

SAMANTAR AND THE FUTURE OF FOREIGN OFFICIAL IMMUNITY

by
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The U.S. Supreme Court's recent decision in Samantar v. Yousuf resolved a long-standing issue of U.S. law by determining that the Foreign Sovereign Immunities Act does not apply to claims brought against individual foreign government officials, as opposed to the foreign government itself. The Court also said, however, that individual officials might instead be entitled to immunity under common law principles of foreign sovereign immunity. In remanding the case for a determination of that question, the Court effectively required the executive branch to clarify the circumstances in which such immunity might apply to visiting officials of foreign government for actions taken by them on behalf of their governments.

This Article examines the background and reasoning of the Samantar decision as well as the subsequent determination of the U.S. government to deny immunity in the circumstances of that case. It contrasts that determination with a submission by the executive branch in a separate case recommending that limited testimonial immunity for a former President of Columbia. In this developing area of the law, these two submissions presumably reflect the executive branch's considered view of how relevant legal principles of customary international law should be applied in future cases as well. The Article raises a number of questions about the practical as well as theoretical implications of the government's position.

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I. INTRODUCTION

For many years, determining the immunity of visiting foreign officials in the United States has posed several difficult legal challenges. Unlike duly accredited diplomats or consular officers, visiting officials of foreign governments generally do not benefit from the protections afforded by multilateral treaties, and only the most senior can directly claim the protection of customary international law rules concerning the immunity of heads of state or government. So when an official of a foreign government comes to the United States to meet with counterparts in our government, to consult members of her own embassy in Washington, or otherwise to conduct official business (for example, at the headquarters of the United Nations or the Organization of American States), questions can arise about the extent to which that individual might be subject to the civil or criminal jurisdiction of U.S. courts for acts taken in her official capacity.

Prior to the enactment of the 1976 Foreign Sovereign Immunities Act (FSIA),¹ these questions were decided by the executive branch—specifically, the Department of State—on the basis of the rules and principles of customary international law.² For these purposes, visiting foreign officials were typically assimilated to the states they represented and thus accorded the same immunity as the foreign states themselves.³ The main purpose of the FSIA, of course, was to codify the customary international law rules governing the immunity of foreign states (including their governments, agencies, and instrumentalities) and to remove the decision-making from the executive branch to the judiciary.⁴ However, the FSIA did not directly address the situation of individual foreign officials doing their governments' business in the United States.⁵ Some courts interpreted the statute in light of prior practice and applied its rules to cases involving individual officials; others did not.⁶

The U.S. Supreme Court recently resolved the resulting circuit split in *Samantar v. Yousuf*, finding no evidence that Congress had intended to codify the immunity to which foreign officials might be entitled.⁷ Yet this

¹ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–1611 (2006)).

² Christopher D. Totten, *Head-of-State and Foreign Official Immunity in the United States After Samantar: A Suggested Approach*, 34 FORDHAM INT'L L.J. 332, 332, 338 (2011).

³ *Id.* at 336–37.

⁴ *Samantar v. Yousuf*, 130 S. Ct. 2278, 2285 (2010); Totten, *supra* note 2, at 339–40.

⁵ *See Samantar*, 130 S. Ct. at 2285.

⁶ *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 81–83 (2d Cir. 2008).

⁷ *Samantar*, 130 S. Ct. at 2291. In the late 1980's and early 1990's, General Mohamed Ali Samantar served as defense minister and prime minister in the Siad Barre regime in Somalia. He is accused of responsibility for various atrocities, including summary execution, rape, torture, and imprisonment, committed during that time by government agents in Somalia. Suit was brought by Somalis in U.S. court under the Alien Tort Statute and the Torture Victims Protection Act. *Id.* at 2282.

decision did not fully resolve the matter. Even though the Court held that “the FSIA does not govern [an individual’s] claim of immunity,”⁸ it also said that a suit against a foreign official might nonetheless be precluded by principles of “foreign sovereign immunity under the common law.”⁹ Moreover, the Court emphasized that there was no reason to believe that Congress meant to eliminate the State Department’s traditional role in making those determinations.¹⁰ The case was thus remanded for a determination by the lower court on whether Samantar might be entitled to immunity under the common law.¹¹

The Supreme Court’s decision has already been the subject of considerable discussion and debate.¹² Little has been written so far about subsequent developments in the *Samantar* litigation. On February 14, 2011, the government filed a “statement of interest” in district court conveying its determination that Samantar “enjoys no claim of official immunity from this civil suit.”¹³ That submission emphasized two factors: (1) Samantar’s status as a “former official of a state with no currently recognized government to request immunity on his behalf”; and (2) U.S. residents like Samantar “ordinarily should be subject to the jurisdiction

⁸ *Id.* at 2292.

⁹ *Id.*

¹⁰ *Id.* at 2291.

¹¹ *Id.* at 2292–93.

¹² See, e.g., Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213; Sévrine Knuchel, *Samantar v. Yousuf: Narrowing the Prospects for Human Rights Litigation Against Foreign Officials?*, 11 HUM. RT. L. REV. 152 (2011); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669 (2011); Totten, *supra* note 2; Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915 (2011). See also Erika M. Lopes, *Seeking Accountability and Justice for Torture Victims: The Hurdle of the Foreign Sovereign Immunities Act in Suing Foreign Officials Under the Torture Victims Protection Act*, 6 SETON HALL CIRCUIT REV. 389 (2010); Heather L. Williams, Comment, *Does an Individual Government Official Qualify for Immunity Under the Foreign Sovereign Immunities Act?: A Human Rights-Based Approach to Resolving a Problematic Circuit Split*, 69 MD. L. REV. 587 (2010).

¹³ Statement of Interest of the United States of America at 7, *Yousuf v. Samantar*, No. 1:04 CV 1360 (LMB) (E.D. Va. Feb. 14, 2011) [hereinafter *Samantar* Statement of Interest]. Typically, when the government wishes to inform the court that it has made a determination that an individual is entitled to immunity, without either intervening as a party or taking sides on an issue otherwise to be decided by the court, the submission is generally denominated a “suggestion of immunity.” By contrast, when the views of the government are offered at the trial level in any case to which it is not a party, they are typically submitted in a “statement of interest.” The specific label, however, is not necessarily determinative. See generally 28 U.S.C. § 517 (2006); *Leading Cases: Foreign Sovereign Immunities Act*, 118 HARV. L. REV. 466, 466–76 (2004). Under 28 U.S.C. § 517, “[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”

of our courts, particularly when sued by U.S. residents.”¹⁴ The following day, District Judge Leonie Brinkema issued an order noting that “[t]he government has determined that the defendant does not have foreign official immunity,” and “[a]ccordingly, defendant’s common law sovereign immunity defense is no longer before the Court.”¹⁵

This Article reviews the background and rationale of the Supreme Court’s decision as well as the government’s subsequent statement of interest in *Samantar*, and argues that while the former was entirely correct, the latter is seriously flawed and risks complicating an area of law the Supreme Court endeavored to clarify. It also considers a statement of interest subsequently filed by the government in a different proceeding regarding former Columbian President Alvaro Uribe’s immunity, which provides additional perspectives on the issues addressed in *Samantar*.

II. THE DOCTRINE OF SOVEREIGN IMMUNITY

The immunity of foreign officials from suit in U.S. courts is rooted in the customary international law doctrine of foreign sovereign immunity. Thus, questions of foreign official immunity must be understood, in the first instance, against the general background of sovereign immunity in U.S. law. Until the mid-twentieth century, the United States (like most nations) followed an “absolute” theory of foreign sovereign immunity.¹⁶ Under this approach, a foreign government could not, without its consent, “be made a respondent in the courts of another sovereign.”¹⁷

The classic formulation was given by Chief Justice Marshall in 1812 in *The Schooner Exchange v. McFaddon*, when the Court held that a French vessel was exempt from U.S. jurisdiction as “a public armed ship, in the service of a foreign sovereign.”¹⁸ The principle of sovereign immunity, he said, flows necessarily from the “perfect equality and absolute independence of sovereigns.”¹⁹ As a matter of comity, members of the international community had implicitly agreed to waive the exercise of their domestic jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign.²⁰ Moreover, the “wrongs committed by a sovereign” generally raise “questions of policy [rather] than of law” and hence “are for diplomatic, rather than legal discussion.”²¹ Important to Chief Justice

¹⁴ Samantar Statement of Interest, *supra* note 13, at 7.

¹⁵ Order, *Yousuf v. Samantar*, No. 1:04cv1360 (LMB/JFA) (E.D. Va. Feb. 15, 2011).

¹⁶ Williams, *supra* note 12, at 589–92. See also Letter from Jack B. Tate, Acting Legal Adviser of the Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), in 26 DEP’T. ST. BULL. 984, 984 (1952) [hereinafter Tate Letter].

¹⁷ See *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356 (2007) (quoting Tate Letter, *supra* note 16, at 984).

¹⁸ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 147 (1812).

¹⁹ *Id.* at 137.

²⁰ *Id.* at 136.

²¹ *Id.* at 146.

