
NOTES

INTERPRETING SILENCE: THE ROLES OF THE COURTS AND THE EXECUTIVE BRANCH IN HEAD OF STATE IMMUNITY CASES

The resolution of head of state immunity claims is often effective, even if not particularly principled. In many cases, the executive branch — speaking through the State Department — provides a “suggestion of immunity” on behalf of a putative head of state that the courts treat as legally dispositive. In some suits, however, the State Department does not communicate its views, leaving the courts to determine whether head of state immunity should bar the suit or individual claims made by plaintiffs. Unsurprisingly, courts are not adept at analyzing as precedent heavily politicized State Department suggestions of immunity in prior cases when determining overarching State Department policy, and the entire judicial enterprise in such situations is fraught with the peril of impacting American foreign relations. Not much has changed in the twenty-five years since one scholar asserted that “[t]he law of head of state immunity is undeveloped and confused.”¹

This Note analyzes various possibilities for producing outcomes that are both more efficient and more likely to emphasize the institutional strengths of the courts and the executive branch than is the current legal regime, which often forces courts to decide claims of head of state immunity without the guidance of the State Department. Part I analyzes current head of state immunity doctrine and its evolution in American courts over the past 200 years. It concludes that the current doctrine is inconsistent and that it rests on politicized precedents that are difficult for courts to apply in a nonpoliticized manner. Part II discusses the Supreme Court’s recent decision in *Samantar v. Yousuf*,² in which the Court held that the Foreign Sovereign Immunities Act of 1976³ (FSIA) does not apply to individuals. Although most lower courts had already concluded that head of state immunity and the FSIA were independent bodies of law, *Samantar* illustrates the multifarious and nebulous scenarios in which claims of head of state immunity can arise and demonstrates the unsatisfactory state of the current doctrine. Part II further argues that the increasingly non-state-based international system and the simultaneous expansion of federal court jurisdiction in cases with potentially strong foreign affairs repercussions

¹ Jerrold L. Mallory, Note, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 197 (1986).

² 130 S. Ct. 2278 (2010).

³ Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

together suggest that complex cases like *Samantar* will put more strain on head of state immunity doctrine in the future. Part III offers possible improvements to the status quo, including a statutory solution resembling the FSIA, an administrative solution in which the State Department would publish head of state immunity guidelines, and a legal presumption regime under which the courts would introduce a rebuttable presumption of the applicability or inapplicability of immunity. Ultimately, this Note concludes that a presumption against the applicability of head of state immunity is the solution most likely to allow courts to make principled decisions, engage the State Department in dialogue, and expedite the resolution of cases. Nonetheless, *any* of the proposed solutions would be a positive development in comparison to the current state of the doctrine.

I. HEAD OF STATE IMMUNITY: A DOCTRINAL ANALYSIS

Generally, head of state immunity protects foreign heads of state from the jurisdiction of domestic courts according to the law of the domestic state.⁴ The underlying purpose of the doctrine is based “on the need for comity among nations and respect for the sovereignty of other nations.”⁵ Head of state immunity is a particular category of the numerous immunities that potentially apply to the acts of foreign sovereigns and their agents.⁶ Among these other sources of immunity are foreign sovereign immunity as defined in the FSIA, diplomatic immunity,⁷ and functional immunity.⁸ Foreign sovereign immunity implies a

⁴ The multitude of manners in which nations around the world determine the applicability of head of state immunity makes it difficult to define this term more concretely. See Mallory, *supra* note 1, at 179 (“Since each doctrine entails a varying, but sufficient degree of immunity, and since there is no agreement on the degree of immunity that attaches to the status of head of state, there is no applicable standard that can be viewed as customary international law.”).

⁵ *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987).

⁶ This Note refers to the immunity afforded foreign states as “sovereign immunity” and to the immunity of foreign rulers in particular as “head of state immunity,” even though the two doctrines share a similar origin, as discussed in section I.A, pp. 2044–47.

⁷ Diplomatic immunity provides “well-nigh absolute immunity” to diplomats from the exercise of jurisdiction by the state to which they are dispatched. ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 160 (2008). As a signatory to the Vienna Convention on Diplomatic Relations, the United States is bound to accord diplomats absolute immunity from criminal suit and nearly absolute immunity from civil or administrative suit unless the diplomat is acting in certain circumstances outside his or her official functions. See Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

⁸ Functional immunity “is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state.” Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT’L L. 853, 862 (2002).

Although most sources state that head of state immunity applies only during a head of state’s tenure in office, see, e.g., *id.* at 864, American and international jurisprudence has not been

broader form of immunity concerning nations themselves as legal actors and their property.⁹

A. Historical Origins and Evolution of Immunities in American Law

Although these several doctrines have diverged over the past 200 years, the 1812 Supreme Court case *The Schooner Exchange v. McFaddon*¹⁰ remains the general starting point for discussions of sovereign immunity in American law. In *The Schooner Exchange*, the plaintiffs, McFaddon and Greetham, alleged that French sailors acting under the instructions of Napoleon had forcibly seized their ship.¹¹ The French navy allegedly refit the vessel as a military ship and christened it the *Balaou*.¹² Seven months after the ship had been seized, adverse weather conditions forced the *Balaou* into port at Philadelphia, at which point McFaddon and Greetham initiated suit to attach the ship.¹³ The Court ultimately dismissed their suit, holding that the entry of the *Balaou* into the United States was predicated on an implicit promise that the ship would be immune from suit while in the country.¹⁴ Writing for the Court, Chief Justice Marshall described the legal basis for sovereign immunity:

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.¹⁵

A corollary to the immunity of a sovereign nation was the freedom “from arrest or detention within a foreign territory” that the sovereign head of state himself enjoyed.¹⁶ The Court reasoned that a state would offend the “dignity” of both a visiting sovereign and the visiting sovereign’s nation if it exercised jurisdiction over the visiting sovereign.¹⁷ Interestingly, the Court also noted that there was a significant legal distinction between a ruler’s private property acquired within the foreign jurisdiction and the military property of the state, as acquiring

steadfast in maintaining this distinction, *see id.* at 862–63; sources cited *infra* notes 51–53. This Note focuses primarily on head of state immunity and foreign sovereign immunity under the FSIA.

⁹ *See* HAZEL FOX, *THE LAW OF STATE IMMUNITY* 218 (2d ed. 2008).

¹⁰ 11 U.S. (7 Cranch) 116 (1812).

¹¹ *Id.* at 117.

¹² *See id.* at 118–19.

¹³ *Id.* at 118.

¹⁴ *Id.* at 147.

¹⁵ *Id.* at 137.

