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The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities

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The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities

*John B. Bellinger III**

ABSTRACT

The Supreme Court's decision in Samantar v. Yousuf vindicated the position of the State Department's Office of the Legal Adviser, which had long argued that the immunities of current and former foreign government officials in U.S. courts are defined by common law and customary international law as articulated by the Executive Branch, rather than by the Foreign Sovereign Immunities Act of 1976. But the decision will place a burden on the Office of the Legal Adviser, which will now be asked to submit its views on the potential immunity of every foreign government official sued in the United States. The State Department will be lobbied both by foreign governments who want to protect their officials and by plaintiffs and human rights advocates who would like to recognize exceptions to official immunities. In deciding whether to recognize the

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immunities of foreign government officials, the State Department will have to consider the reciprocal impact on U.S. officials who may be sued in foreign courts.

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For at least fifty years, the Office of the Legal Adviser of the U.S. Department of State advanced the position that foreign government officials enjoy immunity under the common law from suit and legal process in U.S. courts for acts relating to their official duties. Even after the enactment of the Foreign Sovereign Immunities Act (FSIA) in 1976,¹ which codified procedures for lawsuits against foreign governments, the Legal Adviser's Office continued to argue that the immunity of current and former foreign officials is governed by the common law rather than the FSIA.² The basis upon which foreign officials can claim immunity is important because the scope of common law immunity varies and generally is not coextensive with the FSIA.

From 1990 to 2009, a majority of circuit courts rejected the Legal Adviser's arguments, holding instead that foreign government officials enjoy immunity under the FSIA.³ In 2010, however, in *Samantar v. Yousuf*, the Supreme Court adopted the Legal Adviser's longstanding position, holding that the FSIA applies only to governments, not officials.⁴ The Court left unresolved the question of whether and to what extent the common law recognizes immunity for foreign officials. As a result, *Samantar* will alter significantly the role of the Legal Adviser's Office in future immunity determinations of

1. 28 U.S.C. §§ 1330, 1602–1611 (2006).

2. Even at the time the FSIA was enacted, State Department lawyers took the position that the Act covered only sovereign states, but not their officials. Several officials of the State Department and Justice Department, who were drafters of the FSIA, published after its enactment a compilation of pre-FSIA immunity decisions of the State Department, noting that they “may be of some future significance, because the [FSIA] does not deal with the immunity of individual officers, but only that of foreign states and their political subdivisions, agencies and instrumentalities.” *Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, 1977 DIGEST*, at 1020.

3. See *infra* Part I and note 14.

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

foreign officials. I will review briefly the history of the debate concerning the law applicable to foreign official immunity, and offer some comments about the effect *Samantar* likely will have on the State Department going forward.

I. THE FIRST TEST—*CHUIDIAN*

In 1988, the Legal Adviser's Office had its first opportunity to test its argument that official immunities are governed by common law, not the FSIA. In *Chuidian v. Philippine National Bank*, a suit against a Philippine government official,⁵ the State and Justice Departments filed a statement of interest with the district court, arguing that the foreign official enjoyed immunity under the common law, as recognized and expressed by the Executive Branch, and marshaled several arguments in support of this position.⁶ First, the government's statement of interest noted that while "courts appear not to have had occasion to squarely address this question," the text of the FSIA, as well as its legislative history, demonstrates that the FSIA did not govern immunity claims for foreign government officials.⁷ Second, the government argued that "the rationale for the FSIA's exceptions to absolute immunity—that a foreign sovereign doing business in the United States assents to U.S. jurisdiction over its commercial activities—does not apply to an official carrying out official duties for the sovereign."⁸ Instead, the government argued, the immunity of foreign government officials "should be determined in accordance with the general principles of sovereign immunity, rather than in accordance with the FSIA."⁹ Under the common law, the government argued, "the general rule is that an official should be shielded from personal liability for the performance of official functions."¹⁰

On appeal, the Ninth Circuit rejected the State Department's argument, instead holding that the FSIA applies to both government entities and officials.¹¹ The court recognized that terms used in the FSIA like "agency" and "instrumentality" would "perhaps more

5. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1097 (9th Cir. 1990).

6. The statement of interest filed by the U.S. government in *Chuidian* was signed by then Assistant Attorney General for the Civil Division and future Ambassador to the United Nations John Bolton. See Statement of Interest of the United States, *Chuidian v. Philippine Nat'l Bank*, 734 F.Supp. 415 (C.D. Cal. 1990) (No. 86-2255) [hereinafter *Chuidian* Statement of Interest].