Marshall's reasoning, but often overlooked, was his emphasis on the fact that although the vessel in question was physically within the United States, the assertion of domestic jurisdiction over the foreign sovereign would in its effect be extraterritorial: "This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects."²²

In 1952, taking into account the increasingly common involvement of foreign governments in ordinary commercial activity, the U.S. Department of State adopted a "restrictive" rule of foreign sovereign immunity.²³ Under this approach, initially set forth in the so-called "Tate Letter," foreign states or governments continued to enjoy immunity for their sovereign acts but not for their commercial activities.²⁴ Application of this new rule, while progressive, was not entirely without difficulty, for three reasons. First, distinguishing between sovereign acts (*acta jure imperii*) and commercial acts (*acta jure gestionis*) was sometimes difficult.²⁵ Second, in making that decision, the Department of State necessarily had to take into account a variety of factors beyond the strictly legal issues, including diplomatic considerations.²⁶ And third, the Executive did not always communicate a decision to the courts, leaving the latter on occasion to determine the issue for themselves, presumptively on the basis of the principles the executive branch would have applied had it reached a decision.²⁷ "Not surprisingly, the governing standards were neither clear nor uniformly applied."²⁸

When they were made, however, decisions on foreign sovereign immunity were made by the Department of State on the basis of its interpretation of the principles of customary international law. These decisions were conveyed to the courts in "suggestions of immunity," and almost without exception they were accepted by the courts as

²² *Id.* at 137.

²³ *Slade v. United States of Mexico*, 617 F. Supp. 351, 355 n.10 (D.D.C. 1985).

²⁴ See Tate Letter, *supra* note 16, at 984 (1952). See generally *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487–88 (1983); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 823–24 (9th Cir. 1987).

²⁵ See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2nd Cir. 1971) ("This proposed distinction between acts which are *jure imperii* (which are to be afforded immunity) and those which are *jure gestionis* (which are not), has never been adequately defined, and in fact has been viewed as unworkable by many commentators."); HAZEL FOX, *THE LAW OF STATE IMMUNITY* 502 (2d ed. 2008) (noting that the terms "provide no certain answer when applied to difficult cases.").

²⁶ *Verlinden B.V.*, 461 U.S. at 487.

²⁷ *Cf. Berizzi Bros. Co. v. S.S. Persaro*, 271 U.S. 562, 569–76 (1926) (applying immunity principles). See also *Ex parte Republic of Peru*, 318 U.S. 578, 587–89 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74–75 (1938).

²⁸ *Verlinden B.V.*, 461 U.S. at 488.

dispositive.²⁹ In *Ex parte Republic of Peru*, for example, the Supreme Court said:

[C]ourts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations. . . . [C]ourts are required to accept and follow the executive determination that the vessel is immune. . . . Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations.³⁰

The Supreme Court made clear in *Republic of Mexico v. Hoffman* that “[i]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”³¹

This judicial deference is rooted in the separation of powers. Under the Constitution, the Executive is “the guiding organ in the conduct of our foreign affairs.”³² Given the Executive’s leading foreign policy role, it has long been “an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination” on questions of foreign sovereign immunity.³³

In *Spacil v. Crowe*, for example, the Fifth Circuit held that the State Department’s determination to recognize a claim of foreign sovereign immunity was binding on the judiciary. “When the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question.”³⁴ Two concerns

²⁹ See, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320–21 (S.D.N.Y. 1960).

³⁰ *Ex parte Republic of Peru*, 318 U.S. at 588. See also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945) (“This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings.”).

³¹ *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). See also *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358–59 (2d Cir. 1964) (holding that, where no suggestion of immunity is received, “the court must decide for itself whether it is the established policy of the State Department to recognize claims of immunity of this type”).

³² *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). See U.S. CONST. art. II, § 3 (assigning to the President the authority to “receive ambassadors and other public ministers”).

³³ *Hoffman*, 324 U.S. at 36. See also *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 198 n.4 (5th Cir. 1984) (“*Schooner* rested on the theory of separation of powers, under which potentially embarrassing foreign affairs were the domain of the executive branch.”).

³⁴ *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

underpinned this decision: (1) a clear appreciation of the foreign policy consequences such matters often entail; and (2) an equally compelling concern for the separation of powers principles which are therefore implicated. "The national interests that compel us to permit the executive unreviewable discretion to determine that sovereign immunity is necessary to foreign policy compel us to comply with that determination with great dispatch."³⁵

At issue in that case was the validity of a writ attaching a vessel belonging to a corporation owned by the Government of Cuba.³⁶ The writ had been issued by the United States District Court for the District of the Canal Zone, where the vessel was located.³⁷ Subsequently, the Department of State formally determined that the vessel was immune from U.S. jurisdiction "for the purpose of arrest, attachment, suit, or any other legal process."³⁸ On the basis of that determination, the court of appeals ordered the vessel's release, noting that "[f]rom the early days of the Republic to the present, the United States judiciary has bowed to suggestions by the executive that certain suits against foreign sovereigns should not be entertained in United States courts."³⁹

The precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch. Moreover, they have done so with no further review of the executive's determination. The Supreme Court in *Ex parte Peru* declared that the State Department's suggestion must be accepted by the judiciary as "a conclusive determination" that continued retention of jurisdiction would jeopardize foreign relations. The Fourth Circuit was even more pointed in *Rich v. Naviera Vacuba, S.A.* In the face of these authorities, the plaintiffs ask us to

³⁵ *Id.* at 622. In *Ex parte Republic of Peru*, the Supreme Court similarly emphasized that "courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations" and that "our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." 318 U.S. at 588-589.

³⁶ *Spacil*, 489 F.2d at 615. One vessel (The Playa Larga), owned by a Cuban-government-owned corporation, transported raw sugar from Cuba to Valparaiso, Chile, but due to a military coup in the latter, had left port precipitously and returned to Cuba before fully unloading its cargo. Another vessel (the *Imias*), owned by the same government-owned corporation, was located and attached in the Canal Zone by the Chilean consignee of the Playa Larga's cargo, which sought recovery there for breach of contract. *See generally* Monroe Leigh, Editorial Comment, *Sovereign Immunity—The Case of the "Imias"*, 68 AM. J. INT'L L. 280 (1974).

³⁷ *Spacil*, 489 F.2d at 615.

³⁸ *Id.*

³⁹ *Id.* at 616 (citing, *inter alia*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971); *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24 (4th Cir. 1961)).

depart from the historic practice of granting unquestioned discretion to the executive. We decline to do so.⁴⁰

In 1976, Congress altered the U.S. approach to sovereign immunity both substantively and procedurally. In adopting the Foreign Sovereign Immunities Act,⁴¹ it codified the restrictive rule of foreign sovereign immunity and established a comprehensive framework for determining whether and when a U.S. court may exercise jurisdiction over a foreign state or its political subdivisions, agencies, or instrumentalities.⁴² By its terms, the FSIA is the sole basis for jurisdiction over a foreign state.⁴³ Foreign states and their political subdivisions, agencies, and instrumentalities are presumptively immune from the jurisdiction of U.S. courts, and that immunity can only be overcome if one of the statutory exceptions to immunity applies.⁴⁴ The most significant of those exceptions, of course, is the “commercial activities exception” under 28 U.S.C. § 1605(a)(2), which essentially codifies the restrictive theory of immunity. The statute also changed existing U.S. practice by transferring responsibility for making immunity decisions in specific cases from the Executive to the judicial branch.⁴⁵

By its terms, however, the FSIA did not answer the question of whether it applied to suits in U.S. courts against individual foreign officials for actions taken within the scope of their official duties. This statutory silence gave rise to competing arguments that the statute had been intended to deprive individual foreign officials of any immunity,⁴⁶ or that it necessarily left the question of their immunity to pre-existing (traditional) rules and procedures,⁴⁷ or that it was properly interpreted as applying *sub silentio* to individual officials.⁴⁸ As a result, courts reached differing conclusions about whether the statute covers only states and their agencies or instrumentalities, or extended its protections to individual officials as well.

On the one hand, a line of decisions emerged holding that suits against individual foreign officials should be considered and decided within the FSIA’s statutory framework. In *Chuidian v. Philippine National Bank*, for example, the Ninth Circuit concluded that Congress could not have intended a “bifurcated approach to sovereign immunity” under which decisions as to the immunity of foreign states (and their agencies or instrumentalities) would be made by the courts, while questions

⁴⁰ *Id.* at 617 (footnotes and citations omitted).

⁴¹ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

⁴² *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610, 612 (1992).

⁴³ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

⁴⁴ 28 U.S.C. § 1604 (2006); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

⁴⁵ 28 U.S.C. § 1602.

⁴⁶ *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1099, 1101 (9th Cir. 1990).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1099.

concerning the immunities of individual foreign officials would continue to be made by the Executive.⁴⁹ In so ruling, the court rejected the government's contention that the statute had not changed pre-existing practice concerning foreign official immunity.⁵⁰ At the same time, it rejected Chuidian's argument that Congress must have intended to abrogate immunity for foreign officials entirely, thereby allowing unrestricted suits against individual foreign officials acting in their official capacities.⁵¹ Neither proposition made sense to the court.

