

**SYMPOSIUM**  
**FOREIGN OFFICIAL IMMUNITY AFTER**  
***SAMANTAR V. YOUSUF***

**INTERPRETING THE FOREIGN SOVEREIGN IMMUNITIES ACT:  
READING OR CONSTRUING THE TEXT?**

by  
*Joseph W. Dellapenna\**

*In 1976, Congress enacted the Foreign Sovereign Immunities Act in order to move decisions about the immunity of foreign states from the State Department into the courts. The statute was intended to create definite and certain rules to govern such decisions, in part to minimize litigation costs and potential embarrassment in the conduct of foreign relations. The Immunities Act is a very poorly drafted statute, however, characterized by confusion, ambiguities, and omissions. As a result, it continues to generate a great deal of litigation and controversy, the very opposite of what was hoped for the statute. Ultimately, the Supreme Court has stepped in to attempt to provide some coherence to the resulting case law, but the insistence of many on the Court on using a “textualist” approach to interpret the Immunities Act has resulted in greater*

---

\* Professor of Law, Villanova University School of Law; B.B.A. *with distinction* (Univ. of Mich. 1965); J.D. *cum laude* (Detroit College of Law 1968); LL.M. in International and Comparative Law (Geo. Wash. Univ. 1969); LL.M. in Environmental Law (Columbia Univ. 1974). Professor Dellapenna’s book, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* (2d ed. 2003) was cited by both the majority and the dissent in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), and by numerous lower courts.

Portions of Parts II, III, and V are adapted from the Introduction to JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 1–41 (2d ed. 2003).

Additional portions of Part V are adapted from Joseph W. Dellapenna, International Decision, *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994), 88 AM. J. INT’L L. 528, 529–31 (1994).

*confusion rather than clarification from the Court's decisions. The process is epitomized by the case of Samantar v. Yousuf, the first time the Supreme Court considered whether the Immunities Act applies to natural persons as well as the foreign state proper, its governmental subdivisions, and government-owned (or operated) corporations, or the like. Simply reading the text of the Immunities Act does not advance one very far when the statute does not speak to the question before the Court and the general level of confusion around the law suggests that the text needs a practical construction if one is to make sense of it. While the majority did not rigidly insist on a "textualist" approach to the statute, the insistence of three concurrences on such an approach led the majority to drop anything other than a textualist analysis into a footnote and ignore any expansive attempt to provide guidance on how to treat officials or employees of foreign states. This will give comfort to those who insist on "textualism" as the only legitimate approach to interpreting and applying statutes. However, the result is likely to be continuing confusion in the lower courts about the correct response to claims of immunity by officials or employees of foreign states. Samantar also suggests that broad claims about "textualism" as the only appropriate approach to reading and applying statutes is seriously flawed.*

I.	INTRODUCTION .....	556
II.	THE IMMUNITY OF FOREIGN STATES BEFORE 1976 .....	558
III.	THE PURPOSES AND STRUCTURE OF THE IMMUNITIES ACT .....	561
IV.	THE SUPREME COURT'S APPROACH TO INTERPRETING THE IMMUNITIES ACT .....	566
V.	COURTS GRAPPLE WITH HEADS OF STATE AND OTHER GOVERNMENT OFFICIALS .....	570
	A. Heads of State and Other High-Level Officials .....	571
	B. Derivative Immunity for Lower-Level Functionaries? .....	579
	C. The Supreme Court Steps In .....	582
VI.	CONCLUSIONS .....	585

## I. INTRODUCTION

Mohamed Ali Samantar held high posts in the Somali government headed by Mohamed Siad Barre from 1980, including the positions of First Vice President, Minister of Defense, and Prime Minister, until that government collapsed in 1991.<sup>1</sup> During this period, members of plaintiffs' families were tortured and killed, without legal process, by forces acting under Samantar's authority.<sup>2</sup> When the Barre government

<sup>1</sup> Samantar v. Yousuf, 130 S. Ct. 2278, 2282 (2010); Yousuf v. Samantar, 552 F.3d 371, 373 (4th Cir. 2009).

<sup>2</sup> Samantar, 130 S. Ct. at 2282. There is no claim that Samantar personally committed or was personally involved in these crimes. Yousuf, 552 F.3d at 374.

collapsed, Samantar fled to the United States and settled in Virginia.<sup>3</sup> Thirteen years later, plaintiffs filed suit against Samantar in the federal district court for the Eastern District of Virginia.<sup>4</sup> The district court dismissed the case on the grounds that Samantar was immune from suit under the Foreign Sovereign Immunities Act (Immunities Act)<sup>5</sup> only to be overruled by the United States Court of Appeals for the Fourth Circuit.<sup>6</sup> The Supreme Court, in *Samantar v. Yousuf*, unanimously affirmed the Fourth Circuit's decision that the Immunities Act does not apply to individuals,<sup>7</sup> and in the process overruled what had been a nearly unanimous line of decisions from the lower courts holding that the Immunities Act did apply.<sup>8</sup> The case was remanded for the district court to consider whether a common law immunity would apply to Samantar's actions.<sup>9</sup>

Some 34 years after the enactment of the Immunities Act, *Samantar* was the first case in which the Supreme Court considered the question of whether the Act applied to protect individuals who were acting on behalf of a foreign state. The answer depends on how one reads the Immunities Act. Unfortunately for any court attempting to parse the Immunities Act, it was extremely poorly drafted. Courts from the earliest cases on have lamented the difficulties of deciphering its vague and elusive terms and its convoluted structure. One early court noted that the statute "conceal[ed] distinctions that need to be drawn in careful analysis."<sup>10</sup> A few years later, a court described the Immunities Act as "remarkably obtuse" and a "statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary."<sup>11</sup> The result of this "peculiarly twisted exercise in statutory draftsmanship"<sup>12</sup> is an "enigmatic legislative creation"<sup>13</sup> that has

---

<sup>3</sup> *Samantar*, 130 S. Ct. at 2283.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Yousuf v. Samantar*, 552 F.3d 371, 373 (4th Cir. 2009).

<sup>7</sup> *Samantar*, 130 S. Ct. at 2293.

<sup>8</sup> See, e.g., *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 81 (2d Cir. 2008); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815–16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990). But see *Enhorio v. Abubakar*, 408 F.3d 877, 881–82 (7th Cir. 2005) (holding the Immunities Act not to apply to government officials).

<sup>9</sup> *Samantar*, 130 S. Ct. at 2292–93.

<sup>10</sup> *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1062 (E.D.N.Y. 1979).

<sup>11</sup> *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105–06 (S.D.N.Y. 1982).

<sup>12</sup> *Chisholm & Co. v. Bank of Jam.*, 643 F. Supp. 1393, 1398 n.2 (S.D. Fla. 1986) (quoting *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part)).

produced a “case law interpreting it [that] has tended to be equally obtuse.”<sup>14</sup>

The Supreme Court in interpreting the Immunities Act has never acknowledged these difficulties. Even in *Samantar*, the majority focused primarily on construing the text as if all one had to do was read it,<sup>15</sup> while several concurring opinions castigated the majority for going on to examine the legislative history of the statute to bolster the majority’s determination of the statute’s meaning.<sup>16</sup> The majority in *Samantar* not only did not consider the difficulties involved in construing the statutory text, it even commented on the Immunities Act’s “careful calibration of remedies,”<sup>17</sup> as if to suggest that the Act is a model of excellent drafting.

Part II of this Article briefly reviews the evolution of the U.S. law of immunity for foreign states and their officials, the latter ranging from heads of state and government down to the lowest minions of the state. Part III examines the language of the Immunities Act to see how it captured (or failed to capture) the law it purported to codify. Part IV examines how the Supreme Court has undertaken to deal with the labyrinthine interpretive tangle that is the Immunities Act and how the Court has attempted to avoid becoming trapped in the statutory maze by simply ignoring it. Part V applies the foregoing analysis to the *Samantar* case, describing how the confused text of the Immunities Act and the willful determination of the Court to ignore that confusion has created only a likelihood of more confusion that the Court has left to lower courts to sort out. That could well be another “financial boon for the private bar but a constant bane of the federal judiciary.” And there is a good chance that the resulting mess will once again end up before the Supreme Court. Finally, in Part VI, the Article considers some of the broader implications of the textualist approach to interpretation that was seemingly applied in *Samantar*.

## II. THE IMMUNITY OF FOREIGN STATES BEFORE 1976

From the earliest American cases relating to the immunity of foreign states down to 1938, the Supreme Court justified the immunity of foreign states as reflecting an obligation to apply the controlling principles, or at least the practices, of international law.<sup>18</sup> This was expressed in the

---

<sup>13</sup> *Trans Chem. Ltd. v. China Nat’l Mach. Imp & Exp. Corp.*, 978 F. Supp. 266, 276 (S.D. Tex. 1997), *aff’d*, 161 F.3d 314 (5th Cir. 1998).

<sup>14</sup> *Chisholm & Co. v. Bank of Jam.*, 643 F. Supp. 1393, 1398 n.2 (S.D. Fla. 1986).

<sup>15</sup> *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2285–89 (2010).

<sup>16</sup> *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).

<sup>17</sup> *Id.* at 2288.

<sup>18</sup> *See generally* JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* § 1.1 (2d ed. 2003).

Court's very first decision on foreign state immunity when Chief Justice John Marshall wrote:

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse . . . have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.<sup>19</sup>

In 1938, the Court announced a new policy underlying decisions regarding the immunity of foreign states and their officials—that of preventing judicial interference with the State Department's conduct of foreign relations.<sup>20</sup> Based on the greater expertise of the Department in matters touching on foreign affairs and on its ability to negotiate amicable settlements that in some respects were superior to judicial proceedings, the Supreme Court concluded that courts were bound by a suggestion from the State Department on whether to recognize a claim of immunity by a foreign state.<sup>21</sup> Many criticized a rule of judicial deference to suggestions of the State Department as an abdication of the responsibility of courts to decide cases.<sup>22</sup> It certainly contrasted with the judicial self-confidence shown in earlier immunity cases and was of doubtful aid to the Department in discharging its responsibilities.<sup>23</sup>

The State Department responded to this sudden enlargement of its authority with the Tate Letter in 1952, which announced that the Department would be guided by the restrictive theory of immunity in

---

<sup>19</sup> *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). See also *United States v. Dieckman*, 92 U.S. 520, 524 (1876) (dictum); *Oliver Am. Trading Co. v. United States of Mexico*, 5 F.2d 659, 663 (2d Cir. 1924); *The Carlo Poma*, 259 F. 369 (2d Cir. 1919), *vacated on other grounds*, 255 U.S. 219 (1921); *The Maipo*, 259 F. 367 (S.D.N.Y. 1919); *The Pizarro v. Matthias*, 19 F. Cas. 786, 790 (S.D.N.Y. 1852); *Mason v. Intercolonial Ry. of Can.*, 83 N.E. 876, 877 (Mass. 1908).

<sup>20</sup> See *Ex parte Republic of Peru*, 318 U.S. 578, 586–89 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

<sup>21</sup> See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945); *Ex parte Republic of Peru*, 318 U.S. at 588; *The Navemar*, 303 U.S. at 74.

<sup>22</sup> See, e.g., Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954); Philip C. Jessup, Editorial Comment, *Has the Supreme Court Abdicated One of its Functions?*, 40 AM. J. INT'L L. 168 (1946).

