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## Samantar, Official Immunity and Federal Common Law

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SAMANTAR, OFFICIAL IMMUNITY  
AND FEDERAL COMMON LAW

by  
*Peter B. Rutledge\**

*The Supreme Court's decision in Samantar is most easily understood as holding that the Foreign Sovereign Immunities Act does not cover claims against individual foreign government officers. Instead of stopping at that rather unassailable conclusion, the Court took the more controversial step of holding that individual officers still could be entitled to immunity as a matter of federal common law. This Symposium Essay, part of a larger set of papers addressing Samantar, criticizes that conclusion. It criticizes the Court for failing to justify this exceptional exercise of its common-law-making power and identifies the pitfalls of this under-theorized conception of federal common law. Instead, this Essay argues, the Court should have refrained from exercising its power here. Such an approach would have had the salutary effect of forcing Congress to fill an obvious gap and, thereby, perhaps bring United States law more into harmony with the prevailing international norms on the subject. Finally, the Essay anticipates potential criticisms to this approach and explains how other doctrines can address those criticisms.*

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## I. INTRODUCTION

In *Samantar v. Yousuf*, the Supreme Court addressed a long-simmering dispute over whether the protections of the Foreign Sovereign Immunities Act (“FSIA”) extended to individual government officers.<sup>1</sup> All nine justices agreed that it generally did not, though the Court’s opinion left open the possibility that certain suits against foreign officials could be the functional equivalent of a suit against the state and, thereby, qualify for the FSIA’s protections. Otherwise, foreign government officials are, at most, entitled to an official immunity at federal common law, the precise contours of which the Court left unaddressed.

While the Court at least can be praised for wading into this increasingly important area, its decision is remarkably unsatisfying. The decision fails to articulate a coherent theoretical foundation, fails to provide sufficient guidance about the scope of this federal common law of immunity, and fails to trace through the implications of its holding. The unfortunate result will be at least several years of litigation as lower courts (and litigants) struggle to make sense of the Court’s decision.

This result is especially troubling for two reasons. First, it concerns (at least partly) a jurisdictional rule; such rules should be clear to both the parties and the courts. Second, suits against foreign government officials easily can touch upon the foreign relations of the United States, and the lack of clear standards about when those suits can go forward threatens to frustrate the management of those relations.

Instead of adopting this half-baked solution, the Court should have opted for a more radical approach: it should have held that the FSIA did not cover foreign government officials *and that federal common law did not fill in the gap*. While this result might have had the short-term consequence of leaving some government officials exposed to suit, it would have had the salutary effect of a forcing rule. It would have encouraged the political branches either to amend the FSIA or to formulate a new legislative structure to govern the immunity of foreign government officials. The result would have provided a sounder architecture for these suits and, contrary to an expected criticism, would not have raised insurmountable concerns about the rule’s effect on pending or future cases.

This Essay develops this thesis in three parts. The first part provides a general overview on sovereign immunity law with a special emphasis on official immunity. The second elaborates upon the flaws in *Samantar* and defends the proposition that the Court should not have allowed vague notions of federal common law to fill the apparent gap in the federal law governing sovereign immunity. The third charts an alternative course that the Court could have followed and anticipates criticisms.

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<sup>1</sup> 130 S. Ct. 2278, 2282 (2010).

## II. FOUR ERAS OF IMMUNITY

A bit of background helps to place *Samantar* in context. For nearly the first century and a half of the nation's history, United States courts followed an absolute theory of sovereign immunity.<sup>2</sup> Under that theory, foreign sovereigns were not answerable for their conduct in another country's domestic courts.<sup>3</sup> This approach comported with other post-Westphalian doctrines such as those governing judicial jurisdiction (i.e., personal jurisdiction) and legislative jurisdiction (i.e., the extraterritoriality of federal statutes) that gave primacy to the power of nation-states.<sup>4</sup> It effectively blocked any suits against individual foreign government officials as well. As extensions of the state, these officials enjoy the state's absolute immunity, and little reported case law addresses the precise issue during this period.<sup>5</sup>

While courts linked the immunity of the foreign state with the immunity of foreign state officials, that linkage was not strictly necessary. Domestic sovereign immunity doctrines provide an interesting counterpoint. There, by contrast, the Court showed a willingness in the nineteenth century already to extend state officials a narrower immunity than that extended to the state at least where, under agency principles, the state actor could be said to be acting *ultra vires* or beyond the scope of his authority.<sup>6</sup> Yet this line of reasoning did not, as far as I can tell, penetrate the more formalistic doctrines governing foreign sovereign immunity.<sup>7</sup>

By the early twentieth century, however, the absolute approach to sovereign immunity began to erode, and the jurisprudence entered a second era. In cases like *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, the Court displayed a greater willingness to entertain suits against the foreign sovereign.<sup>8</sup> The critical determinant, however, was the position of the executive branch. In cases where the executive branch filed a suggestion of immunity, the Court consistently acceded to that

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<sup>2</sup> See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 220 (4th ed. 2007).

<sup>3</sup> See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

<sup>4</sup> See BORN & RUTLEDGE, *supra* note 2, at 78–80, 615–17.

<sup>5</sup> See, e.g., *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798); *Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797); *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794).

<sup>6</sup> See, e.g., *In re Ayers*, 123 U.S. 443, 506 (1887).

<sup>7</sup> The petitioner in *Samantar* later advanced a form of this argument. Brief of Appellants at 32 & n.19, *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (No. 07-1893).

<sup>8</sup> See 303 U.S. 68, 74 (1938).

suggestion.<sup>9</sup> In cases where they did not, the Court was more likely to exercise jurisdiction.<sup>10</sup>

Two features marked this second era of sovereign immunity. First, the source of the immunity shifted from a doctrine grounded in principles of international law or constitutional law to one grounded in principles of comity.<sup>11</sup> While comity is an elusive concept subject to many meanings, in this context it can be understood as an effort to ensuring harmonious relations among nation-states.<sup>12</sup> Second, and relatedly, this era represented perhaps the high-water mark of deference to the views of the executive branch. In other words, the court rested its immunity decisions not simply on its own conception of “comity” (as it did, for example, in the judgment-enforcement context).<sup>13</sup> Instead, it allowed the executive branch to serve as the institution defining the effect of a lawsuit on comity and, essentially, deferred to its determination.