7. *Id.* at 4-5.

8. *Id.* at 5.

9. *Id.* at 5, 8.

10. *Id.* at 5.

11. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

readily connot[e] an organization or collective,” but nonetheless held that such terms did not “necessarily exclude individuals.”¹² Further, the Ninth Circuit found persuasive the argument that a suit against a foreign government official acting in his official capacity “is the practical equivalent of a suit against the sovereign directly,” and that it would circumvent the purposes of the FSIA to allow “litigants to accomplish indirectly what the Act barred them from doing directly.”¹³

Over the next fifteen years, the State Department remained on the sidelines as other courts followed *Chuidian*'s holding that foreign government officials were covered by the FSIA.¹⁴ During this period, to the extent that the U.S. government filed statements of interest or amicus briefs in cases that implicated the immunity of foreign government officials, its arguments were consistent with its position on the limited scope of the FSIA, even if it did not attempt to relitigate the issue.¹⁵

12. *Id.* at 1101.

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

14. See, e.g., *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 83 (2d Cir. 2008) (holding that the FSIA covered foreign government officials); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002) (same); *Byrd v. Corporación Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999) (same); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (same); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 289 (S.D.N.Y. 2001) (same); *Jungquist v. Al Nahyan*, 940 F. Supp. 312, 317 (D.D.C. 1996) (same).

15. For example, in the case of *Taiwan v. Tei Yan Sun*, a wrongful death suit brought against the government of Taiwan, the Taipei Economic and Cultural Representative Office (TECRO), and two other government agencies, the plaintiffs sought to depose an official of TECRO stationed in the United States. *Taiwan v. Tei Yan Sun*, 201 F.3d 1105, 1106 (9th Cir. 2000); see also *Taiwan v. U.S. Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712, 716 (9th Cir. 1997) (ruling that the district court could not compel TECRO official to appear at deposition). While the district court had dismissed the initial complaint for lack of subject matter jurisdiction under the FSIA, it permitted the plaintiffs to amend, and subsequently concluded that the TECRO official was not entitled to immunity and thus ordered he be made available for deposition. *Id.* at 715–16. The defendants petitioned for a writ of mandamus and the U.S. government filed an amicus brief before the Ninth Circuit in support of defendants' petition. The U.S. government did not argue that Taiwan, TECRO, and the government agency defendants qualified as foreign governments, agencies, or instrumentalities under the FSIA (because the United States did not recognize Taiwan), but instead argued that they were still entitled, pursuant to an agreement between the United States and Taiwan, to the same immunity as foreign governments, which is defined by the FSIA. Brief for the United States as Amicus Curiae at 5 n.3, *Taiwan v. Tei Yan Sun*, 201 F.3d 1105 (9th Cir. 2000) (No. 97-70375). But with respect to the TECRO official, the U.S. government argued, and the Ninth Circuit agreed, that the scope of his testimonial immunity was governed not by the FSIA but purely by the agreement between the United States and Taiwan. *Tei Yan Sun*, 128 F.3d at 719–20. Because the TECRO official had immunity under this agreement, the U.S. government was not required to address whether he enjoyed common law immunities, but the U.S. government did

The reasons for the State Department's lack of participation in this debate following *Chuidian* are unclear, but its silence may have been due to the fact that courts did not solicit the government's views,¹⁶ or perhaps because foreign governments did not press the issue. Both of these factors are important in whether the Department decides to file a suggestion of immunity.¹⁷ In any event, the so-called "*Chuidian* doctrine" remained the uniform view among the circuit courts until 2005, when the Seventh Circuit became the first to hold that the FSIA was inapplicable to foreign officials in *Enahoro v. Abubakar*.¹⁸

II. DICHTER AND SAMANTAR—THE TURNING POINT

It was not until 2006, when I was the Legal Adviser, that the State Department decided to press the issue again, this time in a suit brought against Avi Dichter, the former Israeli intelligence chief.¹⁹ This case concerned the July 2002 bombing of an apartment building in the Gaza Strip by the Israeli Defense Forces designed to kill

argue that, unlike the government entities, he did not enjoy immunity under the FSIA. Brief for the United States as Amicus Curiae, *supra*, at 5.

