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AN UNUSUAL SEPARATION OF POWER EPISODE: *SAMANTAR V. YOUSUF* AND THE NEED FOR THE EXECUTIVE BRANCH TO ASSERT CONTROL OVER FOREIGN OFFICIAL SOVEREIGN IMMUNITY DETERMINATIONS

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INTRODUCTION

As more human rights cases are being initiated against current and former heads of state in courts around the world, the foreign sovereign immunity doctrine has become a hotly contested issue. Victims and the families of victims of human rights abuses are beginning to question whether the immunity doctrine should apply to officials who commit serious human rights offenses, and several states have followed suit.[1] Foreign sovereign immunity, which was originally meant to allow for current state officials to have freedom to conduct foreign policy, has also traditionally protected former officials from suit after they leave office. International norms are beginning to shift, however, and some states are allowing suits to move forward against former officials in order to provide torture victims and their families vindication. The doctrine in the United States is in flux, leaving international lawyers questioning the sincerity of United States participation in human rights enforcement efforts. As a result, torture victims are left uncertain about whether their individual claims will have any chance in the United States court system.

The recent Supreme Court decision in *Samantar v. Yousuf*[2] addressed the doctrine of foreign official sovereign immunity and resolved a circuit split regarding the federal statutory scheme of the doctrine in the United States. The decision, however, did not answer many of the questions regarding the doctrine's status or applicability in the United States court system.[3] The *Samantar* decision clarified that foreign official

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[1] *See* Tachiona v. Mugabe, 169 F. Supp. 2d 259, 278–79 (S.D.N.Y. 2001) (discussing the increased number of suits against foreign officials in foreign courts, as well as the increased consciousness of violations of international law in the international community); Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 508–09 (2008) (explaining that victims of human rights abuses pursue claims in foreign courts that are more amenable to such claims).

[2] 130 S. Ct. 2278 (2010).

[3] *Id. See* Curt Bradley, *Samantar Insta-Symposium: Samantar and Foreign Official Immunity*, OPINIO JURIS (June 2, 2010, 9:51 AM), http://opiniojuris.org/2010/06/02/samantar-insta-symposium-samantar-and-foreign-official-immunity/ ("With its undefined references

immunity determinations are not controlled by existing federal law, but left open a heavy question: Who is actually responsible for deciding which officials can be tried in United States courts?[4] The Supreme Court renounced the responsibility of providing an answer and indicated it had no intention of forcing the determination on any one branch.[5] As a result, any of the three branches has the ability to take control of the determination, yet each is hesitating. It is rare to see the branches of the United States government politely ceding power to their counterparts.

This Note evaluates the ambiguity of the doctrine of foreign sovereign immunity in the United States today and the interesting interplay of power between the branches over the immunity determination, and argues that the Executive is the proper branch of the government to control immunity determinations going forward. Ultimately, if the Executive wants to maintain its power over this sensitive aspect of foreign policy, the State Department must act before such action is precluded by Congress.

Part I begins by briefly discussing the principal case, *Samantar v. Yousuf*, which provided the Supreme Court the opportunity to resolve the circuit disagreement regarding foreign official immunity in United States courts, specifically whether the Foreign Sovereign Immunities Act governs suits against foreign officials.[6] Part II outlines the evolution and significance of the doctrine of foreign sovereign immunity in the United States. An evaluation of the history reveals a strong, but not uniform, tendency of courts to defer to the executive branch in making foreign sovereign immunity determinations, thus mixing both the judicial and executive branches of the government in the process. Part II also discusses the Foreign Sovereign Immunities Act of 1976 (FSIA, or Act), which Congress enacted both to clarify the immunity doctrine and relieve the State Department of the diplomatic pressures associated with making suggestions as to immunity on behalf of the defendant states. A circuit split regarding the interpretation of the FSIA in cases against foreign officials emerged, and the Supreme Court granted certiorari to address the divergence in *Samantar*. While the decision resolved the split, it focused on state immunity without sorting out the doctrine of foreign sovereign immunity as applied to heads of state. Part III addresses the ambiguity in the doctrine after *Samantar* and the opportunity for each branch to take control of immunity determinations, including the potential for congressional action that would effectively seize at least some executive foreign policy power. This Note argues that the executive branch is most qualified and equipped to make these sensitive foreign policy decisions. Finally, Part IV recommends that the executive branch take immediate action to control immunity determinations in order to avoid preclusion. The Executive should create and implement a framework for courts to follow when a suit is filed against a foreign head of state to avoid potentially grave consequences

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to common law immunity, and its lack of clarification regarding the role of international law, the Court has invited years of litigation and law review articles.").

[4] *Samantar*, 130 S. Ct. at 2292–93.

[5] *Id.* at 2291–92.

[6] *Id.* at 2292.

that could result from allowing the courts or Congress to subject foreign officials to suit in the United States.

I. *SAMANTAR V. YOUSUF*: HIGHLIGHTING THE HEAD OF STATE IMMUNITY PROBLEM IN UNITED STATES COURTS

In November of 1981, three Somali National Security Service (NSS) agents abducted Bashe Abdi Yousuf, a young Somali businessman who was a member and founder of UFFO, a community organization with the declared purpose of improving conditions in local hospitals and schools in Hargeisa, Somalia.[7] The NSS agents took Yousuf to a detention facility, where he and other members of the group were interrogated and severely tortured.[8] The NSS was administrated by the Supreme Revolutionary Council (SRC), a group that, by coup, established authoritarian socialist rule in Somalia in 1969.[9] The SRC selected Mohamed Siad Barre, a Somali General, as its president and spokesperson.[10] At the direction of Siad Barre, military officers took control of every part of the new government, including the Higher Judicial Council, the equivalent of the United States Supreme Court in Somalia.[11] Throughout the Barre regime's rule in the 1980s, Somalia was controlled by an aggressive military dictatorship.[12] The regime's rule was marked by violent civil war, bombings of towns and villages without regard for civilians, a corrupt judicial system, and no rule of law.[13] Further, the Barre regime sought to suppress various opposing clans throughout the country, including the Issaq clan, of which Yousuf and his fellow plaintiffs were members.[14]

During Yousuf's three-month detention, NSS agents and military policemen interrogated him, employing various torture methods including waterboarding,[15] electrocution, and a form of torture known as the "Mig,"[16] whereby the victim's hands and feet are tied together behind his back so that his body is arched backward into a "U" shape with a heavy rock resting on his back, causing intense physical pain.[17] The interrogators aggressively questioned Yousuf about UFFO, seeking admission

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[7] Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *3 (E.D. Va. Aug. 1, 2007).

[8] *Id.* at *3.

[9] *Id.* at *1.

[10] *See* Brief of *Amici Curiae* Academic Experts in Somali History and Current Affairs in Support of Respondents at 7, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) [hereinafter Brief of Amici Curiae].

[11] *Id.* at 16.

[12] *See id.* at 6–19 (discussing the Siad Barre regime and its atrocities against civilians).

[13] *See id.* at 11–16.

[14] *See Yousuf*, 2007 WL 2220579, at *1 (E.D. Va. Aug. 1, 2007); Brief of Amici Curiae, *supra* note 10, at 11–15.

[15] *Yousuf*, 2007 WL 2220579, at *3.

[16] *Id.* at *3 n.6 (noting that this torture method got its name from the resemblance between the shape of the victim's body and the Somali Air Force's MIG aircraft).

