Testimony Before the U.S.-China Economic and Security Review Commission

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Introduction

Thank you to the Commission for the opportunity to provide views on the influence of the Chinese government on U.S. courts. The main point of my presentation today is that foreign authoritarian governments, including China, have relatively easy access to our courts and, in some instances, have abused that access to go after political dissidents or newspapers in the U.S. But there is no need to allow this—Congress can adopt a straightforward fix that would help defendants beat back these political harassment claims.

Stepping back, I am a scholar of civil procedure and transnational litigation. My research focuses on the legal rules governing cases in U.S. federal courts. The transnational part of my research studies cases in U.S. courts involving foreign parties, foreign laws, and foreign nations.[2] My focus today is on U.S. courts and not foreign policy: what is happening in U.S. court cases involving foreign governments? How do the rules of civil procedure interact with cases involving the Chinese government or proxies? As my focus is not on analyzing foreign policy or the internal goals of the Chinese Community Party, I will leave it to the other distinguished experts on the panels to answer your questions about those topics.

Much of my testimony will address the problem of foreign authoritarian governments filing civil cases in U.S. courts in order to pursue political ends. There is evidence that authoritarian regimes from Russia, Venezuela, Turkey, and China, are filing frivolous civil cases in our courts with the goal of imposing legal costs on their targets, be it political dissidents or newspapers. This means that if a political dissident or newspaper runs afoul of the Chinese or Russian governments, those regimes are exporting their oppression to our courts by imposing potentially crippling legal costs. One surprising aspect of all of this is that you might expect these authoritarian countries to mostly be present in U.S. courts as defendants in human rights or expropriation cases. But, it turns out, these countries are surprisingly filing claims *as plaintiffs* either directly or through proxies.

The Chinese government has been one of the worst offenders. An investigation by the Wall Street Journal, relying on sources in the FBI and State Department, found that China has used legal claims to go after Chinese dissidents who fled to the U.S. And we have solid evidence that this is part of a plan orchestrated by the CCP's—in the words of a Chinese official—multidimensional "legal war" against Chinese emigres. In this war, Chinese companies file tort and breach of contract claims against dissidents who have recently fled to the United States to pressure them to return to China. While the use of proxies conceals the involvement of the CCP in political harassment lawsuits, some Chinese officials have acknowledged using U.S. litigation to intimidate Chinese

[1] Associate Professor, Stanford Law School. Most of the content in this written testimony comes directly from my article, Diego Zambrano, *Foreign Dictators in U.S. Court*, 88 U. CHI. L. REV. 157 (2022).
[2] *See e.g.*, Diego A. Zambrano, *How Litigation Imports Foreign Regulation*, 107 VA. L. REV. 1165 (2021).

dissidents. Some Chinese officials have even admitted that the lawsuits are manufactured and seek only to drain defendants' financial resources.[3]

The Chinese government can do this because U.S. procedural rules are permissive: they make it very easy for foreign governments and parties to file claims in our courts.

But our procedural system does not have to work this way and we need not lend our courts to Chinese oppression. The final part of my testimony offers a series of recommendations for actions that the Commission ought to consider. In short, Congress should adopt a statutory fix that would increase the burden on foreign government plaintiffs (or proxies) to demonstrate that their case has merit before they can impose crippling legal costs on the defendants. There would be nothing innovative or out of the norm in this statute because it would resemble what more than twenty states already do in their Anti-SLAPP statutes. I call it a Foreign Sovereign Anti-SLAPP law.

My testimony today will divide into three parts. First, I will explain the legal rules that govern the presence of foreign governments in U.S. courts, either as defendants or as plaintiffs. I'll explain the role of the Foreign Sovereign Immunities Act and the so-called foreign privilege of bringing suit. Second, I will discuss how China seems to be taking advantage of the U.S. legal system to pursue political goals and suppress dissidents. Finally, I will lay out my proposal for a Congressional fix: a Foreign Sovereign Anti SLAPP statute.

I. Foreign Governments in U.S. Civil Cases

Let me begin with the basic legal framework that governs the relationship between foreign countries and U.S. courts: the Foreign Sovereign Immunities Act. I will then explain why foreign sovereigns can file cases in U.S. courts. But, in basic terms, I will lay out two findings. First, foreign sovereigns enjoy immunity from suit in U.S. courts. That means that it is very difficult to file claims against any foreign government in U.S. court. Second, foreign sovereigns enjoy the privilege of access to U.S. courts as plaintiffs, either directly or indirectly through state-owned companies or proxies. This, in contrast to their role as defendants, means that it is very easy for foreign governments to access our courts. The combination of these two findings creates an asymmetry: foreign dictators and their proxies can exploit access to our courts as plaintiffs to harass their opponents, but their regimes are, in turn, immune from lawsuits here.

A. Foreign Sovereign Immunities Act

Congress adopted the Foreign Sovereign Immunities Act in 1976, codifying the doctrine that foreign sovereigns are immune from suit in U.S. court. In basic terms, the FSIA grants all foreign sovereigns a baseline immunity from suit. Unless it fits into an exception, an American company or individual cannot sue a foreign sovereign like China. If you tried to sue China, a U.S. court would immediately dismiss your claim as barred by the FSIA.

[3] Aruna Viswanatha & Kate O'Keeffe, *China's New Tool to Chase Down Fugitives: American Courts*, WALL STREET JOURNAL (July 29, 2020).