¹⁶ *Id.*

¹⁷ *Id.*

the former entailed the sovereign's "assuming the character of a private individual" and potentially subjecting himself to the jurisdiction of the other state.¹⁸ *The Schooner Exchange* thus recognized the potential for different legal treatment of a state and its ruler — at least in regard to private and public acts of the leader¹⁹ — although the doctrines likely overlapped in an era of personal sovereigns in which the head of state and the state itself were coterminous.

The Schooner Exchange presented two factors that would come to play enduring roles in sovereign immunity decisions. First, the United States Attorney for the Eastern District of Pennsylvania, Alexander Dallas, appeared on behalf of the United States government — at the behest of the "executive department"²⁰ — and argued that the suit be dismissed in light of Napoleon's exercise of "his sovereign prerogative" to seize the vessel.²¹ Second, the United States was on the cusp of war with the United Kingdom, which was already engaged in war with France.²² In light of the "state of peace and amity" between the United States and France,²³ the nascent United States had little incentive to offend France in a minor lawsuit. Thus, from the very beginning, executive intervention and foreign relations have played critical roles in sovereign immunity suits.

The United States continued to recognize the absolute immunity of foreign sovereigns from suit until 1952,²⁴ and in most cases the United States requested immunity in suits against friendly foreign sovereigns through the State Department.²⁵ According to the doctrine developed by the Court, in the absence of a suggestion of immunity by "the political branch of the government charged with the conduct of foreign affairs," the courts were to decide for themselves whether a claimed immunity was applicable²⁶ based on whether it was an "established

¹⁸ *Id.* at 145.

¹⁹ See Shobha Varughese George, Note, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 *FORDHAM L. REV.* 1051, 1056 n.44 (1995).

²⁰ *The Schooner Exchange*, 11 U.S. at 117–18.

²¹ *Id.* at 122.

²² The War of 1812 between the United States and the United Kingdom began approximately four months after *The Schooner Exchange*. By 1812, the United Kingdom had already been at war with Napoleon for nine years.

²³ *The Schooner Exchange*, 11 U.S. at 118.

²⁴ See, e.g., Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using A "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 *FORDHAM INT'L L.J.* 781, 786 (2008). Some scholars dispute the claim that the United States adhered to absolute immunity for foreign sovereigns after *The Schooner Exchange*. See VAN ALEBEEK, *supra* note 7, at 21–35.

²⁵ See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

²⁶ See *Republic of Mex. v. Hoffman*, 324 U.S. 30, 34–35 (1945). The Supreme Court noted that "[i]t 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" and

policy of [the State Department] to recognize” the putative basis for immunity.²⁷ If the State Department did suggest immunity, however, the courts had a duty to obey.²⁸

In 1952, the State Department formally abandoned the absolute theory of sovereign immunity in favor of the restrictive theory promulgated in the Tate Letter, which allowed sovereign immunity for a state’s public acts, but not for its private acts.²⁹ Although the letter explicitly identified “commercial activities” as being adjudicable in courts,³⁰ the new policy suffered from not clearly delineating public and private acts.³¹ The new, restrictive theory of sovereign immunity thus proved inconsistent in application. The courts continued to defer to the State Department’s suggestions of immunity, but diplomatic pressure led to uneven State Department intervention and suggestions of immunity that often appeared to be based on ad hoc political reasons, rather than on the criteria laid out in the Tate Letter.³²

In response to these problems, Congress enacted the FSIA. This Act was designed to provide “firm standards” concerning when sovereign immunity would be an applicable defense and to transfer this determination to the courts.³³ In general, the FSIA enacted the restrictive theory of sovereign immunity; it remains the applicable law in foreign sovereign immunity cases.³⁴ The FSIA provides a presumption of sovereign immunity for foreign states, subject to specific exceptions.³⁵ It defines a “foreign state” to include “an agency or instrumentality of a foreign state”³⁶ but is silent on whether it applies to foreign

further advised that the “guiding principle” in such determinations was to prevent hindering the executive branch’s foreign affairs dealings. *Id.* at 35.

²⁷ *Id.* at 36.

²⁸ See *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (finding that the State Department’s certification of immunity to the district court was “a conclusive determination” that not granting immunity would adversely impact American foreign affairs).

²⁹ See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Attorney Gen. (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, app.2 at 714 (1976). During this time period, courts still largely treated head of state immunity as a part of foreign sovereign immunity, not as an independent body of law. See Mallory, *supra* note 1, at 172 n.13 (arguing that courts, as of 1986, still did not treat “head of state immunity as an issue isolated from related doctrines”).

³⁰ See Letter from Jack B. Tate to Attorney Gen., *supra* note 29, at 714.

³¹ See Redman, *supra* note 24, at 788.

³² See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983); George, *supra* note 19, at 1058–59.

³³ See H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

³⁴ See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2285 (2010).

³⁵ 28 U.S.C. § 1604 (2006). For the specific exceptions to the presumption of sovereign immunity, see *id.* §§ 1605–1607 (2006 & Supp. I 2009). These exceptions include claims involving commercial activity with a connection to the United States, certain property and admiralty suits, and claims involving terrorism. See *id.* § 1605.

³⁶ *Id.* § 1603(a).

heads of state.³⁷ As a result, the question naturally arose whether the statute covered individuals — including putative heads of state.³⁸ Most courts interpreted the statutory silence as meaning that foreign heads of state were *not* covered under the FSIA,³⁹ although not all cases uniformly distinguished head of state immunity and foreign sovereign immunity as codified in the FSIA.⁴⁰

B. *The Current Doctrine of Head of State Immunity*

Head of state immunity doctrine remains very unclear. The doctrine in its current form contains deep fissures among courts on fundamental issues, such as whether private or criminal acts are sufficient to negate a claim of immunity. These fissures harm courts' ability to analyze the doctrine as anything other than an amalgam of potentially relevant factors. The doctrine's basic haziness is exacerbated by the State Department's occasional intervention in these cases, and even then it is often unclear whether political considerations — rather than legal reasoning — have driven the State Department's conclusions.

The recent clarification of the scope of the FSIA in *Samantar v. Yousuf*, in which the Supreme Court held that an individual is not considered an “agency or instrumentality” of the state,⁴¹ strongly suggests that head of state immunity and foreign sovereign immunity will remain distinct doctrines. As a result, the governing law is that State Department suggestions of immunity remain binding in head of state immunity cases.⁴² However, courts must decide for themselves whether head of state immunity is applicable in the absence of State De-

³⁷ See, e.g., *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004).

³⁸ The definition of an “agency or instrumentality” contains three further requirements. See 28 U.S.C. § 1603(b). Despite the uncomfortable fit with the statute's language, an individual claiming the protection of the statute could arguably be “a separate legal person,” *id.* § 1603(b)(1), who acts as “an organ of a foreign state or a political subdivision thereof,” *id.* § 1603(b)(2), and who “is neither a citizen of a State of the United States . . . nor [an entity] created under the laws of any third country,” *id.* § 1603(b)(3).