[17] *Id.* at *3.

that its members were involved in an antigovernment scheme.[18] Yousuf refused to confess to any crime and, as a result, was charged with high treason,[19] a crime that carried the death penalty under the national security laws enacted by the Barre regime.[20] Yousuf later pleaded not guilty during the trial against him and twenty-eight other men for various national security crimes.[21] Yousuf was sentenced to twenty years in prison and was held in solitary confinement in a six-by-six-foot cell for more than six years in almost total darkness.[22] Upon release, Yousuf promptly fled Somalia, eventually moving to the United States and becoming a naturalized citizen.[23]

On November 10, 2004, Yousuf, along with seven fellow Somali torture victims,[24] filed a civil action against Mohamed Ali Samantar, a leader of the Barre regime at the time of their detention and torture[25] in the District Court for the Eastern District of Virginia pursuant to the Torture Victim Protection Act of 1991 (TVPA)[26] and the Alien Tort Claims Act (ATCA).[27] Samantar held several positions throughout the time the SRC controlled Somalia, including First Vice President, Minister of Defense, and Prime Minister of the Democratic Republic of Somalia.[28] The plaintiffs to the suit alleged that Samantar knew or should have known of the torture, extrajudicial killing, and arbitrary detention of themselves or members of their families, and that he aided and abetted the commission of these offenses.[29] Samantar was in charge of the armed forces of the military regime that controlled Somalia at the time of the offenses, but fled the country after the regime's collapse in 1991.[30] Samantar settled in Fairfax, Virginia, allowing Yousuf to initiate suit against Samantar in the United States.[31]

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[18] *Id.*

[19] First Amended Complaint at 10, *Yousuf*, 2007 WL 2220579 (1:04cv1360).

[20] *See* Brief of Amici Curiae, *supra* note 10, at 17.

[21] *Yousuf*, 2007 WL 2220579, at *4. The trial was held at the National Security Court, a military court with jurisdiction over claims against civilians for national security and political offenses. *Id.*

[22] *Id.* The State Department documented substantial human rights violations by the Somali government at the time. *See, e.g.*, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989, at 321–26 (1990).

[23] *Yousuf*, 2007 WL 2220579, at *3–4.

[24] *Id.* at *3–5 (describing each of the plaintiffs in the case, their claims of abuse, and their alleged injuries).

[25] *Id.* at *1.

[26] Pub. L. No. 102-256, 106 Stat. 73 (1992).

[27] 28 U.S.C. § 1350 (2000). This statute is also sometimes referred to as the Alien Tort Statute (ATS).

[28] *Yousuf*, 2007 WL 2220579, at *1, *6. The United States has recognized the State of Somalia and the Barre regime, but did not recognize any entity as the government of Somalia at the time of the offense. The United States continues to hold this position today. *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 4 n.3, Samantar v. Yousuf, 130 S. Ct., 2278 (2010) (No. 08-1555) [hereinafter Brief for the United States].

[29] *Samantar*, 130 S. Ct. at 2282–83.

[30] *Id.* at 2283.

[31] *See id.*; *Yousuf*, 2007 WL 2220579, at *6.

Samantar argued that, as Somalia's former Minister of Defense and Prime Minister, he was entitled to immunity from suit in American courts under the Foreign Sovereign Immunities Act of 1976.[32] The district court stayed the proceedings to determine whether the State Department intended to provide the court with a statement of interest[33] regarding Samantar's possible entitlement to sovereign immunity.[34] After two years of silence from the State Department, the court reinstated the case and held that the FSIA provided immunity to "an individual acting in his official capacity on behalf of a foreign state," but not to "an official who acts beyond the scope of his authority."[35] The court concluded that Samantar was entitled to immunity under this reading and that, as a result, the court did not have subject matter jurisdiction over the case.[36] Samantar's motion to dismiss was granted.[37]

The Court of Appeals for the Fourth Circuit reversed, rejecting the district court's interpretation of the FSIA.[38] It found that the language and structure of the FSIA did not provide immunity to individual foreign government agents.[39] In June of 2010, the Supreme Court issued an opinion agreeing with the Fourth Circuit. The Court based its ruling mainly on a textual evaluation of the FSIA, but also found support in the underlying purpose of the statute and the congressional intent.[40]

The ultimate result of the Supreme Court's decision was a clear determination that FSIA does not afford foreign officials or heads of state absolute immunity from suit in American courts.[41] Human rights groups were elated and declared victory,[42] but the effects of the case are not, in fact, as favorable as they had hoped. The Court explicitly stated it had no intention of eliminating the State Department's role in immunity determinations and said almost nothing about how the foreign official immunity determinations are to be made going forward.[43] The question of whether human rights abusers who are present or live in the United States can be sued for their crimes abroad via the United States court system is left unanswered. Yousuf and his co-plaintiffs

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[32] *Yousuf*, 2007 WL 2220579, at *6; *see* 28 U.S.C. §§ 1330, 1602 (2000).

[33] *See infra* notes 134–35 and accompanying text.

[34] *Yousuf*, 2007 WL 2220579, at *6.

[35] *Id.* at *8 (quoting Velasco v. Gov't of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004)).

[36] *Samantar*, 130 S. Ct. at 2283.

[37] *Id.*

[38] *Id.* at 2283–84.

[39] *Id.* The court also offered an alternative basis for its decision, specifically, that even if the FSIA applies to a current official, a former official is not covered. *Id.* at 2284 n.5. Because the Supreme Court agreed that individual officials are not covered by the FSIA, it found the status of the official to be irrelevant. *Id.*

[40] *Id.* at 2285–93.

[41] *Id.* at 2292.

[42] *See, e.g.*, *US Supreme Court Allows Suit to Proceed against Former Somali Minister of Defense*, HUMAN RIGHTS WATCH (June 1, 2010), http://www.hrw.org/news/2010/06/01/us-supreme-court-allows-suit-proceed-against-former-somali-minister-defense.

[43] *Id.* at 2291 n.19 (leaving the process to be determined by the State Department).

will have to re-try their case in district court before they can be sure whether they will find justice.

II. THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

International law constantly seeks balance between independence and equality through rules that are intended to maintain peaceful and cooperative relationships between nations.[44] The heart of the doctrine of foreign sovereign immunity is political, and its purpose is the protection of diplomatic relationships.[45] Historically, the ability of a state leader to travel to foreign countries to conduct official duties without fear of detention by another state was seen as an essential guarantee to facilitate cooperation amongst nations.[46] Since the emergence of international law, holding a state official accountable in domestic courts has been seen as an infringement on sovereignty and damaging to diplomatic relations.[47] To assert control over another sovereign without its consent would undoubtedly cause tension. Increasing commercial interaction amongst states has created the need for regulations of state actions, and enforcement of those rights necessarily follows.[48]

The application of both statutory and the common law doctrine of sovereign immunity in United States courts has not always been clear and has evolved over time. A brief history of the doctrine in the United States court system reveals a unique relationship between the courts and the State Department in making immunity determinations. This process started out as a practical model, but has become burdensome, and perhaps even unjust, over time.

A. Origins of Absolute Sovereign Immunity in the United States

Chief Justice John Marshall's opinion in *The Schooner Exchange v. McFaddon*[49] was the first Supreme Court statement of the rule of foreign state immunity in the United States and has become the foundation of United States jurisprudence on the

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[44] *See* Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361 (2004), *reprinted in* JORDAN J. PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 2–3 (3d ed. 2009).

[45] *See* Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (explaining that sovereign immunity is meant to preserve relations with friendly sovereigns by not "assuming an antagonistic jurisdiction"); *Ex parte* Peru, 318 U.S. 578, 589 (1943) (same).

[46] Michael A. Tunks, Note, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 656 (2002).

[47] *See Hoffman*, 324 U.S. at 35.

[48] *See* ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW 1 (2008) (noting that globalization has created the need for the rights of private citizens to be adjudicated).