The FSIA is rooted in principles of reciprocity and international comity. The idea is that the U.S. government grants respect and dignity to foreign sovereigns in U.S. courts by shielding them from legal claims and, in return, expects that foreign governments will similarly give the U.S. immunity in their courts.

But the FSIA embraces only a restrictive version of immunity, providing that while foreign sovereigns enjoy a baseline of immunity there are also important exceptions. These include cases where the foreign sovereign contractually waives immunity, participates in commercial activity in the United States, takes property in violation of international law, sponsors terrorism, or causes tortious acts in the U.S.[4] Other than the state-sponsored terrorism exception, the FSIA does not draw distinctions among regime types, be it democracy or dictatorship.

The FSIA is in line with international practice and also with other U.S. doctrines that shield foreign sovereigns when they are defendants in U.S. courts. For example, under the act of state doctrine, U.S. courts refuse to judge the validity of a foreign government's official act "done within [their country's] own territory."[5] In other words, if a plaintiff sues a foreign government in U.S. court over an act performed in a foreign country, U.S. courts refuse to inquire into the validity of the foreign sovereign's act. The Supreme Court has justified this doctrine as avoiding threats to "the amicable relations between governments and vex[ing] the peace of nations."[6] Courts have stuck to this doctrine regardless of the government in power. In addition to these foreign or external considerations, there are also concerns with separation of powers built into the doctrine.

Before moving on, notice that the FSIA mostly addresses the relationship between U.S. courts and foreign governments as *defendants*. It has very little to say about foreign governments as plaintiffs.

B. Foreign Sovereigns as Plaintiffs

Setting aside the FSIA, U.S. courts have long recognized that foreign countries can also file cases as plaintiffs in U.S. courts. Under the so-called "privilege of bringing suit," the Supreme Court long ago recognized that "sovereign states are allowed to sue in the courts of the United States."[7] In a canonical 1867 case, an American ship collided with a French transport ship named *The Sapphire* near San Francisco. The French government—in the name of the emperor—then filed suit in a U.S. district court to recover damages for the crash. With a monarch as plaintiff, the question presented to the U.S. Supreme Court was whether "the French Emperor [could] sue in our courts."[8] The Court held that foreign sovereigns were allowed to "prosecute [cases] in our courts," because to deny them that privilege "would manifest a want of comity and friendly feeling."[9] The Court rooted this privilege, among other areas, in Article III of the U.S. Constitution, noting that "[t]he Constitution expressly extends the judicial power to controversies between a

[4] DAVID P. STEWART, FEDERAL JUDICIAL CENTER, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 41 (2013), https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf. The FSIA draws on a long common law tradition of immunity that goes back to a case called The *Schooner Exchange*. That case first established the basic rule that foreign sovereigns enjoy blanket immunity from process in U.S. courts.
[5] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).
[6] *Id*. at 418.
[7] *Id*. at 408–09 (citing The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870)).
[8] *The Sapphire*, 78 U.S. at 164.
[9] *Id*. at 167.

State, or citizens thereof, and *foreign States*, citizens, or subjects."[10] Importantly, the Court explicitly refused to distinguish between Napoleon as emperor and his potential successors in France, noting that "[t]he reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty."[11] The privilege of suing in our courts, the Court affirmed, was given to the foreign sovereign, regardless of who was officially in power.

With that said, keep in mind that foreign companies are independently given access to U.S. courts. To file a lawsuit in U.S. federal courts, a foreign company just needs to satisfy basic subject matter jurisdiction requirements—mostly that it is suing under federal law or diversity jurisdiction. This means that foreign governments can enter U.S. courts through state owned companies or even proxy companies that they indirectly control.

C. Foreign Authoritarian Governments

With the basic legal framework established, let's now move on to the case of foreign authoritarian governments in U.S. courts. As I mentioned before, both the FSIA and the privilege of bringing suit apply equally to democracies and dictatorships. The Supreme Court has implied that courts should not draw distinctions between government types when it comes to immunity and access to courts. I call this an "equal treatment" principle. Lower courts have repeatedly declined to distinguish between foreign government types, instead embracing regime-neutral doctrines. This principle traces back to *The Sapphire*, where the Court refused to distinguish between "[t]he reigning Emperor, or National Assembly, or other actual person or party in power."[12] And this approach resembles the domestic "equal sovereignty" principle.

Because of the equal treatment principle, courts have long accepted foreign authoritarian governments in our courts. Indeed, the first landmark case involving a foreign autocrat was filed in 1811, when two boat owners sought to reclaim a ship that, allegedly, was "violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon." So began two hundred years of interactions between our courts and foreign authoritarian governments.

It is quite easy for foreign dictators or their proxies to access our courts. Foreign governments can thus exploit this access, benefiting from the privilege of bringing suit for any purpose, legitimate or illegitimate.

Looking specifically at post-1945 cases, dictators have been common litigants in U.S. courts. In a previous study focusing on just twenty dictators in the past few decades, I found more than one hundred cases across U.S. district courts. These include names like Mao Zedong, Fidel Castro, Augusto Pinochet, Ferdinand Marcos, and Saddam Hussein. Usually, the official party named in the suit was the country's government or an instrumentality like a central bank. Many claims against foreign dictators were based on the Alien Tort Statute and Torture Victim Protection Act;

[10] *Id*. (emphasis in original).
[11] *Id*. at 168.
[12] *Id*.

some involved torts, extradition, and criminal prosecutions; others were about disputes over sovereign funds; and, of course, a few involved expropriations disputes.[13]

More recently, official parties tend to be proxies, lower-level officials, or cronies. As I will discuss in a moment, the Chinese Communist Party has filed civil cases in U.S. courts through proxy companies or agents, potentially to conceal its involvement in harassment lawsuits. Other cases included countries like Venezuela, Cuba, Iran, the Philippines, Russia, Turkey, and China. Sometimes, however, the dictator was named in his individual capacity, including cases against Ferdinand Marcos, Jiang Zemin, and Radovan Karadžić.