Instead, the court concluded, Congress must have intended to transfer foreign official immunity determinations to the courts along with the other issues of sovereign immunity. "Nowhere in the text or legislative history does Congress state that individuals are not encompassed within the section 1603(b) definition" ⁵² Rather, there is "every indication . . . that Congress intended the Act to be comprehensive."⁵³ The court thus read the statute to cover an individual foreign official on the same basis as an agency or instrumentality of a foreign state.⁵⁴ In the court's view, such an interpretation was consistent with the general rule that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly," and that in many situations, such litigation represents "only another way of pleading an action against an entity of which an officer is an agent."⁵⁵

In time, a majority of U.S. courts followed *Chuidian*, applying the FSIA in suits against foreign officials for acts taken in their official capacities.⁵⁶ For example, in *Belhas v. Ya'alon*, the D.C. Circuit held that former Israeli General Moshe Ya'alon was entitled to sovereign immunity under the FSIA against claims by civilian bombing victims pursuant to the

⁴⁹ *Id.* at 1102–03.

⁵⁰ *Id.* at 1101–02.

⁵¹ *Id.* "Chuidian, a Philippine citizen, [had] sued Daza, a Philippine citizen and an official of the Philippine government, after Daza instructed the Philippine National Bank . . . to dishonor a letter of credit issued by the Republic of the Philippines to Chuidian." *Id.* at 1097. Accepting Chuidian's argument, the court said, "would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly. It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment." *Id.* at 1102.

⁵² *Id.* at 1101 (emphasis omitted).

⁵³ *Id.* at 1102.

⁵⁴ *Id.* at 1101–03.

⁵⁵ *Id.* at 1101–02 (citing and quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

⁵⁶ See, e.g., *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 83 (2d Cir. 2008); *Guevara v. Republic of Peru*, 468 F.3d 1289, 1305 (11th Cir. 2006); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398–99 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388–89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996).

ATS and the TVPA, based on attacks conducted by the Israeli military in a 1996 skirmish with Hezbollah.⁵⁷

A few decisions diverged from the majority approach. In *Enahoro v. Abubakar*, for example, seven Nigerian citizen plaintiffs sued General Abubakar (a former member of Nigeria's ruling junta who had served for a year as Nigerian head of state) for complicity in torture and killings committed in Nigeria by the junta that ruled from November 1993 until May 1999.⁵⁸ The district court determined that he was entitled to common-law immunity for the year that he was head of state, but otherwise was not entitled to immunity under the FSIA.⁵⁹ The Seventh Circuit agreed. It concluded, based on the statutory language, that the definitions of "foreign state" and "agency or instrumentality of a foreign state" could not be read to encompass individuals.⁶⁰ The FSIA thus did not apply to General Abubakar and could not confer jurisdiction over the case.⁶¹ In consequence, the litigation could proceed against him under the Alien Tort Statute⁶² and the Torture Victims Protection Act.⁶³

Similarly, in *Matar v. Dichter*, the Second Circuit affirmed the judgment of a district court granting immunity, but avoided deciding whether the FSIA applied to former foreign government officials.⁶⁴ The district court had concluded (in line with the then-prevailing view) that for purposes of the FSIA, the defendant was entitled to FSIA immunity as an "agency or instrumentality" of the State of Israel.⁶⁵ The case involved claims against the former Director of the Israeli General Security Service, Avraham Dichter, for his role in a 2002 military attack in the Gaza Strip.⁶⁶ That attack allegedly hit an apartment building where Israeli intelligence had determined Saleh Mustafa Shehadeh, a leader of the armed wing of the Hamas terrorist organization, to be at the time. Shehadeh was killed, and a substantial number of civilians were also killed or wounded.⁶⁷ The surviving victims of the attack sought to hold Dichter personally liable for

⁵⁷ Belhas v. Ya'alon, 515 F.3d 1279, 1281–82 (D.C. Cir. 2008).

⁵⁸ Enahoro v. Abubakar, 408 F.3d 877, 878–79 (7th Cir. 2005).

⁵⁹ *Id.* at 879.

⁶⁰ *Id.* at 881–882.

⁶¹ *Id.* at 882.

⁶² 28 U.S.C. § 1350 (2006).

⁶³ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as a note after 28 U.S.C. § 1350 (2006)). *See also* Wei Ye v. Jiang Zemin, 383 F.3d 620, 625 (7th Cir. 2004) (concluding that the FSIA did not apply to heads of state).

⁶⁴ 563 F.3d 9, 13–15 (2d Cir. 2009).

⁶⁵ *Matar v. Dichter*, 500 F. Supp. 2d 284, 291, 296 (S.D.N.Y. 2007). In reaching its decision that the FSIA applied, the district court gave weight to the absence of allegations suggesting that the director's conduct was of a personal nature and relied on a letter from the Israeli state department asserting that anything the director did in connection to the bombing incident was done in furtherance of his official duties. *Id.* at 291.

⁶⁶ *Id.* at 286.

⁶⁷ *Id.*

those casualties by suing in New York under the Alien Tort Statute and the Torture Victims Protection Act.⁶⁸ At the time of the litigation, Dichter was no longer a governmental official.⁶⁹

On appeal, the Second Circuit presaged the Supreme Court's decision in *Samantar* that there was "no reason to believe" that in adopting the FSIA "Congress . . . wanted to eliminate . . . the State Department's [traditional] role in determinations regarding individual official immunity."⁷⁰ The sensitivity of such decisions, the Second Circuit noted, had been recognized as long ago as Chief Justice Marshall's opinion in *The Schooner Exchange*, when he said that because such cases typically raise "questions of policy [rather] than of law," they were most appropriate "for diplomatic, rather than legal discussion."⁷¹ As a result, courts have generally deferred to the decisions of the executive branch on "whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."⁷²

The FSIA is a statute that "invade[d] the common law" and accordingly must be "read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," Common law recognizes the immunity of former foreign officials. . . . Accordingly, even if Dichter, as a former foreign official, is not categorically eligible for immunity under the FSIA (a question we need not decide here), he is nevertheless immune from suit under common-law principles that pre-date, and survive, the enactment of that statute.⁷³

Finally, in *Yousuf v. Samantar*,⁷⁴ the Fourth Circuit explicitly rejected the *Chuidian* approach. Mohamed Ali Samantar was previously a high-level official in the Somali government, a former Prime Minister and Defense Minister.⁷⁵ Several natives of Somalia sought damages against him under the Torture Victim Protection Act and the Alien Tort Statute, alleging that he had been responsible for acts of torture or other abuses in violation of international law committed at the hands of Somali soldiers or other government agents under his overall command.⁷⁶ Without admitting the allegations, Samantar argued that the actions

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010); *see Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009).

⁷¹ *Matar*, 563 F.3d at 13 (alteration in original) (quoting *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812)).

⁷² *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

⁷³ *Matar*, 563 F.3d at 13–14 (citations omitted).

⁷⁴ 552 F.3d 371 (4th Cir. 2009).

⁷⁵ *Id.* at 374.

⁷⁶ *Id.* at 373.

alleged were official in nature and that he was therefore entitled to immunity under the FSIA.⁷⁷

Following the majority view, and relying in particular on *Belhas* and *Dichter*, the district court agreed, noting that “[t]he allegations in the complaint clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation.”⁷⁸ The court therefore dismissed the complaint.⁷⁹

The Court of Appeals disagreed, holding that Samantar was not entitled to the benefits of the FSIA because the statute does not apply to individuals.⁸⁰ As a result, that statute could not deprive the district court of jurisdiction.⁸¹ It reversed the lower court’s ruling and remanded the action for further proceedings.⁸² Samantar appealed.

III. THE SAMANTAR DECISION

In *Samantar v. Yousuf*,⁸³ the U.S. Supreme Court addressed and resolved the question of statutory interpretation. The narrow issue before the Court was whether the FSIA provides individual officials of foreign governments with immunity from suit for actions taken in their official capacity.⁸⁴ The Court held that it does not. Unanimously rejecting Samantar’s contention, it said that the FSIA does not govern whether an individual foreign official enjoys immunity from civil suits.⁸⁵

It found that the text, purpose, and history of the Act all make clear that Congress intended to separate the immunity of foreign states and their agencies or instrumentalities on the one hand from the immunities

⁷⁷ *Id.* at 375, 378–79.

⁷⁸ *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *14 (E.D. Va. Aug. 1, 2007). The district court also said: “The factual similarities between the instant action and *Belhas* and *Matar*, however, cannot be ignored. Like the defendants in *Belhas* and *Matar*, Samantar is a retired military leader. Samantar is perhaps entitled to even more deference because he was Minister of Defense, a cabinet level position, and then Prime Minister, during the alleged events. There is also no doubt that Samantar is being sued in his capacity as a former Minister of Defense and Prime Minister.” *Id.* at *11.

⁷⁹ *Id.* at *15.

⁸⁰ *Yousuf*, 552 F.3d at 373.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 130 S. Ct. 2278 (2010).

⁸⁴ *Id.* at 2286 (“The question we face in this case is whether an individual sued for conduct undertaken in his official capacity is a ‘foreign state’ within the meaning of the Act.”).