If immunity is viewed in light of comity, the role of the executive branch makes some sense. When the executive branch indicates that a case implicates an immunity, it simultaneously is signaling the importance of the case to the foreign relations of the United States. Conversely, when the executive branch declines to file a suggestion of immunity, that inaction likewise signals to the Court that entertaining jurisdiction is unlikely to have much impact on foreign relations.

By the middle of the twentieth century, the United States arguably entered a third era of sovereign immunity law (though it might also be seen as simply an extension of the second). The seminal event in this era was the release of the famous Tate Letter.<sup>14</sup> Penned by the State Department’s legal advisor, that letter embraced what had come to be

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<sup>9</sup> See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 587–89 (1943).

<sup>10</sup> *The Navemar*, 303 U.S. at 75.

<sup>11</sup> There is a competing view here. Under the competing view, both the first and second eras were rooted in comity, with the Court treating comity in the first era as a type of derogable customary international law. The only difference was the treatment of the executive branch’s position. For a thoughtful articulation of this view, see William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169, 188–89 (2010), <http://yalelawjournal.org/2010/12/17/dodge.html>. While I agree with Professor Dodge on the latter point (the evolution in the role of the executive branch), I think his treatment of *Schooner Exchange*, while certainly plausible, does not quite capture its relationship to other doctrines (mentioned in the text) which anchored customary international law in something more than comity.

<sup>12</sup> See generally Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010); William S. Dodge, *International Comity in American Courts* (ASIL Int’l Econ. Law Interest Grp. 2009), available at <http://www.asil.org/files/dodge.pdf>.

<sup>13</sup> *Hilton v. Guyot*, 159 U.S. 113, 227–28 (1895).

<sup>14</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, 984–85 (1952).

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known as the restrictive theory of sovereign immunity.<sup>15</sup> Under that theory, the sovereign remained absolutely immune from suit for acts taken in its sovereign capacity. It surrendered that immunity, however, when it acted in a non-sovereign (most notably a commercial) capacity.

In theory, this evolution held forth the promise of standardizing the immunity determination. That is, the sovereign/non-sovereign line offered the possibility that the immunity determination might turn on a legal standard rather than a political calculus. In practice, however, the executive branch continued to control the immunity determination. It did so by deciding whether to classify a particular act as sovereign or non-sovereign.<sup>16</sup> As with the prior era, courts largely deferred to this determination. The labels had changed, but the basic allocation of power among government institutions had not.

This era also introduced a meaningful distinction between suits against a foreign state and suits against foreign state officials. An exhaustive survey of precedents during this era identifies several cases where the executive branch opined on the immunity of individual foreign government officials from suit.<sup>17</sup>

While the executive branch enjoyed great power during this era (and the preceding one), this power was not altogether welcome. For while the executive branch could use its power over the immunity suggestion (or sovereign/non-sovereign classification) as a source of diplomatic leverage, this authority also subjected the executive branch to regular pressure from foreign states and their patrons to adopt a favorable position when the state was subject to litigation.<sup>18</sup> Such overtures were not always welcome, particularly where the political dynamics of the suit were complex (such as in a case where a major United States company was suing the foreign sovereign). In such cases, the executive branch was put in the dilemma of supporting the foreign state (and risk undermining the interests of an important domestic entity) or not intervening (and risk riling relations with an ally).<sup>19</sup> Unsurprisingly,

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<sup>15</sup> BORN & RUTLEDGE, *supra* note 2, at 221.

<sup>16</sup> *Id.* at 221–22.

<sup>17</sup> See Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977, in 1977 DIGEST app., at 1020.

<sup>18</sup> See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 34–35. (1976) (statement of Monroe Leigh, Legal Advisor, Dep't of State).

<sup>19</sup> Similar issues have arisen more recently in the context of statements of interest in litigation under the Alien Tort Statute. In this regard, recent comments of John Bellinger, former Legal Advisor to the executive branch, are especially apt: “[C]ase-by-case participation can put the Executive Branch in a difficult spot . . . Foreign governments will continue to press U.S. administrations to weigh in on their behalf in ATS litigation. If the Executive is expected to weigh in when litigation presents foreign policy concerns, courts may come to infer (wrongly) from its silence in other cases that there are no such concerns. In addition, foreign governments may come to regard the Executive’s decisions whether or not to file as a reflection of the United

therefore, the executive branch's litigation position during this era was riddled with inconsistencies that were difficult to reconcile.<sup>20</sup>

Against this background, the FSIA ushered in the fourth era of sovereign immunity law in 1976.<sup>21</sup> The stated purpose of the FSIA was to de-politicize immunity determinations and to inject a predictability and consistency into the issue.<sup>22</sup> The law did so by setting forth a general grant of immunity.<sup>23</sup> It then subjected that general grant to a series of exceptions such as waiver, commercial activity, and non-commercial tort.<sup>24</sup> This new scheme largely reallocated power over the immunity determination from the executive branch to Congress and the courts. Congress initially controlled the scope of the immunity through its definition of the entities entitled to it and the scope of the exceptions. The courts secondarily controlled the scope of the immunity through decisions that filled the statute's interstices.

Critical for purposes of this Essay, the statute defined the range of entities entitled to the FISA's protections. Technically, the immunity extended to "foreign state[s]."<sup>25</sup> This term was, however, further defined to encompass three broad categories—the foreign state proper, political subdivisions of the foreign state, and agencies or instrumentalities of the foreign state.<sup>26</sup> While the first two categories were relatively straightforward in most cases,<sup>27</sup> agency or instrumentality required further definition. It included "organ[s]" of the state (a term not

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States' view of its bilateral relationship with that government. Domestically, foreign policy submissions will often be read as partisan support for the activities of foreign governments over the deserving interests of the plaintiff victims." John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 11 (2009).

<sup>20</sup> See *Republic of Austria v. Altmann*, 541 U.S. 677, 690–91 (2004); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487–88 (1983); Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2d 9, 19 (2009).

<sup>21</sup> Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

<sup>22</sup> See 28 U.S.C. § 1602 (2006).

<sup>23</sup> *Id.* § 1604.