That foreign governments can indirectly file claims through proxies means that it is difficult to quantify their true involvement in our courts. Consider that the CCP can simply ask a state-owned company to file a claim against a political target in the U.S. As I mentioned before, foreign companies have easy access to U.S. courts through diversity or federal question jurisdiction. Absent specific intelligence, we would never know if this was a legitimate claim or government harassment. This means that the CCP, Putin, or Maduro can engage in harassment campaigns against opponents, using U.S. discovery and other procedures to their advantage.

Even if the number of claims was small, litigation can have an outsized chilling effect on opponents. Even a single case is enough to cause concern. At the same time, victims have a difficult time suing foreign dictators. Even just in theory, these rules and statutory provisions provide cover for the most egregious acts.

D. Foreign Authoritarian Governments as Plaintiffs

Setting aside cases in which foreign authoritarian governments are defendants, there do appear to be a sizable number of cases involving dictators as plaintiffs in the past few decades. From Mao Zedong's fight with the Kuomintang in a 1952 Northern District of California case to Fidel Castro's 1964 attempt to enforce expropriations in the Southern District of New York, dictators have become a recognizable presence in U.S. courts. Notably, in a 1960s case, *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court firmly established the principle that foreign authoritarian governments can file cases in U.S. courts. The Court allowed Fidel Castro's government to file suit in U.S. court and to benefit from U.S. comity doctrines. The Court explicitly rejected the argument that Cuba "should be denied access to American courts because Cuba is an unfriendly power and does not permit nationals of this country to obtain relief in its courts."[14] *Sabbatino* rested on two pillars: the potential harm to the nation's foreign relations and the difficulty of assessing which foreign regimes deserve different treatment. By treating Cuba's dictatorial regime like any other sovereign, *Sabbatino* reinforced the equal treatment principle I mentioned before.

Foreign dictators litigate a variety of cases in U.S. courts as plaintiffs. Sometimes there are disputes over sovereign funds deposited in U.S. banks. Typically, foreign countries deposit funds in U.S. financial institutions to conduct sovereign transactions. These funds become a source of litigation when democratic opponents contest a dictatorial regime's power, both claiming to represent the

[13] Some of these claims involve the application of foreign authoritarian law in our courts. Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1691 (2020).
[14] *Sabbatino*, 376 U.S. at 408.

country. These cases are, at bottom, about executive recognition of foreign regimes. To name a few, Venezuela, China, Iran, Chile, Nicaragua, and Panama have all had dictators litigate against competing leaders over funds that nominally belong to their respective countries. For example, in 1988, Panamanian President Eric Arturo Delvalle dismissed the then-reigning dictator Manuel Noriega from his military post in Panama. But Noriega refused to step down, setting up a parallel administration to govern the country. This turmoil pushed Delvalle to file a case in U.S. court, seeking to freeze all Panamanian funds deposited in several bank accounts. This, in turn, prompted Noriega's regime to file motions to intervene in the case. Ultimately, the court deferred to the U.S. president's recognition of Delvalle as the representative of "the only lawful government of the Republic of Panama," freezing the funds and putting them at the order of the Delvalle administration. The Panama cases closely resemble cases involving the Shah of Iran, Augusto Pinochet, and Tachito Somoza.

Foreign dictators have also filed cases in the United States to enforce property expropriations. Although expropriations typically take place in a foreign country, they can often have ramifications for U.S. individuals, companies, and funds. Notably, communist regimes—including those in Cuba, Nicaragua, Venezuela, and the Soviet Union—initiated prominent expropriation cases in U.S. courts. And, on closer inspection, many of these cases resulted from dictators' attempts to consolidate power. For instance, when Fidel Castro gained power in 1959, he selectively expropriated strategic businesses to neutralize potential opposition. As I mentioned above, this led to a legal dispute between Cuba and a U.S. company.

E. The Asymmetry of Foreign Authoritarian Governments

The doctrines I have laid out above—the FSIA, the privilege of bringing suit, and courts' refusal to distinguish between democracies and dictatorships—create a problematic asymmetry: foreign dictators and their proxies can access our courts as plaintiffs to harass their opponents, but their regimes are, in turn, usually immune from lawsuits here. For example, in 2016, a top-ranking Venezuelan official sued the *Wall Street Journal* for defamation over an article linking him with drug trafficking. But if the *Wall Street Journal* had tried to sue a Venezuelan official for harassment of its journalists, the case would likely have been dismissed under common-law immunities. Or, for example, consider that the DNC sued Russia for its cyberattacks during the 2016 election. While Russia has pursued dissidents in U.S. courts in a variety of ways, a judge recently held that Russia was itself immune under the FSIA.[15]

Our legal system, then, seems to insulate dictators from the downsides of U.S. law while allowing them to reap the benefits of access to court. This asymmetry makes foreign sovereigns—and specifically foreign dictators who are willing to exploit access to U.S. courts—a unique kind of litigant, worthy of special attention.