[49] 11 U.S. (7 Cranch) 116 (1812).

subject.[50] *The Schooner Exchange* involved the question of whether an American citizen, in an American court, could assert title to a public national vessel of France while it was within United States waters.[51] The Chief Justice gave weight to the international law concept of state sovereignty, first recognizing that each nation has "exclusive and absolute" jurisdiction over its own territory.[52] He described the world as being composed of distinct states "possessing equal rights and equal independence," which were not subject to the jurisdiction of other states unless they provided consent.[53] Marshall famously wrote:

> One sovereign being in no respect amendable 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.[54]

Every state, therefore, was said to have waived jurisdiction over claims against other foreign sovereigns by implied consent, and so it followed that no state was subject to the jurisdiction of another state unless that first state so consented.[55] The rationale was that the waiver of jurisdiction was in the common interest of states, as they gained mutual benefit from engaging in intercourse with each other and benefited from a continued good relationship in this intercourse.[56] The Court extended its reasoning to include representatives of foreign states, explaining that nations should be assured that their representatives will be immune from suit to make certain that they are not inhibited in performing their diplomatic functions.[57]

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[50] *Id.*; *see also* Austria v. Altmann, 541 U.S. 677, 688 (2004) (noting that Chief Justice Marshall's opinion in *Schooner Exchange* is considered the origin of United States foreign sovereign immunity jurisprudence); ALEBEEK, *supra* note 48, at 12 (stating that *Schooner Exchange* was the first judicial determination concerning foreign state immunity). The reasoning of the opinion has also become the basis for rules of immunity in other common law jurisdictions. HAZEL FOX, THE LAW OF STATE IMMUNITY 204 (2d ed. 2008).

[51] *Schooner Exchange*, 11 U.S. at 135. In December of 1810, the French navy seized the schooner *Exchange*, a ship that was owned by U.S. nationals who were traveling from the United States. When the ship later made a stop in the port of Philadelphia, the original owners filed suit in a United States court to assert their right to the property. ALEBEEK, *supra* note 48, at 12.

[52] *Schooner Exchange*, 11 U.S. at 136.

[53] *Id.*

[54] *Id.* at 137.

[55] *Id.* at 136–37; Erika M. Lopes, Comment, *Seeking Accountability and Justice for Torture Victims: The Hurdle of the Foreign Sovereign Immunities Act in Suing Foreign Officials under the Torture Victims Protection Act*, 6 SETON HALL CIRCUIT REV. 389, 396 (2010).

[56] *Schooner Exchange*, 11 U.S. at 136.

[57] *Id.* at 138–39; *see, e.g.*, Lopes, *supra* note 55, at 397; Tunks, *supra* note 46, at 654.

The Chief Justice made it clear that the Constitution did not require the grant of immunity to foreign sovereigns.[58] Rather, the shield has been held to be "a matter of grace and comity on the part of the United States."[59] Since the Constitution does not require courts to hear claims based on the law of nations, the abstention of courts from doing so based on immunity is perfectly constitutional.[60] Despite its narrow holding and the lack of constitutional authority, *The Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns,"[61] and became the basis for the common law doctrine of immunity in the United States.[62] Following the decision, courts routinely granted immunity to foreign sovereigns with few exceptions for almost a century and a half.[63]

B. Judicial Deference to the Executive

As early as *The Schooner Exchange*, the State Department seemingly crossed the boundary between the Executive and Judiciary to influence the immunity determinations of the courts.[64] For example, in *The Schooner Exchange*, the United States Attorney General urged the courts to dismiss the action in recognition of the relationship between the United States and France,[65] a concern the Court found influential.[66] In observance of the holding in this landmark case, subsequent courts developed a two-pronged procedure to determine whether a foreign official or state was entitled to immunity.[67] First, the diplomatic representative of the sovereign could contact the State Department to request immunity from suit.[68] If the State Department chose to honor this request or, for its own reasons, preferred to settle the claim by diplomatic negotiations rather than by litigation in the courts, the Department would issue a "suggestion of

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[58] *See* Heather L. Williams, Comment, *Does an Individual Government Official Qualify for Immunity Under the Foreign Sovereign Immunities Act?: A Human Rights-Based Approach to Resolving a Problematic Circuit Split*, 69 MD. L. REV. 587, 591 (2010) (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983)).

[59] *Verlinden*, 461 U.S. at 486.

[60] *See, e.g.*, MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 335 (2007).

[61] *Verlinden*, 461 U.S. at 486. The absolute theory of sovereign immunity is sometimes referred to as the "classical theory of sovereign immunity." *See* Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to Philip B. Perlman, Acting Att. Gen., Dep't of Justice (May 19, 1952), *in* 26 DEP'T ST. BULL. 984, 984 (1952) [hereinafter Tate Letter].

[62] *See Verlinden*, 461 U.S. at 486.

[63] *See, e.g.*, Williams, *supra* note 58, at 591–92.

[64] *See* PAUST ET AL., *supra* note 44, at 765; *see also infra* note 128 and accompanying text.

[65] PAUST ET AL., *supra* note 44, at 765.

[66] *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 143 (1812).

[67] *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2284–85 (2010).

[68] *See id.* at 2284.

immunity" to the court.[69] The court would then surrender its jurisdiction over the case and promptly terminate the proceedings.[70]

The second prong of the procedure was triggered when the State Department did not issue a suggestion of immunity or statement of interest to the court.[71] In this situation, the district court "had authority to decide for itself whether all the requisites for such immunity existed."[72] The court would then evaluate "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize."[73] Courts were careful not to extend immunity when the State Department had not done so in the past under similar circumstances, for fear of intervening in the Executive's pursuit of national interests.[74] As a result of the two-pronged procedure, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied."[75]

This procedure evidenced the Judiciary's great willingness to defer to the Executive in the realm of foreign relations, allowing the Executive to influence jurisdiction—an inherently judicial determination—on the basis of political considerations. Courts frequently recognized the executive branch, acting through the State Department, as "the political arm of the Government charged with the conduct of our foreign affairs,"[76] and freely relinquished its power to grant or prohibit immunity when the State Department had not acted.[77] The policy behind the procedure,

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[69] *Id.*

[70] *See* Mexico v. Hoffman, 324 U.S. 30, 34 (1945) (opining that courts should terminate judicial proceedings when the executive branch feels that diplomatic measures should be taken rather than the use of adjudication).

> The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State. When the Secretary elects . . . to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court.

Id.; *see also Ex parte* Peru, 318 U.S. 578, 586–87 (1943).

[71] *See Samantar*, 130 S. Ct. at 2284.

[72] *Ex parte Peru*, 318 U.S. at 587.

[73] *Hoffman*, 324 U.S. at 36; *see Samantar*, 130 S. Ct. at 2284.

[74] *See, e.g.*, *Hoffman*, 324 U.S. at 36.

[75] Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983).

[76] *Ex parte Peru*, 318 U.S. at 588.

[77] *Hoffman*, 324 U.S. at 35 ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

recognized by both the courts and the State Department, was that the interests of the United States were "better served . . . if the wrongs to suitors . . . are righted through diplomatic negotiations rather than by compulsions of judicial proceedings."[78] The interests of the victims, therefore, were often sacrificed to those of the United States government and its foreign associate.

At first glance, this level of influence seems appealing for the Executive, but with this power came consequences, including the political pressure placed on the State Department by foreign nations.[79] The State Department, following the lead of several other foreign nations, decided that a different approach to foreign sovereign immunity might be more prudent.[80]

C. The Tate Letter: Adoption of the Restrictive Theory of Immunity

During the twentieth century, the practice of states around the world began to shift from adherence to the theory of absolute sovereign immunity to a more restrictive approach.[81] As global commerce grew, states recognized the need for adjudication of claims arising from the commercial activities of states and their instrumentalities.[82] Allowing states to engage in commercial activities with the protection of immunity and without any consequence for illegal acts was seen as an unfair advantage over private commercial enterprises.[83] The new restrictive approach to sovereign immunity allowed for an exception to the sovereign immunity doctrine: domestic courts could now exercise jurisdiction over claims brought against a foreign state that arose from commercial activities.[84]

Until this time, questions of sovereign immunity in the United States were answered primarily by the State Department, and, generally, immunity was afforded to friendly foreign sovereigns in all actions.[85] In 1952, following the lead of several other states, the State Department announced a definitive change to its foreign sovereign immunity policy through a letter to the Department of Justice, later named the

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[78] *Ex parte Peru*, 318 U.S. at 589.