<sup>23</sup> See Jessup, *supra* note 22, at 170; Arthur K. Kuhn, Editorial Comment, *The Extension of Sovereign Immunity to Government-Owned Commercial Corporations*, 39 AM. J. INT'L L. 772, 774 (1945).

making its suggestions.<sup>24</sup> Internationally, the restrictive theory denied immunity to foreign states for “private” acts while upholding immunity for “public” acts.<sup>25</sup> Reflecting what jurists in the United States considered to be the major impetus behind the development of the restrictive theory, the Tate Letter substituted the term “commercial” for the term “private” and did not even bother to indicate what “public acts” were to be called in the United States.<sup>26</sup> Courts accepted the Tate Letter as a general suggestion, binding them to decide cases according to the restrictive immunity theory set forth in the Tate Letter even when the Department refused to make a specific suggestion.<sup>27</sup> Courts felt bound by specific suggestions of the State Department even if the suggestions were not consistent with restrictive theory of the Tate Letter.<sup>28</sup>

Courts and the State Department both found interpreting the new theory difficult. The Tate Letter offered no criteria for distinguishing commercial and noncommercial acts. The State Department and the courts apparently adopted different tests.<sup>29</sup> Finally, in *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*,<sup>30</sup> the Court of Appeals for the Second Circuit sought to give definitive content to the theory by setting out a shopping list of five “political” or public acts:

- (1) internal administrative acts;
- (2) legislative acts;
- (3) acts concerning the armed forces;
- (4) acts concerning diplomatic activity; and
- (5) public loans.<sup>31</sup>

---

<sup>24</sup> 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, 985 (1952) [hereinafter Tate Letter].

<sup>25</sup> See generally DELLAPENNA, *supra* note 18, § 1.2.

<sup>26</sup> See Tate Letter, *supra* note 24. The Tate Letter also reflected the ideological tensions that arose from competition with “socialist” countries where international trade is a state monopoly. See generally, David S. Caudill, Comment, *Breaking Out of the Capitalist Paradigm: The Significance of Ideology in Determining the Sovereign Immunity of Soviet and Eastern-Bloc Commercial Entities*, 2 HOUS. J. INT’L L. 425 (1980).

<sup>27</sup> See *Heaney v. Gov’t of Spain*, 445 F.2d 501, 504 (2d Cir. 1971); *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359–60 (2d Cir. 1964).

<sup>28</sup> See *Spacil v. Crowe*, 489 F.2d 614, 619–21 (5th Cir. 1974); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961).

<sup>29</sup> Compare *Renchard v. Humphreys & Harding, Inc.*, 381 F. Supp. 382, 385 n.2 (D.D.C. 1974), with *Heaney v. Gov’t of Spain*, 445 F.2d 501, 504 (2d Cir. 1971). See generally DELLAPENNA, *supra* note 18, § 7.5.

<sup>30</sup> 336 F.2d 354 (2d Cir. 1964).

<sup>31</sup> *Id.* at 360. The decision was followed in: *Heaney v. Gov’t of Spain*, 445 F.2d 501, 503–04 (2d Cir. 1971); *Rovin Sales Co. v. Socialist Republic of Romania*, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975); *Ocean Transp. Co. v. Gov’t of Ivory Coast*, 269 F.

All other acts were to be considered “commercial.”<sup>32</sup>

Foreign states put pressure on the State Department to suggest immunity even for indisputably commercial acts, and often the Department gave in to the pressure.<sup>33</sup> Expediency, rather than principle, shaped the Department’s suggestions.<sup>34</sup> To eliminate the resulting problems, the State Department and the Justice Department proposed a bill to codify the principles of sovereign immunity and to turn responsibility over to courts to apply the principles to particular cases.<sup>35</sup> After the Departments of State and Justice redrafted the bill to take into account the concerns of various segments of the organized bar, Congress finally enacted the Immunities Act in 1976.<sup>36</sup>

### III. THE PURPOSES AND STRUCTURE OF THE IMMUNITIES ACT

In the Immunities Act, Congress sought to provide a more balanced legal posture between an injured private party and a foreign-state-related defendant than the courts and the State Department had worked out under the Tate Letter.<sup>37</sup> To achieve this balance, Congress sought to answer questions arising from a defendant’s status as a foreign state or “an agency or instrumentality” of a foreign state; yet despite nearly a decade of work between its first proposal by the State Department and its enactment,<sup>38</sup> the Immunities Act remained poorly drafted. Congress’s highly compressed language combined what are usually treated as separate issues.<sup>39</sup> The Immunities Act also often placed provisions

---

Supp. 703, 705 (E.D. La. 1967); *Am. Hawaiian Ventures, Inc. v. M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

<sup>32</sup> *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358 (2d Cir. 1964).

<sup>33</sup> See 119 Cong. Rec. 2215 (1973) (letter from William P. Rogers, Sec’y of State to the President of the Senate).

<sup>34</sup> See, e.g., *Flota Maritima Browning de Cuba, S.A. v. M/V Ciudad de la Habana*, 335 F.2d 619, 623 (4th Cir. 1964). See also Cardozo, *supra* note 22, at 613–14; Jessup, *supra* note 22, at 170; Sigmund Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 11 (1976).

<sup>35</sup> S. 566, 93d Cong., 119 CONG. REC. 2213 (1973).

<sup>36</sup> The most thorough history of the drafting of the Immunities Act is found in Jeffrey Martin, Note, *The Foreign Sovereign Immunities Act of 1976*, Pub. L. No. 94-583, 90 Stat. 2891, 18 HARV. INT’L L.J. 429 (1977). More or less contemporaneously, a worldwide movement towards codification of foreign state immunity occurred. See generally DELLAPENNA, *supra* note 18, §§ 1.3–1.4.

<sup>37</sup> See generally DELLAPENNA, *supra* note 18, § 1.6. Regarding the Tate Letter regime, see *supra* text accompanying notes 24–32.

<sup>38</sup> See Martin, *supra* note 36, at 429 n.2.

<sup>39</sup> See *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 306 (2d Cir. 1981) (describing the Immunities Act as “a marvel of compression”). See also *Mar. Int’l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1099 (D.C. Cir. 1982) (stating that the court must unravel “the Act’s interlocking provisions governing the separate issues of subject matter jurisdiction, sovereign immunity, and personal jurisdiction”), quoted in *Brewer v. Socialist People’s Republic*

dealing with specific issues in different sections in the Act, making it difficult (and potentially confusing) to find full answers for these issues.<sup>40</sup> A high level of ambiguity is also characteristic of the Act.<sup>41</sup> Finally, the Immunities Act sometimes does not provide any answer at all.<sup>42</sup> As a result of the extraordinary compression and other drafting faults, considerable confusion has surrounded the Immunities Act from the beginning, as many courts have noted.<sup>43</sup>

Given the poorly drafted statute, courts early on used the congressional purposes behind the Immunities Act as the interpretive lodestar in construing its text. The Supreme Court, for example, used the Act's purposes to conclude that the actual immunity rules are substantive, and not, as traditionally described, jurisdictional.<sup>44</sup> While codifying the restrictive theory of immunity was undoubtedly the primary purpose for the statute,<sup>45</sup> Congress in fact expressed six specific purposes for the Immunities Act in its section-by-section analysis of the statute<sup>46</sup>:

---

of Iraq, 890 F.2d 97, 99 (8th Cir. 1989). For example, the Immunities Act combines the requirements of competence ("subject matter jurisdiction"), personal jurisdiction, and immunity in single subsections, generally in single phrases. *See* 28 U.S.C. §§ 1330, 1605, 1607 (2006); *Id.* § 1605A (Supp. II 2008).

<sup>40</sup> For example, the Immunities Act placed the actual rules regarding the immunity of foreign states and their agencies and instrumentalities in at least three different sections. *See* 28 U.S.C. §§ 1604–1607 (2006). This is potentially troublesome if one stops reading upon reaching 28 U.S.C. § 1606, which is on a completely different issue.

<sup>41</sup> Thus the definition of "commercial activity" in the Immunities Act reads in full: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Using the term "commercial" to define the concept "commercial" is not helpful. Similarly, the Immunities Act creates an exception to the applicable choice-of-law rule under the Act without bothering to actually define what that choice-of-law rule is. *Id.* § 1606. *See generally* DELLAPENNA, *supra* note 18, §§ 7.5–7.12 (discussing commercial activity under the Act), 8.1–8.13 (discussing choice of law under the Act).

<sup>42</sup> Most germane to the *Samantar* decision, there is no direct reference to foreign heads of state or to other officials of a foreign state.

<sup>43</sup> *See supra* text accompanying notes 10–14.

<sup>44</sup> *See* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495–97 (1983). This statement will no doubt continue to puzzle litigants and jurists; the view of foreign sovereign immunity as a type of "jurisdictional immunity" will die hard: it dates back to John Marshall's opinion in the first case to recognize the doctrine, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812), and is embedded in the language of the Immunities Act itself. 28 U.S.C. §§ 1602, 1604, 1605.

<sup>45</sup> *See, e.g.,* *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1169 (D.C. Cir. 1994); *Berdakin v. Consulado de la Republica de El Sal.*, 912 F. Supp. 458, 461 (C.D. Cal. 1995); *Mann v. Hanil Bank*, 900 F. Supp. 1077, 1085–87 (E.D. Wis. 1995); *Coleman v. Alcolac, Inc.*, 888 F. Supp. 1388, 1399 (S.D. Tex. 1995); *Int'l Hous. Ltd. v. Rafidain Bank Iraq*, 712 F. Supp. 1112, 1115 (S.D.N.Y. 1989), *aff'd on other grounds*, 893 F.2d 8 (2d Cir. 1989).

<sup>46</sup> Congress directly identified four of these six purposes in the section-by-section analysis. *See* H.R. REP. NO. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605–



- (1) to enact the restrictive theory of immunity for foreign states (including agencies or instrumentalities), making U.S. practice consistent with the current state of international law;<sup>47</sup>
- (2) to depoliticize immunity decisions by vesting them in courts, rather than the State Department, under definite, objective criteria, without seriously embarrassing U.S. foreign relations;<sup>48</sup>
- (3) to provide definite, appropriate rules on competence, jurisdiction, mode of trial, rules of decision, service of process, and venue, in place of unsettled or ineffective prior law;<sup>49</sup>
- (4) to ensure uniform treatment of foreign states in courts in the United States;<sup>50</sup>
- (5) to make the treatment of foreign states in courts in the United States consistent with the treatment of the United States (including its corporations) in courts both here and abroad;<sup>51</sup> and

---

06 [hereinafter cited with pagination only to the reprinted version]. While the purposes here numbered (4) and (5) were not listed as such in the section-by-section analysis, they are discussed there, and they have proven important in understanding certain provisions of the Immunities Act. *See, e.g.,* Coyante v. Linea Aeropostal Venezolana, No. Civ. 91-1020 (RLA), 1993 WL 465398, at \*2-3 (D.P.R. Oct. 18, 1993). *See generally* DELLAPENNA, *supra* note 18, at § 1.6.

<sup>47</sup> 28 U.S.C. §§ 1602, 1604, 1605; Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488-89, 496-97 (1983); H.R. REP. NO. 94-1487, *supra* note 46, at 6605, 6607-08, 6613, 6619, 6621, 6624, 6626.

<sup>48</sup> *See* 28 U.S.C. § 1602; Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983); H.R. REP. NO. 94-1487, *supra* note 46, at 6605-07, 6611, 6616, 6619-20, 6623-26, 6629-31, 6634. Several courts have suggested this was the primary, if not exclusive, purpose of the Immunities Act. *See, e.g.,* Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000); Brenntag Int'l Chems., Inc. v. Bank of India, 175 F.3d 245, 253 (2d Cir. 1999); Peré v. Nuovo Pignone, Inc., 150 F.3d 477, 480 (5th Cir. 1998); Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993).

<sup>49</sup> 28 U.S.C. §§ 1330, 1391(f), 1604, 1605, 1606, 1608, 1610(d); *Id.* § 1605A (Supp. II 2008); H.R. REP. NO. 94-1487, *supra* note 46, at 6606, 6611-12, 6617-18, 6620-25, 6629. "Competence" is used here to mean "subject matter jurisdiction" in the sense that the rules prescribe the types of cases that may properly be brought before a particular court. *See* DELLAPENNA, *supra* note 18, § 3.1.