⁸⁵ *Id.* at 2292. The Court’s decision, written by Justice Stevens, was unanimous. However, Justices Alito, Thomas, and Scalia filed concurring opinions questioning the need for, and propriety of, resorting to legislative history as an interpretive tool in this case. *Id.* at 2293 (Alito, J., concurring), 2293 (Thomas, J., concurring in part and concurring in the judgment), 2293–94 (Scalia, J., concurring in the judgment).

of foreign officials and heads of state on the other.⁸⁶ Only the immunity of the former is addressed by the statute.⁸⁷ As a matter of statutory interpretation, the Court said, nothing in the text of the FSIA itself suggests that the term “foreign state” should be read to include individual officials acting on the state’s behalf or that they were meant to be subsumed within the definition of an “agency or instrumentality of a foreign state.”⁸⁸ Nor does the history or purpose of the Act demonstrate any Congressional intent to “lump individual officials in with foreign states” with regard to immunity issues.⁸⁹ It therefore affirmed the decision of the Fourth Circuit Court of Appeals and thereby resolved a circuit split against the prevailing (*Chuidian*) view.⁹⁰

The decision did not, however, conclusively resolve the question of Samantar’s own amenability to suit, much less the broader issue of foreign officials’ immunity in other circumstances. On the contrary, the Court said that “[a]lthough Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute’s origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.”⁹¹ Noting that “[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted,”⁹² Justice Stevens observed that “[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law.”⁹³ Accordingly, the case was remanded for a determination by the trial court “[w]hether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him.”⁹⁴

The decision thus endorsed the government’s longstanding view, which it had consistently advocated since the FSIA was enacted, that the statute neither conferred nor abrogated immunity for foreign officials and that those questions remain to be determined by application of principles derived from rules of customary international law.⁹⁵ The

⁸⁶ *Id.* at 2292.

⁸⁷ *Id.* at 2289 (“Reading the FSIA as a whole, there is nothing to suggest we should read ‘foreign state’ in § 1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted.”).

⁸⁸ *Id.* at 2286–89.

⁸⁹ *Id.* at 2289–91.

⁹⁰ *Id.* at 2293.

⁹¹ *Id.* at 2292. In so deciding, the Court acknowledged that “the [State] Department has from the time of the FSIA’s enactment understood the Act to leave intact the Department’s role in official immunity cases.” *Id.* at 2291 n.19.

⁹² *Id.* at 2284.

⁹³ *Id.* at 2292.

⁹⁴ *Id.* at 2292–93.

⁹⁵ Brief for the United States as Amicus Curiae Supporting Affirmance at 27, *Samantar*, 130 S. Ct. 2278 (No. 08-1555) [hereinafter Brief for the United States]. The

statute was never intended to govern claims to immunity by foreign government officials regarding their official acts, but addressed only the immunity of foreign states and their agencies and instrumentalities.⁹⁶ The decision also embraced the government's view that in accordance with pre-1976 practice, such decisions fall (at least in the first instance) to the executive branch.⁹⁷ It put questions of foreign official immunity on the same procedural footing as questions involving the immunities of heads of state and government, which had always been determined by the executive branch on the basis of its interpretation of customary international law.⁹⁸

Clearly, the decision regarding statutory interpretation was correct. The text of the FSIA nowhere purports to address the immunity of individual foreign officials. Rather, it speaks only to the immunity of "foreign states" and includes within the definition of "foreign state" any "agency or instrumentality of a foreign state."⁹⁹ The statutory term "agency or instrumentality" was meant to apply only to corporate and other organizational entities and cannot properly be read to include individual officials.¹⁰⁰ This view of the FSIA's text is repeatedly confirmed by its legislative history.¹⁰¹

It is also clear that the Court was on sound ground in concluding that, when it adopted the FSIA, Congress had no intent to supplant the Executive's long-recognized authority and practice of recognizing and defining the immunity of individual foreign officials, as informed by customary international law. Again, the FSIA's legislative history leaves little room to argue that Congress's decision to codify the immunity rules governing foreign states also reflected an intent to cover other immunities. Given the foreign policy sensitivities of such decisions, and the separation of powers issues they generate, Congressional silence could only be interpreted in that fashion. It is precisely on this point that the analysis in *Chuidian* and its progeny was defective. Absent a clear

brief contended that the determination of individual official immunity "is properly founded on non-statutory principles articulated by the Executive Branch," "informed by customary international law and practice," and formally conveyed to the courts. *Id.* at 6, 14.

⁹⁶ *Samantar*, 130 S. Ct. at 2291.

⁹⁷ *Id.*

⁹⁸ See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) ("Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch."). See generally Daniel M. Singerman, Comment, *It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity*, 21 EMORY INT'L L. REV. 413 (2007).

⁹⁹ 28 U.S.C. § 1603(a) (2006).

¹⁰⁰ *Id.* § 1603(b).

¹⁰¹ For example, in clarifying that the FSIA would not affect diplomatic or consular immunity, the House report states that the statute "deals only with the immunity of foreign states." H.R. REP. NO. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620 [hereinafter cited with pagination only to the reprinted version].

statement from Congress, it was wrong to construe the statute as restricting the well-established authority of the executive branch to make those decisions, especially when that authority is constitutionally grounded.

Throughout our history, of course, the executive branch has made the decisions in most cases involving head-of-state and head-of-government immunity, where the applicable principles are also derived from customary international law.¹⁰² Arguably, such cases differ from situations involving diplomatic and consular officials or public international organizations, their officers, employees, and representatives of their member states, where the governing law is provided by relevant self-executing treaties or statutes. However, in those cases as well, and more recently in the case of special-diplomatic-mission immunity, the executive branch has been the determining authority.¹⁰³ In articulating and applying the common-law principles to which the Court referred, the executive branch acts against the backdrop of customary international law as well as an appreciation of the foreign policy context in which the issue arises. It is uniquely positioned (indeed, far better informed than any court) to determine how decisions may affect the government's ability to conduct the foreign relations of the United States, including when and how to assert immunity on behalf of United States officials sued in foreign courts.¹⁰⁴

At the same time, it is important to emphasize that in holding that foreign official immunity is not governed by the FSIA, the Court did not divorce those immunities from the principles of sovereign immunity to which states, and their agencies and instrumentalities, are entitled under the FSIA. The two remain intertwined, in the sense that long-standing principles of sovereign immunity underlie both sets of questions. Indeed, Justice Stevens's opinion took care to point out that "in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity" and that "not every suit can successfully be pleaded against an individual official alone."¹⁰⁵

Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has

¹⁰² See, e.g., *Wei Ye*, 383 F.3d at 624 (discussing the history of head-of-state immunity); *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 (4th Cir. 1987).

¹⁰³ See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 139 (1812). See also *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 38 (D.D.C. 2008) (discussing special-diplomatic-mission immunity).

¹⁰⁴ See, e.g., *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive. The executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary.").

¹⁰⁵ *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290–92 (2010) (discussing and distinguishing the act-of-state doctrine).

“an interest relating to the subject of the action” and “disposing of the action in the person’s absence may . . . as a practical matter impair or impede the person’s ability to protect the interest.” If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law.¹⁰⁶

Finally, the Supreme Court also noted that “it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest.”¹⁰⁷

IV. SUBSEQUENT DEVELOPMENTS

In the wake of the decision in *Samantar*, a number of questions were raised about the real meaning and potential impact of the Court’s reasoning. Did the Court in fact fully endorse the government’s position that immunity determinations for foreign officials (current or former) ought to be made by the executive branch, as they had been prior to the enactment of the FSIA? By referring to the “common law” basis of foreign official immunity, did the Court mean to suggest either that relevant principles of customary international law apply directly in such cases or that judges should not take into account the law and practices of other nations? What range of discretion is open to the Executive in reaching decisions regarding common-law immunity?

The answers to these questions are of considerable importance. International immunities can no longer be considered discretionary or merely a question of grace, comity, or convenience, as they seem to have been by Chief Justice Marshall in *The Schooner Exchange*.¹⁰⁸ Neither can decisions to grant or deny immunity be premised solely on considerations of foreign policy or good relations with “friendly nations.” In an increasingly interconnected world, in which the United States stands for the rule of law and the progressive development of cogent

¹⁰⁶ *Id.* at 2292 (citation omitted) (quoting FED. R. CIV. P. 19(a)(1)(B)).

¹⁰⁷ *Id.* It then cited to *Kentucky v. Graham*, which discussed the differences between personal-capacity and official-capacity suits in the context of a dispute over attorneys’ fees in a § 1983 action. 473 U.S. 159, 166 (1985). It is also true that foreign official immunity and the immunity of states are not coextensive: there clearly can be circumstances in which foreign officials will be protected by official immunity even when the state itself lacks immunity for the underlying conduct. Indeed, the Executive has asserted foreign official immunity in such circumstances in the past. See *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976) (deferring to suggestion of immunity for foreign officials involved in state commercial activity even though the foreign state was not itself immune).

¹⁰⁸ See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 135–39 (discussing the historical basis of sovereign immunity); see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (stating that the doctrine of sovereign immunity is entirely discretionary and not grounded in law).

international norms, such decisions must be founded on a clear relationship to customary international law.