[79] *Verlinden*, 461 U.S. at 487.

[80] *See* Williams, *supra* note 58, at 595 (noting that the restrictive theory of immunity eventually adopted by the United States matched "the approach of nearly every other country—where decisions as to foreign sovereign immunity were exclusively judicial rather than political").

[81] Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 120 (2004).

[82] JENNIFER K. ELSEA & JORDAN E. SEGALL, CONG. RESEARCH SERV., R 41379, SAMANTAR V. YOUSUF: THE FOREIGN SOVEREIGN IMMUNITIES ACT AND FOREIGN OFFICIALS 2 (2010).

[83] *Id.*

[84] *Id.*

[85] *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (observing the history of State Department awards of sovereign immunity).

"Tate Letter."[86] The letter expressed the Executive's intention to adopt the restrictive form of sovereign immunity, meaning that courts should "not grant immunity to a foreign sovereign in suits arising out of private or commercial activity."[87] The letter explained that "[a]ccording to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts . . . of a state, but not with respect to private acts."[88] The letter made clear the Executive's intention to allow the United States courts to adjudicate claims arising out of commercial enterprise.[89]

Despite this definitive language, the letter made a qualification when it said that it would be the "[State] Department's policy to follow the restrictive theory . . . *in the consideration of* requests . . . for a grant of sovereign immunity."[90] In reality, while the letter marked a significant change in policy, it did not change the procedural approach to the determination, and, as a result, the application of the restrictive theory in the courts proved to be problematic.[91] When foreign sovereigns were served, they continued to exert pressure on the State Department for immunity, and the Department continued to issue suggestions of immunity to the courts, even in cases where the restrictive theory should have made immunity unavailable.[92] When a sovereign state did not petition the State Department for immunity, courts were required to independently determine immunity, creating further inconsistencies.[93]

Since the Tate Letter, "the clear trend" has been toward a more limited application of foreign sovereign immunity.[94] A large contributing factor to the strength of this trend in the United States has been the codification of the restrictive approach to the doctrine in the Foreign Sovereign Immunities Act of 1976.[95] Congress passed the FSIA as a reaction to both the development of this trend around the world and the inconsistent application of immunity in the United States.[96] The FSIA, however, did not clearly answer several questions raised by the sovereign immunity doctrine in United States courts, including whether foreign officials were entitled to immunity, who should determine whether officials are entitled, or how the determination should be made. The Court in *Samantar* dissected the statute to determine that it does not govern whether a foreign official is entitled to immunity, thereby limiting the scope of the Act.[97]

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[86] Tate Letter, *supra* note 61; *see Verlinden*, 461 U.S. at 487.

[87] Lopes, *supra* note 55, at 401; *see also* Tate Letter, *supra* note 61.

[88] Tate Letter, *supra* note 61, at 984.

[89] *See* Lopes, *supra* note 55, at 401.

[90] Tate Letter, *supra* note 61 (emphasis added).

[91] *See* Lopes, *supra* note 55, at 402; *see also Verlinden*, 461 U.S. at 487.

[92] *Id.*

[93] *Verlinden*, 461 U.S. at 487–88 (discussing how standards were not uniformly applied).

[94] David P. Stewart, *Immunity and Accountability: More Continuity Than Change?*, 99 AM. SOC'Y INT'L L. PROC. 227, 228 (2005).

[95] *See id.*

[96] *Verlinden*, 461 U.S. at 488 (discussing the objectives of the FSIA).

[97] Samantar v. Yousuf, 130 S. Ct. 2278, 2284, 2292 (2010).

D. Foreign Sovereign Immunities Act of 1976: Circuit Confusion Over Foreign Official Immunity

The doctrine of foreign sovereign immunity developed as a matter of common law, and the FSIA served, in part, as codification of the restrictive approach to the doctrine.[98] Congress drafted the FSIA in order to provide a forum for adjudication of disputes arising from commercial or private acts of a state, and also to clarify the standards for determining when immunity should be granted.[99] Congress stated several main purposes for the legislation, including the formal adoption of the restrictive approach as set down in the Tate Letter.[100] Another central purpose of the statute was the desire to remove the political dynamic that had previously influenced the determination.[101] Congress sought to remove the immunity determination from the executive branch, instead locating the determination exclusively within the power of the judicial branch.[102] By removing from the State Department the responsibility for making suggestions of immunity, Congress hoped to relieve the political pressure that was being placed on the Department by defendant states and free the executive branch from "any adverse consequences resulting from an unwillingness . . . to support that immunity."[103] Congress also wanted to assure litigants that immunity determinations were "made on purely legal grounds and under procedures that insure [sic] due process."[104] By enacting the FSIA, Congress attempted to "depoliticize the field by codifying legal standards that courts could apply impartially."[105]

The statute confined the grant of immunity to suits "involving a foreign state's public acts . . . and [did] not extend [the grant] to suits based on [the state's] commercial or private acts."[106] The State Department approved of usurpation of its

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[98] *Id.* at 2284–85; *Verlinden*, 461 U.S. at 488.

[99] *Verlinden*, 461 U.S. at 488; WALTER FLOWERS, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605.

[100] H.R. REP. NO. 94-1487, at 8. The formation of procedures to establish personal jurisdiction over a foreign state and to provide a means for obtaining judgments over a defendant state were other stated purposes of the Act. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976).

[101] H.R. REP. NO. 94-1487, at 7; *see Samantar*, 130 S. Ct. at 2285 (explaining the "Act's two primary purposes: (1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts.") (citation omitted); FOX, *supra* note 50 at 317 ("A principal purpose of the legislation was to transfer the determination of sovereign immunity from the executive to the judicial branch, thereby reducing the foreign policy implications and providing legal standards and due process procedures.").

[102] H.R. REP. NO. 94-1487, at 7.

[103] *Id.*

[104] *Id.*

[105] Neuman, *supra* note 81, at 121.

[106] H.R. REP. NO. 94-1487, at 7.

influence over the immunity determination for these acts.[107] The statute was not clear, however, on whether the immunity determination of a foreign official, acting in his or her public or private capacity, was to be governed by legislation and, therefore, determined solely by the courts and by the same standards the court would apply to a state. A split developed in the federal circuits with regard to this question.[108]

E. Resolution of the Circuit Split

In *Samantar*, the Fourth Circuit followed the minority of circuits when it held that the FSIA does not provide immunity to former heads of state, preserving the Executive's role in these immunity determinations.[109] The Supreme Court agreed.[110] In a detailed evaluation of the text of the statute, the Court found that Congress did not intend to include a foreign official within the meaning of a "foreign state," and further emphasized that "the legislative history points toward an intent to leave official immunity outside the scope of the Act."[111] The Court did not distinguish between former and current heads of state, concluding that the FSIA did not govern the immunity determinations of foreign officials;[112] rather, it only addressed foreign states.[113] In essence, the Court held that the common law doctrine would continue to control.