³⁹ See, e.g., *Enahoro v. Abubakar*, 408 F.3d 877, 881 (7th Cir. 2005); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (“Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny.”); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (“Because the FSIA makes no mention of heads-of-state, their legal status remains uncertain.”); see also *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 914–15 (N.D. Ill. 2003) (compiling cases), *aff'd sub nom. Enahoro*, 408 F.3d 877.

⁴⁰ See, e.g., *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) (analyzing a suit against Ferdinand Marcos under the FSIA without mentioning whether that statute governed head of state immunity).

⁴¹ *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010).

⁴² See, e.g., *Ye*, 383 F.3d at 625; *Noriega*, 117 F.3d at 1212. But see *Republic of Phil. v. Marcos*, 665 F. Supp. 793, 798 (N.D. Cal. 1987) (rejecting the State Department's suggestion of head of state immunity for the Solicitor General of the Philippines).

partment guidance by determining whether it is the “policy” of the State Department to grant immunity in similar situations.⁴³ Courts have ostensibly diverged over how searching this independent inquiry should be. Some courts have seemingly started from a baseline presumption of immunity,⁴⁴ whereas other courts have claimed that the determination should truly be independent, even to the point of a near presumption against head of state immunity absent State Department intervention.⁴⁵

Two relatively settled factors appear to play important roles in courts’ inquiries into the applicability of head of state immunity.⁴⁶ First, the United States must have recognized the alleged leader as a head of state.⁴⁷ The determination by the executive branch whether an individual is a head of state is binding on the courts.⁴⁸ Second, a state may waive head of state immunity for a particular individual, a decision to which the courts tend to give effect in the absence of a countervailing State Department suggestion of immunity.⁴⁹

Several more contentious factors can also play critical roles in head of state immunity determinations. Although scholars generally agree that head of state immunity should attach only to sitting heads of

⁴³ See *Republic of Mex. v. Hoffman*, 324 U.S. 30, 34–36 (1945); see also *Noriega*, 117 F.3d at 1212 (discussing authority for independent determinations); *Doe*, 860 F.2d at 45 (same).

⁴⁴ See *Lafontant v. Aristide*, 844 F. Supp. 128, 131–32 (E.D.N.Y. 1994) (“A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States.”).

⁴⁵ See *Noriega*, 117 F.3d at 1212 (reasoning that Manuel Noriega was not entitled to head of state immunity based either on a presumption that head of state immunity did not apply when the State Department made no suggestion or on an independent examination by the court); Working Group of the Am. Bar Ass’n, Report, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT’L L. 489, 536 (2002) (“When the State Department has declined to suggest head of state immunity . . . the courts have examined claims of head-of-state immunity with careful scrutiny and applied the doctrine narrowly, often rejecting immunity for one reason or another.”).

⁴⁶ For a detailed discussion of some of these factors, see Amber Fitzgerald, *The Pinochet Case: Head of State Immunity Within the United States*, 22 WHITTIER L. REV. 987, 1016–28 (2001).

⁴⁷ See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995) (rejecting head of state immunity claim for leader of state not yet recognized by the United States); *Lafontant*, 844 F. Supp. at 132 (“The immunity extends only to the person the United States government acknowledges as the official head-of-state.”). If recognition of the putative head of state by the United States government is treated as a necessary condition for head of state immunity, the *Noriega* and *Lafontant* opinions are reconcilable, as the *Noriega* court observed that the United States had not recognized Noriega as the legitimate leader of Panama. See *Noriega*, 117 F.3d at 1209–10.

⁴⁸ See *Lafontant*, 844 F. Supp. at 133 (citing *United States v. Pink*, 315 U.S. 203, 230 (1942)).

⁴⁹ See *In re Doe*, 860 F.2d 40, 45–46 (2d Cir. 1988) (finding that the Philippines had waived Ferdinand Marcos’s and Imelda Marcos’s head of state immunity claims); *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110–11 (4th Cir. 1987) (same). But see *Lafontant*, 844 F. Supp. at 134 (rejecting attempt by successor government not recognized by the United States to waive head of state immunity, in addition to finding that the waiver was not sufficiently “explicit”).

state,⁵⁰ not all courts have accepted this rule.⁵¹ Some courts have stated that acts committed by a head of state that are either “private or criminal acts in violation of American law” may suffice to deny immunity,⁵² but other courts have refused to deny immunity even in such situations.⁵³ Although some courts have accepted the State Department’s suggestions of immunity for relatives of heads of state and prime ministers,⁵⁴ other courts have restricted head of state immunity claims to a much narrower scope.⁵⁵

As this Part has demonstrated, courts must look to an inconsistent doctrine when adjudicating claims of head of state immunity in the absence of State Department guidance. In these situations, the courts’ required adherence to sporadic State Department suggestions of immunity — whose stated reasoning (if there is any) the courts cannot even question⁵⁶ — makes attempts to interpret precedent as nonpoliticized legal reasoning a difficult undertaking.

II. *SAMANTAR V. YOUSUF*: A CASE STUDY

Head of state immunity will probably have to undergo a transformation to deal with the increasing number of cases, with increasingly diverse fact patterns, in which these claims may surface. Current developments in international relations make complicated fact patterns more likely to arise in the future, suggesting the need for doctrinal evolution. The recent litigation in *Samantar v. Yousuf*⁵⁷ illustrates how

⁵⁰ See VAN ALEBEEK, *supra* note 7, at 183 (“Head of state immunity only applies to heads of state in office. Upon abdication a former head of state can only rely on the rule of functional immunity as applicable to *all* (former) foreign state officials.”).

⁵¹ See *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 916 (N.D. Ill. 2003) (finding head of state immunity applicable to former head of state), *aff’d on other grounds sub nom.* Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005); VAN ALEBEEK, *supra* note 7, at 184 (“In the United States suits against former heads of state may be dismissed on the basis of the head of state immunity doctrine.”).

⁵² *Doe*, 860 F.2d at 45 (stating that there is “respectable authority” for such a position but deciding the case on other grounds); see also *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (citing *Doe* approvingly).

⁵³ See *Abiola*, 267 F. Supp. 2d at 915–16 (“[C]ommon law immunity . . . remains intact with respect to heads of state. . . . [U]nder the common law heads of state enjoyed absolute immunity from suit, regardless of the nature of the allegations.”).

⁵⁴ See VAN ALEBEEK, *supra* note 7, at 185–86 (collecting cases).

⁵⁵ See *El-Hadad v. Embassy of the U.A.E.*, 69 F. Supp. 2d 69, 82 n.10 (D.D.C. 1999) (rejecting head of state immunity claim against high-level government officials); *Republic of Phil. v. Marcos*, 665 F. Supp. 793, 798 (N.D. Cal. 1987) (rejecting State Department suggestion of immunity for Solicitor General of the Philippines as a “radical departure from past custom”).