Given the national interest in promoting such norms, the need for uniformity in the resolution of such cases, and the sensitive foreign relations context in which the issues necessarily arise, there may be little debate that this area is presumptively one of federal common law. Moreover, because individual immunity decisions concerning foreign officials typically implicate the President's constitutional authority to "send and receive" ambassadors and to conduct foreign relations,¹⁰⁹ it is entirely proper that they should be made by the executive branch.

Some advocates and observers bristle at the latter proposition, arguing that determinations of customary international law are for the courts, not the executive branch. On this view, reverting to pre-FSIA procedures would inappropriately allow the State Department to resolve immunity issues on the basis of its own version of customary international law, to say nothing of its political considerations or considerations of reciprocity.¹¹⁰ If an individual's entitlement to immunity is a question of common law, they contend, it should be determined by a court, regardless of the views of the government.¹¹¹ At best, the government's views might be relevant but could not be dispositive.

For some months, there was doubt about the precise approach the government would in fact take to these issues in *Samantar* in the district court, or what the trial court's reaction to that approach might be. On February 14, 2011, however, the Justice Department filed a Statement of Interest with the district court in *Samantar*, conveying the Department of State's determination that Samantar is *not* immune from suit.¹¹² The reasoning behind that conclusion bears analysis.

According to the accompanying letter from the Department of State's Legal Adviser, the determination was based on several "circumstances."¹¹³ They may be summarized as follows:

- Samantar is a U.S. resident and the suit against him is brought by U.S. and Somali plaintiffs.
- The suit is brought under the Alien Tort Statute and the Torture Victim Protection Act for alleged responsibility for torture, extrajudicial killings, and other atrocities.
- Samantar is a former official of a state with no current government formally recognized by the United States.

¹⁰⁹ See U.S. CONST. art II, §§ 2–3.

¹¹⁰ See, e.g., Singerman, *supra* note 98, at 449–50.

¹¹¹ See, e.g., *id.* at 450.

¹¹² Samantar Statement of Interest, *supra* note 13, at 1.

¹¹³ *Id.* at Ex. 1 (Letter from Harold Hongju Koh, Legal Adviser, Dept. of State, to Tony West, Assistant Att'y Gen., Civil Div., Dept. of Justice (Feb. 11, 2011)).

- He would “generally” enjoy only residual immunity, unless waived, and even then only for actions taken in an official capacity.
- No recognized foreign government is available either to assert or waive any immunity he might enjoy.¹¹⁴

The letter concluded that “[i]n light of these circumstances, taking into account the relevant principles of customary international law, and considering the overall impact of this matter on the foreign policy of the United States, . . . Samantar does not enjoy immunity from the jurisdiction of U.S. courts with respect to this action.”¹¹⁵

The letter carefully avoided prioritizing these various “circumstances” or indicating which might have been of the greatest significance in the Department’s assessment. The Statement of Interest submitted by the Department of Justice, however, summarized the factors in a somewhat different fashion, identifying two points as “critical”:

- (1) that “Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity” and
- (2) that “U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents.”¹¹⁶

The Statement of Interest also strongly asserted the authority of the executive branch to determine the immunity of foreign officials in such cases, emphasizing that judicial deference to its views (as evidenced by ample prior precedent) is not discretionary but is “rooted in the separation of powers.”¹¹⁷

¹¹⁴ See *id.* The letter notes that the transitional Somali government (which the United States does not recognize) has not sought to assert immunity on Samantar’s behalf, while “a competing entity, the putative government of the ‘Republic of Somaliland,’ has sought to waive any possible immunity.” *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 7.

¹¹⁷ *Id.* at 3. In mid-March, the U.S. Department of Justice filed a similar Statement of Interest, at the request of the State Department’s Legal Adviser, in *Ahmed v. Magan*, No. 2:10-cv-342 (S.D. Ohio), a case under the ATS and the TVPA involving claims of torture against a former senior official of the Somali National Security Service under Siad Barre. Stating that the defendant is not entitled to official immunity, the Statement of Interest reiterated the two “circumstances” on which the *Samantar* statement was based: “(1) that Magan is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive’s assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Magan who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts.” Statement of Interest of the United States of America at 7, *Ahmed v. Magan*, No. 2:10-cv-342 (S.D. Ohio March 15, 2011). As of early June, no decision had been rendered in response to that statement of interest.

The district court's response was immediate and accepting. Judge Brinkema's order of the following day stated simply that "[t]he government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court" ¹¹⁸

V. DOCTRINAL IMPLICATIONS

How are these developments to be assessed? Because the government's submission to the district court was the first in the post-*Samantar* era, it presumptively reflects a carefully considered approach to the issue of foreign official immunity based on the Executive's understanding of the controlling principles of customary international law. It thus deserves a careful reading.

No doubt the government's rationale will be closely scrutinized by those who favor a strong doctrine of immunity as well as those who question the propriety of such a doctrine in the contemporary international climate. The evaluation will surely be mixed, depending on the perspective of the assessors. Some parts of the government's position in *Samantar* on remand seem to stand on firmer ground than others, and the rationale behind them will likely be subject to criticisms from various quarters. The debate will likely involve at least six points of concern.

In the first instance, some (especially those who continue to contend that immunity determinations should be made by the judiciary on the basis of its independent interpretation of the law) will be dismayed that the district court immediately accepted and acted upon the government's determination that *Samantar* lacked immunity, without conducting its own independent analysis. But this outcome is hardly surprising, and it is in fact firmly in line with the Supreme Court's decision in *Samantar*, since the Court indicated that in returning to pre-1976 practice the executive branch should continue to play the operative role in determining the immunity of foreign officials (unless and until Congress might decide otherwise). ¹¹⁹ The district court's quick acceptance of the executive branch's decision without question or comment will be a welcome and affirming development for those who believe that the Executive retains the prerogative of making the decision on whether to accord immunity in a particular case. After *Samantar*, U.S. courts today must continue to defer to those determinations of foreign official immunity, just as they did prior to the enactment of the FSIA. ¹²⁰

¹¹⁸ Order, *supra* note 15.

¹¹⁹ *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010).

¹²⁰ And as they have done with respect to head-of-state and head-of-government immunity. For some commentators, the issue remains open. See, e.g., Wuerth, *supra* note 12, at 938 ("[E]xecutive power in the immunity context stands on questionable footing.").

Second, it is now crystal clear that the Executive can and will continue to base its decisions on a mixture of factors, including its assessment of the relevant principles of customary international law as well as its judgment about “the overall impact of [the] matter on the foreign policy of the United States,” to use the phrase that appears in the Legal Adviser’s letter.¹²¹ Again, for some, this approach will not be welcomed, and the government’s position will no doubt be criticized for mixing law and policy, or at least for inappropriately opening the door to “extraneous” political concerns in its immunity determinations. There can be little question, however, that the government’s position is squarely within the relevant precedents and fully consistent with principles of separation of powers under the Constitution.

Third, to the extent that the Department of State’s decision rested on the absence of an assertion of immunity from a “recognized” government, it can be read in several (potentially inconsistent) ways. On the one hand, it might be understood to reflect the view that the lack of any formal assertion of immunity by a recognized foreign government amounts to a *de facto* waiver of that immunity. The logic would be that the immunity belongs to the state (not the individual) and thus attaches only when asserted by the government of that state. The first part of that proposition is true; the second part, however, would not be consistent with the generally held view that immunity in such cases derives from concepts of sovereignty and rests on accepted principles of international law which bar the exercise of jurisdiction unless affirmatively waived. The Foreign Sovereign Immunities Act reflects that understanding, for example.¹²²

Alternatively, the Legal Adviser’s formulation might be read to suggest that (i) immunity will only be available to officials of governments which have been “recognized” by the United States, or more narrowly that (ii) no immunity will be available to officials of “failed states” or states in turmoil which lack functioning governments capable of making assertions of immunity. The first would be surprising on several grounds. For some time, the practice of the United States has been not to “recognize” governments (as opposed to states); limiting immunity only to recognized governments would introduce a new (and politically subjective) element into the equation. The second would likewise condition immunity on a political judgment and would create a new exception to immunity doctrine with troublesome implications, particularly for states in transition. The government’s statement offers no

¹²¹ Samantar Statement of Interest, *supra* note 13, at Ex. 1.

¹²² Waiver is of course one of the recognized bases under the FSIA for permitting a case against a foreign state to proceed. See 28 U.S.C. § 1605(a)(1) (2006) (No immunity is recognized when “the foreign state has waived its immunity either explicitly or by implication.”). That waiver must generally be affirmative (“explicit”); implicit waivers are sometimes accepted but generally disfavored. See, e.g., *Cabiri v. Republic of Ghana*, 165 F.3d 193, 201–03 (2d Cir. 1999).

particular reason why transitional turmoil should, in and of itself, operate to deprive the state in question of its sovereign immunity.