16. It is not uncommon for district court judges, *sua sponte*, to ask the Legal Adviser for his views. See, e.g., Letter from Hon. Richard Leon, U.S. Dist. Court Judge, to John B. Bellinger III, Legal Adviser, U.S. Dep't of State (Feb. 24, 2006), available at <http://www.state.gov/documents/organization/98830.pdf> (soliciting the views of the Office of the Legal Adviser of the State Department concerning, *inter alia*, the applicability of the FSIA with respect to suit brought against then-Minister of Commerce of the People's Republic of China, Bo Xilai, in a case where defendant had failed to respond to the complaint and the court had entered a default judgment).

17. In general, the State Department's historical practice has been not to file suggestions of immunity for lower-level foreign government officials at the district court level, unless requested by the court. This is in contrast to the Department's practice for asserting immunity for sitting heads of state and foreign ministers. In those circumstances, the Department generally will notify the district court as soon as it becomes aware of a suit against a sitting head of state or foreign minister. See, e.g., *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296–97 (S.D.N.Y. 2001), (noting the State Department's suggestion of immunity for a sitting head of state and foreign minister) *rev'd in part*, 386 F.3d 205 (2d Cir. 2004); *Lafontant v. Aristide*, 844 F. Supp. 128, 133 (E.D.N.Y. 1994) (noting the State Department's suggestion of immunity for a sitting head of state). In fact, even in those jurisdictions that adopted the *Chuidian* doctrine, the State Department continued to argue that the FSIA did not supplant the Executive Branch's authority to determine the immunity from civil suit of sitting heads of state. See, e.g., *Doe v. Roman Catholic Diocese of Galveston-Hous.*, 408 F. Supp. 2d 272, 279 (S.D. Tex. 2005) (“[T]he United States, through its Suggestion of Immunity and letter from the Department of State Legal Adviser, has explicitly requested that . . . Pope Benedict XVI [] head of the Holy See, be dismissed from this lawsuit on the basis of head-of-state immunity Judicial review of this determination is not appropriate.”).

18. *Enahoro v. Abubakar*, 408 F.3d 877, 881–82 (7th Cir. 2005).

19. *Matar v. Dichter*, 563 F.3d 9, 10 (2d Cir. 2009).

Mustafah Shehadeh, an alleged leader of Hamas.²⁰ While the bombing succeeded in this objective, 14 civilians were killed and over 150 were wounded in the attack.²¹ Those victims filed suit against Dichter under the Alien Tort Statute,²² and the Torture Victim Protection Act,²³ alleging that Dichter authorized, planned, and directed the bombing.²⁴ The State Department publicly criticized the Shehadeh attack and the risk it posed to innocent civilian lives.²⁵ However, as is often the case, the interests of the State Department with respect to the question of official acts immunity are independent from the underlying subject matter of the dispute.

Upon the court's invitation for the views of the State Department,²⁶ the Legal Adviser's Office and Justice Department filed a fifty-page statement of interest in the Southern District of New York, arguing that Dichter enjoyed immunity under customary international law, as recognized by the State Department.²⁷ I cannot claim primary credit for this brief, although I was extensively involved in reviewing it. It was the brainchild of Catherine Brown, then the Assistant Legal Adviser for Diplomatic Law, and was drafted in conjunction with attorneys in the Department of Justice.²⁸

In our *Dichter* statement of interest, in addition to arguing that neither the text of the FSIA nor its legislative history supported its application to foreign officials,²⁹ we also argued that allowing foreign officials to be sued for their official conduct would depart from customary international law, aggravate relations with foreign states, and expose our own officials to similar suits abroad.³⁰ The district

20. *Id.* at 10–11.

21. *Matar v. Dichter*, 500 F. Supp. 2d 284, 286 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009).

22. Alien Tort Statute, 28 U.S.C. § 1350 (2006).

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

24. *Dichter*, 500 F. Supp. 2d at 286–87.

25. *Id.* at 286; *see also* Richard Boucher, Spokesman, U.S. Dep't of State, Daily Press Briefing (July 23, 2002), *available at* <http://2001-2009.state.gov/r/pa/prs/dpb/2002/12098.htm> (criticizing the Shehadeh attack).

26. Order of July 20, 2006, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ. 10270) (inviting the State Department to state its views on whether, as Dichter argued, the action was barred by the FSIA, the political question doctrine, and the act of state doctrine, or on any other issue it considered relevant).

27. Statement of Interest of the United States at 19–22, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ. 10270) [hereinafter *Dichter Statement of Interest*].