<sup>50</sup> Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 489, 497 (1983); H.R. REP. NO. 94-1487, *supra* note 46, at 6607, 6610-12, 6631-32.

<sup>51</sup> H.R. REP. NO. 94-1487, *supra* note 46, at 6607-08, 6611-12, 6620, 6626, 6630, 6632. While courts have not stressed this purpose, one commentator concluded that equalizing the posture of foreign states with that of the domestic sovereign in its own courts is the only reason for the general acceptance of the restrictive theory of state immunity. GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 79-106, 133-39 (1984).

(6) to provide a balanced possibility for execution of a judgment against a foreign state.<sup>52</sup>

To accomplish these purposes, the Immunities Act, as originally enacted, was structured in the form of a presumption of immunity coupled with a shopping list of seven exceptions.<sup>53</sup> Subsequent amendments added two further exceptions.<sup>54</sup> The structure is designed to balance the need for a remedy for injured parties with the need to protect foreign states against undue intrusion into the conduct of the states' public affairs (purpose 1). The structure also arguably protects the State Department from embarrassment in doubtful cases (purpose 2), ensures uniform treatment of foreign states in our courts (purpose 4), and (more certainly) equalizes the posture of foreign states and the United States itself in our courts (purpose 5).

Among other noteworthy structural features, Congress redefined the competence (subject matter jurisdiction) of federal district courts, providing both original and removal competence for all suits involving foreign states as defined in the Immunities Act.<sup>55</sup> One can infer from the grant of removal competence that Congress also left a residual competence in state courts, although the statute doesn't actually say this.<sup>56</sup> Congress also enacted a detailed jurisdictional scheme for proceedings under the Act in federal courts, including banning jurisdictional attachments, although it preserved some aspects of in rem jurisdiction for admiralty proceedings.<sup>57</sup> It also defines long-arm personal jurisdiction over foreign states by requiring a distinct jurisdictional nexus for each exception to immunity, except waiver, making confusion about the jurisdictional nexus a definite possibility given the possibility of confusion over the exceptions to immunity.<sup>58</sup> Nor do these complex provisions exhaust the topic. Courts must also consider general limits on jurisdiction under both international law and due process.<sup>59</sup> The Immunities Act, however, is silent as to any special jurisdictional requirements for suits against foreign states in state courts.<sup>60</sup>

<sup>52</sup> 28 U.S.C. §§ 1609–1611; H.R. REP. NO. 94-1487, *supra* note 46, at 6606, 6625–30.

<sup>53</sup> 28 U.S.C. §§ 1604, 1605(a)(1)–(5), (b), 1607. While 28 U.S.C. § 1604 does not actually use the term “presumption,” presumption is the proper characterization of the effect of 28 U.S.C. § 1604. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

<sup>54</sup> 28 U.S.C. § 1605(a)(6); *Id.* § 1605A (Supp. II 2008).

<sup>55</sup> *See id.* §§ 1330(a), 1332(a)(4), 1441(d) (2006); *see generally* DELLAPENNA, *supra* note 18, §§ 3.2–3.12. For analysis of this use of the term “competence” for the Immunities Act, *see id.* § 3.1.

<sup>56</sup> *See generally* DELLAPENNA, *supra* note 18, at § 3.13.

<sup>57</sup> *See* 28 U.S.C. §§ 1605(b), 1610(d)(2); *see generally* DELLAPENNA, *supra* note 18, §§ 4.7, 4.8, 12.2.

<sup>58</sup> *See* 28 U.S.C. §§ 1330(b), 1605, 1607; *see generally* DELLAPENNA, *supra* note 18, §§ 4.7–4.21.

<sup>59</sup> *See generally* DELLAPENNA, *supra* note 18, §§ 4.1–4.6.

<sup>60</sup> *See id.* § 4.22.

The Immunities Act also provides a complex and detailed scheme for serving process on foreign states, varying with whether service is on a foreign state proper or on an agency or instrumentality, and also introduces special notice and translation requirements.<sup>61</sup> The Act provides special rules relating to venue against foreign states modeled after the venue rules applicable to suits against the United States.<sup>62</sup> It is silent on whether courts have discretion to decline to exercise competence and jurisdiction.<sup>63</sup> The Act gives only the most rudimentary indication of what substantive law should be applied to suits against foreign states.<sup>64</sup> It provides limited rules governing the effect of an appearance, without indicating how an appearance would have to occur, and also abolishes jury trials, at least in federal courts, while restricting default judgments.<sup>65</sup> Finally, the Act includes a presumption of immunity from execution, with the exceptions to this immunity being more constricted than the exceptions to immunity from suit, varying with whether the defendant is a foreign state proper or an agency or instrumentality.<sup>66</sup> The Act says nothing else about procedural reforms despite the problems that arise with many ordinary procedures when they are applied to foreign states and their agencies or instrumentalities.

As this brief survey of the contents of the Immunities Act indicates, the Act attempts to codify the American version of the restrictive theory of foreign state immunity as expounded in the Tate Letter,<sup>67</sup> and goes further to provide a set of exceptions to the immunity of foreign states and their agencies or instrumentalities,<sup>68</sup> apparently in the belief that such standards are necessary to make American law consistent with international law.<sup>69</sup> Leaving aside questions about whether the chosen approach really is consistent with international law, the statute simply fails to provide a workable definition of its standards,<sup>70</sup> fails to address numerous central issues regarding such topics as the applicable law and various procedural issues,<sup>71</sup> and generally serves more as an invitation to

<sup>61</sup> See 28 U.S.C. § 1608; see generally DELLAPENNA, *supra* note 18, §§ 5.1–5.13.

<sup>62</sup> See 28 U.S.C. § 1391(f); see generally DELLAPENNA, *supra* note 18, §§ 6.1–6.9.

<sup>63</sup> See generally DELLAPENNA, *supra* note 18, §§ 8.1–8.13.

<sup>64</sup> See 28 U.S.C. § 1606; see generally DELLAPENNA, *supra* note 18, §§ 8.1–8.6.

<sup>65</sup> See 28 U.S.C. §§ 1330(a) (jury trials), 1330(c) (appearances), 1608(e) (default judgments); see generally DELLAPENNA, *supra* note 18, §§ 10.2 (appearances), 10.6, 10.7 (jury trials), 11.4 (default judgments).

<sup>66</sup> See 28 U.S.C. §§ 1605, 1609, 1610; see generally DELLAPENNA, *supra* note 18, §§ 12.1–12.16.

<sup>67</sup> See Tate Letter, *supra* note 24; see also 28 U.S.C. §§ 1604, 1605(a)(2).

<sup>68</sup> 28 U.S.C. §§ 1605(a)(1), (a)(3)–(d), 1607; *id.* § 1605A (Supp. II 2008).

<sup>69</sup> See *id.* § 1602 (2006); see also cases cited *supra* note 45. For a more complete discussion of this and the other purposes behind the Immunities Act, see *supra* notes 44–52 and accompanying text.

<sup>70</sup> See 28 U.S.C. § 1603. An example of the shortcomings of the so-called definitions in the Immunities Act is provided *supra* note 41 and accompanying text.

<sup>71</sup> See *supra* text accompanying notes 55–66.

protracted litigation than as a basis for resolving questions relating to the liability of foreign states before U.S. courts.<sup>72</sup> The lack of answers to such questions means that the Act leaves a potential to embarrass U.S. relations with the foreign states being sued—contrary to one of the primary, perhaps *the* primary, purpose of the Act.<sup>73</sup>

#### IV. THE SUPREME COURT'S APPROACH TO INTERPRETING THE IMMUNITIES ACT

With so many sources of confusion in the Immunities Act, how is a court to go about interpreting and applying the Act to specific cases? Consider, for example, the fact that the Immunities Act says not one word about the availability of equitable remedies against foreign states and their agencies or instrumentalities. Congress indicated in the section-by-section analysis of the Immunities Act that courts retained the power to enjoin, or to grant other extraordinary relief against, a foreign state,<sup>74</sup> but did not include any provision to this effect in the statute itself. Should a court then take the section-by-section analysis as a supplement to the Immunities Act, or should it, as some currently on the Supreme Court would have it, treat the section-by-section analysis as an attempt to put into the statute that which could not be included in the language actually voted on in Congress?<sup>75</sup> In other words, should courts rely on the section-by-section analysis or not?

When the Immunities Act was first enacted, courts did not hesitate to turn to the section-by-section analysis to fill the gaps and clarify the ambiguities in the statute,<sup>76</sup> or they sometimes simply applied legal rules drawn from other areas of law without support either in the text of the

---

<sup>72</sup> See *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982) (describing the Immunities Act as “a statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary”).

<sup>73</sup> See cases cited *supra* note 48.

<sup>74</sup> H.R. REP. NO. 94-1487, *supra* note 46, at 6621.

<sup>75</sup> In *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), contrast the majority's willingness to use the section-by-section analysis with the separate opinions of three justices. *Id.* at 2287 n.9 (majority opinion by Stevens, J.), 2293 (Alito, J., concurring), 2293 (Thomas, J., concurring in part and concurring in the judgment), 2293–94 (Scalia, J., concurring in the judgment).

<sup>76</sup> See, e.g., *Geveke & Co. Int'l, Inc. v. Kompania Di Awa I Elektrisidat Di Korsou N.V.*, 482 F. Supp. 660, 662 (S.D.N.Y. 1979) (noting that the section-by-section analysis evidences the legislative intent in passing the Immunities Act “to replace jurisdiction over foreign state defendants based upon prejudgment attachment with a comprehensive system of in personam jurisdiction”); *Jones v. Shipping Corp. of India* 491 F. Supp. 1260 (E.D. Va. 1980) (relying on the section-by-section analysis to hold that Congress intended to provide a uniform and comprehensive scheme for adjudicating actions against a foreign state).

statute or in the legislative history.<sup>77</sup> Lower courts routinely grant equitable relief against foreign states and their agencies or instrumentalities, although generally without reference to the language in the section-by-section analysis and sometimes even without reference to the Immunities Act.<sup>78</sup> In contrast, we find courts using the section-by-section analysis to justify interpreting the provision withdrawing immunity for certain non-commercial torts as including a requirement that the tortious conduct as well as the resulting injury occur in the United States,<sup>79</sup> although the statutory language refers only to an injury occurring in the United States.<sup>80</sup> This radical, and not entirely happy, transformation of the reach of the non-commercial-tort exception to the immunity of a foreign state seems now firmly established on the basis not of the statute, but of the legislative history of the statute.<sup>81</sup> Yet because the question has never been reviewed by the Supreme Court and given the Court's recent approach to interpreting the statute, that interpretation might be overturned if the Court were to take up the question.

The Supreme Court or individual Justices on the Court have referred to the section-by-section analysis in nine cases in which the Court construed the Immunities Act,<sup>82</sup> yet the Court has never clearly committed itself to reading the section-by-section analysis as a supplement or controlling guide to the meaning of the Immunities Act. In fact, most of these references are virtually throw-away lines that

<sup>77</sup> See, e.g., *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (applying ordinary corporate law to determine whether the defendant state-owned bank is a separate legal person from the state).

<sup>78</sup> See, e.g., *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 252–54 (2d Cir. 1999); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174 (5th Cir. 1989); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1353–58 (11th Cir. 1982). But see *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983). See generally DELLAPENNA, *supra* note 18, § 11.5.

<sup>79</sup> See, e.g., *Wolf v. Federal Republic of Germany*, 95 F.3d 536, 542 (7th Cir. 1996); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 169 (D.C. Cir. 1994); *Olsen v. Gov't of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984).

<sup>80</sup> 28 U.S.C. § 1605(a)(5) (2006).

<sup>81</sup> See DELLAPENNA, *supra* note 18, § 4.20.