The most worrisome cases involve efforts by foreign dictators to exploit the U.S. judiciary to their advantage. Regimes dress up these cases as run-of-the-mill claims: defamation, contract claims, enforcement of foreign awards, 1782 discovery requests, or bankruptcy disputes. Sometimes state-

[15] *See* Sam Kleiner & Lee Wolosky, *Time for a Cyber-Attack Exception to the Foreign Sovereign Immunities Act*, JUST SECURITY (Aug. 14, 2019), https://www.justsecurity.org/65809/time-for-a-cyber-attack-exception-to-the-foreign-sovereign-immunities-act/.

affiliated companies—like China's Huawei or Russia's Kapersky Lab—sue in U.S. courts to pursue seemingly commercial interests that are, on closer look, aligned with an authoritarian regime's goals. Notable cases involve dictatorships in China, Venezuela, Russia, and Turkey. While many cases have been successful, some of these claims have been dismissed at early stages.

To be sure, this asymmetry applies to all foreign states, regardless of regime type. But the asymmetry has particularly worrisome consequences in dictator-related cases because foreign authoritarians go on the offense against democratic opponents, newspapers, and dissidents in the United States. There appear to be no cases of democracies taking advantage of our courts this way. And, importantly, democracies usually give Americans access to foreign court systems. Dictatorships, by contrast, generally block any cases that have political implications. This lack of reciprocal access and willingness to exploit our courts is what makes foreign dictators unique kinds of litigants. Setting aside the FSIA and other immunities, doctrines that benefit dictators, like act of state and the privilege of bringing suit, are based on shaky premises that open them up to abuse or manipulation.

II. China's Use and Abuse of U.S. Courts

China has been one of the most prolific foreign authoritarian governments to take advantage of U.S. courts. In 2014, a Chinese anti-corruption program announced a "multidimensional legal war" against corruption suspects around the world.[16] As part of this plan, the Chinese government decided to "sue fugitives in American courts" with the goal of harassing defendants, draining their financial resources, and forcing them to return to China.[17] But instead of filing those cases in China's sovereign capacity, the program recruited state-owned businesses to do its bidding. This has resulted in several civil cases in state and federal courts, on claims ranging from breach of fiduciary duty to fraud. Surprisingly, Chinese officials have called "the lawsuit strategy a success, publicly citing one of the suits as helping to force one of their most-wanted home."[18] U.S. officials, however, have called the lawsuits an "effort to pursue political targets rather than just criminal ones."[19] The Chinese suits have apparently been paired with physical harassment, stalking—including by Chinese agents dressed as "fake FBI officials"—and outright threats.[20] All of this appears to be an organized attempt by a foreign dictatorship to use U.S. civil lawsuits for political ends. The most galling aspect of this is that Chinese officials have admitted that the lawsuits are manufactured and seek only to drain defendants' financial resources.

Take the case of Peng Xufeng, who claims he fled China after he refused to testify against enemies of the Chinese Premier, Xi Jinping. In response, Chinese officials allegedly harassed him in California, smashed his windows, arrested his family in China, moved his child to an orphanage, and, finally, used a state-owned company to sue him in U.S. court.

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[16] Aruna Viswanatha & Kate O'Keeffe, China's New Tool to Chase Down Fugitives: American Courts, WALL ST. J. (July 29, 2020, 10:29 AM), https://www.wsj.com/articles/china-corruption-president-xi-communist-party-fugitives-california-lawsuits-us-courts-11596032112.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.

Or consider Xiao Jianming, a Chinese businessman who fled to the United States. In 2019, a Chinese state-owned company sued Xiao and his daughter in U.S. courts, alleging that Xiao diverted to his daughter hundreds of thousands of dollars in company funds. Facing this costly lawsuit, Xiao returned to China. Immediately thereafter, the company dismissed its U.S. claim and, simultaneously, a Chinese anticorruption entity called the Central Commission for Discipline Inspection celebrated the success of the litigation pressure.

To be sure, China claims that these defendants violated criminal law in China and were not persecuted because they were dissidents or refugees. But this is irrelevant. China is violating basic norms of diplomacy when it uses bogus U.S. civil lawsuits to pressure these defendants, rather than rely on traditional negotiations with the State Department or the Department of Justice.

Let me say a few words about the potential success of these lawsuits. It is hard to overstate how difficult it can be for a political dissident to deal with these claims. To begin, of course, a simple case has the potential to impose high legal costs. When a Chinese dissident faces a lawsuit in U.S. court, they must retain legal counsel, a task that may be routine for sophisticated entities but can be difficult for individuals and especially recent immigrants. If there are language barriers, the defendant has to determine a way to communicate with their lawyer. The target must then prepare legal documents and stay on top of a developing case in a legal system that may be totally foreign. And if the case continues, the defendant must comply with discovery requests that can seek a wealth of documents or can force the defendant to sit down for a deposition.[21] The litigation process can pile on more burdens, court dates, traveling to distant fora, communicating with and supervising an attorney, and costly motion practice. These difficulties will be even heavier for a recent immigrant with few connections, piling on anxiety and legal and psychological costs. If you then combine this with explicit threats from China against family members who are still abroad, no wonder, then, that some dissidents have returned to China.