⁵⁶ See *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) (“[T]he Executive Branch’s suggestion of immunity is conclusive and not subject to judicial inquiry.”).

⁵⁷ The litigation in *Samantar* has continued following the Supreme Court’s remand of the case to the district court to determine which defenses to suit, including head of state immunity, might apply. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292–93 (2010). Although the State Department ultimately suggested that *Samantar* should receive no immunity — a conclusion that the district

these developments will present issues that will make many head of state immunity claims difficult to resolve absent State Department intervention.

A. Failed States and Fragmentation

Developments in international relations make it highly likely that complicated scenarios will continue to arise in the future. In turn, these scenarios will make it incredibly difficult for courts to analyze head of state immunity claims under the confused common law regime. Civil wars that began after 1980 tend to last three times longer than did wars in the two decades preceding that date. The longevity of these conflicts creates a “cycle of poverty, instability, and violence” in which government officials focus on procuring wealth instead of long-term stability.⁵⁸ Although the number of interstate wars has declined since the end of the Cold War, the number of intrastate conflicts has increased.⁵⁹ Nearly two billion people — almost a third of the world’s population — live in countries at risk of collapse.⁶⁰ Many of these countries risk becoming failed states in which the government loses effective control of the country.⁶¹ These states are characterized by extreme violence, an absence of the rule of law, and substantial economic inequality.⁶² Among other problems created by failed states is their inability to fit within the international legal order based on state sovereignty,⁶³ including a doctrine of head of state immunity predicated on a functioning government. The Bush Administration stated in 2002 that the United States “is now threatened less by conquering states than . . . by failing ones.”⁶⁴ In a faltering or failed country, it is reasonable, if not likely, for the United States to engage in discussions with numerous political groups, each with different leaders vying for power.⁶⁵ The classical Westphalian international system at

court accepted, *see* Order, *Yousuf v. Samantar*, No. 04-1360 (E.D. Va. Feb. 15, 2010) — the facts of the case illustrate the problems of current head of state immunity doctrine.

⁵⁸ *See* Sebastian Mallaby, *The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire*, FOREIGN AFF., Mar.–Apr. 2002, at 2.

⁵⁹ *See Failed States Index FAQ*, FUND FOR PEACE (2009), http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=102.

⁶⁰ *See id.*

⁶¹ *See* Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1161–62 (2005).

⁶² *See id.*

⁶³ *See id.* at 1162.

⁶⁴ WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002), available at http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf.

⁶⁵ *See, e.g.*, Bureau of Afr. Affairs, *Background Note: Somalia*, U.S. DEP’T OF STATE (Jan. 3, 2011), <http://www.state.gov/r/pa/ei/bgn/2863.htm> (noting that the State Department “maintains regular dialogue with the TFG and other key stakeholders in Somalia” (emphasis added)).

the core of *The Schooner Exchange* is anachronistic or nonexistent in a substantial portion of the world.

Coupled with this trend of international fragmentation is the increase in the use of American courts as the “venue of choice” for civil lawsuits with strong international implications.⁶⁶ Through laws like the Alien Tort Statute⁶⁷ (ATS) and the Torture Victim Protection Act of 1991⁶⁸ (TVPA), Congress has officially sanctioned federal courts as an avenue for suits involving torture, extrajudicial killing,⁶⁹ and torts in violation of the law of nations or a United States treaty.⁷⁰ At the same time, neither of these statutes negates claims of head of state immunity.⁷¹ As a result, there exists a strong potential for more suits in American courts against foreign officials with increasingly complex fact patterns that differ significantly from the cases that formed the doctrinal basis for head of state immunity.⁷² The recent litigation in *Samantar* demonstrates what this combination may portend, as it originated in Somalia, the paradigmatic example of a failed state.⁷³

B. *Samantar v. Yousuf*

In 1969, Somali Major General Mohamed Siad Barre overthrew the existing Somali government and established a new government led by the Supreme Revolutionary Council, a group composed primarily of military officers who supported the coup.⁷⁴ The Barre regime attempted to use military force to suppress opposing movements and ethnic groups, focusing in particular on the Isaaq clan in the northern part of the country.⁷⁵ Throughout the 1980s, civil war wracked the country.⁷⁶ Forces opposing the Barre regime eventually cornered the vestiges of the government in the capital, Mogadishu, before driving

⁶⁶ See Anne-Marie Slaughter & David Bosco, *Plaintiffs' Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102.

⁶⁷ 28 U.S.C. § 1350 (2006).

⁶⁸ *Id.* § 1350 note.

⁶⁹ *Id.* (creating causes of action for claims of torture and extrajudicial killings). The TVPA also requires that plaintiffs “exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred” before suing in the United States. *Id.*

⁷⁰ *Id.* § 1350; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–25 (2004) (discussing which torts are actionable under the ATS).

⁷¹ See Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A “Sinical” Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 525 (2002) (noting that courts have held head of state immunity to be applicable under both statutes).

⁷² See, e.g., Slaughter & Bosco, *supra* note 66, at 107 (“Furthermore, the spate of civil wars in recent years has made deciding whether to grant immunity all the more complicated, since negotiations today often involve rebel and ethnic leaders whose status in international law is unclear.”).

⁷³ See Brooks, *supra* note 61, at 1161.

⁷⁴ See *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *1 (E.D. Va. Aug. 1, 2007).

⁷⁵ Bureau of Afr. Affairs, *supra* note 65.

⁷⁶ See *id.*

Barre out of the country and plunging Somalia into utter lawlessness.⁷⁷ The U.S. embassy in Somalia has been closed since the fall of the Barre regime, but “[t]he United States maintains regular dialogue with . . . key stakeholders” in the country through the American embassy in Kenya and has “never formally severed diplomatic relations with Somalia.”⁷⁸

It was in this highly troubled era that Mohamed Ali Samantar held government office in Somalia. Although the exact offices that Samantar held are unclear,⁷⁹ it is undisputed that he was the First Vice President and Minister of Defense of Somalia from 1980 to 1986 and the Prime Minister of Somalia from 1987 to 1990.⁸⁰ Samantar claimed that he visited various high-level American officials during his terms in office, including Vice President George H.W. Bush, Vice President Dan Quayle, and Secretary of State James Baker.⁸¹ After the collapse of the Barre regime in 1991, Samantar moved to Kenya and Italy before settling in the United States in the summer of 1997.⁸²

The plaintiffs consisted of a group of Somalis who were members of the Isaaq clan and who alleged gross human rights violations during the time period in which Samantar was in office. They sued him under the TVPA and the ATS.⁸³ The named plaintiff, Bashe Abdi Yousuf, claimed that members of the Somali National Security Service detained, interrogated, and tortured him in 1981 due to Yousuf’s role in forming a group attempting to improve living conditions in his town.⁸⁴

After waiting for two years in vain for the State Department to provide a statement of interest to the court at Samantar’s behest, the court moved forward with the case.⁸⁵ At around the same time, the arguably recognized government of Somalia, the Transitional Federal Government (TFG),⁸⁶ sent a second letter to the State Department

⁷⁷ *See id.*

⁷⁸ *Id.*

⁷⁹ In the motion to dismiss filed by Samantar after the Supreme Court remanded the case to the district court, Samantar claimed that he was the “First Vice President and, in the President’s absence, . . . Acting President of Somalia, from January 1976 to December 1986,” and “Minister of Defense from 1971 to 1980 and from 1982 to 1986.” Brief in Support of Defendant Samantar’s Motion to Dismiss Second Amended Complaint at 1, *Yousuf v. Samantar*, No. 04-1360 (E.D. Va. Nov. 29, 2010).