<sup>82</sup> See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 n.9 (2010) (majority opinion by Stevens, J.); *id.* at 2294 (Scalia, J., dissenting); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2423 (2007); *Republic of Austria v. Altmann*, 541 U.S. 677, 716 (2004) (Kennedy, J., dissenting); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484–86 (2003) (Breyer & O'Connor, JJ., concurring in part and dissenting in part); *Saudi Arabia v. Nelson*, 507 U.S. 349, 365 (1993) (White & Blackmun, JJ., concurring in the judgment); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617–18 (1992); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 435 n.3 (1989); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620–21, 622 n.11, 628 (1983); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488–90, 493 n.20, 495 n.22, 496 (1983).

contribute little to the analysis of the Court or of the individual Justices. Only in five of the nine cases does resort to the section-by-section analysis seem actually to inform the construction of the Immunities Act put forth in the opinion.<sup>83</sup> That did occur, however, in the first two cases under the Immunities Act to reach the Court—*Verlinden B.V. v. Central Bank of Nigeria*<sup>84</sup> and *First National City Bank v. Banco Para el Comercio Exterior de Cuba*.<sup>85</sup>

In *Verlinden*, the first case under the Immunities Act to reach the Supreme Court, the parties lacked diversity of citizenship and therefore the only possible basis for upholding the constitutionality of the grant of competence (subject matter jurisdiction) to the federal courts would be because the cause of action “arose” under federal substantive law.<sup>86</sup> The Court relied on the purposes stated in the section-by-section analysis to conclude both that the Immunities Act reached suits by foreign plaintiffs against foreign-state-related defendants,<sup>87</sup> and that the Act was not simply a jurisdictional grant, but in fact provided a body of substantive law governing suits under the Act and therefore satisfied the constitutional requirements for “arising under” jurisdiction.<sup>88</sup>

The Supreme Court returned to the Immunities Act during that same term. In *First National City Bank*, the Court again relied on the section-by-section analysis to inform its reading of the highly ambiguous statute.<sup>89</sup> In that case, the question was whether an American defendant could set off a claim against the Cuban government against claims by a Cuban government-owned bank—an agency or instrumentality of the Cuban government.<sup>90</sup> The Immunities Act said nothing regarding the possibility of “piercing the corporate veil” in executing judgments under the Act. Despite citing the language in the section-by-section analysis that the Immunities Act did not change the substantive liability of foreign governments and their agencies or instrumentalities,<sup>91</sup> the Court went on to hold, contrary to the purpose outlined in the section-by-section analysis of having a “uniform body of law” applicable to suits under the

---

<sup>83</sup> See *Republic of Austria v. Altmann*, 541 U.S. 677, 716 (2004) (Kennedy, J., dissenting); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484–86 (2003) (Breyer & O'Connor, JJ., concurring in part and dissenting in part); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617–18 (1992); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620–21, 622 n.11, 628 (1983); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488–90, 493 n.20, 495 n.22, 496 (1983).

<sup>84</sup> 461 U.S. 480 (1983).

<sup>85</sup> 462 U.S. 611 (1983).

<sup>86</sup> See *Verlinden B.V.*, 461 U.S. at 485.

<sup>87</sup> *Id.* at 488–91.

<sup>88</sup> *Id.* at 493–97.

<sup>89</sup> *First Nat'l City Bank*, 462 U.S. at 620–21, 622 n.11, 628.

<sup>90</sup> *Id.* at 613.

<sup>91</sup> *Id.* at 620–21. Note that this appears to contradict the holding in *Verlinden*, 461 U.S. at 493–97.

Immunities Act,<sup>92</sup> that the Immunities Act must be read as creating a “presumption of independent status” as a matter of federal law.<sup>93</sup> The Court justified this conclusion on the basis of its own readings of the policies underlying the Act,<sup>94</sup> on international precedent from British courts,<sup>95</sup> and from its reading of the section-by-section analysis.<sup>96</sup> Three Justices dissented in the case only on the grounds that the Court should have remanded it for lower courts to apply the announced standard to the facts of the case rather than, as the majority chose to do, deciding for itself that piercing the corporate veil was inappropriate under the facts of the case.<sup>97</sup>

These two decisions took recourse to the section-by-section analysis as a matter of course. The subsequent rise of an insistent textualist approach to the reading of statutes that was embraced by several members of the Supreme Court made this hitherto unquestioned approach controversial. Justice Antonin Scalia, who has been one of the most insistent advocates for a textualist approach on the Supreme Court, summarized this view most succinctly in a dissenting opinion in *Chisom v. Roemer*:

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.<sup>98</sup>

Such a textualist approach has been called “law without mind.”<sup>99</sup> Textualists would reluctantly allow recourse to legislative history only if a statute were ambiguous or if there were an omission that needed to be filled.<sup>100</sup> Completely unacknowledged in such an approach is that reliance on the “plain meaning” of a statutory text is as much an act of

---

<sup>92</sup> *First Nat’l City Bank*, 462 U.S. at 622 n.11 (quoting H.R. REP. NO. 94-1487, *supra* note 46, at 6631).

<sup>93</sup> *Id.* at 627.

<sup>94</sup> *Id.* at 626–27.

<sup>95</sup> *Id.* at 626 n.18.

<sup>96</sup> *Id.* at 628.

<sup>97</sup> *Id.* at 634–35 (Stevens, Brennan & Blackmun, JJ., concurring in part and dissenting in part).

<sup>98</sup> *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting). *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183–84 (1989). For critiques of the textualist approach, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971 (2005); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992). For a more nuanced defense of textualism, see John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010).

<sup>99</sup> Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989).

<sup>100</sup> Popkin, *supra* note 98, at 1137.

interpretation (or construction) as would be reliance on legislative history or any other source extrinsic to the statutory text. What is plain is in the mind of the reader and not in the text itself. Also unacknowledged is that for a statute as full of ambiguities and omissions as the Immunities Act, textual analysis as such can seldom, if ever, be sufficient to resolve the meaning or proper application of the Act.

Take, for example, the problem of whether a commercial activity causes a “direct effect” in the United States.<sup>101</sup> In *Republic of Argentina v. Weltover, Inc.*, Justice Scalia was able to persuade a unanimous Court that it was sufficient to define “direct effect” to state that an “effect is ‘direct’ if it follows ‘as an immediate consequence of the defendant’s . . . activity.’”<sup>102</sup> This simply begs the question of how “immediate” an “immediate consequence” must be, for “immediacy” is a matter of judgment, not a simple fact—and judgment is precisely what Justice Scalia seeks to avoid. In *Weltover*, Justice Scalia found that there was a “direct effect” in the United States because the defendant had deposited payments in an account in New York,<sup>103</sup> although such actions are certainly not required to establish a “direct effect” in every case.<sup>104</sup> After all, the same section of the statute confers jurisdiction on American courts because of a commercial activity in the United States, so if “direct effect” required an activity in the United States, it would be superfluous language—something that a strong textualist such as Justice Scalia recognizes is to be avoided if possible.<sup>105</sup> Textualism is a particularly inappropriate interpretive approach to the Immunities Act given its characteristic vagueness, pervasive ambiguities, and enormous gaps.<sup>106</sup> In short, rather than grappling with the textual problems in the Immunities Act, in the cases decided after *First National City Bank*, the Supreme Court has chosen to ignore those problems and to speak as if the Act provides a clear, coherent set of commands that the Court merely has to read and apply. The results, as are clear in the *Samantar* decision, are merely spreading confusion and arbitrary results.

#### V. COURTS GRAPPLE WITH HEADS OF STATE AND OTHER GOVERNMENT OFFICIALS

The question of whether the Immunities Act applies to heads of state, heads of government, other high officials, and even low-level functionaries arose early on in litigation under the Act.<sup>107</sup> The Supreme

---

<sup>101</sup> 28 U.S.C. § 1605(a)(2) (2006).

<sup>102</sup> 504 U.S. 607, 618 (1992) (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991).

<sup>103</sup> *Id.* at 618–19.

<sup>104</sup> See DELLAPENNA, *supra* note 18, at § 4.12.

<sup>105</sup> See *United States v. Santos*, 128 S. Ct. 2020, 2028 n.6 (2008).

<sup>106</sup> See *supra* notes 39–43 and accompanying text.

<sup>107</sup> See DELLAPENNA, *supra* note 18, §§ 2.12, 2.13.



Court did not take on the question until *Samantar v. Yousuf* in 2010.<sup>108</sup> This section briefly summarizes the attempts of the lower courts to grapple with the problem of immunity for heads of state and other high-level officials, and then the attempts of lower courts to grapple with the possible immunity of low-level officials. Finally, this section explores how the Supreme Court approached these problems in *Samantar*.

A. *Heads of State and Other High-Level Officials*

The Immunities Act defines “foreign state” as including “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.”<sup>109</sup> The language of the Immunities Act does not specifically address any possible immunity of foreign heads of state or other high-level officials.<sup>110</sup> In fact, its definition of “foreign state” does not expressly include any natural persons, seeming to apply only to “legal person[s].”<sup>111</sup> Nor is the legislative history of the Immunities Act helpful. Nothing in the section-by-section analysis of the Immunities Act refers to whether there is such a thing as “head-of-state immunity,” let alone what its reach might be. The closest we find to any comment that might reflect the idea that there was a separate rule of head-of-state immunity was a comment by Bruno Ristau, then Chief of the Foreign Litigation Unit of the Department of Justice, who having just described the possibility of suing Lufthansa (then a foreign-government-owned airline) for its ordinary commercial activities, stated, “Now we are not talking, Congressman, in terms of permitting suit against the Chancellor of the Federal Republic. . . . That is an altogether different question.”<sup>112</sup> Ristau’s brief remarks did not indicate whether he, let alone the entire Executive Branch, believed that there was some sort of immunity for heads of government or heads of state apart from the Immunities Act, or whether he was merely indicating a certain skepticism about whether suits against the Chancellor would likely involve commercial activities.<sup>113</sup>

The silence of the statute and of its legislative history opened a path for the State Department and a growing number of courts to conclude

---

<sup>108</sup> See 130 S. Ct. 2278, 2282 (2010).

<sup>109</sup> 28 U.S.C. § 1603 (2006).

<sup>110</sup> The terrorism provision of the Immunities Act does refer to an “official, employee, or agent” of a foreign state, but it provides only that, under certain circumstances, the foreign state is not immune. 28 U.S.C. § 1605A(a) (Supp. II 2008). It adds nothing to the definition of “foreign state” that might indicate that officials, employees, or agents are to be included in the exception to immunity provided in that section.

<sup>111</sup> 28 U.S.C. § 1603(b)(1) (2006).

<sup>112</sup> *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 16 (1973) (statement of Bruno A. Ristau, Chief, Foreign Litig. Unit, Dep’t of Justice).

<sup>113</sup> See *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 275–77 (S.D.N.Y. 2001).

that a species of absolute immunity from civil and criminal litigation<sup>114</sup> for an ill-defined class of persons survived the enactment of the Immunities Act. If there is such a thing as “head-of-state immunity” independent of the provisions of the Immunities Act,<sup>115</sup> the meaning and scope of that immunity remains unclear. In fact, the very phrase “head-of-state immunity” is misleading because the purported immunity has been applied to family members of a head of state, to prime ministers and other important members of the government, and even to former presidents.<sup>116</sup> In foreign practice, however, immunity does not extend to family members or to former heads of state.<sup>117</sup> The Supreme Court has not yet considered any of these questions, so it is no wonder that more than one court has noted that “the exact contours of head-of-state immunity . . . are still unsettled.”<sup>118</sup>

The notion of “head-of-state immunity,” like the doctrine of the immunity of foreign states, is, at bottom, rooted in the sovereign equality

<sup>114</sup> On the criminal aspects of foreign state and foreign official immunity, see DELLAPENNA, *supra* note 18, § 1.7.

<sup>115</sup> See Amber Fitzgerald, *The Pinochet Case: Head of State Immunity Within the United States*, 22 WHITTIER L. REV. 987, 1002–06 (2001); see generally Joseph W. Dellapenna, International Decision, *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994), 88 AM. J. INT’L L. 528 (1994).