The complete scale of harm to political dissidents and democracy is also hard to measure. Although we can identify dozens of claims across U.S. courts, most cases likely remain hidden because authoritarian governments use proxies to file them. Moreover, these claims may be most significant because of litigation's chilling effect on other dissidents and journalists. Even a single claim sends a powerful message to would-be critics: if you are in the United States, we can bring our harassment to U.S. courts. Comply with the CCP's demands or else.

As if this were not difficult enough, consider that pesky asymmetry I mentioned earlier: when the Chinese government is a defendant in U.S. courts, they can take advantage of the FSIA and other doctrines like head-of-state immunity and act of state to avoid liability and quickly dismiss cases. For example, in 2004, a group of unidentified plaintiffs belonging to the Chinese group Falun Gong filed a claim against China's former premier, Jiang Zemin, while he traveled through the United States. Plaintiffs' alleged that Jiang "organize[d] and direct[ed] the suppression of Falun Gong throughout China," leading to a series of human rights violations, rape, execution, disappearances, and torture.[22] The U.S. government, however, filed an amicus brief suggesting that

[21] For a broader discussion of discovery, *see e.g.*, Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020).

[22] Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F. Supp. 2d 875, 878 (N.D. Ill. 2003), *aff'd but criticized sub nom.* Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004).

Jiang was "immune from the jurisdiction of the Court because he is China's former head of state."[23] The court accepted the executive's suggestion and dismissed the claim.[24]

To be sure, China's aggressive use of our courts is not unique—it is part of a pattern of abuse also perpetrated by Turkey, Venezuela, and Russia:

- Turkey's dictator, Erdogan, used government lawyers to go after his main opponent, Muhammed Fethullah Gülen, a cleric who lives in Pennsylvania. But instead of filing the case in the name of Turkey, it appears that Erdogan's regime recruited regular citizens as proxies to file a seemingly private case. The complaint alleged that Gulen engaged in religious persecution against plaintiffs within Turkey. But, in fact, the litigation coincided with a broader effort by Erdogan to purge the Turkish opposition and weaken Gulen's status as his most important political opponent. Moreover, the fact that Turkish government lawyers represented these supposed individual plaintiffs suggests a broader government plan. Not only did the Turkish government hire the law firm, the main plaintiffs' lawyer admitted that the lawsuit "represents a legal battle as well as a political battle and an investigation targeting the Gülen Movement" that would show Gulen is "not untouchable in the United States."[25] Even though the district court dismissed the case early on, it appears that Erdogan decided to use the U.S. legal system to harass Gulen in his home state of Pennsylvania. And Turkey seems to be using other types of claims to pursue its interests.

- Or take, for example, claims by Venezuela in U.S. court. In 2016, the second most powerful official in Venezuela's dictatorship, Diosdado Cabello, sued the *Wall Street Journal* over an article that suggested he was linked to narcotrafficking. Although the district court dismissed the claim, Cabello appealed to the Second Circuit and pursued his claim for nearly two years. This case involved Cabello's individual interests in his reputation but, importantly, also the broader dictatorship's political goals to push back against U.S. pressure. Another notorious regime crony also sued the U.S. network Univision for defamation on similar grounds. In 2019, disputes between dictator Nicolas Maduro and his opponent, Juan Guaidó, triggered another series of cases. Guaidó, as opposition leader and President of the Venezuelan legislature, assumed the Venezuelan Presidency in 2019 after Maduro refused to hold free and fair elections. The United States recognized Guaidó, leading to two separate regimes both claiming to represent Venezuela in many contexts. This situation resulted in legal disputes over Venezuelan property in the U.S., including ownership over oil-distributor CITGO, which is based in the United States. And cases have proliferated, with nearly half a dozen claims filed in Delaware, Texas, and Louisiana. These cases have put U.S. courts in the difficult position of deciding whether Guaidó or Maduro has standing to sue. But despite U.S. action to recognize Guaidó and even to issue indictments against Maduro, Venezuela's dictatorial regime continues to litigate across the country and in other foreign courts.

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[23] *Id*. at 879.

[24] Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 917 (2011).

[25] Defendant Muhammed Fethullah Gülen's Memorandum of Law in Support of His Motion for Rule 11 Sanctions Against Plaintiffs & Their Counsel at 3, 13, Ateş v. Gülen, 2016 WL 3568190 (No. 15-cv-2354).

- Importantly, Russia has been one of the most prolific foreign authoritarian governments to take advantage of U.S. courts.[26] Since around 2004, Russian proxies have filed several cases against dissidents and Putin critics. Some of these cases involve enforcement of foreign awards against dissident politicians, bankruptcy disputes, and discovery requests for foreign proceedings that "[w]ere part of a coordinated effort to use the US courts to harass and further extort assets" from opponents.[27] In one case, Putin's attempt to expropriate a Russian alcohol manufacturer included "fabricated criminal charges" against the owner, extradition requests, and trademark infringement cases filed in U.S. court.[28] The Atlantic Council called some of these cases an orchestrated Russian effort to "exploit[] US courts by pursuing superficially legitimate lawsuits with a two-part purpose: perpetrating global harassment campaigns against the Kremlin's enemies, while seeking to enrich themselves through bad faith claims made possible by the Russian state's abuse."[29] Some of these cases have led to protracted struggles in both federal and state court, including extensive discovery and claims by a state judge that there was a "blatant misuse of the federal forum."[30] Two cases involved defamation claims by three Russian oligarchs against BuzzFeed News and Christopher Steele over the Steele Dossier.