It might have been possible to assert that henceforth the United States will not accord immunities to officials from states (as opposed to governments) which we do not recognize or with which we do not maintain diplomatic relations. But it would be difficult to find support for such a proposition in existing customary international law, and reliance on this circumstantial factor is subject to criticism as unduly elevating political considerations over legal principles. The premise of foreign official immunity, of course, is not friendly relations but respect for the fact that the official in question represents a sovereign state. To condition immunity on “recognition” or on the existence of a friendly functional government might be thought tantamount to acknowledging, at least implicitly, that in the “circumstances” of the particular case, a refusal to assert immunity would not create any significant foreign policy problems.¹²³ It does not take much imagination to see how, if this approach were widely adopted by governments whose views of the United States are less than friendly, it could create potential difficulties when visiting U.S. officials are sued in their national courts.

Fourth, both the Statement of Interest and the accompanying letter emphasize the fact of Samantar’s U.S. residence. To quote the former, “U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents.”¹²⁴ The Legal Adviser’s letter also notes that he “is being sued by U.S. citizen and Somali plaintiffs.”¹²⁵ It is not entirely clear what implication to draw from the emphasis on residence. Is it meant, for example, to distinguish Samantar’s situation from those of visiting foreign officials who come temporarily to the United States to conduct official business? If so, that would be a significant limitation on whatever predictive or precedential value might flow from the government’s submission in this particular case.

However, some might think it a bit disingenuous to premise the decision to deny immunity on the fact that “resident” defendants “enjoy the protections of U.S. law.” In point of fact, the same is true of all litigants, plaintiffs, and defendants in our legal system, including those who are only temporarily in the United States. That a defendant might be unfairly dealt with in U.S. courts has never been accepted as a reason for granting immunity.

More importantly, stressing the U.S. residence of (at least two of) the plaintiffs and the defendant (who apparently remains a Somali citizen)

¹²³ This might be thought of as the immunity equivalent of a “Bernstein letter” in the context of the act-of-state doctrine. Cf. Breana Frankel, Oy Vey! *The Bernstein Exception: Rethinking the Doctrine in the Wake of Constitutional Abuses, Corporate Malfeasance, and the ‘War on Terror’*, 41 GEO. WASH. INT’L L. REV. 67, 67 (2009).

¹²⁴ Samantar Statement of Interest, *supra* note 13, at 7.

¹²⁵ *Id.* at Ex. 1.

obscures the essential fact that substantively the litigation has no real connection to the United States apart from Samantar's presence in the country. The letter specifically notes that Samantar was sued by U.S. and Somali plaintiffs, and indeed, according to the Second Amended Complaint, two of the named plaintiffs are in fact naturalized U.S. citizens (presumptively resident in the United States).¹²⁶ However, the majority of plaintiffs in *Samantar* are neither U.S. citizens nor residents.¹²⁷ The complaint alleges various acts of torture, rape, extrajudicial killing, arbitrary detention, crimes against humanity, and war crimes (among others), all of which were committed in Somalia by Somalis against Somalis.¹²⁸ There is of course no question that under the two statutes on which the suit is based, actions can properly be brought by non-U.S. persons against officials of foreign governments for actions taken against foreigners in foreign countries; indeed, most litigation under these statutes against foreign officials will involve abuses committed entirely in other countries.¹²⁹ The point is simply that U.S. residence is essentially irrelevant to the question of jurisdiction under the relevant statutes and in any event not logically pertinent to the question of immunity.

Fifth, the precedential weight of the government's position may be further limited by the apparent stress it places on Samantar's status as a "former" official of a foreign government. Perhaps that emphasis signals an intent to speak only to the question of how the principles of customary international law relate to that particular category of individuals. Without question, the lawsuits which have raised the most troublesome questions about foreign official immunity (and the greatest concerns about reciprocal treatment of U.S. officials abroad)¹³⁰ have been those involving temporary visits by current, not former, officials of foreign governments. The government's submission to the district court might have been intended to reserve judgment on how to handle that more difficult category of litigation.

For all its potential practical benefits, however, such an interpretation would raise difficult doctrinal issues. The immunity of foreign government officials derives from the fact that they do the state's work; it is therefore a form of sovereign (rather than personal)

¹²⁶ See Second Amended Complaint at 3–4, *Yousuf v. Samantar*, No. 1:04 CV 1360 (LMB/BRP) (E.D. Va. Feb. 22, 2007).

¹²⁷ *Id.* at 3–4.

¹²⁸ *Id.* at 18. In all important respects, the case is extraterritorial in the same sense as concerned Chief Justice Marshall in *The Schooner Exchange*. See *supra* text accompanying note 22.

¹²⁹ See Second Amended Complaint, *supra* note 126, at 3; 28 U.S.C. § 1350 (2006).

¹³⁰ It is an obvious fact that a refusal by the United States to afford foreign officials immunity for suit in U.S. courts could easily prompt other countries, especially those not particularly friendly to the United States, to do likewise when U.S. officials are sued in their courts. See, e.g., *Boos v. Barry*, 485 U.S. 312, 323–24 (1988); *Garb v. Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006).

immunity. It has long been recognized as such in U.S. law.¹³¹ Indeed, as the Supreme Court explicitly recognized in *Samantar* itself, suits against foreign officials (even though not covered by the FSIA) can nonetheless be precluded by principles of “foreign sovereign immunity under the common law.”¹³² As the government’s Statement of Interest makes clear, “the immunity belongs to the state, and not the individual.”¹³³ If that principle had in fact been respected in this litigation—if the suit had been brought against Somalia (the state or the government) and decided on the basis of the Foreign Sovereign Immunities Act—the outcome would have been different, for the litigation would have been dismissed outright.¹³⁴

It can cogently be argued that this fact—that the immunity derives from and belongs to the state—is what distinguishes foreign official immunity from the immunity accorded to diplomatic agents and consular officers under conventional international law.¹³⁵ The immunity granted to those individuals is based on the need to protect their personal status at a particular time and place. In technical terms, it is immunity *ratione personae*, while, by contrast, foreign official immunity is properly considered immunity *ratione materiae*.¹³⁶

¹³¹ In U.S. law, the immunity of a foreign sovereign was traditionally understood to encompass not only the state, heads of state, and diplomatic officials, but also other officials insofar as they acted on the state’s behalf. See, e.g., *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (rejecting a suit against a Venezuelan general for actions taken in his military capacity, holding that the defendant was protected by “[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders”).

¹³² *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010) (emphasis added).

¹³³ *Samantar* Statement of Interest, *supra* note 13, at 8. See also *id.* at 9 (“[A] former official’s residual immunity is not a personal right. It is for the benefit of the official’s state.”).

¹³⁴ Under the FSIA, allegations of abuse committed in Somalia against Somalis would not have fallen within any of the statutorily specified exceptions to immunity. For example, the exception under 28 U.S.C. § 1605(a)(5) applies only to certain torts “occurring in the United States” and, to date, alleged violations of *jus cogens* norms have not been accepted. Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004) (recognizing that justiciable torts under the Alien Tort Statute will be slow to be accepted).

¹³⁵ See Vienna Convention on Consular Relations and Optional Protocol on Disputes arts. 43(1), 45, April 24, 1963, 21 U.S.T. 77; Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes arts. 32, 39(2), April 18, 1961, 23 U.S.T. 3227.

¹³⁶ Under international law, certain officials (heads of state and accredited diplomats) enjoy immunities that attach to the office or status of the official, but are operative only as long as the official remains in office; these are personal immunities or immunity *ratione personae*. It has long been clear that under customary international law the head of state and diplomats accredited to a foreign state possess such immunities from the jurisdiction of foreign states. See generally Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22 (Feb. 14); Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR.J. INT’L L. 815 (2010); Totten, *supra* note 2, at 334.

A suit against a government official arising from his (or her) official acts is not a suit against him in his personal capacity, but rather a suit against the government of the state for which he works (or worked).¹³⁷ A state (or government) can only act through its officials and employees, and the immunity to which it is entitled would be illusory if it failed to embrace those officials and employees in respect of acts done by them on its behalf, while in office or afterwards. In that context, immunity reflects the fact that the individual should not be held legally responsible for acts which are those of the state.¹³⁸

This is the view taken by the U.K. House of Lords in *Jones v. Saudi Arabia*, holding, *inter alia*, that under the relevant U.K. statute, the State's immunity precludes the suit against the individual official through whom the State acted.¹³⁹ Lord Hoffman noted, for instance, that "as a matter of international law, the same immunity against suit in a foreign domestic court which protects the state itself also protects the individuals for whom the state is responsible."¹⁴⁰ According to Lord Bingham of Cornhill,

[i]nternational law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies.¹⁴¹

Properly conceived, then, the conduct-based sovereign immunity should protect even former (as well as serving) officials in respect of official acts performed while in office. From this perspective, to contend (as the Legal Adviser's letter appears to do) that Samantar's amenability

¹³⁷ Foreign official immunity is therefore analogous to "special missions immunity." In *Weixum v. Xilai*, practitioners of the Falun Gong spiritual movement sued the visiting Minister of Commerce of the Peoples' Republic of China for human rights abuses that allegedly occurred when he had previously served as a provincial governor. 568 F. Supp. 2d 35 (D.D.C. 2008). The court accepted as dispositive a decision by the Department of State that the Minister was entitled to such immunity during a visit to the United States when he functioned "as an official diplomatic envoy of the PRC." *Id.* at 38.