<sup>116</sup> See *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296–97 (S.D.N.Y. 2001) (involving a suit against the Foreign Minister as well as the President of Zimbabwe); *Leutwyler v. Office of Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (involving a suit against the wife of King Abdullah of Jordan); *Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL 75283, at \*4 (E.D.N.Y. Feb. 13, 1996) (involving a suit against the former Prime Minister of Israel); *Lafontant v. Aristide*, 844 F. Supp. 128, 134 (E.D.N.Y. 1994) (involving a suit against a former President of Haiti); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (involving a suit against the Prime Minister of the United Kingdom), *aff’d in part and rev’d in part*, 886 F.2d 438 (D.C. Cir. 1989); *Kilroy v. Windsor*, No. C 78-291 (N.D. Ohio 1978) (involving a suit against Charles, Prince of Wales), *excerpted in* Special Missions and Trade Delegations, 1978 DIGEST § 3, at 641–42, *also in* 81 I.L.R. 605; *Kline v. Kaneko*, 535 N.Y.S.2d 303, 304–05 (Sup. Ct. 1988) (involving a suit against secretary of the Government of Mexico and the wife of the President of Mexico), *aff’d mem. sub nom.* *Kline v. Cordero de la Madrid*, 546 N.Y.S.2d 506 (App. Div. 1989). But see *Marra v. Papandreou*, 216 F.3d 1119, 1120 (D.C. Cir. 2000) (involving a suit against the Minister of Tourism decided on non-immunity grounds); *El-Hadad v. Embassy of the U.A.E.*, 69 F. Supp. 2d 69, 82 n.10 (D.D.C. 1999) (dictum declining to extend head-of-state immunity to embassy officials), *aff’d in part, rev’d in part on other grounds sub nom.* *El-Hadad v. United Arab Emirates*, 216 F.3d 29 (D.C. Cir. 2000); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797–98 (N.D. Cal. 1987) (refusing to accept a suggestion of immunity on behalf of the Philippines’ Solicitor General).

<sup>117</sup> See, e.g., *Mobutu v. SA Cotoni*, 91 I.L.R. 259, 260 (Civ. Ct. 1988) (Belg.) (denying immunity to family members); *Ex-King Farouk v. Christian Dior, S.A.R.L.*, 24 I.L.R. 228, 228–29 (Ct. App. 1957) (Fr.) (denying immunity to former heads of state).

<sup>118</sup> *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 (4th Cir. 1987), *quoted in* *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 288 (S.D.N.Y. 2001).

of states.<sup>119</sup> The sovereign equality of states would be violated if the courts of one sovereign were to sit in judgment of the person who effectively embodies the sovereignty of another nation. Curiously, at least two courts have suggested that “head-of-state immunity” extends only to the heads of “friendly foreign states”—a status that has nothing to do with mutual respect among equal sovereigns.<sup>120</sup> Furthermore, comity requires some form of immunity if heads of state are “to freely perform their duties at home and abroad” on behalf of the sovereign state.<sup>121</sup> To achieve these goals, any immunity accorded to heads of foreign states no more needs to be absolute than the immunity accorded to foreign states themselves.

Before enactment of the Immunities Act in 1976, the immunity of heads of state seems to have been part and parcel of the immunity of the state itself. Historically, no such notion could have existed when the head of a state was thought to be the state, a perspective summarized in the famous quip of King Louis XIV of France, “*L’état c’est moi*.” Courts in early sovereign immunity decisions, such as that in *The Schooner Exchange v. McFaddon*, spoke in highly personal terms of the immunity of the foreign state, using “he” as the pronoun for the foreign sovereign rather than the modern “it.”<sup>122</sup> With the literal fall of empires in the twentieth century, continuation of the identification of a monarch or other head of state with the state itself was no longer meaningful, and the practice gradually fell into general disuse, except to some extent in Great Britain, at least when the foreign state is headed by a monarch.<sup>123</sup> Yet as recently as the approval of the *Restatement (Second) of Foreign Relations Law* in 1965, the American Law Institute treated the immunity of heads of state as integral to the immunity of the state itself.<sup>124</sup> Thus, in the cases decided before 1976, if a suit genuinely was against the state with the personal sovereign named only as a pleading device, a holding on the immunity of the head of state is indicative not of any special immunity for the person or the office, but rather of the immunity of the state itself. The older tradition of treating the state as an expression of the person of the sovereign continues to echo in the title of our *Foreign Sovereign Immunities Act*. Curiously, in the United Kingdom and elsewhere in the British Commonwealth, where the practice of personification seems more

---

<sup>119</sup> See *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994). Regarding the basis of foreign state immunity, see *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136-37 (1812) (the most pertinent language from the opinion is quoted *supra*, accompanying note 19).

<sup>120</sup> *Lafontant*, 844 F. Supp. at 133-35; *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff’d in part and rev’d in part*, 886 F.2d 438 (D.C. Cir. 1989).

<sup>121</sup> *Lafontant*, 844 F. Supp. at 132.

<sup>122</sup> 11 U.S. (7 Cranch) 116, 137 (1812).

<sup>123</sup> This remains evident in the recent edition of Oppenheim’s treatment of the topic. See 1 OPPENHEIM’S INTERNATIONAL LAW § 454 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

<sup>124</sup> See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 65, 66 (1965).

entrenched, their corresponding statutes are termed *State Immunity Acts*, a title that more accurately expresses the focus of the statutes.<sup>125</sup> Despite its title, however, our Immunities Act does not explicitly address the question of immunity for foreign heads of state, while the Australian Foreign States Immunities Act and the British and Canadian State Immunity Acts all define “foreign state” as including the sovereign or other head of the state, as well as the government of the state and related institutions and entities.<sup>126</sup> Still, the tradition of viewing the personal immunity of the head of state as part and parcel of the immunity of the state itself would suggest that the terms of our Immunities Act should apply to heads of state as well.

So long as American courts accorded foreign states more or less absolute immunity from suit, courts apparently were ready to draw upon the two strands of state immunity and diplomatic immunity to craft a rule of absolute immunity for foreign heads of state.<sup>127</sup> No case so holding, however, was ever regularly reported, and the few unreported decisions can be explained on other grounds.<sup>128</sup> Nor did the State Department pay the matter any greater attention. The Tate Letter (inaugurating the restrictive rule of foreign sovereign immunity in American law) did not even mention the possibility of personal immunity for foreign sovereigns.<sup>129</sup> If anyone considered the possibility of a separate immunity for foreign heads of state at that time, it would have been more of a notion than a doctrine. After all, the practice in courts abroad was only somewhat more definite than the few American precedents,<sup>130</sup> although the foreign decisions are hardly more numerous. The few foreign decisions are also uniformly narrow in their scope and cautious in their tenor. A sparse line of English cases, dating back to the nineteenth century, accorded immunity to foreign heads of state.<sup>131</sup> More recently, when a suit was brought against Erich Honecker alleging deprivation of the plaintiff’s personal liberty through the plaintiff’s imprisonment on Honecker’s orders, a court of the German Federal Republic accorded Honecker head-of-state immunity because he was Chairman of the Council of State (*i.e.*, President) of the German Democratic Republic at

---

<sup>125</sup> See, e.g., *Foreign States Immunities Act 1985* (Cth) (Austl.), reprinted in 25 I.L.M. 715 (1986); *State Immunity Act, 1978*, c. 33 (U.K.), reprinted in 17 I.L.M. 1123 (1978); *State Immunity Act, S.C. 1980-81-82*, c. 95 (Can.), reprinted in 21 I.L.M. 798 (1982).

<sup>126</sup> *Foreign States Immunities Act 1985* (Cth), at s 3(3) (Austl.); *State Immunity Act, 1978*, c. 33, § 14(1) (U.K.); *State Immunity Act, S.C. 1980-81-82*, c. 95, § 2 (Can.).

<sup>127</sup> See GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 136–37 (6th rev. ed. 1992); see also *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 275–76 (S.D.N.Y. 2001); Dellapenna, *supra* note 115, at 529–30.

<sup>128</sup> See, e.g., *Estate of Domingo v. Marcos*, No. C82-1055V, 1983 WL 482332, at \*2 (W.D. Wash. July 14, 1983) (holding that foreign heads of state have absolute immunity just as diplomatic and consular officials do).

<sup>129</sup> See Tate Letter, *supra* note 24.

<sup>130</sup> See VON GLAHN, *supra* note 127, at 136–37.

<sup>131</sup> See 1 OPPENHEIM, *supra* note 123, § 454 n.6.

the time of the alleged wrongs.<sup>132</sup> A Belgian court even more recently indicated that President Mobutu Sese Seko of Zaire was absolutely immune from suit in Belgium in a case arising out of the expropriation of property in Zaire.<sup>133</sup> The Belgian court went on to hold, however, that there was, in any event, no basis in the case for holding President Mobutu personally liable.<sup>134</sup>

The State Department sponsored the Immunities Act in large measure because it found the politicization of sovereign immunity decisions by the practice of State Department suggestions to be a considerable embarrassment, concluding that moving those decisions into the courts would prove less embarrassing than leaving them in the Department.<sup>135</sup> The Department, however, was never quite able to act on this assessment of the situation. It continues to act as an *amicus* or to provide a "statement of interest" to advise courts, from the lowest trial court up to the Supreme Court, on the correct interpretation and application of the Immunities Act to the facts of particular cases.<sup>136</sup> This practice has not proven entirely satisfactory to the State Department because courts have not always accepted the Department's advice.<sup>137</sup> The Department goes further regarding foreign heads of state and similar high-level functionaries, issuing what it claims to be binding suggestions to courts.<sup>138</sup>

This issue became important because, in the upsurge of litigation against foreign states and foreign-state-related entities that followed the enactment of the Immunities Act in 1976, a remarkable number of suits (given the prior dearth of such suits) were filed against heads of foreign

<sup>132</sup> *In re Honecker*, 80 I.L.R. 365, 365 (Fed. Ct. J. 1984) (Ger.).

<sup>133</sup> *Mobutu v. SA Cotoni*, 91 I.L.R. 259, 260 (Civ. Ct. 1988) (Belg.).

<sup>134</sup> *Id.* at 262.

<sup>135</sup> See H.R. REP. NO. 94-1487, *supra* note 46, at 6605-07, 6611, 6616, 6634; see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).

<sup>136</sup> See, e.g., *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986) (affirming district court's set aside of a default judgment after a special appearance by the defendant and an *amicus* brief by the United States); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1, 2 (D.D.C. 1990) (vacating a default judgment after a special appearance by the defendant and a statement of interest by the State Department); *Transportes Aereos de Angl. v. Ronair, Inc.*, 544 F. Supp. 858, 861-64 (D. Del. 1982) (deferring to the State Department suggestion that a foreign state be allowed to sue).

<sup>137</sup> See, e.g., *New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 133-34 (S.D.N.Y. 1980) (refusing the State Department's in camera request for a stay), *remanded on other grounds*, 646 F.2d 779 (2d Cir. 1981).

<sup>138</sup> See, e.g., *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 288-97 (S.D.N.Y. 2001); *Lafontant v. Aristide*, 844 F. Supp. 128, 131 (E.D.N.Y. 1994); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff'd in part and rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989). See also Fitzgerald, *supra* note 115, at 1017-19; Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Immunity as Head of State for Zimbabwe's President Mugabe*, 95 AM.J. INT'L L. 874 (2001).

states rather than against the foreign state as such.<sup>139</sup> This upsurge might reflect nothing more than a growing awareness, thanks to the Immunities Act, of the possibilities of such suits as well as, perhaps, a growing involvement of foreign officials in commercial activities.<sup>140</sup> The upsurge also reflects a growing belief that violations of human rights should be redressed through legal proceedings.<sup>141</sup> In most of these head-of-state cases, the court has simply deferred to a suggestion by the State Department that it accord immunity to the foreign head of state.<sup>142</sup>

When the State Department has declined to suggest head-of-state immunity, our courts have rejected such claims even when the facts were indistinguishable from those cases in which the State Department suggested, and the courts accorded, immunity. The first such cases involved former President Marcos of the Philippines and members of his family for actions or events during his tenure in office.<sup>143</sup> Recent decisions denied immunity to members of the family of the Sheikh of Abu-Dhabi and to members of the family of the Sultan of Brunei, although the Department had suggested immunity for the Sheikh himself in the same case.<sup>144</sup> One court also upheld a discovery order

<sup>139</sup> See, e.g., *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379 (S.D. Tex. 1994), *aff'd mem.*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993); *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988), *aff'd in part and rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989).