Again, it's difficult to measure the importance of these cases but their potential impact cannot be overstated. The fact that there are dozens of such claims likely hides their impact on defendants and other related parties. These claims may be most significant not because of each case's outcome on the merits, but because of litigation's chilling effect on dissidents and journalists. Even a single defamation claim against the *Wall Street Journal* or a tort suit against a dissident in U.S. court sends a powerful message to all would-be dissidents or journalists: even if you flee to the United States we can continue to harass you or sue you there. And that is why it also does not matter whether these foreign dictators are winning these claims on the merits or not. The fact that they have easy access to court is itself a victory for their regimes and a defeat for their opponents.

III. Foreign Dictators as Plaintiffs and Solutions that Would not Work

There are currently no straightforward legal tools for defendants to quickly defeat claims by foreign dictators. First, the Foreign Sovereign Immunities Act does not address the context of foreign governments as plaintiffs. It provides only for a counterclaim exception so that defendants can file claims against a foreign country. But it otherwise provides no help at all for defendants.

Second, current tools in the judicial arsenal are insufficient and often inapplicable to these cases. The main instrument to deter and punish frivolous suits comes from Federal Rule of Civil Procedure 11, which allows a federal judge to sanction attorneys that bring harassment claims. But the standard for Rule 11 violations is too high and the rule is not fit for a situation when a foreign country is involved because judges may not want to punish foreign sovereigns without explicit

[26] *See* ANDERS ÅSLUND, ATL. COUNCIL, RUSSIA'S INTERFERENCE IN THE US JUDICIARY 24 (2018), https://perma.cc/9RVS-32UZ.
[27] *Id*. at 18.
[28] *Id*. at 17.
[29] *Id*. at 23–24.
[30] Avilon Auto. Grp. v. Leontiev, No. 656007/16, 2017 WL 4422593, at *4 (N.Y. Sup. Ct. Oct. 05, 2017), *rev'd*, 91 N.Y.S.3d 379 (N.Y. App. Div. 2019).

Congressional authorization.[31] Moreover, these sanction requests often come at too late a stage in litigation, they force defendants to incur substantial legal costs, and they do not sufficiently penalize plaintiffs. Because these tools are part of the judicial arsenal, they also lack the Congressional and executive imprimatur necessary for a situation in which foreign sovereigns are involved.

Third, courts cannot easily discriminate against dictatorships because of judicial administrability and separation of powers pressures. Courts may need to decide on a case-by-case basis whether a dictatorship deserves equal treatment or not, bumping heads against the State Department. Courts may also be forced to evaluate foreign policy consequences of dictator-related decisions, weakening deference to the executive. There is simply no easy way for courts to administer a categorical anti-dictatorship standard. Even setting aside fundamental concerns with separation of powers, dictatorships may not be the right category to target. The problem with dictatorial acts is that they fundamentally challenge basic human rights and liberties. But democratic governments can do that too. That is why U.S. courts have previously refused to enforce libel awards from the United Kingdom. Judging all dictatorships as different from democratic governments for purposes of all claims would also be substantively overinclusive. There is no need to prevent dictatorships from litigating nonpolitical claims like contract disputes or embassy hit-and-run accidents. Lastly, forcing U.S. courts to distinguish between friendly and unfriendly dictatorships, as well as among the different shades of authoritarian governments (e.g., hybrid, semiauthoritarian, or competitive authoritarian), would be unfeasible.

These and other functionalist problems discussed below make one conclusion clear: it would be infeasible to categorically discriminate against foreign dictatorships. We should instead judge dictatorships by the types of cases they file and related doctrines.

IV. A Proposed Fix: Foreign Sovereign Anti-SLAPP Statute

To resolve the problem of dictators-as-plaintiffs Congress should make it easier for defendants to dismiss those claims immediately, before costly legal proceedings get underway. The best way to do this is to adopt a statute (or amendment to the FSIA) that subjects the privilege of bringing suit to the robust procedural protections of a federal Anti-SLAPP provision so that defendants can quickly dismiss oppressive political claims.[32]

The fundamental problem with the privilege of bringing suit is that foreign dictators and their proxies can access our courts to harass opponents: Cuba can enforce expropriations; Panamanian and Venezuelan dictators can sue democratic challengers and newspapers; the Chinese communist party, Turkey's Erdogan, and Russia's Putin can file claims against dissidents; and Iran can pursue a variety of objectives in our courts. These claims are often illegitimate because they use judicial

[31] There is also a strong norm in the judiciary against Rule 11 sanctions. *See* Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, __ NW. U. L. REV. __ (forthcoming 2024).

[32] While current anti-SLAPP statutes in many states could apply to these cases, there is a circuit split over whether a federal court can apply a state anti-SLAPP statute. *See e.g.*, La Liberte v. Reid, 966 F.3d 79 (2d Cir. 2020); U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328 (D.C. Cir. 2015). For a further discussion of state and federal interactions in this and other contexts, *see e.g.*, Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019).

methods and manufactured claims to exercise sovereign control beyond national borders, engage in harassment, and pursue purely political aims.[33]