The Court provided no guidance on the critical issue of how to determine whether foreign officials are entitled to immunity, an issue the common law leaves unclear. It is unsurprising that the Court showed restraint, since the Judiciary has almost always dodged the issue of immunity and deferred to the Executive. Although the Court found "no reason to believe that Congress saw a problem [with], or wanted to eliminate, the State Department's role in determinations regarding individual official immunity," it did not provide any guidance as to what role the State Department should play going forward.[114] Unlike some other cases before it, the *Samantar* decision did not address the Judiciary's potential interference with the Executive's exercise of political power when making immunity determinations, separation of powers concerns if Congress were to create legislation on the issue, or the issue of judicial independence.[115] *Samantar* leaves many questions unanswered: Is a former head of state present in the United States immune from suit for serious human rights offenses? Should foreign officials living in the United States be held accountable for human rights abuses even if the suit would offend the official's home state? What

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[107] *Id.* at 6.

[108] *See* Lopes, *supra* note 55, at 404–09.

[109] Samantar v. Yousuf, 130 S. Ct. 2278, 2283–84 (2010).

[110] *Id.* at 2282.

[111] *Id.* at 2291.

[112] *Id.* at 2284 n.5.

[113] *Id.* at 2285–93.

[114] *Id.* at 2291.

[115] *See* Austria v. Altmann, 541 U.S. 677, 734 (2004) (Kennedy, J., dissenting); Neuman, *supra* note 81, at 123.

branch of government has control over head of state immunity determinations? The Supreme Court simply stated that any issue related to foreign sovereign immunity should first be argued in district court.[116] What is clear after *Samantar* is the need for further development of the foreign official immunity doctrine.

III. IMMUNITY DETERMINATIONS IN THE UNITED STATES POST-*SAMANTAR*: WHY THE EXECUTIVE MUST ASSERT CONTROL

Having decided that the FSIA did not address heads of state, the Supreme Court avoided tackling the difficult question of how head of state immunity determinations should be made internationally or in the United States going forward.[117] The only guidance the *Samantar* decision provided for head of state immunity determinations was that the common law may still apply.[118] The Court left the problems associated with the application of the common law to be resolved by the district courts.[119] As a result, the Judiciary, Executive and Legislature all have the power to influence the utility of the doctrine going forward. Although courts may have influence over the implementation of the doctrine, it is more likely that the real fight for control over the immunity determinations will arise between the Legislature and the Executive. In the meantime, the courts with suits against foreign officials on their dockets are left with little direction about the proper steps to take to adjudicate the claims.

A. The Common Law Approach: Determinations in the Judiciary, Growing Litigation and Little Guidance

Amplifying the problem of an unclear head of state immunity doctrine in the United States is the probable increase in the number of these cases in federal courts. For victims of human rights abuses in many countries around the world, litigation for these crimes in their home country is impossible.[120] Without a special criminal tribunal created by treaty, these victims have no recourse other than filing suit in a country capable of and willing to adjudicate claims against foreign sovereigns.[121]

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[116] *Samantar*, 130 S. Ct. at 2292–93.

[117] *Id.* at 2290 n.14; William S. Dodge, *Samantar Insta-Symposium: What Samantar Doesn't Decide*, OPINIO JURIS (June 2, 2010, 8:42 PM), http://opiniojuris.org/2010/06/02/samantar-insta-symposium-what-samantar-doesn%e2%80%99t-decide/ (noting that the Court was not required to address the future of the immunity determination); *see* Bradley, *supra* note 3 (noting the lack of discussion about international law in the *Samantar* opinion); *cf.* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (discussing international law at length in order to determine whether the procedures of the military commission violated the Uniform Military Code of Justice and international law as enumerated by the Geneva Conventions).

[118] *Samantar*, 130 S. Ct. at 2292–93.

[119] *Id.*

[120] *See, e.g.*, Alford, *supra* note 1, at 508.

[121] *Id.*

After the initial enactment of the FSIA, there was a considerable increase in litigation against foreign parties in United States courts.[122] Although this increase can be partly attributed to the increase in commercial suits, tied to increased economic activity of states, it is significant that a substantial portion of claims were not commercial contract claims brought against a state.[123] Instead, many of the claims were brought against foreign officials for conduct that was "personal and unconnected with any governmental duties,"[124] including claims under the Alien Tort Statute and the Torture Victim Protection Act.[125] This influx shows that with any new reduction in the immunity doctrine in the United States, a wave of new plaintiffs seeking redress will come forward.[126] This trend highlights the Judiciary's need for clarity regarding the application of the immunity doctrine after *Samantar*.

Without much judicial guidance regarding the determinations, the only comfortable approach for the lower courts to follow is the common law precedent. As noted previously, the Judiciary is hesitant when it faces the prospect of holding foreign leaders accountable without Executive endorsement.[127] Courts have repeatedly recognized foreign relations as a politically charged area of the law and expressed the view that it is best addressed in the political branches of the government.[128] The

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[122] *See* Tachiona v. Mugabe, 169 F. Supp. 2d 259, 279 (S.D.N.Y. 2001) (noting that "with greater incidence, foreign state officials are accused of wrongful conduct arising not just from private commercial ventures, but from alleged criminal activity and abuses of human rights in violation of customary international law").

[123] *Id.* at 278.

[124] *Id.*

[125] *See id.* at 280.

[126] In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), Scott Nelson sued the Saudi government for personal injury resulting from unlawful detention and torture. *Id.* at 349. After being recruited and hired in the United States by the Saudi government, Nelson traveled to Riyadh to begin his employment as a systems engineer at King Faisal Specialist Hospital. *Id.* at 352. One year later, the Saudi Government arrested, detained, and tortured Nelson for reporting safety defects at the hospital. *Id.* at 352–53. The Supreme Court held that the district court did not have subject matter jurisdiction over the suit because the FSIA granted the government immunity because the unlawful acts and torture committed by the Saudi Government were not "based upon commercial activity" within the meaning of the FSIA. *Id.* at 349. Because the FSIA is the "sole basis for obtaining jurisdiction over a foreign state" in the United States, and Nelson did not bring a suit pursuant to one of the immunity exceptions in the statute, immunity had to be granted. *Id.* at 355 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989)).

[127] *See* Tunks, *supra* note 46, at 668; *cf.* Austria v. Altmann, 541 U.S. 677 (2004) (rejecting the State Department's recommendation when determining whether pre-FSIA conduct should be governed by the statute). In his opinion in *Altmann*, Justice Stevens expressed some distaste for the involvement of the State Department in immunity determinations, stating, "[w]hile the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." *Id.* at 701.

[128] *See* Doe v. United States, 860 F.2d 40, 45 (2d Cir. 1988); Mexico v. Hoffman, 324 U.S. 30, 35 (1945). Judicial deference to executive decisions that are political in nature was expressed as early as *Marbury v. Madison*. According to *Marbury*, the judicial power does not

Samantar Court expresses almost nothing along this line of reasoning, presumably in order to leave any discussion of the "foreign policy power" out of the equation.[129] Without any new guidance, the courts must simply follow the flawed common law procedure already in place.[130] To make matters worse, the procedure only becomes more difficult to apply over time because the United States' relationships with states, as well as non-nation states, are often complicated and always evolving.

Courts have little experience making foreign policy decisions and often wait years for State Department guidance before allowing a case to move forward.[131] Without Executive recommendations, courts make inconsistent determinations, leading to more confusion and frustration.[132] Further, the Judiciary cannot be held politically accountable for such decisions, unlike the State Department. Leaving the determination to the courts only exacerbates the problems that have been noted for years, including delays in the court system, inconsistent determinations, lack of clarity of the doctrine, and the injustice of denying the complaining parties' rightful causes of action under the Alien Tort Statute and the Torture Victims Protection Act.[133]

The common law approach forced Yousuf to wait two years for State Department intervention before the district court finally allowed his case to move forward despite the Department's silence.[134] In February of 2011, after the Supreme Court's decision to remand the case back to the district court for another look at the immunity determination, the State Department finally filed a statement of interest in the case.[135] It is difficult to conclude that the United States court system has provided justice to a plaintiff who has been forced to endure more than six years of litigation before his claim has even been heard. This Note argues that the continued application of the common law doctrine is not the best option for dealing with cases against foreign officials

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authorize courts to question the discretion of the Executive regarding foreign policy decisions. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803). Chief Justice Marshall wrote:

> By the constitution of the United States, the President is invested with certain important political powers; in the exercise of which he is to use his own discretion . . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

Id.