<sup>140</sup> *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 278 (S.D.N.Y. 2001).

<sup>141</sup> *Id.* at 278–80.

<sup>142</sup> See, e.g., *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994), *aff'd mem.*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 139 (E.D.N.Y. 1994); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff'd in part and rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989).

<sup>143</sup> See *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 496–98 (9th Cir. 1992) (denying immunity to the daughter of a former head of state who had acted on her own behalf); *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1360–61 (9th Cir. 1988) (rejecting act-of-state defense); *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110–11 (4th Cir. 1987) (denying immunity to a former head of state defying a grand jury subpoena); *Republic of Philippines v. Marcos*, 806 F.2d 344, 347, 360–61 (2d Cir. 1986) (dictum doubting that a former head of state would be immune from suit); *United States v. Marcos*, No. SSSS 87 CR. 598 (JFK), 1990 WL 29368, at \*1–2 (S.D.N.Y. Mar. 9, 1990) (denying immunity to the widow of a former head-of-state from criminal prosecution in the United States); *Estate of Domingo v. Republic of Philippines*, 694 F. Supp. 782, 785–86 (W.D. Wash. 1988) (denying immunity to former heads of state resisting reinstatement as defendants), *appeal dismissed mem. sub nom. Estate of Domingo v. Marcos*, 895 F.2d 1416 (9th Cir. 1990); *Roxas v. Marcos*, 969 P.2d 1209, 1251–52 (Haw. 1998) (denying immunity to the widow of a former head of state).

<sup>144</sup> See *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119–21 (D.D.C. 1996); *Bolkiah v. Superior Court*, 88 Cal. Rptr. 2d 540, 548–49 (Ct. App. 1999). See also *Jungquist v. al Nahyan*, 940 F. Supp. 312, 321 (D.D.C. 1996) (denying immunity to

against the Sultan of Abu Dhabi, the owner of the defendant-corporation, after the defendant-corporation filed a counterclaim.<sup>145</sup> The court held that the counterclaim was an implied waiver of testimonial immunity by the corporation and on behalf of the Sultan for whom, the court held, the defendant-corporation was merely an “alter ego.”<sup>146</sup> In *Flatow v. Islamic Republic of Iran*, after the State Department did not suggest immunity, Judge Royce Lamberth held that the terrorism amendment<sup>147</sup> to the Immunities Act implicitly “overrides the common law doctrine of head of state immunity” because the amendment expressly applies to officials, employees, or agents of a foreign state.<sup>148</sup> That conclusion does not follow, however, because courts have repeatedly concluded that heads of state are to be treated differently from mere officials, employees, or agents.<sup>149</sup>

Cases in which a court recognized head-of-state immunity, and the suggestions of the State Department on which they were based, did not rest on the rather ordinary premise that visiting foreign heads of state are entitled to the same privileges and immunities as diplomats.<sup>150</sup> These decisions rest on the more extreme proposition that foreign heads of state are protected by an absolute substantive immunity, at least as long as it pleases the State Department, regardless of whether they could be sued without abridging diplomatic immunity. By this theory, a foreign head of state would be immune even if subject to long-arm jurisdiction in a proceeding based upon private or commercial activities wholly unrelated to traveling to, or in, the United States.<sup>151</sup> And if the State Department is not supportive, perhaps there is no immunity at all. We are left then, at best, with an amorphous legal doctrine whose very existence is not entirely settled and whose reach is almost completely uncertain.<sup>152</sup> One court has even questioned the existence of the doctrine in dictum.<sup>153</sup>

---

family member of a head of state) (dismissing the suit because of lack of personal jurisdiction rather than because of immunity), *rev'd on other grounds*, 115 F.3d 1020 (D.C. Cir. 1997).

<sup>145</sup> See *Lasidi, S.A. v. Financiera Avenida, S.A.*, 538 N.E.2d 332, 334 (N.Y. 1989).

<sup>146</sup> *Id.*

<sup>147</sup> 28 U.S.C. § 1605(a)(7) (2006), *now recodified at* 28 U.S.C. § 1605A (Supp. II 2008). See generally DELLAPENNA, *supra* note 18, § 7.24.

<sup>148</sup> *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 24–25 (D.D.C. 1998).

<sup>149</sup> See, e.g., *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff'd in part and rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989). See generally DELLAPENNA, *supra* note 18, §§ 2.12, 2.13.

<sup>150</sup> See J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 254–55 (Humphrey Waldock ed., 6th ed. 1963); 1 OPPENHEIM, *supra* note 123, § 451.

<sup>151</sup> See *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996).

<sup>152</sup> See Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 187–92 (2000); John M. Walker, Jr., *Domestic Adjudication of International*

The Immunities Act is silent on the question of its application to heads of state or other high-level functionaries. Should that silence mean that the old law is still in place or is the implicit reach of the Act sufficient to apply to such officials? While American courts concluded that the old law remained in place, they never seemed to consider whether the judicial acceptance of control by the State Department is consistent with the policies and purposes of the Immunities Act. The State Department invokes the “doctrine” in order to control litigation against high-level foreign officials, the very opposite of Congress’s intent in enacting the Immunities Act as far as the foreign state itself or its agencies or instrumentalities are concerned.<sup>154</sup> While any litigation against an office-holder interferes to some extent with the discharge of the duties of office, to shield an office-holder behind a claim of immunity works a denial of justice to those who have suffered a wrong and interferes with the achievement of regulatory goals in the nation to which the activity pertains. Claims of official immunity, like claims of state or sovereign immunity, always must be balanced against the interests of justice and against relevant regulatory goals.<sup>155</sup> If in virtually every other context we have concluded that the interests of justice or regulatory goals predominate when the state or the office-holder descends from the heights of sovereign (or public or official) duty to the plane of private or commercial activity, or otherwise behaves so that the shield of immunity should be lost, why should they be immune from suit? Suppose, for example, a president of a foreign state were to order a large amount of wine from a winery in California for personal use and then refuse to pay for it, without lawful excuse. Would anyone seriously contend that the president should not be suable in an appropriate American court, subject to all of the protections that would have been available to the foreign state itself if the wine had been ordered for use at an embassy in Washington?<sup>156</sup>

There appears to be only one reason to treat foreign heads of state any differently. That is the risk of personal affront arising from service of process upon a foreign head of state on an official visit. That risk could be dealt with by holding the foreign head of state or other high-level functionary immune from personal service while visiting the United States as a sort of diplomatic immunity. This would render the foreign official immune to personal jurisdiction if (but only if) personal jurisdiction is based solely upon personal service of process while in the

---

*Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 554–58 (1997).

<sup>153</sup> See *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988).

<sup>154</sup> See 28 U.S.C. § 1602 (2006); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); H.R. REP. NO. 94-1487, *supra* note 46, at 6605–07.

<sup>155</sup> Cf. *Clinton v. Jones*, 520 U.S. 681, 692–95 (1997) (upholding limited immunity from suit for a sitting President of the United States).

<sup>156</sup> Cf. *Ex-King Farouk v. Christian Dior, S.A.R.L.*, 24 I.L.R. 228, 228–29 (Ct. App. 1957) (Fr.).



United States on an official visit. The only controlling role for the State Department in these cases should be to inform the court whether the purported state is recognized by the United States, and perhaps whether the person in question is in fact a “head of state” or holds some other position within the ambit of “head of state immunity.”<sup>157</sup> Whether that person is immune should be a legal question for the court. Such an approach is consistent with the provisions of the International Law Commission Draft Articles<sup>158</sup> and consistent with emerging state practice as found in comparable State Immunity Acts<sup>159</sup> and foreign case law,<sup>160</sup> as well as consistent with a fair reading of the Immunities Act.

The lower courts have simply declined to consider interpreting the reach of the Immunities Act in these cases by recourse to the policies or the legislative history of the Act or the legal history of the doctrine of foreign sovereign immunity. This predates the Supreme Court’s embrace of a textualist approach to construing the statute, presumably from the same sort of excessive deference to the desires of the executive branch that led to the problems with suits against foreign states before enactment of the Immunities Act.<sup>161</sup> A textualist approach would cement these conclusions in the construction of the Act.

#### B. *Derivative Immunity for Lower-Level Functionaries?*

The lower courts have handled the even larger number of cases brought against lesser foreign officials based upon alleged wrongs committed in the performance of their official duties very differently from suits against heads of state or other high-level functionaries. The Act’s definition of “agencies or instrumentalities” of foreign states, in

<sup>157</sup> See, e.g., *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 24 (D.D.C. 1998); *Doe v. Karadzic*, 866 F. Supp. 734, 737–38 (S.D.N.Y. 1994), *rev’d sub nom. Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994), *aff’d mem.*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 131 (E.D.N.Y. 1994).

<sup>158</sup> Rep. of the Int’l Law Comm’n, 43d sess., Apr. 29–July 19, 1991, at 11–13, 32–33, U.N. Doc. A/43/10; GAOR, 46th Sess., Supp. No. 10 (1991), *reprinted in* 30 I.L.M. 1554 (1991) (proposing draft articles on the “jurisdictional immunities of States and their property,” extending immunity provisions to “representatives of the State acting in that capacity,” and indicating no effect on the immunities of persons affiliated with diplomatic missions or the like, or privileges relating to the “*ratione personae*” of the head of state). The commentary is explicit that the provision is intended to cover heads of state as well as other officials. *Id.* at 24.

<sup>159</sup> See, e.g., *Foreign States Immunities Act 1985* (Cth), s 3(3)(b) (Austl.), *reprinted in* 25 I.L.M. 715 (1986); State Immunity Act, 1978 c. 33, §§ 14(1)(a), 20(1)(a) (U.K.), *reprinted in* 17 I.L.M. 1123 (1978); State Immunity Act, S.C. 1980-81-82, c. 95, § 2(a) (Can.), *reprinted in* 21 I.L.M. 798 (1982).

<sup>160</sup> See, e.g., *Mobutu v. SA Cotoni*, 91 I.L.R. 259, 260 (Civ. Ct. 1988) (Belg.).

<sup>161</sup> See Cardozo, *supra* note 22; Jessup, *supra* note 22, at 169–70; Kuhn, *supra* note 23, at 774; Timberg, *supra* note 34, at 35.

fact, seems to apply only to “legal persons.”<sup>162</sup> Nonetheless, courts have recognized that sometimes a suit against a person employed by a state really is a suit against the state.<sup>163</sup> Because of this, numerous courts applied the Immunities Act to bar such suits—unless the plaintiff could bring the claim within an exception to immunity—despite the silence of the Act on the question.<sup>164</sup> The list would be longer if one were to count the cases in which individuals are joined as co-defendants with a foreign state or its agency or instrumentality and the court simply lumped all defendants together without separately analyzing the possible immunity of the individual defendants—although many of these cases involved situations where the foreign-state-related defendants would not be immune even after applying the Immunities Act.<sup>165</sup> If the actions in question are within the scope of the office, employment, or agency, lower American courts have judged claims of immunity in terms of the statutory exceptions to immunity.<sup>166</sup> American courts have also extended such

<sup>162</sup> 28 U.S.C. § 1603(b) (2006); *Samantar v. Yousuf*, 130 S. Ct. 2278, 2286–87 (2010). *See generally* DELLAPENNA, *supra* note 18, § 2.5.