⁸⁰ *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2282 (2010). Because the district court granted Samantar’s initial motion to dismiss, it accepted the plaintiffs’ allegations as true and construed them in the light most favorable to the plaintiffs. *See Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *1 & n.2 (E.D. Va. Aug. 1, 2007).

⁸¹ *See* Brief in Support of Defendant, *supra* note 79, at 1.

⁸² *See id.*

⁸³ *Yousuf*, 2007 WL 2220579, at *1.

⁸⁴ *See id.* at *3–4.

⁸⁵ *Id.* at *7.

⁸⁶ Although the district court stated that the TFG was the recognized government of Somalia, *see id.* at *11, the United States’ amicus brief in the Supreme Court called this characterization

claiming that Samantar had acted in his official capacity in all actions alleged in the lawsuit, that the current government did not waive Samantar's sovereign immunity, and that finding Samantar amenable to suit would harm the Somali reconciliation process.⁸⁷ On appeal, the Supreme Court unanimously held that the FSIA's "agency or instrumentality" language did not apply to individual officials.⁸⁸ Neither the Fourth Circuit nor the Supreme Court addressed the head of state immunity claim, which both courts deemed proper for the district court to decide first.⁸⁹ In February 2011, after six years of litigation, the State Department finally filed a statement of interest with the district court, stating that Samantar should not receive foreign official immunity for two primary reasons: he "is a former official of a state with no currently recognized government to request immunity on his behalf," and he is a U.S. resident who "enjoy[s] the protections of U.S. law [and] ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents."⁹⁰

In alluding to the fact that the FSIA does not govern head of state immunity claims, the Court confirmed that the existing common law doctrine would continue to control such cases. However, the facts of *Samantar* illustrate how inadequate the existing law is. The State Department's resolution provides no guidance whatsoever for future cases: the statement of interest includes the proviso that in the future,

the Department could determine that a former official of a state without a recognized government is immune from civil suit for acts taken in an official capacity, or that a former official of a state with a recognized government is not immune from civil suit for acts that were not taken in an official capacity.⁹¹

The State Department's intervention in *Samantar* is the paradigmatic one-off, *deus ex machina* resolution that plagues head of state immunity doctrine. Given this remarkably torpid response with no precedential value, *Samantar* highlights the need for a change in the doctrine that would either motivate faster and more frequent interventions by the State Department or provide a legal standard that the courts could more easily apply on their own.

The developments in modern international relations discussed above further highlight the urgent need for doctrinal evolution. *Samantar* is a harbinger of the cases that are likely to arise in the future,

"incorrect[.]" Brief for the United States as Amicus Curiae Supporting Affirmance at 4–5, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031.

⁸⁷ See *Yousuf*, 2007 WL 2220579, at *11.

⁸⁸ See *Samantar*, 130 S. Ct. at 2286–87.

⁸⁹ See *id.* at 2290 n.15; *Yousuf v. Samantar*, 552 F.3d 371, 383 (4th Cir. 2009).

⁹⁰ See Statement of Interest of the United States at 7, *Yousuf v. Samantar*, No. 1:04cv1360 (E.D. Va. Feb. 14, 2011).

⁹¹ *Id.* at 9.

many of which will press the doctrinal fringes of who counts as a head of state, how much recognition from the United States is sufficient, how to treat officials from contested governments, and so on. A significant number of cases in which defendants raise head of state immunity claims arise in suits alleging human rights violations, a relatively new area of law⁹² that taxes the contours of a head of state immunity doctrine stemming from the nineteenth century. As these cases become more nontraditional and variegated, the courts will have to grapple with increasingly difficult questions — like whether a head of state loses the protection of immunity for human rights violations⁹³ — that were either nonexistent or are only roughly analogous to past cases.⁹⁴ These issues not only make it more difficult for courts to reach decisions on the basis of precedent, but are also likely to have particularly sensitive foreign affairs implications.

C. Politicization and Predictability

The underlying problem with the lack of doctrinal clarity and infrequent State Department intervention is that courts must issue decisions that are unpredictable and potentially influenced by political considerations. These concerns involving the politicization and predictability of head of state immunity doctrine arise when courts must attempt to divine the “policy” of the State Department in the absence of State Department involvement in a particular case.⁹⁵ As the State Department is an agency within the executive branch, it can — and should — factor political considerations into its head of state immunity determinations. In light of this State Department prerogative, it is also arguably unnecessary for courts to counter unpredictable State Department analyses of cases.⁹⁶ However, these two points break down when the

⁹² See, e.g., Jonathan Turley, *Transformative Justice and the Ethos of Nuremberg*, 33 LOY. L.A. L. REV. 655, 669 (2000) (“Nuremberg is rightfully regarded as the birth of modern human rights laws . . .”).

⁹³ See cases cited *supra* notes 52–53.

⁹⁴ For example, many of the historical cases laying out foundational elements of the relationship between the executive branch and the judiciary in the sovereign immunity context involved maritime attachments. See *Ye v. Zemin*, 383 F.3d 620, 625–26, 626 n.8 (7th Cir. 2004) (noting this phenomenon and collecting sources); see also Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 205–06 (1997) (noting that the expansion of human rights law “has created jurisdictional rights and enforcement needs that did not exist previously”).

⁹⁵ Supreme Court precedent explicitly requires courts to determine State Department “policy” regarding a claimed immunity when the State Department does not intervene. See *Republic of Mex. v. Hoffman*, 324 U.S. 30, 34–36 (1945) (“In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist.” *Id.* at 34–35. “[T]he court will inquire whether the ground of immunity is one which it is the established policy of the department to recognize.” *Id.* at 36.).

