2001).
  16. Cf. *Price v. Libya*, 294 F.3d 82, 93-95 (D.C. Cir. 2002) (holding that plaintiffs’ complaint was insufficiently detailed to permit the court to determine whether the wrongs allegedly done to them amounted to torture).
  17. See, e.g., *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990) (discussing whether a company or actor was the agent of a foreign nation).
  18. See, e.g., *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 930 (2d Cir. 1998) (analyzing whether there was a sufficient nexus between a foreign country’s commercial activity and a plaintiff’s suit).
  19. Indeed, the *Kilburn* plaintiffs required the assistance of the former State Department Coordinator for Counterterrorism. See *Kilburn v. Libya*, 376 F.3d 1123, 1131 (D.C. Cir. 2004).
  20. See Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 82 (1991). This problem is compounded by the confusion in U.S. courts over what should count as “material support.” Compare *Kilburn*, 376 F.3d at 1130

My fear—that *Kilburn* will provoke more jurisdictional discovery—is not unfounded.<sup>21</sup> Last year, the D.C. Circuit had to consider how much jurisdictional discovery to permit in the aftermath of *Kilburn*.<sup>22</sup>

## II. THE INCOMPATIBILITY OF JURISDICTIONAL DISCOVERY WITH THE FSIA AND THE TERRORISM AMENDMENT

Extensive jurisdictional discovery is inconsistent with the general purposes of the FSIA scheme and with the specific purposes of the terrorism amendment. Congress passed the FSIA to make foreign sovereign immunity track U.S. sovereign immunity.<sup>23</sup> Accordingly, most courts to consider the FSIA's tort exception have read it as congruent with the Federal Tort Claims Act.<sup>24</sup> But the United States would never submit to extensive jurisdictional discovery on the basis of an allegation that an act or omission by a U.S. official was the proximate cause of torture or other egregious injury. In *Arar v. Ashcroft*, for example, a suit brought by a Canadian-Syrian dual citizen allegedly rendered to Syria by the United States, the United States has opposed

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(stating that there is no requirement that support “be *directly* traceable to a particular terrorist act”), *with* *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003) (finding certain provisions of material support definition void for vagueness), *and* *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1012 (7th Cir. 2002) (“To hold the defendants liable for donating money without knowledge of the donee’s intended criminal use of the funds would impose strict liability.”).

21. Congress may have been aware of the potential for jurisdictional discovery. It authorized the Attorney General to “stay any request, demand, or order for discovery on the United States . . . [under the state sponsor of terrorism exception if she] certifies [it] would significantly interfere with a criminal investigation or prosecution, or a national security operation.” 28 U.S.C. § 1605(g)(1) (2000).
22. *See, e.g., Beecham v. Libya*, 424 F.3d 1109 (D.C. Cir. 2005). Indeed, in *Beecham*, although the D.C. Circuit returned the case to the district court because the appeal was premature, amici urged the court to allow full-blown discovery on the question of causation rather than merely jurisdictional discovery. *See* Brief of Amici Curiae Blake Kilburn et al. in Support of Plaintiffs-Appellees at 13, *Beecham*, 424 F.3d 1109 (No. 04-7037).
23. *See* H.R. REP. NO. 94-1487, at 9, 13, 21, 31, 33 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607-08, 6611, 6620, 6630, 6632. The Report states: “The exceptions . . . correspond to many of the claims with respect to which the U.S. Government retains immunity . . .” *Id.* at 6620.
24. JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 258, 423 (2d ed. 2003); *see also* *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1233 (C.D. Cal. 1987) (“The FTCA is a codification of the principle of restrictive immunity with regard to the U.S. Government on a domestic level.”).

discovery on the causation issue.<sup>25</sup> Requiring a foreign nation to submit to discovery to which the U.S. would not accede violates the principle of congruity underlying the FSIA.