But it turns out that state governments have dealt with an analogous problem in the free speech context: anti-Strategic Lawsuits Against Public Participation statutes. In the 1990s, a few scholars and legislators noticed a worrying trend of lawsuits against private individuals "for speaking out politically."[34] In the most worrisome cases, large organizations seemed to be suing individuals for exercising their freedom of speech in contexts like "testifying against real estate development at a zoning hearing, complaining to a school board about unfit teachers, or demonstrating peacefully for or against government actions."[35] These so-called strategic lawsuits against public participation ("SLAPP") claims are fundamentally about intimidating and imposing costs on defendants. Superficially, the claims vary in their substance, dressed up as defamation, business torts, or civil rights suits. But the proliferation of SLAPP claims present a significant challenge to the First Amendment and political speech. This is true even if plaintiffs lose most cases because they impose significant litigation costs on defendants. As Professor Pring noted, "SLAPPs send a clear message: that there is a 'price' for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings."[36]

The potential for SLAPP chilling effects forced state legislatures into action. States like California, Washington, Oregon, Texas, and Nevada quickly enacted so called anti-SLAPP statutes to provide a "quick and inexpensive" way for defendants to move to dismiss claims before protracted litigation sets in.[37] Most of the statutes allow defendants to demonstrate that they are being sued for "exercising . . . constitutional right[s]," usually freedom of speech, political participation, or petitioning.[38] If defendants meet this standard, they trigger an array of procedural protections and shift the burden onto plaintiffs to prove that they will prevail on the merits. The statutes expedite judicial considerations of anti-SLAPP motions (usually within 30 or 60 days), stay all discovery, provide "attorney's fees for prevailing defendants," allow for immediate appeals, and even provide for penalties for filing the claims as well as "any additional relief to deter repetition of the conduct and comparable conduct."[39] And these statutes are widely used, including in at least 300 to 450 filings per year in the state of California alone.[40]

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[33] This is analogous to what used to be known as "lawfare."

[34] Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385 (1988); George W. Pring, *Intimidation Suits Against Citizens: A Risk for Public Policy Advocates*, 7 NAT'L L. J. 16 (1985).

[35] Laura Long, *SLAPPing Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right to Petition*, 60 OKLA. L. REV. 421 (2007).

[36] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation* 7 PACE ENV'T L. REV. 3, 6 (1989).

[37] Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 735 (2003). Thirty states now have some form of anti-SLAPP statute. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT (2017), https://www.anti-slapp.org/your-states-free-speech-protection/.

[38] Braun, *supra* note 53, at 735.

[39] Tom Wyrwich, *A Cure for A "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 674 (2011).

[40] *See* Thomas R. Burke, *The Annual Roundup of California Anti-SLAPP Appellate Decisions*, DAVIS WRIGHT TREMAINE LLP (Feb. 28, 2020), https://www.dwt.com/blogs/media-law-monitor/2020/02/the-annual-roundup-of-california-antislapp-appella.

Congress should draw on the experience of the states and enact a Foreign Sovereign Anti-SLAPP statute.[41] This statute would mirror state anti-SLAPP laws and would work in two steps.

First, if a defendant is a victim of a political harassment lawsuit by the Chinese government, then the defendant can file a special motion to dismiss the claim. The defendants would allege that a foreign government or its proxy has sued them for political purposes or for exercising rights protected by the U.S. Constitution, either at home or abroad.

Second, if defendants can meet this initial threshold, the burden would shift to the foreign plaintiff to demonstrate that they will prevail on the merits, that they are not attempting to abuse legal process, and, in the case of individuals, that they are not a proxy for a foreign dictatorship. In the meantime, anti-SLAPP procedural protections would kick in.

The statute must address two main definitional problems: (1) what counts as a "political" lawsuit? and (2) what counts as a proxy of a foreign government? On the first question, the statute can draw from current anti-SLAPP standards, the political exception to extradition, and the immigration law standards for political asylum.

Courts in the extradition context consider whether a foreign government has charged a defendant with a crime that is "political in nature."[42] So called "pure political" offenses involve crimes "like treason, sedition, and espionage, acts directed against the state but which contain none of the elements of ordinary crime."[43] "Relative" political offenses involve common crimes that are "so connected with a political act that the entire offense is regarded as political."[44] This latter offense, in turn, depends on the existence of a "political disturbance" and an offense that was incidental to it.[45] This standard is still overly narrow and hinges on "violent" uprisings.

An even better model is the political asylum standard, where an applicant "must demonstrate that he faces persecution on account of . . . political opinion."[46] Applicants satisfy this by showing that a foreign government harmed them for holding a political opinion, including by participating in "act[s] against the government" or protests.[47] And applicants only have to show that holding a political opinion was "one central reason" for the mistreatment or persecution.[48] There are thousands of asylum decisions expounding on this standard, showing that courts are comfortable defining the existence of "political" acts and subsequent persecution.

These doctrines and case law provide a good starting point for a foreign sovereign anti-SLAPP statute. A pure political lawsuit in the United States results when the defendant is simultaneously sued civilly in U.S. courts *and* prosecuted abroad for alleged crimes directed against the foreign state. But the statute should go much further. In dictatorships, political dissidents can oppose the

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[41] Such a statute would, in effect, be the civil equivalent to the political exception to extradition discussed above. A few groups, including the ABA, have proposed a federal anti-SLAPP for all claims. *See, e.g.*, AMERICAN BAR ASSOCIATION RESOLUTION 115 (August 6–7, 2012), http://www.anti-slapp.org/wp- content/uploads/2012/08/aba.pdf.
[42] Venckiene v. United States, 929 F.3d 843, 855 (7th Cir. 2019).
[43] *Id*. at 854.
[44] *Id*. at 854.
[45] *Id*. at 854–56.
[46] Kumar v. Sessions, 755 F. App'x 610, 611 (9th Cir. 2018).
[47] Zhiqiang Hu v. Holder, 652 F.3d 1011, 1017 (9th Cir. 2011).
[48] *Id*.