<sup>163</sup> *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1101–02 (9th Cir. 1990); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1120 (D.D.C. 1996); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 370 n.3 (S.D.N.Y. 1996).

<sup>164</sup> *See, e.g.*, *Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 874–76 (9th Cir. 2000); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 245–46 (2d Cir. 1999); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 386–91 (5th Cir. 1999); *In re Papandreou*, 139 F.3d 247, 252–53 (D.C. Cir. 1998); *Fagot Rodriguez v. Republic of Costa Rica*, 139 F. Supp. 2d 173, 196–97 (D.P.R. 2001). *See also* *Butters v. Vance Int’l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (allowing derivative immunity for an independent contractor of a foreign state because the foreign state made the challenged decision and the contractor was performing a state function). For analyses of this line of cases, see David J. Bederman, *Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT’L & COMP. L. 255, 258–70 (1996); Joan Fitzpatrick, *The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violations*, 15 WHITTIER L. REV. 465 (1994). Canadian courts have reached a similar conclusion under the Canadian State Immunity Act. *See, e.g.*, *Walker v. Bank of N.Y. Inc.* (1994), 69 O.A.C. 153 (Can. Ont. C.A.).

<sup>165</sup> *See, e.g.*, *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1212–13, 1216–19 (10th Cir. 1999); *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 762–64 (2d Cir. 1998); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173–74 (5th Cir. 1994); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1247–48 (S.D. Fla. 1997); *Am. Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861, 863–64 (N.D. Ill. 1987).

<sup>166</sup> A lower-level functionary is not protected for actions taken outside the scope of the office, employment, or agency. *See, e.g.*, *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999) (dictum); *Jungquist v. al Nahyan*, 115 F.3d 1020, 1027–30 (D.C. Cir. 1997) (stating the rule, but finding that lower-level functionaries were acting within the scope of their official duties); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306–07 (9th Cir. 1997); *Fagot Rodriguez v. Republic of Costa Rica*, 139 F. Supp. 2d 173, 196–97 (D.P.R. 2001); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 679 (S.D.N.Y. 1996) (dictum); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197–98 (S.D.N.Y. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175–76 (D. Mass. 1995). *See also* Bederman, *supra* note 164, at 263–70.

protections even to temporary or *ad hoc* officers, employees, or agents of a foreign state or an agency or instrumentality.<sup>167</sup> The approach adopted by lower U.S. courts is similar to the treatment of suits against natural persons who are agents of the United States.<sup>168</sup> Foreign courts similarly accord such protections to officers, employees, or agents of the United States.<sup>169</sup>

Because the Immunities Act does not speak in terms of natural persons, application of the statute's procedural rules—such as service of process—was awkward.<sup>170</sup> How then to justify this conclusion in the face of the silence of the Immunities Act and the awkwardness of applying certain provisions of the Act? As least one court concluded that the answer is found in the expressed intent of Congress to codify the then-existing restrictive theory of immunity in the statute—an existing theory that had subsumed the immunity of state officers, employees, or agents under the immunity of the state.<sup>171</sup> Not only did Congress intend to codify existing practice, but it also meant to eliminate the role of the State Department in suggesting immunity—a practice that would be resurrected if the State Department's suggestion of interest were followed in the case.<sup>172</sup> This conclusion required a court to distinguish carefully between the derivative immunity under the Immunities Act applied in suits against lower-level functionaries of a foreign state and the special immunities of diplomatic and consular representatives of foreign

---

U.S. courts ignored the possible application of the Immunities Act to lower-level functionaries in cases where the defendant no longer held the position and the current government disavowed the activity. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992).

<sup>167</sup> *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 245–46 (2d Cir. 1999) (applying the Immunities Act to liquidators of a bankrupt bank); *Vanderkam v. Clarke*, 993 F. Supp. 1031, 1032 (S.D. Tex. 1998) (applying the Immunities Act to an attorney appointed to investigate a corporation); *Granville Gold Trust-Switz. v. Commissione del Fallimento/Interchange Bank*, 928 F. Supp. 241, 243–44 (E.D.N.Y. 1996) (applying the Immunities Act to liquidators of a bankrupt bank), *aff'd mem.*, 111 F.3d 123 (2d Cir. 1997); *Fabe v. Aneco Reinsurance Underwriting Ltd.*, 784 F. Supp. 448, 450–51 (S.D. Ohio 1991) (applying the Immunities Act to liquidators of a bankrupt corporation). *See also Rimsat, Ltd. v. Hilliard (In re Rimsat, Ltd.)*, 207 B.R. 964, 967 (D.D.C. 1997) (finding an implicit waiver of immunity by the liquidators of a bankrupt corporation).

<sup>168</sup> *Compare Republic of Philippines v. Marcos*, 806 F.2d 344, 360–61 (2d Cir. 1986), *with Nixon v. Fitzgerald*, 457 U.S. 731, 757–58 (1982).

<sup>169</sup> *See, e.g., Jaffe v. Miller* (1993), 64 O.A.C. 20 (Can. Ont. C.A.); *Tritt v. United States* (1989), 68 O.R. 2d 284 (Can. Ont. Sup. Ct.); *Holland v. Lampen-Wolfe*, [2000] 3 All E.R. 833 (H.L.) (Eng.).

<sup>170</sup> *See, e.g., Byung Wha An v. Doo-Hwan Chun*, No. 96-35971, 1998 WL 31494 (9th Cir. 1998).

<sup>171</sup> *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101–03 (9th Cir. 1990) (citing H.R. REP. NO. 94-1487, *supra* note 46, at 6605–07).

<sup>172</sup> *See* H.R. REP. NO. 94-1487, *supra* note 46, at 6605–66.

states.<sup>173</sup> Diplomatic and consular immunity derives directly from a body of international law that Congress was careful to leave intact.<sup>174</sup> While diplomatic and consular immunity in some respects is similar to the restrictive immunity as enacted in the Immunities Act,<sup>175</sup> those immunities are in no way dependent on the Immunities Act.

*C. The Supreme Court Steps In*

The suit against Mohamed Ali Samantar provided the occasion for the Supreme Court at last to address the question of derivative immunities for individuals under the Immunities Act.<sup>176</sup> He was alleged to have been responsible for the murder and death of political opponents while he was Minister of Defense and Prime Minister, during a period of about ten years.<sup>177</sup> The district court and the Court of Appeals for the Fourth Circuit treated the suit as one against an officer or employee of a foreign state<sup>178</sup>—what I have termed a lower-level functionary. If Samantar were seen as a lower-level government official, the lower courts in the thirty-four years since the Immunities Act came into effect would have unanimously held that whether he was immune from suit was governed by the terms of the Act.<sup>179</sup> Judge William Traxler, Jr., writing for a unanimous panel of the Court of Appeals, concluded, however, that the question was open in the Fourth Circuit.<sup>180</sup> Relying on the text of the statute, which applies only awkwardly, if at all, to natural persons, and on the section-by-section analysis, which similarly seems to contemplate only artificial persons as “agencies or instrumentalities,” the majority concluded that the Immunities Act did not apply to individuals like Samantar.<sup>181</sup>

On appeal, a unanimous Supreme Court affirmed the Court of Appeals. After briefly summarizing the history of foreign state immunity

---

<sup>173</sup> See, e.g., *Taiwan v. U.S. Dist. Court*, 128 F.3d 712 (9th Cir. 1997); *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996); *767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295 (2d Cir. 1993); *Abdulaziz v. Metro. Dade Cnty.*, 741 F.2d 1328 (11th Cir. 1984). See generally Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77 (entered into force with respect to United States Dec. 24, 1969).

<sup>174</sup> H.R. REP. 94-1487, *supra* note 46, at 6619–21, 6624, 6628.

<sup>175</sup> See, e.g., *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1296 (11th Cir. 1999). But see *Tabion v. Mufti*, 73 F.3d 535, 538–39 (4th Cir. 1996) (indicating that the Immunities Act is not helpful in interpreting the term “commercial activity” relating to diplomatic or consular immunity).

<sup>176</sup> The facts and procedural history are summarized *supra* in the text accompanying notes 1–9.

<sup>177</sup> *Samantar v. Yousuf*, 130 S. Ct. 2278, 2282 (2010).

<sup>178</sup> *Yousuf v. Samantar*, 552 F.3d 371, 373, 381 (4th Cir. 2009).

<sup>179</sup> See *supra* notes 163–69 and accompanying text.

<sup>180</sup> *Yousuf*, 552 F.3d at 378.

<sup>181</sup> *Id.* at 379–81.

in the United States and the enactment of the Immunities Act,<sup>182</sup> Justice John Paul Stevens turned to a close analysis of the text of the Act to conclude that it did not apply to suits against natural persons.<sup>183</sup> He stressed that the definition of “agency or instrumentality” included language at least four times that referred to corporations or other artificial persons<sup>184</sup>: “any entity”;<sup>185</sup> “a separate legal person, corporate or otherwise”;<sup>186</sup> “a majority of whose shares or other ownership interest”;<sup>187</sup> and “which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.”<sup>188</sup> Justice Stevens also referred to the section-by-section analysis to bolster his conclusion, although discussing this point only in a footnote.<sup>189</sup> Justice Stevens also pointed out that the Act mentioned “foreign officials” at several points,<sup>190</sup> concluding that if Congress had wanted to include them in the concept of a “foreign state” it would have done so.<sup>191</sup> Justice Stevens summed up the analysis by noting the Immunities Act’s “careful calibration of remedies among the listed types of defendants,” a calibration that would be upset if the Court were to sweep within the Act other types of defendants.<sup>192</sup> Completely missing from this analysis is any sense of the ambiguities, gaps, and confusions that abound in the Immunities Act<sup>193</sup>—problems that could lead a court to undertake a more expansive approach to interpreting the reach and meaning of the statute.

The plaintiffs did not rest their case solely on arguments about the text and legislative history of the Immunities Act. They made a policy argument that the intent of the statute to codify the common law of state immunity required the Court to read it as covering official immunity as well as the immunity of the state itself.<sup>194</sup> Justice Stevens fell back on the “canon[s] of construction,” primarily that in legislating in an area previously covered by the common law, the resulting statute should be

---

<sup>182</sup> *Samantar*, 130 S. Ct. at 2284–85.

<sup>183</sup> *Id.* at 2285–89.

<sup>184</sup> *See id.* at 2286.

<sup>185</sup> 28 U.S.C. § 1603(b) (2006).

<sup>186</sup> *Id.* § 1603(b)(1).

<sup>187</sup> *Id.* § 1603(b)(2).

<sup>188</sup> *Id.* § 1603(b)(3). Sections 1332(c) and (e) refer to the “citizenship” of corporations.

<sup>189</sup> *See Samantar*, 130 S. Ct. at 2287 n.9. This brief discussion elicited the only points of difference between the majority opinion and three separate concurring opinions. *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). They objected that any consideration of legislative history was both unnecessary and objectionable in principle.

<sup>190</sup> *Id.* at 2288; *see also* 28 U.S.C. § 1605A (Supp. II 2008).

<sup>191</sup> *Samantar*, 130 S. Ct. at 2289.

<sup>192</sup> *Id.* at 2288–89.

<sup>193</sup> *See supra* notes 10–14, 38–43 and accompanying text.