<sup>24</sup> *Id.* § 1605.

<sup>25</sup> *Id.* § 1604.

<sup>26</sup> *Id.* § 1603.

<sup>27</sup> One nested ambiguity in the statute was how to identify whether a defendant satisfied the definition of a foreign state proper. Jurisprudence following the FSIA's enactment has followed one of two main roads. Most courts have analyzed the question based on whether the executive branch has recognized the state (a residual area in which the executive branch's views on the immunity determination can be effectively dispositive). A second approach has been to apply a more legalistic definition to the concept of the state, borrowing from the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987). See BORN & RUTLEDGE, *supra* note 2, at 239.

otherwise defined in the statute) and corporate or other similar entities that were majority-owned by the state.<sup>28</sup>

Yet the statute contained a gaping hole—it did not address the extent to which individual foreign government officials enjoyed immunity.<sup>29</sup> This lacuna created a classic interpretive dilemma for lower courts. If they concluded that the FSIA simply did not cover government officials (and thus they enjoyed no special immunity from suit in the United States), then creative plaintiffs could perform an end-run around the FSIA simply by suing the government official rather than the sovereign itself. On the other hand, if they concluded that individual foreign government officials continued to enjoy immunity from suit, that conclusion created some tension with the FSIA's overall purpose of depoliticizing questions of foreign sovereign immunity through a comprehensive federal statute that set forth predictable standards applicable in both federal and state courts.

Given this interpretive dilemma, federal courts unsurprisingly reached conflicting conclusions.<sup>30</sup> Some courts concluded that, notwithstanding the awkward textual fit, the FSIA continued to cover individual government officers.<sup>31</sup> The Ninth Circuit's decision in *Chuidian v. Philippine National Bank* was an early important decision exemplifying this approach.<sup>32</sup> By contrast, other courts concluded that the FSIA did not cover foreign government officials, but that such officials continued to enjoy the common-law immunity that predated the FSIA's enactment. The Seventh Circuit's decision in *Enahoro v. Abubakar* supplied the most thorough articulation of this position.<sup>33</sup>

A third position was available to courts—namely that, following the FSIA's enactment, individual government officials no longer enjoyed any immunity from suit. Such an approach would have avoided the dilemmas confronted by the two preceding approaches. It avoids any tension with the FSIA's language (and may well have prompted Congress to adopt a legislative fix). It also avoids any ambiguity about the legitimacy and scope of a federal common-law immunity. Yet, except in rare cases involving United States citizens who claimed to have been acting on

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<sup>28</sup> 28 U.S.C. § 1603(b)(2); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

<sup>29</sup> The reasons for this lacuna are unclear. Some sources suggest that Congress simply did not consider the matter while others suggest that Congress intentionally meant to exclude it. See Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE 1, 6–7 (2010), <http://www.yjil.org/docs/pub/o-36-keitner-officially-immune.pdf>.

<sup>30</sup> Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2680 (2011).

<sup>31</sup> Some academic scholarship supported this view. See Bradley & Goldsmith, *supra* note 20, at 9–10. For criticism, see Keitner, *supra* note 29, at 6–7.

<sup>32</sup> 912 F.2d 1095 (9th Cir. 1990).

<sup>33</sup> 408 F.3d 877, 881–82 (7th Cir. 2005).

behalf of foreign sovereign entities,<sup>34</sup> no reported decisions appear to have followed this path.

By the time the petitioners in *Samantar* sought certiorari, the doctrine was in disarray. Two circuits had held that the FSIA did not cover foreign government officials, while at least five others (arguably) held that it did.<sup>35</sup>

*Samantar* offered a good vehicle in which to resolve this conflict. The original case involved a suit by natives of Somalia who alleged that Samantar, the former Prime Minister, First Vice President and Minister of Defense, had authorized extrajudicial killings and torture of the plaintiffs or their family members during the 1980s.<sup>36</sup> During that time, the United States formally recognized the military regime, of which Samantar was a part, as the lawful government of Somalia.<sup>37</sup> Following the fall of the military regime, Samantar fled the country in 1991 and eventually became a resident of Virginia.<sup>38</sup> Thus, by the time plaintiffs commenced their suit, Samantar was a former high-government official of a foreign state.

The district court, relying on a prior circuit precedent, held that the FSIA covered Samantar, at least insofar as he was acting within the scope of his authority, and (concluding that he was) further held that none of FSIA's exceptions applied.<sup>39</sup> Consequently, the district court concluded that it lacked subject matter jurisdiction.<sup>40</sup> The Fourth Circuit reversed.<sup>41</sup> It held that the FSIA did not apply to individual government officers but remanded the case to the district court to decide whether a common-law immunity protected Samantar.<sup>42</sup>

Affirming the Fourth Circuit's judgment, the Supreme Court held that the FSIA generally does not cover individual government officers.<sup>43</sup> That conclusion, the Court rightly recognized, flowed from the FSIA's text and structure which simply did not contemplate individual defendants within its design.<sup>44</sup> While holding that (most) suits against

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<sup>34</sup> See, e.g., *In re Rimsat, Ltd.*, 98 F.3d 956, 963 (7th Cir. 1996); *Rimsat, Ltd. v. Hilliard (In re Rimsat, Ltd.)*, 207 B.R. 964, 968 (D.D.C. 1997); *Jugobanka d.d. N.Y. Agency v. Unis Int'l Corp.*, No. 93 C 1865, 1995 WL 3987, at \*4 (N.D. Ill. Jan. 5, 1995).

<sup>35</sup> *Samantar v. Yousuf*, 130 S. Ct. 2278, 2283 n.4 (2010) (summarizing split).

<sup>36</sup> *Id.* at 2282.

<sup>37</sup> See *id.* at 2283; see also Brief for the United States as Amicus Curiae Supporting Affirmance at 4, *Samantar*, 130 S. Ct. 2278 (No. 08-1555) [hereinafter Brief for the United States].

<sup>38</sup> *Samantar*, 130 S. Ct. at 2283.

<sup>39</sup> *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at \*8-14 (E.D. Va. Aug. 1, 2007).

<sup>40</sup> *Id.* at \*15.

<sup>41</sup> *Yousuf v. Samantar*, 552 F.3d 371, 373 (4th Cir. 2009).