⁹⁶ The reverse side of this argument is that “the State Department can sacrifice the wholly private rights of the plaintiff without any formal procedures, indeed without any formal explana-

State Department does not intervene in a case and the court is forced to try to synthesize previous head of state immunity cases to determine what the State Department *would* do. Lacking State Department guidance, courts must assess previous cases that analyze the State Department's intervention — intervention that often contains strong, unmentioned political undertones that can significantly affect doctrinal developments. This situation puts courts at two institutional disadvantages. First, common law courts are skilled at finding patterns in precedent and discerning outliers. When the State Department intervenes sporadically and in a doctrinally inconsistent manner, courts are set adrift in a sea of unpatterned individual guideposts from the past that likely involved subterranean political considerations.⁹⁷ Second, in trying to interpret State Department "policy," the courts are poorly equipped institutionally to make any foreign policy-related decisions in comparison to the democratically accountable State Department, which is entrusted with just that task.⁹⁸ The problems of politicization and unpredictability lie not with the State Department but rather with the courts that must attempt to interpret the results of politicized and unpredictable decisionmaking. Thus, the following proposals attempt to maximize the institutional competence of the *courts* either by providing avenues for them to make more predictable, apolitical decisions that will in turn create better precedent for future cases, or by incentivizing more frequent State Department intervention.

III. POSSIBLE RESPONSES TO THE CURRENT LEGAL REGIME

Head of state immunity doctrine would benefit substantially from further evolution in light of the rapid developments in international relations and the ambiguous nature of the current law. Ultimately, the best solution will likely be a presumption in favor of waiving head of state immunity, but all of the following proposals would nevertheless be favorable developments from the current state of the law.

tion." Mallory, *supra* note 1, at 185. The conclusive deference offered to State Department intervention sanctions this trade-off, but the results of any individual case will likely begin to seem less fair to individual plaintiffs as State Department intervention accords less with any discernible overarching policy.

⁹⁷ The State Department's intervention in *Samantar*, discussed *supra* p. 2053, provides a useful example of this point, as the State Department explicitly reserved the right to decide the same factual scenario differently in the future.

⁹⁸ See Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 976–99 (2004) (discussing the numerous institutional disadvantages that the judiciary faces in comparison to the political branches in foreign affairs cases).

A. A Statutory Solution

Several commentators have proposed that Congress solve the head of state immunity quagmire by either subsuming head of state immunity under the FSIA or creating a similar statute that covers head of state immunity.⁹⁹ Among the benefits of this proposal are that it would facilitate decisions based on objective factors, thus improving due process in head of state immunity cases,¹⁰⁰ and that it would lodge the resolution of individual cases in the branch best suited to determine legal issues — the judiciary.¹⁰¹ The vesting of statutory resolution of head of state immunity in the judiciary would also remove one of the key problems demonstrated in *Samantar* — prolonged delays of cases in the hope that the State Department might intervene. A more sensible body of case law would likely arise as a result of both the cleaner precedential slate and a more coherent doctrinal starting point.¹⁰² The FSIA presents a natural paradigm from which Congress could draw, either substantively¹⁰³ or conceptually.¹⁰⁴ By adopting the substantive and conceptual regime of the FSIA, for example, a statutory solution could provide a blanket statement of head of state immunity subject to certain exceptions for commercial or otherwise “public” acts of the official.¹⁰⁵ This framework could even be expanded to provide exemptions for violations of human rights law or to allow tort liability for criminal actions.¹⁰⁶

The general problem with any statutory solution is that head of state immunity claims are immensely difficult to treat in a generalized fashion. As the case law demonstrates, many suits in which head of state immunity claims arise involve allegations of human rights violations. Even if immunity were not allowed for violations of human rights under a theory that such acts were “private” or *ultra vires*, it

⁹⁹ See, e.g., George, *supra* note 19, at 1076–86; Mallory, *supra* note 1, at 187–97. Because the Supreme Court held in *Samantar* that the FSIA does not apply to individuals under the “agency or instrumentality” language, see *Samantar v. Yousuf*, 130 S. Ct. 2278, 2286–87 (2010), an amendment would probably necessitate dedicating a section specifically to heads of state. The necessity of particularized treatment of heads of state would counsel in favor of such a statutory change, as Congress could take account of the special circumstances involved in the resolution of these cases.

¹⁰⁰ See Mallory, *supra* note 1, at 197.

¹⁰¹ See *id.* at 187.

¹⁰² See George, *supra* note 19, at 1087.

¹⁰³ One suggestion is to use the general legal framework of the FSIA in the head of state context. See Mallory, *supra* note 1, at 189. Under this rubric, heads of state would receive a kind of combination of FSIA and diplomatic immunity subject to exceptions for criminal and noncommercially tortious conduct. See *id.* at 187–97.

¹⁰⁴ For example, the statutory solution could start from a blanket statement of immunity subject to delineated exceptions. Cf. 28 U.S.C. § 1604 (2006).

¹⁰⁵ See Mallory, *supra* note 1, at 189.

¹⁰⁶ See *id.* at 195–96 (proposing civil liability for criminal conduct).

would be nearly impossible to make the initial immunity determination without also determining the merits of the case. Under one FSIA amendment proposal, for example, “the focus of the immunity’s inquiry will shift from whether the head-of-state is in power to the nature of the disputed act.”¹⁰⁷ Focusing on the act will result in one of three possible outcomes: an immunity rule that is unduly prophylactic, too lax, or too entangled in determining the merits before the applicability of the immunity is determined. Any blanket rule — that human rights abuses are *ultra vires* and thus actionable or, less likely, subject to immunity — would be either overinclusive or underinclusive. In the alternative, the very purpose of the immunity would be lost if there were an initial inquiry into the facts of the alleged acts that constitute the disputed merits of the case instead of the current doctrine’s inquiry into the status of the alleged actor.

A statutory solution may prove troublesome for other reasons. If the statute retained the conclusive deference to State Department suggestions of immunity, much of the beneficial predictability inherent in the rigidity of a statutory solution would be obviated by sporadic State Department intervention. Conversely, if the statute eliminated the conclusive deference granted to State Department suggestions of immunity, the applicable law would be more certain, but courts would lose the benefits of the State Department’s foreign affairs expertise. Although it would certainly be simple to deem the most egregious violations of international law *ultra vires*, the statute would require frequent updating as human rights norms and institutions evolved, a task that might be particularly taxing and difficult for Congress to carry out.¹⁰⁸ The countervailing benefit to the State Department’s perceived inconsistency in making head of state immunity determinations is its ability to make complex factual determinations with up-to-date knowledge of applicable international law, which arguably counsels against the ossification of head of state immunity claims by statute.

B. The Administrative Solution: State Department Guidelines

Another possible solution would be for the State Department to publish guidelines specifically delineating the criteria that the execu-

¹⁰⁷ George, *supra* note 19, at 1054.