Congress also hoped that the FSIA would square U.S. practice with international law,<sup>26</sup> but jurisdictional discovery, because it can violate customary international law,<sup>27</sup> may vitiate that hope. First, it potentially infringes the comity of nations.<sup>28</sup> Foreign law may forbid disclosure of documents plaintiffs need for discovery.<sup>29</sup> Therefore, if a U.S. court orders production in such situations, it overrides foreign law. This contravenes principles of comity and is disapproved by U.S. jurists<sup>30</sup> and other nations.<sup>31</sup> Second, jurists and nations agree on the need to limit the jurisdictional

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25. See Letter to Judge Trager on Behalf of the United States, *Arar v. Ashcroft*, No. 04-CV-249-DGT-VVP (E.D.N.Y. filed Jan. 18, 2005), available at [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Arar\\_StateSecrets.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar_StateSecrets.pdf); see also *Ellsberg v. Mitchell*, 709 F.2d 51, 55-56 (D.C. Cir. 1983).
  26. See H.R. REP. NO. 94-1487, at 7, 9-11, 14, 19-20, 22, 25, 27 (1976), reprinted in 1976 U.S.C.C.A.N. 6605, 6607-10, 6613, 6619, 6621, 6624, 6626. As the Supreme Court has explained, “the Act codifie[d] . . . the restrictive theory of sovereign immunity,” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983), which had by that time become the prevailing norm in the international community. See Letter from Jack B. Tate, Acting Legal Adviser, Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952) (“[I]t should be observed that [even] in most of the countries still following the classical theory there is a school of influential writers favoring the restricting theory . . .”), reprinted in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, app. 2 at 713 (1976).
  27. I define customary international law for these purposes as the opinions of jurists and the practices of nations. See, e.g., *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 20 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . .”).
  28. Comity is not an “absolute” requirement of international law, but neither is it a matter of “mere courtesy and good will.” *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). I include comity as international law in this discussion because Congress wanted the FSIA to “promote harmonious international relations.” *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998). For an excellent review of why discovery may infringe the comity of nations, see Bernard H. Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733 (1983).
  29. See, e.g., *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977).
  30. See, e.g., *In re Sealed Case*, 825 F.2d 494, 498-99 (D.C. Cir. 1987).
  31. See Michael L. Novicoff, *Blocking and Clawing Back in the Name of Public Policy: The United Kingdom’s Protection of Private Economic Interests Against Adverse Foreign Adjudications*, 7 NW. J. INT’L L. & BUS. 12 (1985); cf. European Convention on State Immunity art. 18, Europ. T.S. No. 074 (entered into force June 11, 1976) (limiting the power of a court to enforce a discovery order).

discovery required of foreign sovereigns because of dignity concerns. In *In re Papandreou*, the D.C. Circuit cited international practice and refused to permit the district court to order certain kinds of discovery because they “offend[ed] diplomatic niceties.”<sup>32</sup> Third, the enforcement of discovery requests may result in yet other violations of customary international law. When a discovery order is disobeyed, for example, the court usually holds the offender in contempt,<sup>33</sup> but it is far from clear that international law permits a court to take this action against a sovereign state.<sup>34</sup>

Congress’s purposes in passing the terrorism amendment were slightly different than its purposes in passing the FSIA. It hoped first, to provide effective remedies for victims of terrorism, and, second, to deter nations from sponsoring terrorism.<sup>35</sup> But extensive jurisdictional discovery is likely to drive foreign sovereign defendants out of court. Foreign sovereigns have only recently begun to participate in terrorism-related litigation,<sup>36</sup> and requiring them to submit to extensive, intrusive discovery may reverse this incipient trend.<sup>37</sup>