<sup>42</sup> *Id.* at 383-84.

<sup>43</sup> *Samantar*, 130 S. Ct. at 2283 n.3, 2289.

<sup>44</sup> *Id.* at 2286-89.

foreign government officials fell outside the FSIA, the Court did not hang them out to dry. Instead, aligning itself with the Seventh Circuit's decision in *Enahoro*, the Court held that such officials might enjoy a common-law immunity.<sup>45</sup> Unfortunately, the Court provided virtually no guidance on the scope of that immunity, instead remanding the case so that the district court, in the first instance, could decide whether Samantar was entitled to immunity under that (unspecified) standard.<sup>46</sup>

### III. FOUR PUZZLES

While *Samantar* deserves some nominal praise for resolving the immediate circuit split, the decision is deeply unsatisfying. The theoretical underpinnings of this exercise of federal common-law power are woefully underdeveloped. Moreover, even assuming that the Court properly exercised its common-law power in this setting, the decision leaves unanswered a host of questions about the scope of individual immunity and the relationship between that immunity and the FSIA's framework. Finally, the decision renews (but does not resolve) the old wars over the proper branch of government to control the immunity determination. In these respects, *Samantar* may well have unleashed more doctrinal problems than it resolved.

#### A. *What's the authority for the federal common law?*

Perhaps the most remarkable aspect of the Court's opinion is its unexamined assumption that its power to articulate federal common law extends to the doctrine of the immunity of foreign government officials. In recent years, the Court's power to assert federal common law has been a hotly debated issue, including in matters of international civil litigation.<sup>47</sup> Yet in *Samantar* all nine justices accepted the proposition that the Court's post-*Erie* power to articulate federal common law extends to a field that abuts one where Congress has spoken.<sup>48</sup>

The Court's decision in *Sosa v. Alvarez-Machain* vividly illustrates the need to articulate clearly the source and basis of the federal common-law power. *Sosa* concerned the Alien Tort Statute, which authorizes federal court jurisdiction over suits brought by aliens alleging torts committed in

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<sup>45</sup> *Id.* at 2292–93.

<sup>46</sup> *Id.* at 2293.

<sup>47</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). See BORN & RUTLEDGE, *supra* note 2, at 11–13.

<sup>48</sup> *Samantar*, 130 S. Ct. at 2292. Of course, the fault here may not simply lie with the *Samantar* Court but, instead, the earlier post-*Erie* decisions of *Ex parte Republic of Peru* and *Hoffman* which asserted the power to make federal common law in this area. For a thoughtful argument that those decisions were wrong as an original matter, see Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 928 (2011). Special thanks to Bill Dodge for pushing me on this argument.

violation of the law of nations.<sup>49</sup> In *Sosa*, the Court held that this grant of subject-matter jurisdiction encompassed a limited number of historically rooted causes of action (like violations of safe passage by ambassadors) and also contemplated a limited number of new torts created as a matter of federal common law so long as the norm, defined at a high level of specificity, had achieved a degree of acceptance among civilized nations comparable to the acceptance of the historically rooted actions recognized at the time of the ATS's enactment in the late eighteenth century.<sup>50</sup> The *Sosa* majority thought this approach, coupled with various prudential devices, would apply a meaningful check on ATS litigation.<sup>51</sup> Yet it had precisely the opposite effect. This opaque standard instantly invited widespread academic criticism and spawned significant confusion among lower courts about when a norm satisfied the *Sosa* standard.<sup>52</sup> Tellingly, even though the Court in *Sosa* claimed that the standard set a high bar and, thus, should limit the number of suits, it appears that, in certain sectors, more ATS suits were filed *after Sosa* than prior to that decision (during the two decades where the ATS's scope was completely unaddressed by the Court and parties fought on an open terrain).<sup>53</sup> *Sosa* thus demonstrates the perils of announcing a vague federal common-law standard in a Supreme Court opinion and leaving the lower courts (and litigants) to sort out the messy details. Compared to the rule announced in *Samantar*, the rule in *Sosa* is a model of clarity.

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<sup>49</sup> *Sosa*, 542 U.S. at 712. The Alien Tort Statute is codified at 28 U.S.C. § 1350 (2006).

<sup>50</sup> *Sosa*, 542 U.S. at 724–25.

<sup>51</sup> *Id.* at 725–31; *see also id.* at 739–51 (Scalia, J., concurring in part and concurring in the judgment).

<sup>52</sup> *See, e.g.*, BORN & RUTLEDGE, *supra* note 2, at 33; Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004). Indeed, even in the one instance where Congress spoke clearly in this area—namely the Torture Victim Protection Act—courts cannot agree over whether the TVPA states the exclusive remedy for torture claims or, instead, such claims are also actionable under *Sosa* as a matter of federal common law. *Compare, e.g.*, *Enahoro v. Abubakar*, 408 F.3d 877, 884–85 (7th Cir. 2005) (holding that the TVPA “occup[ied] the field” for torture claims), *and* *Mohamad v. Rajoub*, 664 F. Supp. 2d 20, 24 (D.D.C. 2009) (“Surely, caution in developing a cause of action under federal common law is appropriate in situations such as this where Congress has already established a cause of action and explicitly defined its scope in the TVPA.”), *with* *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005) (holding that the TVPA merely extended to United States citizens the right to bring torture claims, a right unavailable to them under the ATS), *and* *Ali Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 28 (D.D.C. 2010) (holding that the TVPA does not preclude torture claims under federal common law against non-natural persons). *See generally* *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1085–86 (N.D. Cal. 2008) (collecting cases).

<sup>53</sup> Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 7, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (No. 07-919) (mem.), *aff'g* *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam). In the interest of disclosure, I should note that I filed this brief on behalf of the Chamber of Commerce.

Of course, one might distinguish between a federal common-law-making power to create a cause of action and a federal common-law-making power to generate an affirmative defense (like immunity). Leaving the latter a bit vague is less problematic, so the argument goes, because there is less harm in judicial overextension of a liability-limiting (as opposed to liability-creating) rule of federal common law. This argument assumes, of course, that federal courts will use their common-law power generously (risking overextensions of the immunity) rather than sparingly (risking insufficient immunity). Moreover, the defensibility of that distinction depends critically on the value underpinning one's view of federal common-law power. If the underlying value is comity, then perhaps the distinction makes sense. But if the underlying value is separation of powers (or simply a more modest view of judicial lawmaking power), then the two are not so easily distinguished. Vague and unprincipled assertions of the power to make federal common law, whether liability-creating or liability-limiting, trample upon the power of the legislative branch to regulate a matter (or leave it unregulated).