[129] *See generally* Samantar v. Yousuf, 130 S. Ct. 2278 (2010).

[130] *See* Brief for the United States, *supra* note 28, at *6.

[131] *See Samantar*, 130 S. Ct. at 2283.

[132] *See* Statement of Interest of the United States at 2, Yousuf v. Samantar, No. 1:04 CV 1360 (E.D. Va. Feb. 14, 2011) (highlighting the case's procedural history with numerous reversals and remands).

[133] *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487–88 (1983); Tachiova v. Mugabe, 169 F. Supp. 2d 259, 281 (S.D.N.Y. 2001).

[134] *Samantar*, 130 S. Ct. at 2283.

[135] *See* Statement of Interest of the United States, *supra* note 132.

going forward. Instead, the executive branch must develop a framework that removes the determination from the courts and facilitates faster and more consistent immunity determinations while addressing sensitive foreign policy considerations.

B. Possible Congressional Control Over the Determination Process

The *Samantar* decision does not expressly address the role of Congress in shaping immunity determinations going forward, but it also does not call into question Congress's ability to enact such statutes.[136] Congress has the power to codify a process for foreign official immunity determinations, and it is possible that Congress has the desire to do so.[137] While it is unlikely that Congress intended the FSIA to be the complete framework on which foreign-official immunity determinations are to be based, Congress has expressed aversion toward the State Department's political involvement in certain cases against foreign officials, instead favoring determinations based on legal standards.[138] The critical problem is that a statutory scheme controlling the immunity of officials will likely overlook many important and sensitive aspects of the doctrine that would result in negative foreign policy implications for the United States government. An attempt to provide the sole means for official immunity will almost certainly be met with opposition from the executive branch. Nonetheless, Congress has two possible avenues for codifying the immunity determination process.[139]

First, Congress can create a new exception to the FSIA that will govern the question of whether foreign officials are entitled to immunity. An amendment to the definition of "foreign state" in the FSIA to include former officials acting in their official capacities would make the jurisdictional determination for officials the same as that for states.[140] Alternatively, Congress could create a new exception in the

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[136] ELSEA & SEGALL, *supra* note 82, at 14–17.

[137] WALTER FLOWERS, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 94-1487, at 7–8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605–06.

[138] *See Samantar*, 130 S. Ct. at 2291 (noting that "the legislative history points toward an intent to leave official immunity outside the scope of the Act"); Brief for the United States, *supra* note 28, at 27 (stating that "[n]othing in the FSIA suggests that Congress intended to accord immunity to current officials but not former officials"); H.R. REP. NO. 94-1487, at 7 (explaining that Congress intended to move "the determination of sovereign immunity from the executive branch to the judicial branch" in order to ensure that "crucial decisions are made on purely legal grounds").

[139] *See* Brief for the United States, *supra* note 28, at 27 (arguing that the executive branch's determinations, informed by customary international law, govern the law of immunity, at least when officials are acting in their official capacity).

[140] The FSIA currently defines "foreign state" as "a political subdivision of a foreign state or an agency or instrumentality or a foreign state." 28 U.S.C. § 1603(a) (1976). The *Samantar* Court decided that the terms "agency or instrumentality" do not include an individual official. *Samantar*, 130 S. Ct. at 2286–87.

statute to apply to foreign officials specifically. With either of these actions, Congress would place foreign official immunity determinations in the hands of the courts, in the same way courts are presently empowered to deal with the commercial acts of states.

Congress can also pass new statutes that govern immunity determinations. The Justice Against Sponsors of Terrorism Act,[141] for example, is a proposed bill that would provide courts jurisdiction over private causes of action against foreign states and officials who commit "extrajudicial killing, aircraft sabotage, hostage taking, terrorism or the provision of material support or resources . . . for such an act."[142] This law would allow victims to bring suits against foreign officials into United States courts.[143] While the proposed statute would require that the state be substituted for the foreign official acting in his or her official capacity as the defendant in the suit,[144] Congress would still be side-stepping the Executive's consideration of the foreign policy implications associated with subjecting states to suit based on more than just their commercial activities.

Congress could take these actions to limit, or even extinguish, the role of the Executive in the immunity determination because such legislation would eliminate the need for courts to rely on the State Department's suggestions of immunity.[145] The foreign policy power debate is implicated in this struggle.[146] It is generally established that the courtroom is not the place where foreign affairs decisions should be made.[147] It is seen as dangerous for courts to undermine or second-guess foreign policy decisions of the President, since the Executive is the branch primarily charged with these decisions and is the branch that has the relevant information to do so effectively.[148] It has also been argued that it is dangerous for the Legislature, rather than the President, to exercise power over United States foreign policy, especially when the issues are fact-specific rather than broad policy initiatives.[149]

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[141] S. 2930, 111th Cong. § 3 (2010). The current version of this bill, S.1894, 112th Cong. (2011), is now pending before the Senate Judiciary Committee.

[142] *Id.*; ELSEA & SEGALL, *supra* note 82, at 14–15.

[143] S. 2930, § 2; ELSEA & SEGALL, *supra* note 82, at 15.

[144] S. 2930, § 4(a) ("[A]ny claim based on an act or omission of an official or employee of a foreign state or of an official or employee of an organ of a foreign state, while acting within the scope of his office or employment, shall be asserted against the foreign state or organ of the foreign state.").

[145] *See supra* notes 132–34 and accompanying text.

[146] *See* RAMSEY, *supra* note 60, at 321.

[147] *Id.*; *cf.* A. Mark Weisburd, *Affecting Foreign Affairs is Not the Same as Making Foreign Policy: A Comment on Judicial Foreign Policy*, 53 ST. LOUIS U. L.J. 197, 207 (2008) (concluding that it would be appropriate for the court to hear some foreign policy cases, such as "cases requiring nothing more than resolving factual disputes on the basis of evidence and applying clear rules of decision to the facts so found").

[148] RAMSEY, *supra* note 60, at 321.

[149] The Constitution does not grant Congress a "general foreign affairs power" but does provide some enumerated powers. U.S. CONST. art. I, § 8, cl. 1–17. "Congress [also] has [the] derivative power to pass laws 'necessary and proper' to support other branches' powers,"

On the other hand, statutory codification of international law principles may provide the United States with a more impartial means for adjudicating claims for violations of international law against former heads of state while providing due process to victims. Statutes that incorporate international law may not bring about the same negative consequences feared by subjecting officials to suit because the international community as a whole supports the exercise of universal jurisdiction and prosecution of former officials for crimes like genocide and other *jus cogens* violations.[150] Also, there is no indication that the Supreme Court would find this congressional action constitutionally offensive.[151] One way for Congress to implement such a statute can be illustrated by the Genocide Accountability Act (GAA).[152] In 2007, Congress passed the GAA, which codified the Genocide Convention in the United States.[153] The GAA "expand[ed] the jurisdictional bases of the U.S. law criminalizing genocide . . . to allow prosecution of any perpetrator of genocide found in the U.S."[154] A foreign official sued under this statute would claim immunity, but if Congress made it clear that immunity would not be granted for the crime of genocide, there would be no place for a State Department suggestion of immunity in the determination, thereby removing the executive branch from the decision.[155]

Congress has several constitutionally permissible options that have some benefits, but all have negative consequences. Congress can amend the FSIA to allow for officials to be sued based on specific criminal acts, or Congress can pass new statutes that incorporate international law treaties and subject officials to suit through the criminalization of certain specific and widely accepted international law violations.[156] The latter approach has a stronger foundation than the former, which may make the prosecution of the individual more legitimate, possibly reducing some of the foreign policy ramifications of the suit. Despite the benefits of making immunity determinations

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meaning that Congress could exercise some foreign affairs powers but would have to act in coordination with the Executive. RAMSEY, *supra* note 60, at 208.