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32. 139 F.3d 247, 251–52 (D.C. Cir. 1998) (discussing how “sensitive diplomatic considerations” of the State Department might be upset (internal quotation marks omitted)); *cf.* Int’l Law Comm’n, *Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments*, 58, UN Doc. A/CN.4/410 (Feb. 17, 1988) (noting the United Kingdom’s position that it is not “appropriate for a domestic court to order the Government of another State, without its consent, to do or not to do particular acts”).
  33. *See, e.g.*, *First City, Texas-Houston v. Rafidain Bank*, 281 F.3d 48, 53 (2d Cir. 2002); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992).
  34. *See* Brief of the United States as Amicus Curiae Supporting Defendant-Appellant, *Belize Telecom Ltd. v. Gov’t of Belize*, No. 05-12641-CC (11th Cir. filed May 4, 2005) (arguing that holding a foreign sovereign in contempt not only would contravene international practice but would also adversely affect our relations with other nations).
  35. 142 CONG. REC. S3463 (Apr. 17, 1996) (statement of Sen. Brown) (arguing that “[b]eyond ensuring that American citizens have recourse after brutal terrorist acts, this section represents a vital counterterrorism measure,” and noting that “I am confident that the threat of enforceable judgments and levies against assets from U.S. courts will be a significant inducement for countries to get themselves off the State Department’s terrorist list”).
  36. DELLAPENNA, *supra* note 24, at 418 & n.578, 420 n.594.
  37. Once a sovereign has appeared in court, the sovereign is more likely than not to see litigation through to its completion. Indeed, the restrictive theory of sovereign immunity emerged in part from cases in which sovereigns made special appearances to contest jurisdiction and ended up litigating claims and counterclaims. *See, e.g.*, *The Sao Vicente v. Transportes Maritimos do Estado*, 281 F. 111, 114 (2d Cir. 1922). But “without an opportunity to obtain an authoritative determination of its amendability [sic] to suit at the earliest possible opportunity,” *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987), a foreign sovereign is not likely to appear in court at all.

Finally, extensive jurisdictional discovery undermines Congress's efforts to deter terrorists. If the Sudan is not only considered liable for damages wrought by al Qaeda long after the Sudan ejected Osama bin Laden,<sup>38</sup> but also must disclose sensitive material when contesting such liability, it will have little incentive to cooperate with U.S. courts. Disclosures may be embarrassing and the resulting shame may be an additional sanction.<sup>39</sup> Moreover, it is not clear whether, in the international sphere, disclosure of malfeasance induces compliance with or deviance from international law.<sup>40</sup>

### III. SOLUTIONS TO THE DISCOVERY DEBACLE

I propose two solutions to the problem I have identified—that *Kilburn* will require courts to engage in extensive jurisdictional discovery. First, U.S. courts should require plaintiffs to plead that a foreign sovereign knew of or intended to support specific terrorist acts—not that her injuries were merely the proximate result of support provided to a terrorist organization—before ordering jurisdictional discovery. The D.C. Circuit considered this argument but failed to realize that the only way courts can affect the amount of discovery required is by changing the pleading requirements.<sup>41</sup> The D.C. Circuit also failed to consider the specific international law ramifications of its decision.<sup>42</sup> Requiring plaintiffs to plead knowledge or intent would be consistent with the FSIA's goals<sup>43</sup> and, although it would not make causation a legal question, it would reduce the number of fact questions that would come before the court

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38. See *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 5 (D.D.C. 2005).

39. See ELIZA AHMED ET AL., SHAME MANAGEMENT THROUGH REINTEGRATION (2001).

40. Cf. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 81 (2003) (“[A]n individual’s perception of the extent of evasion powerfully predicts compliance behavior: the higher an individual believes the rate of . . . cheating to be, the more likely he or she is to cheat too.”). If nations become aware of the extent to which other nations derogate from international requirements, they may be induced to follow suit.

41. See *supra* text accompanying notes 16–18 (arguing that by permitting the resolution of legal questions rather than requiring the investigation of factual puzzles Congress makes determinations of jurisdiction easier).

42. The D.C. Circuit relied on *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, in which the Supreme Court read “caused by” to mean proximate cause but expressly asserted that “[n]ormal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements.” 513 U.S. 527, 537–38 (1995). The Supreme Court’s description does not apply to FSIA litigation.

43. Steven R. Swanson, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 13 EMORY INT’L L. REV. 445, 482 (1999) (“Allowing a vague, unformed argument would undercut FSIA goals.”).

and would permit courts to apply a rule rather than a standard.<sup>44</sup> Thus, a plaintiff who could not persuasively explain how she intended to prove knowledge or intent at trial would not be entitled to discovery.