*B. What's the scope of the common-law immunity for foreign officials?*

The ultimate section of *Samantar* can be read to support the notion that this common-law immunity survives the FSIA.<sup>54</sup> Exactly *how* that immunity operates is something that *Samantar* leaves remarkably unclear.<sup>55</sup> Footnote 17 of the Court's opinion could be read to suggest an "official capacity" or "scope of authority" test, but then the Court explicitly backs away from endorsing that (or any other) test.<sup>56</sup> Several academic commentators have sought to address this issue, but none of those accounts are satisfactory.

Under one account, the Court's lack of clarification on this point may be defended on the ground that it was entirely appropriate for the Court to leave such issues to lower courts to work out in the first instance.<sup>57</sup> It is true that the Court routinely makes this move in its opinions, but this was not the sort of issue warranting such a punt. For one thing, this was not some novel theory cooked up by a creative Supreme Court advocate that had never been tested below. Instead, the issue had been raised below and had been an established theory among the lower courts for how to resolve issues of individual immunity. For another thing, the issue did not involve an application of law to fact but,

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<sup>54</sup> See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292–93 (2010).

<sup>55</sup> See Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 68 (2010) ("The central challenge for the district court in *Samantar* on remand, and for courts in other cases, will be to determine which acts are entitled to immunity, and which acts are not.").

<sup>56</sup> See *Samantar*, 130 S. Ct. at 2291 n.17.

<sup>57</sup> I thank Ed Swaine for his thoughtful reactions to my post on *Opinio Juris* on this point.

instead, a pure question of law, which the Supreme Court is as equipped to address as a lower federal court. (On this score, it might have been justifiable for the court to remand the case for further factual development on whether Samantar *satisfied* whatever test the Court articulated,<sup>58</sup> a different result than remanding so the lower courts could try to divine the proper test from the entrails in the Court's opinion.) Furthermore, this *particular* question of law would have justified more clarity from the Court. As the Court has noted elsewhere, immunity defenses protect officials not simply from liability but from the burdens of suit.<sup>59</sup> By remanding the case for further articulation (and likely appeal) on the proper test, Samantar will be forced to endure several rounds of litigation even if he ultimately prevails. Finally, as a prudential matter, the Court could have afforded to do more. Its view on the central immunity question was unanimous (with the justices disagreeing only on the validity of resorting to legislative history),<sup>60</sup> so surely the Court *might* have attempted to reach some consensus on the proper standard even if, in doing so, it risked splitting off a couple of justices who took a different view about the proper test.

Under another account, the Court's opinion either should be read to endorse the pre-FSIA "official immunity" test or, alternatively, courts should adopt this test on remand as a matter of federal common law.<sup>61</sup> That view suffers from several flaws.<sup>62</sup> For one thing, the principle that acts of Congress will not be lightly read to derogate from the common law presupposes the existence of a well-established common-law principle. As even the Solicitor General's brief itself acknowledges, virtually no cases addressed the issue of official immunity as of the time

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<sup>58</sup> As it did, for example, in *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 546 (1999).

<sup>59</sup> See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 813–15 (1982).

<sup>60</sup> See *Samantar*, 130 S. Ct. 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>61</sup> The Seventh Circuit implicitly proposed this approach in the *Abubakar* litigation. See *Enahoro v. Abubakar*, 408 F.3d 877, 881–82 (7th Cir. 2005).

<sup>62</sup> The limited experience following *Samantar* does not make one sanguine about the prospects for a clear test. Following remand of the case, the Justice Department filed a statement of interest sharing the State Department's views that Samantar was not entitled to official immunity. See Statement of Interest of the United States of America at 7, *Yousuf v. Samantar*, No. 1:04 CV 1360 (LMB) (E.D. Va. Feb. 14, 2011) [hereinafter Statement of Interest]. Rather than anchoring this view in Samantar's conduct, the State Department rested on two obscure facts—(a) the lack of a formally recognized government in Somalia and (b) Samantar's current residence in the United States. Moreover, the brief went to great pains to explain how its view was informed by customary international law and how the factors articulated by the State Department were not exhaustive. As I have explained elsewhere in greater detail, this vague position hardly provides predictability in this area and does not represent the sort of principled litigating position that, under normal principles of administrative law, would be entitled to much deference. See Peter B. Rutledge, *Samantar and Executive Power*, 45 VAND. J. TRANSNAT'L L. (forthcoming 2011).

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of the FSIA's enactment.<sup>63</sup> So the idea that Congress implicitly intended to leave this area of law alone is dubious at best. For another thing, this standard simply begs the point about how one describes the scope of authority. Suppose that a covert agent assassinates a foreign official; suppose that a government official refuses to issue a title to a real estate transfer (which it's his job to do) because he's been bribed. Do these acts fall within the scope of the officials' authority? Even if courts can coalesce around a test, what law governs the question? Federal common law, one might naturally say. But not so fast. How can that approach be squared with the scope-of-employment prong under the non-commercial tort exception? Lower courts disagree over what conflicts principles (federal or state) and what substantive principles (federal, state, or international) govern these questions.<sup>64</sup> Consequently, *Samantar* creates an odd situation where different sources of law inform the same inquiry, depending solely on the identity of the defendant (which could produce particularly confusing results when both the foreign state and the individual officer are defendants).

*C. When is a suit against an individual government official the functional equivalent of a suit against a foreign state?*

As noted above, the Court fudged on part of its opinion in *Samantar*. While holding that the FSIA generally does not cover suits against individual officers, the Court acknowledged that some suits against individual officers are indistinguishable from suits against the foreign state itself.<sup>65</sup> In those circumstances, the FSIA applies.