[150] PAUST, *supra* note 44, at 3–4 (defining *jus cogens* (commanding law) as peremptory norms).

[151] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Court of Appeals for the Second Circuit held that United States courts can adjudicate tort claims between aliens even when neither the crime nor the parties have any connection to the United States, so long as the violations alleged are of "well-established, universally recognized norms of international law." *Id.* at 888.

[152] Pub. L. No. 110-151, 121 Stat. 1821 (2007).

[153] *Id.*

[154] Zachary Pall, *The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide*, 3 INTERDISC. J. HUM. RTS. L. 13, 13 (2009).

[155] *See* John Bellinger, *Immunities*, OPINIO JURIS (Jan. 18, 2007, 7:00 AM), http://opiniojuris.org/2007/01/18/immunities/ (explaining that "[t]he Executive Branch has a long-standing practice of affirmatively 'suggesting' head of state immunity to our courts when a person who enjoys that immunity has been served with judicial process").

[156] *See id.*

more consistent, clear, and efficient for the courts, either approach is still overinclusive. Codification of the immunity determination process would not account for the important political factors that play into the sensitive relationships the Executive must manage around the world, or the serious reciprocity implications that will likely result from automatically subjecting officials to suit by statute.[157] Further, codification would remove any possibility of the settlement of claims through diplomatic negotiations, a powerful conciliatory tool for the Executive.

Ultimately, the sensitive immunity analysis required in cases against foreign officials is best vested with the executive branch.[158] Without case-by-case consideration of the consequences of subjecting officials to suit in the United States, the executive branch's foreign policy agenda could sustain major damage.[159] The Executive has the pertinent information and foreign relations skills that are necessary to maintain positive global relationships.[160] The executive branch can, and should, act before such congressional action is taken in order to maintain executive power in this area, avoid suits against U.S. allies in its courts, and prevent reciprocity repercussions that could result in U.S. officials being subject to suit abroad.[161]

C. Executive Control Over the Immunity Determination: The Best Branch for the Job

The Executive has many interests at stake related to head of state immunity. First, and most obviously, the executive branch is charged with creating and executing the foreign policy for the country, including fostering relationships with other states around the world.[162] Without the ability to grant immunity to state officials sued in United States courts, the executive branch loses some control over its ability to guarantee protection of its allies and maintain neutral relations with states with which it may have sensitive relationships. Also, the executive branch will lose its ability to engage in diplomatic negotiations as a possible means of resolving these suits.

The executive branch also has an interest in limiting the jurisdiction of the federal courts to prevent the United States court system from becoming a tribunal for international crimes. Allowing any and all foreign officials from around the world to be sued and punished in the United States is not a policy objective that a single executive administration has ever endorsed.[163] Congress has followed suit, refusing

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[157] *See id.*; ELSEA & SEGALL, *supra* note 82, at 15–16.

[158] *See* ELSEA & SEGALL, supra note 82, at 12 (noting the *Samantar* Court's placement of responsibility on Executive branch principles in resolving these disputes).

[159] *See id.* at 12, 15–16.

[160] *See id.* at 12–13, 15–16.

[161] *Id.*

[162] U.S. CONST. art. II, § 2.

[163] *See* Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 392, 398 (2009) (explaining U.S. engagement policy as being derived from the principle of subsidiarity or comity to other international entities).

to ratify several human rights treaties that would require the United States to exercise universal jurisdiction to criminally prosecute foreign officials in the United States court system.[164] However, Congress did pass statutes such as the Aviation Transportation and Security Act and Victims of Trafficking and Violence Protection Act in order to provide redress for victims of intolerable crimes through civil suit against perpetrators in the United States.[165] The Executive must create some framework to deal with impending civil litigation against foreign officials pursuant to these laws, while preserving its role in foreign official immunity determinations. At the same time, the Executive must also be sure to prevent Congress from creating statutes that would transform the U.S. court system into an international human rights tribunal.

The Executive also has an interest in protecting United States officials from charges in foreign courts. Suggestions of immunity by the State Department in many cases recognize the "special sensitivities of exposing [government leaders] to civil litigation in foreign courts, particularly while they are still in office."[166] By recognizing these special sensitivities, the State Department avoids potentially dangerous foreign policy issues, including reciprocity repercussions.[167] John Bellinger, former State Department Legal Advisor, recognized that "[t]he sovereign and official immunity rules the United States applies domestically have important implications for how the United States and its officials are treated abroad. Thus immunity outcomes in [United States] courts are relevant not merely because of the potential immediate foreign policy consequences of U.S. exercises of jurisdiction."[168] The current United States position when its officials are sued abroad is to simply assert immunity.[169] If immunity determinations in United States courts were to be made by the courts without any executive input, many more officials would be successfully sued in the United States. This would result in an increase of countries that would no longer respect the United States' assertions of immunity for its own officials. Jeopardizing the immunity of United States officials abroad is a risk that the Executive surely does not want to take, especially in a time of war.

As *Samantar* indicates, it is unlikely that the Court will object to the State Department making immunity determinations according to common law practices going forward.[170] The challenge for the Executive, then, rests in the balancing of

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[164] *Id.* at 391 ("[D]espite strong . . . human rights commitments, the United States has appeared to flinch, even recoil, when it comes to direct domestic application of human rights treaty norms . . . .").

[165] Aviation Transportation and Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

[166] Bellinger, *supra* note 155.

[167] *Id.*

[168] *Id.*

[169] *Id.* ("[The common law] approach . . . is more consistent with the position taken by the United States on behalf of its own officials when they are sued abroad.").

[170] Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2010).

interests: the desire to maintain friendly relations with foreign states and to protect United States officials abroad on one hand with the national interest of participation in enforcement of international human rights norms and the need for impartial adjudication of civil suits based on human rights violations on the other hand.[171] In order to promote positive foreign relationships and to avoid being subject to constant political pressure, the State Department must grant immunity based on a more consistent framework that promotes the United States foreign policy agenda. As discussed previously, the Executive must also act before it is excluded from the process by federal legislation.[172] Despite the strain on the State Department, the influence over the determination of immunity for officials is a power that the Executive should continue to preserve as its own. This Note recommends that the State Department take full control of immunity determinations. The executive branch must dedicate more resources to the State Department to make efficient immunity determinations and must also create a framework that courts can apply with more consistency.

IV. RECOMMENDATION TO THE EXECUTIVE: STATE DEPARTMENT CONTROL OVER FOREIGN OFFICIAL IMMUNITY DETERMINATIONS

The arguments made during the *Samantar* case revealed the Executive's desire to keep some role in assessing sovereign immunity claims by foreign officials.[173] These arguments rely on the foreign policy power of the executive branch and emphasize various reasons for keeping the immunity determinations as is.[174] The *Samantar* Court expressed no aversion to this position and suggested that lower courts respect State Department suggestions of immunity on a case-by-case basis going forward.[175] The Court also agreed with the Executive that the common law approach remains in effect with respect to former officials.[176] Following the common law, however, will preserve the previous issues courts have faced with foreign state immunity determinations, including delays, inconsistencies, and injustices in the judicial process.[177] Also, the common law approach allows courts to act in contradiction of a State Department suggestion of immunity, a result the Executive can avoid.[178] Even worse, following the common law allows for Congress to step in and codify the immunity determination,

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[171] *See* Melish, *supra* note 163, at 390 ("National public opinion polls . . . suggest that roughly eighty percent of Americans believe that human rights inhere in every human being. Equal numbers express . . . support for U.S. ratification of human rights treaties . . . ." (footnote omitted)).