<sup>194</sup> *Samantar*, 130 S. Ct. at 2289.

construed as retaining the substance of the common law.<sup>195</sup> He did not consider the actual utility of such “canons” or acknowledge the effective deconstruction of such rules by Karl Llewellyn sixty years ago.<sup>196</sup> Nor did he take seriously the plaintiffs’ invocation of the canon that statutes should be construed to be consistent with international law.<sup>197</sup> Instead, he found in the *Restatement (Second) of Foreign Relations Law* that the international law of official immunity was more limited than that of the foreign state itself from the *Restatement’s* limitation of immunity of “agent[s] of the state” to “acts performed in his official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state.*”<sup>198</sup> Therefore, Justice Stevens concluded, if Congress had intended to codify official immunity, it would have done so explicitly in order to include or modify this special limitation.<sup>199</sup> Instead, Justice Stevens concluded that the immunity of foreign officials remained covered by the common law,<sup>200</sup> including the potential role of the State Department in making “suggestions of immunity.”<sup>201</sup> As for the very real possibility that clever plaintiffs would seek to avoid the immunity of a foreign state by suing its officials, Justice Stevens concluded that trial courts would address that issue by finding that the foreign state (including its agency or instrumentality) was a necessary party to the litigation and therefore the suit could proceed only if the foreign state was not itself immune.<sup>202</sup>

The upshot of this brief decision is that the immunity of foreign officials is governed by a nearly non-existent common law of official immunity,<sup>203</sup> while the Court’s interpretive approach virtually abandons

---

<sup>195</sup> *Id.* at 2289 n.13. For the classic discussion of the problems with reliance on “canons of construction,” see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–406 (1950). See also William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

<sup>196</sup> See Llewellyn, *supra* note 195, at 401–406; see also Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971 (2007).

<sup>197</sup> *Samantar*, 130 S. Ct. at 2290 n.14.

<sup>198</sup> *Id.* at 2290 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965)). Justice Stevens indicates that he is referring to the *Restatement (Second)* earlier in the opinion, without explanation as to why he did not refer to the *Restatement (Third)*. See 130 S. Ct. at 2285 n.6. Additionally, § 66 is found only in the *Restatement (Second)*. The numbering system for sections of the *Restatement (Third)* is different and the *Restatement (Third)* does not address the immunity of foreign state officials.

<sup>199</sup> *Samantar*, 130 S. Ct. at 2290–91.

<sup>200</sup> *Id.* at 2291–92.

<sup>201</sup> *Id.* at 2285, 2291 n.19.

<sup>202</sup> *Id.* at 2292.

<sup>203</sup> Justice Stevens noted that there were only four cases involving official immunity and two involving head-of-state immunity during the period from 1952 (when the Tate Letter was issued) to 1977 (when the Immunities Act came into effect), out of 110 total foreign immunity cases. *Id.* at 2291 n.18.

any effort to construe the Immunities Act to give effect to its manifest purposes or to address the numerous confusions, elisions, and contradictions of the statute. The application of the common law of immunity to Samantar himself was left completely unclear. Samantar's status as Prime Minister during part of the time during which the claims against him arose<sup>204</sup> and possibly his role as Minister of Defense and Vice-President during the remainder of the period could entitle him to head-of-state immunity rather than the immunity of a lower-level functionary.<sup>205</sup> Justice Stevens acknowledged this possibility, but gave no guidance whatsoever as to how this question should be resolved.<sup>206</sup> The Court was merely content to tell lower courts not to use the Immunities Act in suits against foreign officials at any level of responsibility. The *Samantar* decision gives almost no guidance on how to proceed in such cases.

## VI. CONCLUSIONS

The immediate question now confronting lawyers and judges is: What will the lower courts make of the so-called common law of foreign official immunity?<sup>207</sup> Is the standard the same for high-level functionaries ("head-of-state immunity") and for lower-level officials ("official immunity")?<sup>208</sup> What is the standard of immunity for either or both groups?<sup>209</sup> And, what is the role of the State Department in deciding whether and how to recognize and apply such immunities?<sup>210</sup>

Thus far, two decisions by the Second Circuit Court of Appeals noted these questions, but left the issues undecided.<sup>211</sup> Another court ruled that Liberia's insurance commissioner was not immune under the Immunities

<sup>204</sup> Compare *id.* at 2282, with *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (involving a suit against the Prime Minister of the United Kingdom), *aff'd in part and rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989).

<sup>205</sup> See, e.g., *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296–97 (S.D.N.Y. 2001) (involving a suit against the Foreign Minister as well as the President of Zimbabwe); *Kline v. Kaneko*, 535 N.Y.S.2d 303 (Sup. Ct. 1988) (involving a suit against secretary of the Government of Mexico and the wife of the President of Mexico), *aff'd mem. sub nom.* *Kline v. Cordero de la Madrid*, 546 N.Y.S.2d 506 (App. Div. 1989).

<sup>206</sup> *Samantar*, 130 S. Ct. at 2290 n.15.

<sup>207</sup> The only attempt thus far at a scholarly analysis is a short article in a less formal journal. See Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61 (2010).

<sup>208</sup> See *id.* at 63–68.

<sup>209</sup> See *id.* at 68–71.

<sup>210</sup> See *id.* at 71–75.

<sup>211</sup> *RSM Prod. Corp. v. Fridman*, 387 F. App'x 72 (2d Cir. 2010) (affirming dismissal of claim for failure to state a cause of action); *Carpenter v. Republic of Chile*, 610 F.3d 776, 780–81 (2d Cir. 2010) (remanding for the district court to consider whether there is common law immunity). Other decisions have declined to reach the immunity question in dismissing cases on other grounds. See, e.g., *Ochoa Lizarbe v. Rivera Rondon*, 402 F. App'x 834 (4th Cir. 2010); *In re Terrorist Attacks on Sept. 11, 2001*, 718 F. Supp. 2d 456 (S.D.N.Y. 2010).

Act, without considering whether there was some sort of common law immunity.<sup>212</sup> So we have no clue yet how the lower courts will develop the supposed immunities. In *Matar v. Dichter*, the Second Circuit, however, had applied immunity under the common law in 2009, perhaps in anticipation of the step the Supreme Court took in *Samantar*.<sup>213</sup> Judge Dennis Jacobs, writing on behalf of a unanimous panel, found the particular defendant immune because the State Department and the Justice Department suggested immunity, even though, as he acknowledged, the defendant might not have been immune under a judicial application of the strictly legal principles of foreign official immunity.<sup>214</sup> Judge Jacobs rejected a claim that the defendant had forfeited immunity by violating a *jus cogens* norm against war crimes and extrajudicial killing.<sup>215</sup> Finally, Judge Jacobs rejected the application of the Torture Victim Protection Act<sup>216</sup> on the grounds that it could not override a suggestion of immunity by the State Department.<sup>217</sup> For those who champion the rule of law in foreign relations, this is not a good start.<sup>218</sup>

In addition to the specific question of whether a particular foreign official is, or ought to be, immune from suit in an American court, there is the broader question squarely presented in the *Samantar* decision of how to approach the interpretation of the Immunities Act. A textualist approach would support the conclusions the lower courts reached, but does such an approach produce a rational application of the law or an abdication of the rule of law? Should that be relevant to construing the reach of the Act? Should whether the reading comports with “progressive development” of international law be relevant in interpreting the Act?<sup>219</sup>

Going beyond the interpretation of the Immunities Act, there is an even broader question involved in *Samantar*—a question that may well prove to be the most important legacy of *Samantar*. Is interpretation of the law simply a question of reading a text and giving it a plain meaning—a meaning that is itself already an interpretation? Or is there

---

<sup>212</sup> See *Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Ins. Co.*, 391 F. App’x 173 (3d Cir. 2010).

<sup>213</sup> 563 F.3d 9 (2d Cir. 2009). The court indicated that it reverted to the supposed common law immunity because of the uncertainty about the applicability of the Immunities Act introduced by the Fourth Circuit’s decision in *Yousuf v. Samantar*. *Id.* at 12–14.

<sup>214</sup> *Id.* at 14.

<sup>215</sup> *Id.* at 14–15.

<sup>216</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992), (codified as a note after 28 U.S.C. § 1350 (2006)).

<sup>217</sup> *Matar*, 563 F.3d at 15.

<sup>218</sup> See Cardozo, *supra* note 22; Jessup, *supra* note 22; Kuhn, *supra* note 23; Keitner, *supra* note 207, at 71–73; Timberg, *supra* note 34.

<sup>219</sup> “Progressive development” is not a term of American law, but it is found as an objective of at least some aspects of the interpretation of customary international law in the UN system. See U.N. Charter art. 13, para. 1; Statute of the International Law Commission, G.A. Res. 174(II), art. 1, U.N. Doc. A/CN.4/4 (Nov. 21, 1947).



necessarily a role for judgment and creativity in applying the law? Already there are citations to the *Samantar* decision for this broader question, and not simply to resolve questions of the immunity of foreign officials.<sup>220</sup> While space does not allow full discussion of the inadequacies of mindless<sup>221</sup> attempts to avoid the need to interpret language, the evident inadequacies of this approach in *Samantar* itself provide a concrete instance of the broader inadequacies of a rigid textualism—a “plain meaning” approach to reading statutes.<sup>222</sup>

The text is, of course, where interpretation begins. Whatever it means, the text is the “authoritative statement” enacted by Congress and signed by the President, not the legislative history.<sup>223</sup> The text, however, cannot be where interpretation ends, for if the meaning were so clear the case wouldn’t be in court in the first place. After all, even Jimmy Page and Robert Plant realized that “sometimes words have two meanings.”<sup>224</sup> Of course, words often have more than two meanings, meanings that are shaped by context and purpose and do not just reflect dictionary definitions. One needn’t conclude that all meaning is utterly indeterminate<sup>225</sup> to conclude that a textualist approach often creates only an illusion of certainty.

Interpretation is, it must be, a form of “practical reasoning” transcending any singular approach to finding meaning.<sup>226</sup> Finding the correct reading of a statute requires careful attention to the social, political, economic, historical, and legal context in which the statute was crafted. Among the most important aspects of that context is the purpose that Congress was seeking to achieve in enacting a statute. At least when that purpose is clear, the Court should interpret the statute consistently with that purpose.<sup>227</sup> Even allowing for the possibility that imperfections in the statutory language might have been deliberate—the result of a

---

<sup>220</sup> See *Duarte-Ceri v. Holder*, 630 F.3d 83, 101 (2d Cir. 2010); *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 798 (7th Cir. 2010); *Ben-Rafael v. Islamic Republic of Iran*, 718 F. Supp. 2d 25, 32 n. 7 (D.D.C. 2010).

<sup>221</sup> See Smith, *supra* note 99.

<sup>222</sup> See articles cited *supra* note 98.

<sup>223</sup> *Exxon Mobil Corp. v. Allapattah Servs, Inc.*, 545 U.S. 546, 568 (2005).

<sup>224</sup> LED ZEPPELIN, *Stairway to Heaven*, on LED ZEPPELIN IV (Atlantic 1971).

<sup>225</sup> See, e.g., James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 708–11, 728 (1985).

<sup>226</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

<sup>227</sup> See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 94–99 (2007); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591 (2004); *Clinton v. City of New York*, 524 U.S. 417, 428–29 (1998); *Lewis v. United States*, 523 U.S. 155, 160 (1998); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 454–55 (1989). See also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* 81–97 (2008); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

legislative compromise<sup>228</sup>—does not mean that the purpose of the statute is irrelevant to interpreting the statute. As one prominent textualist has admitted, even textualism, at bottom, is a kind of purposive philosophy. Textualism assumes that Congress, in choosing its language, is expressing its purpose.<sup>229</sup> All this merely means is that one must be cautious, realistic, and pragmatic in interpreting a statute. Finally, textualists overlook the possibility that rather than a knowing compromise, the language in the statute is just poorly drafted.<sup>230</sup> Which brings us back to the Immunities Act: How is a court to interpret a statute as poorly drafted as the Immunities Act?<sup>231</sup>

---

<sup>228</sup> See, e.g., *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646–47 (1990). See generally Manning, *supra* note 98, at 1310–18; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–78 (2006); Molot, *supra* note 227, at 32–33.

<sup>229</sup> Manning, *supra* note 98, at 1316.

<sup>230</sup> See generally Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329 (Andrei Marmor ed., 1995).

<sup>231</sup> See *supra* notes 10–14, 38–43 and accompanying text.