Yet the Court offers virtually no guidance on when such a state of affairs arises. One can tease only three hints from its opinion. First, the Court implicitly holds that the instant suit against *Samantar* does not fall within this category.<sup>66</sup> But whether that is because *Samantar* is a former official or because of some other feature of the case, the Court leaves unclear. Second, the Court acknowledges the test from section 66 of the *Restatement (Second) of Foreign Relations Law of the United States*—where a judgment against the foreign official “would be to enforce a rule of law against the state.”<sup>67</sup> Yet while acknowledging the test, the Court explicitly

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<sup>63</sup> See Brief for the United States, *supra* note 37, at 9–12, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555). This sets official immunity apart from other immunities like diplomatic immunity that enjoy a much richer history. See BORN & RUTLEDGE, *supra* note 2, at 242, 255–57. Moreover, though commentators regularly overlook this fact, diplomatic immunity is formally domesticated in the United States by statute, namely the Diplomatic Relations Act, 22 U.S.C. § 254d (2006).

<sup>64</sup> Compare *Barkan v. Gen. Admin. of Civil Aviation of China*, 923 F.2d 957, 959–61 (2d Cir. 1991) (applying state choice-of-law principles under FSIA), with *Liu v. Republic of China*, 892 F.2d 1419, 1425–26 (9th Cir. 1989) (applying federal choice-of-law principles under FSIA). See BORN & RUTLEDGE, *supra* note 2, at 242, 255–57.

<sup>65</sup> *Samantar*, 130 S. Ct. at 2292.

<sup>66</sup> *Id.* at 2292.

<sup>67</sup> *Id.* at 2290 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE

refuses to endorse it.<sup>68</sup> Third, the Court alludes to its decision in *Philippines v. Pimentel*,<sup>69</sup> suggesting that the linkage between official immunity and foreign-state immunity concerns whether the state would be an indispensable party.<sup>70</sup> But that decision involves a rather unique set of events where the state and private plaintiffs had competing claims against a pool of assets seized from the former Philippine dictator—not the typical stuff of which suits against foreign states or foreign officials are made.<sup>71</sup> In short, nothing in the Court’s opinion sheds much light on identifying whether the suit against the government official qualifies as the functional equivalent of a suit against the state.

The Court’s lack of guidance is especially troubling, given the significance of the decision. For one thing, the answer to this question determines whether the FSIA’s above-described entitlements apply in the case. Of particular importance are the special rights of judicial access. For example, a foreign state has a right to remove the case from state to federal court; similarly, a foreign state has an immediate right of appeal from an order denying a claim of immunity.<sup>72</sup> If a suit against a foreign government official does not qualify as the functional equivalent of a suit against the state, then these rights presumably drop out (unless the undeveloped federal common law of official immunity also contains *these* entitlements too—a result that not only would amount to a massive expansion of federal common law but would make the whole issue in *Samantar* a somewhat academic exercise).<sup>73</sup>

*Samantar* suggests that the FSIA’s special entitlements do not apply to suits against foreign officials that do not qualify as the functional equivalent of a suit against the state. In a seeming nod to government defendants, the Court explains that the FSIA’s provisions on personal jurisdiction and service of process do not apply in these cases.<sup>74</sup> This, according to the Court, should serve as a brake on suits against foreign government officials.<sup>75</sup> Jurisdiction rules may supply more of a brake depending on what happens when the Court finally confronts whether

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UNITED STATES § 66 (1965)).

<sup>68</sup> *Id.* at 2290 n.15.

<sup>69</sup> 128 S. Ct. 2180 (2008).

<sup>70</sup> *Samantar*, 130 S. Ct. at 2292.

<sup>71</sup> *See Pimentel*, 128 S. Ct. at 2286. Moreover, the argument presupposes that federal procedural law will govern the indispensable party analysis. As I note elsewhere, one particularly important consequence of *Samantar* is that it charts a path to keep a case against foreign government officials out of federal court. *See infra* notes 82–83 and accompanying text.

<sup>72</sup> 28 U.S.C. § 1441(d) (2006); *see, e.g.*, *Eckert Int’l, Inc. v. Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994).

<sup>73</sup> One recent appellate decision holds, with virtually no analysis, that denials of post-*Samantar* official immunity under federal common law are immediately appealable. *See Ochoa Lizarbe v. Rivera Rondon*, 402 F. App’x 834, at 837 (4th Cir. 2010).

<sup>74</sup> *Samantar*, 130 S. Ct. at 2292 n.20.

<sup>75</sup> *Id.* at 2292.

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agencies and instrumentalities of foreign states are entitled to the protections of the Due Process Clause's limits on the exercise of personal jurisdiction.<sup>76</sup> As to service of process, however, the Court gets it exactly backwards. Contrary to the Supreme Court's view, serving process on a private foreign defendant is far easier than serving process on the foreign state. For one thing, service of process on foreign states is subject to rules of "strict compliance," whereas service of process rules on "agencies or instrumentalities" (and other private defendants) is not as strict.<sup>77</sup> For another thing, Federal Rule of Civil Procedure 4(f) (which governs most instances of service of process on a foreign defendant) authorizes a variety of forms of service, and courts have been especially creative to use their powers under Rule 4(f)(3) to authorize a variety of creative methods of service (like email and facsimile) that never would suffice under the FSIA's strict rules.<sup>78</sup> Far from adding to the plaintiff's burden when suing an individual government officer, the Court's holding in *Samantar* lightens it.

A host of other considerations follow from whether the suit against the foreign official is deemed to be the functional equivalent of a suit against the state. For example, under the FSIA, a state can be subject to suit if it waives the immunity.<sup>79</sup> Where a suit against an individual official is the functional equivalent of a suit against the state, can the state as the *de facto* defendant waive the individual official's immunity?<sup>80</sup> What about former officials? Further, the answer to the "functional equivalent" question has important forum shopping implications. Prior to *Samantar*, the FSIA-based approach to individual immunity at least had the functional value of ensuring that a uniform immunity rule applied. One could avoid the risk of inconsistent results in federal and state court

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<sup>76</sup> See *Frontera Res. Azer. Corp. v. State Oil Co. of Azer.*, 582 F.3d 393, 399 (2d Cir. 2009) (holding that the Due Process Clause does not prevent the U.S. from subjecting foreign states and instrumentalities to personal jurisdiction); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002) (holding the same for foreign states only). If the Court embraces the *Price-Frontera* line, then it'll be harder to establish personal jurisdiction over government officials than foreign states. But if the Court rejects *Price-Frontera* line, then there will be no greater protection of individuals than foreign states. Moreover, malleability of personal jurisdiction doctrines (particularly with imputation theories) means the contacts of individual officers may not be so important.