¹⁰⁸ Although the Constitution recognizes Congress as the proper body “[t]o define and punish . . . Offences against the Law of Nations,” U.S. CONST. art. I, § 8, cl. 10, it is undeniable that the complexity and development of the international human rights regime in the past 200 years would, at the very least, make it much more difficult for Congress to stay abreast of — and implement — frequent changes in international human rights law. Cf. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 831–32 (1997) (noting that customary international law generally concerned only interstate relations until after World War II, when individual human rights were increasingly recognized).

tive branch views as important in determining whether to suggest head of state immunity. This solution could be preferable to a statutory solution, as it would capture institutional expertise within both branches — the executive branch would provide, in essence, guidelines for the exercise of its foreign relations discretion, while the courts would apply those guidelines to facts¹⁰⁹ — and it would keep the State Department involved in the legal process. The ultimate weakness of this solution, however, is that the State Department has little incentive to assist the courts when it already has plenary control over the outcome of cases.

In the abstract, the primary benefit of State Department elucidation of its decisionmaking process would be that the courts would have a “default” State Department suggestion even when the agency chose not to make its views of a particular case known. Unlike a statutory solution, this solution would enable the State Department to update the guidelines continually to match developments in case outcomes or foreign affairs that it found important. Even if the guidelines were subject to change, the certainty that they provided at any given moment could alleviate much of the confusion inherent in the doctrine and would provide a national framework within which to view head of state immunity instead of the currently diffuse development of the law.¹¹⁰ Finally, this solution would allow the State Department to publish guidelines to the extent that it desired to disseminate its views publicly. If the State Department wished to opine only on certain questions — however basic — it could do so.

Nevertheless, the nature of head of state immunity determinations and the legal and practical incentives of the State Department make a guidelines-based (or other administrative) solution unlikely. First, the State Department’s unfettered and unexaminable¹¹¹ ability to intervene in any case to suggest immunity gives it little incentive to make any broad policy pronouncement. Furthermore, the courts themselves have recognized that head of state immunity determinations involve balancing “individual private rights and interests of international comity” and that the executive is better positioned institutionally than

¹⁰⁹ Under this proposal, the State Department would arguably be ceding foreign affairs discretion to the courts, an area that is clearly not within their institutional expertise. *Cf.* *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”). But this situation is functionally equivalent to what occurs in the absence of State Department intervention, for in that case the courts must still determine whether suits may go forward — that is, whether immunity applies based on precedent.

¹¹⁰ *Cf.* George, *supra* note 19, at 1082 (discussing the certainty benefits of a statutory solution).

¹¹¹ The courts have determined that they should not inquire into the reasoning, if any, provided by the State Department. *See generally* *Ye v. Zemin*, 383 F.3d 620, 625–26 (7th Cir. 2004).

the judiciary is to weigh these competing concerns.¹¹² In short, the courts and the Executive seem to agree that head of state immunity decisions involve a “pragmatic need for realpolitik”¹¹³ that does not easily lend itself to *any* substantive assessment that does not proceed case by case. The Tate Letter, the obvious paradigm for a guidelines-based solution, faltered on these grounds. The State Department would occasionally suggest immunity outside the contours of the restrictive theory that the letter espoused, leading to inconsistency and a lack of clarity when courts attempted to interpret State Department policy — the exact problem that this Note seeks to address.¹¹⁴ Second, the lack of a State Department incentive to make a generalized statement regarding head of state immunity legal criteria means that in the unlikely event that the State Department did decide to issue guidelines, it would face strong incentives to make the guidelines such vague, high-level pronouncements that they would probably be of little value to courts grappling with doctrinal incoherence. As a result, the courts could interpret the State Department’s promulgated guidelines as a non-binding, judicially unenforceable “policy statement.” Such an interpretation would further undermine the predictability of legal decisionmaking by allowing the courts to substitute their own common law determinations for the State Department’s guidelines.¹¹⁵ The final element in this recursive loop would be the potential pressure that the State Department might feel to adhere to its own guidelines. Even if there were no legal obligation to do so, the State Department might suffer from the perception of other parties and the courts that it was adopting one rule and then frequently applying another.¹¹⁶ The potential blowback from noncompliance with its own guidance document

¹¹² *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988).

¹¹³ Daniel M. Singerman, Comment, *It’s Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity*, 21 EMORY INT’L L. REV. 413, 458 (2007).

¹¹⁴ See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487–88 (1983). These problems ultimately led to the passage of the FSIA. See *id.* at 488.

¹¹⁵ See, e.g., *Wilderness Soc’y v. Norton*, 434 F.3d 584, 595–97 (D.C. Cir. 2006) (treating the National Park Service’s *Management Policies 2001* as a nonbinding, judicially unenforceable statement of internal procedure). However, the courts could repeat their treatment of the Tate Letter, which they generally accepted as binding despite its “represent[ing] no more than the sentiment and future policy of the Department of State.” Marla Goodman, Note, *The Destruction of International Notions of Power and Sovereignty: The Supreme Court’s Misguided Application of Retroactivity Doctrine to the Foreign Sovereign Immunities Act in Republic of Austria v. Altmann*, 93 GEO. L.J. 1117, 1122 (2005).

¹¹⁶ The enactment of the FSIA rested at least in part on the fact that the State Department had adopted the restrictive theory of sovereign immunity in the Tate Letter but had not consistently followed it. The FSIA was considered necessary “to free the Government from the case-by-case diplomatic pressures . . . and to ‘assur[e] litigants that . . . decisions are made on purely legal grounds.’” *Verlinden B.V.*, 461 U.S. at 488 (quoting H.R. REP. NO. 94-1487, at 7 (1976)) (second and third alterations in original).

would, at the very least, further disincentivize the State Department from enacting a generally applicable set of criteria for head of state immunity determinations.

C. A Legal Presumption: The Self-Help Solution

The most promising solution is for courts to adopt a default presumption either in favor of or against head of state immunity's application. In addition to creating a more administrable default rule that will allow courts to sidestep the issue of head of state immunity absent a countervailing showing, a presumption is the only solution examined that the courts can implement on their own. Moreover, a presumption can be used as a deliberation-forcing mechanism that may provide an incentive for the State Department to make its views of a particular case known. A presumption against the applicability of head of state immunity will make it easier for the courts to reach consistent outcomes in these cases and will put the State Department on notice that it will likely have to intervene if it wants an individual to be immune from suit. Some courts have stated that such a presumption would be permissible,¹¹⁷ and other courts would be wise to follow their lead.