28. During my tenure as Legal Adviser, I described the Office's practice with respect to immunities in a January 2007 blog post on the website OPINIO JURIS. *See* John Bellinger, *Immunities*, OPINIO JURIS (Jan. 18, 2007, 7:00 AM), <http://opiniojuris.org/2007/01/18/immunities>.

29. *Dichter Statement of Interest*, *supra* note 27, at 10–13.

30. *Id.* at 19–23.

court rejected the United States' argument.³¹ On appeal to the Second Circuit in 2007, we filed an amicus brief which reiterated this position before the district court, and further argued that courts' deference to the Executive Branch in foreign official immunity cases was grounded in constitutional separation of powers principles. By analyzing official acts immunity cases under the FSIA, we wrote that "*Chuidian's* approach . . . undermines a function exercised by the Executive under our constitutional framework,"³² but that instead, "[u]nder separation of powers principles, the only permissible inference from the FSIA's silence concerning the immunity of foreign officials is that Congress did not attempt to supplant the Executive's long-recognized authority to recognize and define [foreign officials'] immunity."³³

This time, our arguments found traction. The Second Circuit accepted that the common law provides immunity for the formal acts of former officials, although the court stopped short of holding that the FSIA was inapplicable *per se*.³⁴ Because the State Department and Justice Department filed a statement of interest recognizing that *Dichter* was entitled to immunity, the Second Circuit deferred to the Executive Branch and held that *Dichter* was "immune from suit under common-law principles that pre-date, and survive, the enactment of [the FSIA]."³⁵ The Second Circuit, however, did not attempt to explain *why* the common law of foreign official immunity survived the enactment of the FSIA, while the Executive's practice of suggesting immunity for foreign states, agencies and instrumentalities was wholly supplanted by that statute.³⁶

Simultaneously, the *Samantar* case was proceeding through the courts. In *Samantar*, the plaintiffs claimed to have suffered torture and abuse by soldiers under the command of Mohamed Ali Samantar,

31. *Dichter*, 500 F. Supp. 2d at 291 .

32. Brief for the United States as Amicus Curiae in Support of Affirmance at 15, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579) [hereinafter *Dichter* Amicus Brief].

33. *Id.* at 12.

34. Although it expressed strong skepticism that the FSIA applied to foreign government officials, the court did not definitively resolve the question, as it found that *Dichter* would be entitled to common law immunity in any event. *See Dichter*, 563 F.3d at 14 (noting that the plaintiffs had identified "no provision or feature of the FSIA that bespeaks intent to abrogate [the] common-law scheme [pre-dating the FSIA] with respect to former officials").

35. *Id.*

36. That the Second Circuit recognized that the common law of foreign official immunity survived the enactment of the FSIA, while refusing to hold the FSIA to be inapplicable *per se* in foreign official immunity cases, suggests that the court was reticent to leave foreign official immunity entirely to the FSIA, either in light of (1) constitutional separation of powers principles; or (2) the anomalous consequences that could result from failing to defer to executive suggestions of immunity. *See Dichter* Amicus Brief, *supra* note 32, at 8–18.

a former Somali Minister of Defense and Prime Minister.³⁷ As in *Dichter*, the plaintiffs sought recovery under the Alien Tort Statute and the Torture Victim Protection Act.³⁸ Also, as in *Dichter*, the district court held that the defendant was entitled to sovereign immunity under the FSIA.³⁹ Just one week prior to oral arguments before the Second Circuit in *Dichter*, the Fourth Circuit in *Samantar* reversed the opinion of the district court, concluding that “based on the language and structure of the statute, . . . the FSIA does not apply to individual foreign government agents like Samantar.”⁴⁰ The Fourth Circuit therefore joined the Seventh Circuit in finding that the immunity of foreign government officials was not governed by the FSIA, while the Second, Fifth, Sixth, Ninth, and D.C. Circuits had followed *Chuidian* and reached the opposite conclusion.⁴¹

The Obama Administration reasserted the traditional executive branch position on foreign official immunity in amicus briefs to the Supreme Court in the 2009 case *In re Terrorist Attacks on September 11, 2001*,⁴² and in *Samantar* in 2010.⁴³ In the former amicus brief, the U.S. government argued, *inter alia*, that although it “disagree[d] . . . with the analysis of the court of appeals” in its finding that the Saudi Princes were immune under the FSIA for their official acts, the government suggested instead that they were immune based upon “non-statutory principles articulated by the Executive, not the FSIA.”⁴⁴ Yet “[t]hat difference of opinion on the correct legal basis for the individual defendants’ official immunity does not . . . warrant this Court’s review,” the government argued, where the “respondents would be immune from suit under both the FSIA and principles articulated by the Executive.”⁴⁵ In the latter amicus brief, the U.S. government again argued that foreign officials’ immunity is governed by generally applicable principles of immunity as articulated by the Executive, but this time recommended that “a remand would be required to apply the relevant standards and determine whether [Samantar] has immunity,” in view of “complex

37. *Yousuf v. Samantar*, 552 F.3d 371, 373 (4th Cir. 2009), *aff’d*, 130 S. Ct. 2278 (2010).