<sup>77</sup> See, e.g., *Magness v. Russian Federation*, 247 F.3d 609, 615–16 (5th Cir. 2001). See also BORN & RUTLEDGE, *supra* note 2, at 896–902.

<sup>78</sup> See, e.g., *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1012 (9th Cir. 2002). See also BORN & RUTLEDGE, *supra* note 2, at 823–25.

<sup>79</sup> 28 U.S.C. § 1605(a)(1) (2006).

<sup>80</sup> The State Department has taken the view that, in light of the Supreme Court's decision in *Samantar*, the foreign state could waive the former official's immunity. See Statement of Interest, *supra* note 62, at Ex. 1 (letter from Harold Koh, Legal Adviser for the Dep't of State to Tony West, Assistant Att'y Gen., Civil Div., Dep't of Justice (Feb. 11, 2011)). Certainly nothing in the Court's extremely narrow holding dictates that rule (obviously, as a formal matter, issues of waiver were not before the Court).

through the FSIA's removal provision.<sup>81</sup> After *Samantar*, the risk of forum shopping became rampant—to keep a case in state court, just file in a way to avoid section 1332 removal and structure the causes of action to avoid federal claims.<sup>82</sup> Wouldn't that be a pretty airtight way of keeping a case out of federal court despite the potentially profound impact of the case on foreign relations? The effect may be greater pressure to push more substantive federal common law into state court. This might ensure uniformity but at the expense of any theoretical coherence, and at the risk of undermining doctrines that balance the federal and state interests in the allocation of judicial and legislative jurisdiction.<sup>83</sup>

Here, other doctrines may provide a solution to the dilemma created by the Court's opinion. Two important doctrines—the act-of-state doctrine and the foreign-sovereign-compulsion doctrine—may provide the proper lens through which to view these issues.<sup>84</sup> Both of those doctrines, like the standard set forth in section 66 of the *Restatement (Second)*, concern the effect of decisions rendered by a United States court on a foreign sovereign. The doctrines apply even when the foreign sovereign is not a formal party to the case and, thus, provide an especially apt analogy to the sort of fact pattern that *Samantar* presents.<sup>85</sup> Tying the two doctrines together and applying them in this context, one might construct a test under which the FSIA's protections will apply where the suit might require a United States court to review the acts of a foreign state taken within its territory or, alternatively, require a foreign state to engage in some sort of conduct within its territory. For the logic of this analogy to work, the standards must be more relaxed than those necessary for either doctrine to apply (otherwise, the FSIA inquiry would

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<sup>81</sup> 28 U.S.C. § 1441(d) (2006); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983).

<sup>82</sup> Assuming the case involves purely alien plaintiffs, then Article III would bar removal by the alien defendant. *See Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1810).

<sup>83</sup> *See, e.g., Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994) (comity-of-nations doctrine). Lower courts are currently divided over the extent to which cases presenting foreign policy implications (whether grounded in comity or the act-of-state doctrine) raise substantial questions of federal common law and, thereby, give rise to federal jurisdiction. *Compare Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1376–78 (11th Cir. 1998) (acknowledging that federal common law of foreign relations could give rise to federal jurisdiction), *with Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088–90 (9th Cir. 2009) (act-of-state doctrine did not give rise to federal jurisdiction), *and Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001) (federal common law of foreign relations does not give rise to federal jurisdiction), *and In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 34–38 (D.D.C. 2000) (same).

<sup>84</sup> *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (act-of-state doctrine); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1301–03 (D. Del. 1970) (foreign-sovereign-compulsion doctrine). *See also BORN & RUTLEDGE, supra note 2, at 751–812.*

<sup>85</sup> *See BORN & RUTLEDGE, supra note 2, at 751–812.*

be moot because the doctrines would likely necessitate dismissal of the suit).<sup>86</sup>

*D. What's the role of the executive branch?*

As noted earlier, prior to the FSIA's enactment, the executive branch played a critical role in the immunity determination (albeit more frequently with foreign states than with their agencies or instrumentalities). To the extent *Samantar* holds that the pre-FSIA common-law immunity still covers individual officers after the FSIA's enactment, does this framework also perpetuate the deference to the executive branch that predated the FSIA's enactment? In a variety of recent contexts, the Court has indicated that the views of the executive branch are entitled to at least some weight.<sup>87</sup> This simply continues a long-running debate in a variety of fields of international litigation about the role of the executive branch.<sup>88</sup> How does this operate in the individual immunity context?<sup>89</sup>

Under the Solicitor General's view, the FSIA left untouched the third-era approach to official immunity under which the executive branch determined the immunity of foreign government officials.<sup>90</sup> This view is problematic for at least two reasons. As noted above, it is far from clear that this common-law practice was so well established.<sup>91</sup> Second, even if one accepts the premise that official immunity had achieved some sufficient degree of acceptance at the time of the FSIA's enactment, it is constitutionally suspect, at best, to suppose that the *content* of this law depends on an executive determination (as opposed to judicial determination). While the law's meaning (whether statutory or common law) might take into account the executive branch's views (or even defer to them), no area of law to my knowledge depends on the executive branch's interpretation to define its very content.<sup>92</sup>

A more modest level of deference to the executive branch is defended by analogy to both diplomatic immunity and head-of-state

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<sup>86</sup> This is the case unless, of course, one of the exceptions to the doctrine applied. *See id.* at 791–806.

<sup>87</sup> *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

<sup>88</sup> *See BORN & RUTLEDGE*, *supra* note 2, at 18–20.

<sup>89</sup> I explore these issues at greater length in a forthcoming symposium piece for the *Vanderbilt Journal of Transnational Law*. *See Rutledge*, *supra* note 62.

<sup>90</sup> *See* Brief for the United States, *supra* note 37, at 8–13. Under a more modest version of this proposal, Chimène Keitner urges deference to status-based but not conduct-based immunities. *See Keitner*, *supra* note 55.