¹³⁸ See, e.g., *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997), <http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html> ("[State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since." (footnotes omitted)).

¹³⁹ [2006] UKHL 26, [2007] 1 A.C. (H.L.) 270 (appeal taken from Eng.).

¹⁴⁰ *Id.* ¶ 66 (Lord Hoffman).

¹⁴¹ *Id.* ¶ 12 (Lord Bingham of Cornhill).

to suit for acts taken in his official capacity is permitted by the fact that he is no longer in office is to apply the wrong conceptual model.

Granted, there has recently been considerable debate about the scope of foreign sovereign immunity available to former officials—both heads of state as well as other officials. The Pinochet case is perhaps the most prominent (and controversial) example of a decision to circumscribe the immunities of a former head of state.¹⁴² It was certainly open to the government to follow that precedent, to treat the issue as one of immunity *ratione personae*, and to conclude on the basis of its understanding of customary international law that as a former head of state Samantar should not be cloaked in immunity for alleged acts in violation of international law. It did not do so, but chose instead to describe him as a “former official of a state with no current government formally recognized by the United States”¹⁴³ governed by “the foreign official immunity doctrine.”¹⁴⁴ In so doing, it appears to have articulated a new exception to that doctrine.

As the government noted in its brief to the Supreme Court in *Samantar*, “the scope of immunity for foreign officials is not necessarily co-extensive with that of foreign states—and can diverge in either direction.”¹⁴⁵ Nonetheless, there appears to be broad agreement that a state’s immunity cannot be circumvented simply by recasting the suit as one against its officials or agents.¹⁴⁶ That appears to be the functional result of the government’s submission in *Samantar*, at least as to former officials of foreign states.

Another possibility—and this is the sixth and final point of discussion—is that the most important consideration in the government’s decision to deny immunity was not Samantar’s personal situation, but rather the nature of the specific allegations against him and the jurisdictional basis of the suit. As indicated above, the complaint describes a horrific pattern of gross human rights abuses in Somalia (a “deliberate reign of state terror”)¹⁴⁷ including widespread and systematic

¹⁴² In 1999, the U.K. House of Lords decided, in the context of an extradition request from Spain, that former Chilean President Augusto Pinochet was not entitled to immunity from charges of torture committed in Chile. There were differing opinions, however, on the reasons for that conclusion and considerable discussion on whether torture by government officials could ever be an “official” act. See *R. v. Bow St. Metro. Stipendiary Magistrate*, [1999] 2 All E.R. 97 (H.L.) (appeal taken from Eng.).

¹⁴³ Samantar Statement of Interest, *supra* note 13, at Ex. 1.

¹⁴⁴ *Id.* at 2.

¹⁴⁵ Brief for the United States, *supra* note 95, at 13.

¹⁴⁶ As the Supreme Court said in *Samantar*, “an official’s acts can be considered the acts of the foreign state” and “we do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity.” *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290–91 (2010). See also *Jones*, [2006] UKHL 26, ¶ 10 (“The foreign state’s right to immunity cannot be circumvented by suing its servants or agents.”).

¹⁴⁷ Second Amended Complaint, *supra* note 126, at 5.

torture, rape, arbitrary detention, mass executions, and war crimes.¹⁴⁸ These acts are alleged to have been “carried out under actual or apparent authority or color of law of the government of Somalia,” of which the defendant was a senior member and for which, acting as Defense Minister and later Prime Minister, he bears responsibility.¹⁴⁹ According to the complaint, during the relevant times, he exercised command and control authority over the Somali armed forces, acquiesced in and permitted others to commit these abuses, knew or should have known that they were doing so and that his subordinates had committed, were committing, or were about to commit these human rights violations.¹⁵⁰

Domestic U.S. law—in particular the Alien Tort Statute and the Torture Victim Protection Act—expressly permits such suits to be brought in U.S. court, including against non-U.S. citizens and residents for abuses committed against foreigners in other countries.¹⁵¹ A substantial and growing body of case law (beginning with the well-known *Filartiga* case in the Second Circuit) attests to the importance of this avenue of litigation to the human rights community.¹⁵² In this light, it is quite possible to see in the government’s decision to deny immunity to Samantar a particularly solicitous appreciation of such litigation, based on the view that since Congress has opened U.S. courts to foreign plaintiffs in cases involving claims of egregious abuses by foreign government officials, the presumption should be against according immunity to the named defendants. Nothing in the Legal Adviser’s letter or the government’s Statement of Interest says so explicitly, however.

Such a policy might have been formulated in several ways. Taking the Pinochet case as a point of departure, for example, it would be possible to assert that, by definition, violations of internationally recognized human rights or of *jus cogens*, cannot be said to fall within the scope of anyone’s official functions, and, as a consequence, the United States will not recognize claims of immunity *rationae materiae* in litigation based on such allegations.¹⁵³ Among the practical difficulties of such an approach might be the challenge of determining the precise scope of an official’s authority in a given case, as well as the inescapable fact that immunity issues arise (and must be resolved) at the very outset of litigation because they constitute a challenge to the court’s jurisdiction. If immunity can be eliminated simply because the plaintiffs allege certain

¹⁴⁸ *Id.* at 5, 18.

¹⁴⁹ *Id.* at 18.

¹⁵⁰ *See id.*

¹⁵¹ 28 U.S.C. § 1350 (2006); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as a note after 28 U.S.C. § 1350).

¹⁵² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁵³ For example, in the Pinochet case, the Law Lords held, by majority, that a former head of state is not entitled to immunity for actions constituting international crimes committed while in office. *See R. v. Bow St. Metro. Stipendiary Magistrate*, [1999] 2 All E.R. 97 (H.L.) (appeal taken from Eng.).

types of abuses (internationally acknowledged crimes, for instance, or violations of so-called *jus cogens*), then as a practical matter its effectiveness is vitiated. Moreover, it would seem difficult if not impossible to limit such a rule to suits against officials of “unfriendly” or “unrecognized” states or governments, since human rights allegations can be made against any officials. But again, neither the letter from the Legal Adviser nor the government’s Statement of Interest explicitly adopted such a position.

VI. THE URIBE SUBPOENA

A number of these issues were also raised, and not clearly resolved, by the government’s recent Statement of Interest in *Giraldo v. Drummond Co.*, filed some six weeks after the government’s submission to the district court in *Samantar*.¹⁵⁴ In that case, plaintiffs sought to enforce a third-party subpoena against Alvaro Uribe, former President of Columbia, in connection with Alien Tort Statute litigation seeking to hold Drummond responsible for the assassination of Colombian workers and union sympathizers near Drummond’s coal mining operations in northeast Colombia.¹⁵⁵ The plaintiffs (Columbian nationals) allege that Uribe likely knows whether Drummond made certain payments to facilitate the cooperation of the Colombian military and the Autodefensas Unidas de Colombia (a rightwing paramilitary organization), which (plaintiffs claim) together committed war crimes that also furthered Drummond’s interests in Colombia.¹⁵⁶

Acting on a formal request from the Government of Columbia, the government informed the court that “former President Uribe enjoys residual immunity . . . insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official.”¹⁵⁷ As in *Samantar*, the Statement of Interest emphasized that

the Executive Branch continues to play the primary role in determining the immunity of foreign officials as an aspect of the President’s responsibility for the conduct of foreign relations and recognition of foreign governments. Accordingly, courts today must continue to defer to Executive determinations of foreign official immunity, just as they deferred to determinations of foreign state immunity before the enactment of the FSIA.¹⁵⁸

¹⁵⁴ Statement of Interest and Suggestion of Immunity of and by the United States of America, *Giraldo v. Drummond Co.*, No. 1:10mc00764 (JDB) (D.D.C. Mar. 31, 2011) [hereinafter Uribe Statement of Interest].

¹⁵⁵ *Id.* at 1; Second Amended Complaint at 1–6, *Giraldo v. Drummond Co.*, No. 7:09-cv-1041-RDP (N.D. Al. June 14, 2010).

¹⁵⁶ Uribe Statement of Interest, *supra* note 154, Ex. 2, at 8 (Conrad & Scherer Press Release).

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.* at 4.

Consistent with the premise that the Executive's role is based on the President's constitutional authority, the Statement of Interest makes it crystal clear that the determination is not simply a legal one. "In making a foreign official immunity determination, the Department of State takes into account principles of international law as well as the United States' foreign policy interests."¹⁵⁹

To say (correctly, in this author's view) that immunity determinations are not strictly or exclusively legal questions is certainly not to contend that they can be detached from, or uninformed by, legal principles and precedents, or that they may be taken arbitrarily. Precisely because they are exercises of executive authority binding on the courts, and because they are frequently dispositive of litigation involving the rights and interests of private parties, immunity determinations must be legally well grounded and carefully articulated. When they are not, they risk not only criticism but pressure for moving the decision-making into the courts, much as occurred with the FSIA.¹⁶⁰

In this light, the Uribe Statement of Interest raises three areas of possible concern. The first is that, from the perspective of international law, the doctrinal approach it takes is at best confusing. Textually, the Statement speaks repeatedly of the immunity of foreign governmental officials (presumably meaning at all levels, and both present and former), yet at the same time it focuses specifically on the fact that Uribe is the former President and thus a former head of state of Columbia.¹⁶¹ The two concepts—head of state and government on the one hand, and foreign government official on the other—appear intertwined. Thus, the government stresses that "[u]nder international law, former heads of state have residual immunity from suit only for acts taken in an official capacity while in office."¹⁶² But it concludes that to the extent that the plaintiffs seek to depose Uribe about acts performed or information obtained when he was not "a government official" (or "during his time in office other than in his official capacity as a governmental official"), the United States does not suggest that he is entitled to immunity.¹⁶³ The

¹⁵⁹ *Id.*

¹⁶⁰ *Cf. Leigh, supra* note 36, at 289 ("In the view of this writer, so long as the power of decision with respect to immunity is lodged in a political agency such as the State Department, political considerations are likely to prevail over considerations of international law in the hard cases.").