Perhaps the strongest argument in favor of a legal presumption in either direction is that it supplies a much-needed default rule that would largely take the courts out of the business of interpreting politicized "precedent" resulting from prior head of state immunity cases. Instead of attempting to parse the numerous factors in a future *Samantar*-like example, a court could simply determine that the borderline case was insufficient to rebut the legal presumption. This solution would return the courts to the role for which they are best suited: resolving or dismissing concrete disputes on the legal merits, not on antecedent immunity determinations. Moreover, a legal presumption would neither obviate the State Department's continued involvement as applicable law develops (as a statutory solution might) nor constrain the State Department from intervening in an inconsistent, haphazard manner at its absolute discretion (as a promulgation of State Department guidelines might). A legal presumption, therefore, retains the core competencies of both branches: the executive branch can make conclusive suggestions of immunity when foreign affairs are at issue, and the judiciary can decide or dismiss legal cases based on legal criteria in the absence of State Department guidance. Unlike the other proposals, the legal presumption solution also has the benefit of enabling the courts to begin the interbranch dialogue on their own —

¹¹⁷ See *Doe*, 860 F.2d at 45; see also *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) ("Some courts have held that absent a formal suggestion of immunity, a putative head of state should receive no immunity.").

they do not need the assistance of both other branches, as they would for a statutory solution, and they do not need the largesse of the State Department, as they would in the provision of guidelines. The important question then becomes what courts should presume about the applicability of head of state immunity.

The practical nature of State Department intervention suggests the superiority of a presumption *against* head of state immunity. Two cases in particular, *United States v. Noriega*¹¹⁸ and *In re Doe*,¹¹⁹ allude to the idea that a putative head of state should not receive immunity unless the State Department makes a suggestion of immunity.¹²⁰ This conclusion accords well with the practical reality underlying the relationship between the executive branch and the courts in this area of law. The judiciary's ultimate aspiration in crafting head of state immunity doctrine is to track State Department policy.¹²¹ Therefore, the doctrine should provide an incentive for the State Department to intervene if a court would make a determination at odds with the State Department's ostensible policy.

The dialogue-inducing process engendered by a presumption against head of state immunity suggests that such a presumption would assist courts more than would a presumption for immunity. As the primary rationale for judicial deference to the executive branch's position on immunity is to ensure that the courts do "not so act as to embarrass the executive arm in its conduct of foreign affairs,"¹²² the default rule that would most likely prompt the State Department to become involved is the default rule that would expose putative heads of state to liability. The State Department has a significantly greater incentive to become involved in cases that could harm foreign relations by finding a head of state subject to suit than it does in cases that could not go forward without its imprimatur. A presumption in favor of immunity would likely be drastically overinclusive by preventing suits through mere State Department inaction that the State Department would have allowed. A presumption against immunity, in contrast, would spur the State Department to intervene in cases that affected its interests, better according with the goal of the judiciary in head of state immunity cases.

Although this presumption would increase the risk that the executive branch would be "embarrassed," there nonetheless remains an important safety valve in individual cases: the presumption would be rebuttable either by a State Department suggestion of immunity or by

¹¹⁸ 117 F.3d 1206.

¹¹⁹ 860 F.2d 40.

¹²⁰ See *Noriega*, 117 F.3d at 1212; *Doe*, 860 F.2d at 45.

¹²¹ See *Republic of Mex. v. Hoffman*, 324 U.S. 30, 36 (1945).

¹²² *Id.* at 35.

law. Although the former easily accords with current doctrine, the latter would be more troublesome because it requires an ability to distinguish cases that should be subject to the presumption from those that should not — the exact problem created by the murkiness of head of state immunity doctrine in the first place. In light of the incentives discussed above, the defendant should carry a substantial burden in rebutting the presumption. Both to effect a change from current law and to incentivize State Department intervention, the borderline or implausible head of state immunity claim should be presumptively denied, while the clear claim (for example, a sitting head of state recognized by the United States) should be sufficient to rebut the presumption. A further concern may be that the State Department cannot intervene in suits that it does not know about, but this problem can be allayed by the defendant's approaching the State Department.¹²³

The benefit of the presumption — that the courts will delve into potentially politically charged cases through denying head of state immunity by default, which will in turn lead the State Department to prevent the courts' involvement in such cases — is also its greatest weakness. By setting head of state immunity not to apply by default, the United States only exacerbates its image as “a country happy to haul foreign defendants into its own courts”¹²⁴ and thereby risks negative foreign affairs repercussions. Moreover, it is not immediately clear how strong the presumption should be, which leads to a potential concern that the presumption could become insuperable. Nevertheless, the presumption solution provides much-needed clarity that ultimately outweighs these concerns, and the final check in this system is the continued ability of the State Department to suggest immunity, which would remain dispositive. As a result, the foreign affairs repercussions remain solidly within the jurisdiction of the executive branch, while the legal merits remain within the purview of the judiciary. As Justice Frankfurter noted long ago, in the absence of an “established policy of

¹²³ The original district court decision in *Samantar* noted that the court stayed the case for *two* years to give the State Department an opportunity to respond to Samantar's request for a statement of interest. See *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *6 (E.D. Va. Aug. 1, 2007). On remand from the Supreme Court, District Judge Leonie M. Brinkema on January 6, 2011, ordered the government to file a written statement of its position. Docket Entry No. 146, *Samantar*, 2007 WL 2220579. This order came one day after the United States filed a document stating that it *might* become involved in the suit. See *id.* No. 145. Under the presumption against immunity, the defendant will face the strongest incentive to appeal personally to the State Department to intervene. The putative head of state would presumably have more influence with the State Department than would an individual plaintiff, which may provide an additional reason in favor of this presumption: the party with the better likelihood of receiving a receptive audience at the State Department should be required to approach the government.

¹²⁴ Slaughter & Bosco, *supra* note 66, at 115.

our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.”¹²⁵

CONCLUSION

The law of head of state immunity remains deeply incoherent. The haphazard intervention of the State Department only complicates this problem. Courts dispose of cases on the basis of State Department suggestions of immunity, but courts that receive no guidance from the State Department are forced to piece together cases decided in part on the basis of unspoken and therefore unknown reasons. This framework significantly disadvantages the judiciary in fulfilling its institutional mandate, and the changing face of modern international relations suggests that difficult cases involving head of state immunity are even more likely to arise in the future.

This Note has analyzed several possible solutions to these problems. Ultimately, the prerogative to intervene in order to bar suits on immunity grounds remains with the executive branch. In light of this institutional arrangement, adopting a legal presumption against immunity maximizes the institutional strengths of both branches while still affording the Executive the absolute right to intervene in lawsuits as needed to protect the foreign relations of the United States. By adopting the incremental solution of presumptively denying head of state immunity, the judiciary can ensure that the executive branch is fully aware of — and capable of knowing — what it must do if it wants head of state immunity to apply in a particular case. Most importantly, a presumption against head of state immunity allows courts to do what they do best: resolve disputes on the merits.

¹²⁵ *Hoffman*, 324 U.S. at 42 (Frankfurter, J., concurring).