ruling regime through public acts that are closer to the political asylum standard of persecution based on a "political opinion." Therefore, relative political lawsuits in the United States result when there is evidence that the defendant opposed a foreign regime through a legitimate public act—an exercise of free speech under the U.S. Constitution, including petitions, peaceful protests, commercial decisions, or statements to local and foreign press—and was thereafter sued in U.S. courts. Crucially, just like in the asylum context, a defendant would only need to show that a political opinion was "at least one central reason" for the civil lawsuit in the United States.[49] This standard would resolve the problem of proxy plaintiffs filing facially legitimate complaints that are also partially motivated by political persecution abroad.

The statute should also explicitly address the problem of proxies suing to promote the interests of foreign governments. The statute here can draw on analogous inquiries that courts conduct when they pierce the veil of corporate structures, analyze who the "real party in interest" is in a federal case, or scrutinize whether a legal party is merely an agent for someone else.[50]

Defendants would first have the burden to show that a foreign individual is merely a proxy of a foreign government. The statute should err on the side of a broad definition because, at worst, even if it is overinclusive it is merely raising the standards on innocent foreign plaintiffs to file lawsuits in U.S. courts. So there should be a presumption that state-owned entities and government officials (current or former) are proxies of a foreign government, even if they claim to be suing in their individual capacity. Same, too, for foreign oligarchs closely linked to autocratic regimes. For entities that appear independent, courts should focus on whether a foreign country is the primary beneficiary of the lawsuit or exercises ultimate control over the plaintiff, lawyers, or the legal claim. If met, the burden would shift to plaintiffs to prove otherwise, by presenting evidence that they are not a proxy for a foreign government.

Congress should legislate a few other important additions to the statute to adapt it to the foreign sovereign context. First, the statute should explicitly disable the benefits provided by comity doctrines like act of state. Without such a provision, foreign dictatorships could still enforce their objectives in U.S. court. Second, the statute should explicitly apply to extraterritorial conduct in order to comport with recent case law. Third, Congress should explore the possibility that if a foreign sovereign is found to have abused access to U.S. courts to pursue political dissidents, a regime loses the privilege of bringing suit for a specified period of time.

A Foreign Sovereign Anti-SLAPP statute would prevent many of the most egregious cases filed by foreign authoritarian governments. It would have stopped Castro's case against the sugar company in *Sabbatino*, China's array of cases against corruption suspects, Turkey's claim against Gulen, Russia and Venezuela's many claims against dissidents, and Noriega's claims. Such a statute would be a boon for democracy around the world.

But even if Congress does not adopt such a statute, courts can still take smaller steps to move towards such an approach. In the face of political lawsuits by foreign authoritarian governments or proxies, U.S. courts could use existing tools—from inherent authority, forum non conveniens,

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[49] *Id*.

[50] *See, e.g.*, 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1554 (3d ed. 2002) (describing how to raise an objection to plaintiff's status as the real party in interest).

malicious prosecution or abuse of process claims, all the way to international comity abstention—to avoid these cases. Courts should focus on the problem of abuse of process and analogize to the political exception to extradition and political asylum.

Conclusion

Ultimately, the problem I highlight is a pragmatic one: the manipulation or abuse of our legal system. Dictators are using their privileges—as recognized by our democratic institutions—to advance their authoritarian agendas. It is self-evident that U.S. courts should not serve the interests of foreign dictatorships if they can avoid it. Liberal theorists from Karl Popper to John Rawls have defended a democracy's right to resist having its institutions employed for illiberal purposes.[51] Indeed, under a Kantian view of international law, democracies are not obligated to extend comity to tyrannical states because dictators do not represent their people so "they cannot create obligations for their subjects."[52] Without necessarily embracing that view, the problem is that the foreign relations doctrines mentioned above—the privilege of bringing suit, act of state, FSIA, and related immunities—benefit all sovereigns equally, including those governed by dictatorships. So then the question becomes whether domestic law requires extending wide access to court to foreign dictators. If it does not, courts can and should discard it.

Suffice it to say, for now, that foreign dictators challenge the goals and foundations of both a democratic polity (and its courts), and the underlying justifications for international comity. In the United States, our courts have defended international comity to foreign sovereigns because it strengthens a community of nations that wish to promote cooperation, free commerce, and reciprocal treatment. But even if most modern autocracies are not autarkic, authoritarian governments are not reliable promoters of reciprocal judicial access. Dictators often bar our citizens from their court systems and treat U.S. companies unfairly vis-a-vis their domestic companies.

While foreign dictators (or monarchs) have been litigants in our courts since the beginning of the Republic, there is no need to grant them the current level of access. Foreign dictators have no right to benefit from access to U.S. courts in order to pursue political goals. Doctrines like act of state, the privilege of bringing suit, or official immunity can adapt to a modern world under threat from democratic regression. U.S. courts and Congress should take up the baton and, in a careful and targeted way, recalibrate international comity in these cases.

[51] JOHN RAWLS, A THEORY OF JUSTICE 217 (1971); Karl Popper, THE OPEN SOCIETY AND ITS ENEMIES (Ed. 1995); Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI. REV. 417, 638 (1937); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).
[52] Fernando Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 89 (1992).