<sup>91</sup> *See supra* notes 14–20 and accompanying text.

<sup>92</sup> *Cf. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984). *See also* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *YALE L.J.* 1170 (2007) (explaining the degree to which principles of *Chevron* deference may be properly extended to foreign relations law).

immunity.<sup>93</sup> Closer examination, however, reveals that those analogies are especially inapt. Both of those doctrines involve a formal act of recognition—recognition of a diplomat or recognition of the legitimate head of state; such acts of recognition are understandably a quintessentially executive function (ones where the nation needs to speak with one voice) and, consequently, appropriate areas for deference to the executive branch.<sup>94</sup>

Determination of a foreign government official's entitlement to immunity stands on a very different footing. Such cases do not involve any act of recognition by the executive branch; instead, they simply involve matters about the formal organization of the foreign government (and perhaps relatedly whether the government official was acting within his or her scope of employment when engaging in the alleged act giving rise to the claim). As to such matters there is no particularly compelling need for the nation to speak with one voice, nor can the executive branch profess to have any particular expertise in the matter (compared, for example, with matters of diplomatic immunity). Thus, the case for deference to the executive branch as to the foreign official's entitlement to immunity is especially weak.

This is not to suggest, however, that the executive branch has no role to play in such suits. The executive branch still can play an important role by informing the Court about the effect of such a suit on the foreign relations of the United States. Thus, the executive branch certainly still can urge dismissal on the ground that considerations of comity, political question, or other grounds necessitate the Court to stay its hand.<sup>95</sup> That function, however, concerns the general assessment of a case's impact on the foreign relations of the United States and not the granular determination of whether a foreign government official qualifies for immunity under the common law.

#### IV. WHAT THE COURT SHOULD HAVE DONE

As the foregoing critique of *Samantar* suggests, the Court correctly held that the FSIA does not apply to individual officers but should *not* have invented an immunity doctrine in the exercise of its power to make federal common law. Instead, it should have held that individual government officials are not, presently, entitled to official immunity. Such a rule would have had three salutary consequences compared to the rule announced by the Court. For one thing, it would have provided clarity—litigants and courts would have immediately understood the rule's effect on jurisdiction and a defendant's rights. Second, the rule

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<sup>93</sup> See Lewis S. Yelin, *Head-of-State Immunity as Sole Executive Lawmaking*, 45 VAND. J. TRANSNAT'L L. (forthcoming 2011).

<sup>94</sup> The same is true of recognition of the state itself, part of the inquiry into a state's immunity under the FSIA. See BORN & RUTLEDGE, *supra* note 2, at 236–42.

<sup>95</sup> See *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

would have avoided the theoretical confusion over the source of the Court's power to make federal common law in this area. Third, the rule (not unlike an information-forcing default rule) undoubtedly would have forced the political branches to act and, thereby, take a more systematic approach to the entire issue, as it did with the FSIA, rather than have the doctrine develop incrementally, as *Samantar* anticipates.<sup>96</sup> This forcing effect would have been especially valuable, as it might have induced Congress to take a fresh look at sovereign immunity law since the FSIA's enactment, particularly in light of the recently drafted United Nations Convention on State Immunities and other efforts to achieve harmonization in this area.<sup>97</sup>

This proposal undoubtedly will prompt objections, and I address two here. First, critics will claim that the rule leaves foreign government officials exposed to new lawsuits. Of course, this objection is valid only if one presupposes that the political branches would not respond to the forcing effects of such a decision. Yet the FSIA demonstrates Congress's willingness to legislate in this area, and recent experience in other areas suggests that Congress is prepared to act swiftly when it disagrees with a non-constitutional decision of the Court.<sup>98</sup> Moreover, as the Court itself in *Samantar* noted, personal jurisdiction rules would still serve as an effective constraint on suits against at least some foreign officials.

Second, critics will argue that such a rule would throw existing litigation against foreign government officials into disarray. That objection, however, is exaggerated. In the short term, the Court could simply give prospective effect to its decision, as it has done in other

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<sup>96</sup> Regarding this forcing effect of judicial decisions on the actions undertaken by coordinate branches of government, see Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 687-88 (1999); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1436 (1999); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 568 (2005).

<sup>97</sup> See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004). In this respect, defenders of *Samantar* have it wrong when they suggest that the decision was necessary in order not to cause the United States to violate its obligations under international law. *But cf.* *Samantar v. Yousuf*, 130 S. Ct. 2278, 2283 n.3 (2010). Indeed, by forcing the political branches to address squarely the scope of a foreign government official's immunity, it would have caused them to confront those obligations directly and address them in a systematic fashion that better assured compliance than the incremental, undeveloped approach taken by the Court.

<sup>98</sup> See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), *superseded in part* by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010) (to be codified at 15 U.S.C. § 77v); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified at in scattered sections of 42 U.S.C.).

areas.<sup>99</sup> Additionally, the executive branch could have intervened in politically sensitive cases against foreign government officials and urged their dismissal on prudential grounds. In the medium term, a legislative fix could address this issue as well. Just as the political branches have the authority to remove existing cases from federal court entirely,<sup>100</sup> so too do they have the power to extend sovereign immunity to defendants in existing suits.<sup>101</sup>

Ironically, in the same term that the Court decided *Samantar*, the Court unanimously resolved another case involving federal jurisdiction. There the Court wrote:

Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake.<sup>102</sup>

While the Court uttered those words in the context of the “principal place of business” determination in diversity suits, they equally apply in the context of jurisdictional determinations in cases against foreign governments or their officials. Indeed, given the potential foreign relations implications, the stakes are arguably far higher (and thus the need for clear, workable rules far greater). Yet the Court in *Samantar* did not heed its own advice and has bequeathed to lower courts (as well as litigants) a confused and murky test that hardly supplies the clarity that the Court described in *Hertz* as so essential. Unless the Court corrects its course (or Congress intervenes), this disappointing decision only will clutter the courts with distracting jurisdictional disputes for years to come.

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<sup>99</sup> See generally Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811 (2003) (discussing circumstances in which the Court has only given prospective effect to its decisions).

<sup>100</sup> See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>101</sup> See *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2194 (2009) (“Laws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases.”).

<sup>102</sup> *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) (citation omitted).