This change would cause little harm to plaintiffs' interests.<sup>45</sup> Plaintiffs bringing suit under the terrorism amendment must often demonstrate knowledge or intent in the liability phase. After *Cicippio-Puleo v. Iran*, a recent case in which the D.C. Circuit found that the Flatow Amendment<sup>46</sup> did not create a cause of action against foreign sovereigns,<sup>47</sup> courts have required plaintiffs to "identify a particular cause of action arising out of a specific source of law"<sup>48</sup> before finding foreign sovereign defendants liable for terrorist acts. State law—the usual source for such causes of action—often requires proof of tight causal links. Even the *Kilburn* plaintiffs acknowledged that "[l]iability might require more [facts], depending on the claim being pursued."<sup>49</sup>

Nor does this proposal undermine Congress's efforts to provide a remedy for victims of terrorism. Plaintiffs are often in the best position to unearth the facts that might justify an assertion of jurisdiction, and they should be required to explore avenues open to them without court assistance before discovery is granted. For instance, in *Beecham v. Libya*, the question was whether a U.S. military officer "received national defense information . . . that the instructions for the La Belle attack had been sent from the Libyan government."<sup>50</sup> The plaintiffs could readily have sought that information from the United States before demanding it from Libya.

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44. See *supra* note 20 and accompanying text.

45. I advocate heightening only pleading requirements, not proof requirements. Cf. *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (distinguishing the facts a plaintiff must allege to demonstrate standing and the facts a plaintiff must prove to secure relief).

46. 28 U.S.C. § 1605 note (2000). The Amendment provides that those injured by terrorist acts shall have a federal cause of action against "official[s], employee[s], or agent[s]" of state sponsors of terrorism.

47. *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004).

48. *Dammarell v. Islamic Republic of Iran*, 370 F. Supp. 2d 218, 223 (D.D.C. 2005), *vacated*, 2005 U.S. Dist. LEXIS 32618, at \*53 (D.D.C. Dec. 14, 2005) (imposing liability for, among other offenses, battery, which "[under] North Carolina [law] . . . [requires] intent" (internal quotation marks omitted)); see also *Acree v. Republic of Iraq*, 370 F.3d 41, 58-60 (D.C. Cir. 2004) (holding that plaintiffs who could not point to any state law cause of action could not maintain their suit against a foreign sovereign), *cert. denied* 125 S. Ct. 1928 (2005).

49. Brief of Appellee at 22, *Kilburn v. Libya*, 376 F.3d 1123 (D.C. Cir. 2004) (No. 03-7117); see, e.g., *In re Terrorist Acts on Sept. 11, 2001*, 349 F. Supp. 2d 765, 801 (S.D.N.Y. 2005) (requiring plaintiffs to plead "facts [that would] suggest the [sovereign defendants] knew they were making contributions to terrorist fronts" (emphasis added)).

50. Brief for Appellants at 7, *Beecham v. Libya*, 424 F.3d 1109 (D.C. Cir. 2005) (No. 04-7307).



Second, I propose that when a sovereign defendant objects to discovery, the court should permit it to submit discoverable material in camera and ex parte.<sup>51</sup> If foreign nations were assured that the information they submitted would not be disclosed to the public, foreign sovereigns might be more inclined to participate in litigation and might be more likely to abjure sponsorship of future terrorist acts.

Again, this proposal is not unrealistic. Congress seems to have contemplated in passing the FSIA that courts would permit foreign sovereigns and their agents to invoke privileges analogous to those the United States and its officers may invoke.<sup>52</sup> This scheme would also be consistent with notions of international comity. As the Supreme Court has explained, discovery “asymmetries” are frowned upon.<sup>53</sup>

## CONCLUSION

In this Comment, I have sought to demonstrate why *Kilburn* is inconsistent with the FSIA scheme. Although the *Kilburn* causation standard is not inherently problematic, the case is likely to have far-reaching effects on the scope and frequency of jurisdictional discovery ordered under the Act. I urge courts not to adopt the *Kilburn* standard. Rather, courts should impose more stringent pleading requirements up front and take greater care to protect the interests of foreign sovereigns. The United States is better served when foreign nations show up in court than when they are deterred from climbing the courthouse steps by the threat of burdensome discovery requests.

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51. For an example of how this might work, see *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004), cert. denied 125 S. Ct. 1670 (2005).
  52. H.R. REP. NO. 94-1487 (1976), at 23 & n.2, reprinted in 1976 U.S.C.C.A.N. 6621-22 & n.2 (referring to exceptions to the Freedom of Information Act). For instance, in *Taiwan v. United States District Court*, the Ninth Circuit permitted a foreign diplomat embroiled in an FSIA case to claim testimonial immunity. 128 F.3d 712 (9th Cir. 1997).
  53. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 540 n.25 (1987).



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