[172] *See supra* Part III.B.

[173] *See* Brief for the United States, *supra* note 28, at 6–7.

[174] *Id.* at 8–27.

[175] *See Samantar*, 130 S. Ct. at 2291; ELSEA & SEGALL, *supra* note 82, at 12.

[176] *Samantar*, 130 S. Ct. at 2291.

[177] *See supra* Part III.A.

[178] *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983) ("[T]he governing standards [for immunity determinations] were neither clear nor uniformly applied.").

keeping the Executive from having any role in this important foreign policy doctrine.[179] The Executive must act to change the current procedure of immunity determinations in courts today.

The State Department currently lacks the ability to make efficient immunity determinations.[180] Today, issuing a statement of interest to the courts can take several months, or even years to complete.[181] This kind of backlog in the court system is one that Congress may seek to correct without consideration of the foreign policy consequences of its legislation.[182] Also, the delay in a response from the United States government creates uncertainty for the court and litigants, as well as a lack of faith in the judicial processes of the federal courts. The Executive must dedicate more resources to the State Department so it can act quickly to issue suggestions of immunity to district courts for each case. Increased resources will assure courts and litigants that statements of interest will be issued in each case and within a shorter time frame. More resources will also lessen the burden on the Department and reduce delays and injustice in the court system.

In addition to greater resources for the State Department, the Executive should create a framework that provides direction to courts adjudicating cases against foreign heads of state. Instead of the current common law approach, the Executive should issue a statement to the Judiciary regarding the suggested process to follow when a suit is filed against a foreign official. Most importantly, the framework should require that courts consider State Department statements of interest in every case. This requirement will allow the Executive to maintain exclusive control over this component of foreign policy by preventing courts from making immunity determinations of their own volition. Required statements of interest will also create certainty for the courts and litigants.

Other details of the framework can be established to help the State Department and courts in the determination process. To reduce unnecessary delays, the Judiciary could be required to notify the proper authority within the State Department as soon as a case is filed against a foreign head of state.[183] Additionally, the Executive can request that the courts institute a legal presumption in favor of immunity and require that plaintiffs rebut the presumption before allowing the case to move forward.[184] The presumption in favor of immunity would reduce the number of cases requiring responses from the State Department.[185] The framework could also include required filings by the parties to facilitate the State Department's fact-finding process.

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[179] *See supra* Part III.B.

[180] *See supra* Part III.A.

[181] *See supra* Part III.A.

[182] *See supra* Part III.B.

[183] *See* Note, *Interpreting Silence: The Roles of the Courts and the Executive Branch in Head of State Immunity Cases*, 124 HARV. L. REV. 2042, 2060–63 (2011) (discussing the creation of legal presumptions in favor of both the defendant and plaintiff).

[184] *See id.* at 2060–63.

[185] *Id.* at 2061.

Alternatively, some have suggested that the State Department issue "guidelines" to the courts in order to develop the common law approach.[186] A "guidelines-based" approach, however, is insufficient to address the current problems associated with the common law procedure. General guidelines will not address these fact-specific and sensitive cases with enough care to prevent foreign policy ramifications. Even with State Department guidelines, each court charged with making immunity determinations will inevitability treat head of state cases differently, considering varying factors and weighing those factors according to differing standards. The result will be a continuation of the unpredictable and inconsistent common law approach.

Another alternative is a court-created analytical framework.[187] The common law approach, however, has proved that courts are ill-equipped to make immunity determinations. When making determinations, courts attempt to discern prior State Department suggestions of immunity in head of state cases because the courts recognize that the Executive is best suited for making political decisions.[188] A framework created by the Executive will eliminate the need for a framework created by the courts and, in turn, will avoid the continuation of the issues of the common law approach.

No matter what the exact process the executive branch implements for addressing civil tort claims against foreign heads of state, the most important goal is that the process be adopted before Congress takes action to preclude Executive input. An assertive Executive stance regarding these determinations will be important in keeping Congress from taking its own action in the process, and also for preventing courts from applying the common law approach going forward.

CONCLUSION

The Constitution grants both the executive and legislative branches of government different duties regarding the foreign policy power, but the Executive is generally charged with conducting foreign affairs on behalf of the United States.[189] Foreign sovereign immunity is a customary international law doctrine that had been left in the hands of the Executive until the 1970s when Congress enacted the FSIA and the Executive consented to the relinquishment of control over immunity determinations for states' commercial acts.[190] Although the immunity of foreign states is now settled in the United States, control over immunity determinations for foreign heads of state is in flux after the Supreme Court's decision in *Samantar v. Yousuf*.[191] *Samantar* left

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[186] *Id.* at 2057–60.

[187] *See* Christopher D. Totten, *Head-Of-State and Foreign Official Immunity in the United States After* Samantar: *A Suggested Approach*, 34 FORDHAM INT'L L.J. 332, 332–33 (2011) (suggesting that courts adopt an analytical framework "to use when such suggestions of immunity are not provided").

[188] *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983); Mexico v. Hoffman, 324 U.S. 30, 35 (1945); *Ex parte* Peru, 318 U.S. 578, 589 (1943).

[189] *See* RAMSEY, *supra* note 60, at 321.

[190] *See supra* Part II.C.

[191] *See supra* Part II.E.

the doctrine as applied to officials unclear, both in terms of how the determinations are to be made and by whom.[192]

Samantar commenced a race between Congress and the Executive to take action to secure power over immunity determinations going forward. Congress has the power to amend the FSIA or pass a different statute to control immunity determinations for suits against officials. While the foreign policy power is one that is widely accepted as belonging to the Executive,[193] the Supreme Court has expressed no will to overturn legislation that transfers the immunity determination from the Executive to the courts.[194] Absent a constitutional challenge,[195] the Executive may lose this power as a result of such legislation if it does not act to preserve it and prevent potentially permanent foreign policy ramifications. If, on the other hand, the Executive asserts control over the immunity determinations and prevents congressional legislation, the President could safely keep this important power within his control. Without action by either branch, the courts will continue to apply the problematic common law approach.

This Note has argued that the Executive should not continue to follow the common law approach for foreign official immunity determinations because of the various problems with the approach as it stands today. Further, it has been argued that the Executive should take action to avoid the negative foreign policy implications that would result if a mechanical, statutory approach were to be enacted by Congress.[196] This Note has also presented the best means for Executive action: increased resources for the State Department to assist it in making more informative, clear, and efficient statements of interest going forward, as well as the creation of a framework that will provide direction to courts in adjudicating cases against foreign heads of state, and establish Executive control over the determinations.[197] In short, the Executive must act to retain power over complicated immunity determinations that are best left to the executive branch. Further, the common law approach must be updated and clarified to cure the inefficiencies, inconsistencies, and injustices that occur today.

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[192] *See supra* Part II.E.

[193] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321 (1936) ("The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments.").

[194] Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2010) ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."); *see* ELSEA & SEGALL, *supra* note 82, at 16–17 ("The *Samantar* decision does not seem to question Congress's authority to enact a new statutory framework to govern official immunity in the event that any of the negative predictions, or perhaps unpredictable outcomes, come to pass.").

[195] This Note does not attempt to analyze the outcome of a constitutional challenge by the Executive to combat congressional legislation related to foreign policy issues. However, if such a challenge were raised, many issues would likely be similar to those discussed in this Note, including the Executive's broad power over foreign policy decisions.

[196] *See supra* Part III.C.

[197] *See supra* Part IV.