¹⁶¹ Of course, so was Samantar. Like Samantar, Uribe had previously served in several governmental capacities, including as a national senator as well as governor of Antioquia. Uribe Statement of Interest, *supra* note 155, at 2.

¹⁶² *Id.* at 4 (citing *A, B, C, D, E, F v. Jiang Zemin*, 282 F. Supp. 2d 875, 883 (N.D. Ill. 2003), and *Arrest Warrant of 11 Apr. 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 25–26 (Feb. 14)). The letter from the Legal Adviser of the State Department asking the Department of Justice to convey its decision to the court was unambiguous in basing its request on residual "head of state" immunity. *See id.*, Ex. 2, at 1 (Letter from Harold H. Koh, Legal Adviser, Dep't of State to Tony West, Assistant Att'y Gen., U.S. Dep't of Justice, Mar. 31, 2011).

¹⁶³ *Id.* at 5.

premise of the latter formulation obviously extends beyond heads of state or government.

The implications of this apparent equivalence are unclear. Is it the government's current view that the immunity accorded to foreign heads of state and government (once a limited and conceptually distinct category with the broadest protections) is in fact the same immunity accorded to all foreign officials, including those of lesser status?¹⁶⁴ The Statement of Interest certainly takes the position that when no longer in office, all former officials (including former heads of state) enjoy only residual "official acts" immunity. It seems unlikely that the government would assert that all current foreign government officials other than heads of state or government are entitled to the same broad measure of immunity typically accorded sitting heads of state and government. Does the government's formulation then suggest reluctance to give the broadest immunity to sitting heads of state or government? Perhaps more troubling, is foreign official immunity now to be considered immunity *rationae personae*, not *ratione materiae*? If so, that would seem to be a departure from long-standing doctrine as articulated by U.S. courts, as recently, for example, as the *Samantar* decision, which viewed the immunity of foreign officials as an aspect of foreign sovereign immunity. Indeed, the Uribe Statement of Interest explicitly based its analysis on the concept of sovereign immunity.¹⁶⁵

The second point of concern stems from the fact that the Statement of Interest seems to leave the resolution of the immunity question to the court. Although the Government of Columbia asked to have the subpoena quashed, the Statement of Interest did not do so, suggesting only that Uribe enjoys residual immunity "insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a governmental official."¹⁶⁶ Thus, it appears to be up to the court to decide whether a given act was in fact "official" or "taken in an official capacity," and whether information was "obtained" in an official capacity. Presumably, this would require some kind of evidentiary hearing, which might be seen by the Colombian government as effectively overcoming its immunity.

Some may ask whether such an approach will mean that immunity issues—when raised in the context of former foreign government officials generally—are no longer to be decided by the executive branch

¹⁶⁴ See, e.g., *id.* at 3 (noting that following the adoption of the FSIA, "many courts continued to look to the Executive Branch for a determination of foreign official immunity, especially in suits against foreign heads of state").

¹⁶⁵ See *id.* at 2–3 (citing, *inter alia*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974)).

¹⁶⁶ *Id.* at 1.

but necessarily become appropriate for judicial determination. The practical difference could be enormous. Consider, for example, a challenge in U.S. court to the actions of any individual currently employed as a foreign government official, as to which the government would allow immunity. Would not the same question, if brought in litigation months later after the individual in question has left his or her position, legitimately become a subject of inquiry in a U.S. court (at least, in the first instance, as to whether it was an “official” act)? The sovereign interests of the state concerned have not changed; it may well be that the foreign relations interests of the United States have not changed either. But the locus of decision-making will have changed.

A third question can also be asked in regard to the Uribe Statement of Interest: why did the government suggest (even a limited form of) immunity in that case but decline to do so in the *Samantar* case? What, if anything, distinguishes the two? *Samantar*, like Uribe, is a former head of state or government. In both cases, the litigation is based on the same statutes and the underlying claims involve egregious human rights violations. Granted, Uribe is not the named defendant in the Drummond litigation and is evidently not permanently resident in the United States, but the case is brought against a U.S. corporation and the implication of the subpoena seems to be that Uribe may have been complicit in some fashion. If the only relevant difference were that the request to quash the subpoena was made by a friendly foreign government with which the United States maintains close relations, the decision might be criticized on grounds of simple expediency.¹⁶⁷

VII. CONCLUSION

Given the foregoing ambiguities, one may regrettably be left in some doubt about the precise position taken by the government both in its submission to the district court on remand in *Samantar* and in respect of the Uribe subpoena. Exactly what guidance do these statements of interest provide for resolving questions of foreign official immunity in future cases?

One response might be to say that the question asks too much. It is possible that in its first post-*Samantar* submissions, the government responded only to the specific facts of the cases at hand, and it would be wrong to read too much into its submissions. Each case is unique and needs to be evaluated on its own merits. Different situations will inevitably yield different results. After some thirty-five years of atrophy in

¹⁶⁷ Those so inclined may find it also troubling that the Statement of Interest asserted a “foreign relations interest in minimizing the burden on former President Uribe as a former head of state” even as to information for which he enjoys no immunity and asking the court to order plaintiffs to exhaust “other reasonably available methods of procuring such information” before allowing the deposition to proceed. *Id.* at 5–6.

the shadow of the Foreign Sovereign Immunities Act, it will take time to resuscitate the doctrine of foreign official immunity.

On the other hand, there can be little question that, having succeeded in reclaiming the authority to make these kinds of immunity determinations, the government must be mindful that each decision will be viewed as precedential. Surely the government does not want to make all the decisions in all future litigations involving foreign officials. Nor is it compelled to do so; there may well be substantive reasons why it would choose not to. In cases where it chooses not to communicate its determination to the court, the decision will necessarily fall to the court. The courts will need to divine the appropriate result based on an understanding of the principles endorsed by the government, in arriving at the result that the government would have adopted.¹⁶⁸

In addition, from the perspective of the orderly and principled development of the international law of foreign official immunity, a clear understanding of the U.S. government's position would be beneficial. The outcome in *Samantar* and in the Uribe situation will be analyzed by experts in foreign and justice ministries around the world, to say nothing of practitioners, advocates, and academics. Accordingly, it might have been expected that the government would endeavor to set out clear rules, guidelines, or principles for use by litigants as well as courts. Yet commentators are likely to differ about whether the posture it has adopted in these two cases provides the guidance that is needed.

While the international community has now formally adopted the restrictive theory of sovereign immunity,¹⁶⁹ it continues on the whole to consider suits against foreign officials as suits against the state itself and thus subject to its jurisdictional immunities.¹⁷⁰ To the extent that the outcomes in *Samantar* and *Drummond* are viewed as adopting a contrary rule, they may well be considered as destabilizing the widespread practice. They may also be seen as moving the United States closer to the view that no immunity can shield former officials of foreign governments from scrutiny of their acts in U.S. courts, especially when those acts are claimed to have violated fundamental human rights or to have constituted international crimes.

In some quarters there is likely to be concern about the practical implications of the decision in *Samantar* to permit the litigation to go forward, especially the potential it raises for eventual substantial monetary judgments against officials of foreign governments. That the

¹⁶⁸ As Ingrid Wuerth has perceptively observed, "[t]he more predictable and transparent the government's immunity determinations are, the less likely an increase in cases will occur." Wuerth, *supra* note 12, at 949.

¹⁶⁹ See, e.g., United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex art. 10(1), U.N. Doc. A/RES/59/38 (Dec. 2, 2004).

¹⁷⁰ *Id.* at Annex art. 2(1)(b)(iv) (expressly including in the definition of "State" the "representatives of the State acting in that capacity").

decision is limited by its terms to former officials of unrecognized governments now resident in the United States will probably be cold comfort, at best, for those charged with assessing its broader implications, and in light of the Uribe decision. The adoption of reciprocal limitations on the immunity of former (or even present) U.S. government officials would not be surprising. Given U.S. involvement in conflictive situations around the world, it takes little imagination to see that U.S. officials can be subjected to politically driven lawsuits abroad.

Wholly apart from the particular merits or demerits of the allegations in these two lawsuits, or the deplorable situations which gave rise to them, many will see the prospect (or perhaps the risk) of extensive future litigation. It is a safe bet that international lawyers will be debating these issues for some time to come.