38. *Id.* at 374–75.

39. *Yousuf v. Samantar*, No. 1:04-cv1360, 2007 WL 2220579, at *12 (E.D. Va. Aug. 1, 2007), *rev’d*, 552 F.3d 371 (4th Cir. 2009).

40. *Samantar*, 552 F.3d at 381.

41. See *supra* notes 5, 14 & 18 and accompanying text.

42. Brief for the United States as Amicus Curiae at 6, *Fed. Ins. Co. v. Kingdom of Saudi Arabia* 129 S. Ct. 2859 (2009) (No. 08640) [hereinafter *In re Terrorist Attacks Amicus Brief*].

43. Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555) [hereinafter *Samantar Amicus Brief*].

44. *In re Terrorist Attacks Amicus Brief*, *supra* note 42, at 3, 6.

45. *Id.* at 6, 8.

considerations,” such as the lack of any recognized government in Somalia, bearing on the issue.⁴⁶

In *Samantar*, the Supreme Court resolved the circuit split and agreed with the State Department that the immunity of foreign officials is governed by the common law and not by the FSIA.⁴⁷ The Court held that “[a]lthough Congress clearly intended to supersede the common-law regime for claims against foreign states” with the enactment of the FSIA, “nothing in the statute’s origin or aims . . . indicate[s] that Congress similarly wanted to codify the law of foreign official immunity.”⁴⁸ Moreover, the Court explained that it had “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.”⁴⁹ Accordingly, the Court did not address any general principles governing foreign official immunity, nor did it address whether the foreign official defendant was entitled to immunity in the case before it, leaving those matters to the lower courts.⁵⁰

III. THE BURDEN OF SAMANTAR

Thus, the State Department, after thirty years and three attempts, is vindicated on its position of foreign official immunity. On a personal level, it was gratifying to see the Court reach the outcome that the Legal Adviser’s Office and I advocated in *Dichter*. But with the victory comes a new burden.⁵¹ *Samantar* ushers in a new era for the Legal Adviser’s Office as the government will likely be asked to express its views on the immunity of foreign government officials in every applicable lawsuit. Since *Samantar*, three courts already have asked the Legal Adviser’s Office for the government’s views, including the *Samantar* remand and a case involving the former President of

46. *Samantar* Amicus Brief, *supra* note 43, at 7–8.

47. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010) (“And we think this case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is properly governed by the common law because it is not a claim against a foreign state as the Act defines that term.”).

48. *Id.*

49. *Id.* at 2291.

50. See *id.* at 2292–93 (“We emphasize, however, the narrowness of our holding. Whether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed in the first instance by the District Court on remand.”).

51. See John B. Bellinger III, *Ruling Burdens State Dept.: Samantar Held Foreign Officials Are Not Immune from Human Rights Suits, So State Will Have to Decide Whether to Assert Immunity and Will Be Subject to Lobbying*, NAT’L L.J., June 28, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463009727&slreturn=1&hblogin=1> (suggesting the State Department will be faced with new decisions regarding when to assert immunity over foreign officials).

Colombia, Alvaro Uribe.⁵² In response, the U.S. government suggested immunity for President Uribe,⁵³ and declined to suggest immunity in the other two cases.⁵⁴ Of course, it is not yet clear whether the courts will agree to be bound by the suggestions of the State Department, even though the U.S. government maintains that the Legal Adviser's determination is binding.⁵⁵

These three post-*Samantar* statements of interest foretell a new onus on the Legal Adviser's Office. As judicial requests for the Office's views continue to mount, the Department will need to decide whether

52. See Statement of Interest and Suggestion of Immunity of and by the United States, *Giraldo v. Drummond Co.*, No. 1:10mc00764 (JDB) (D.D.C. 2011), 2011 WL 3926372 [hereinafter Uribe Statement of Interest] (responding to court's request for input on the immunity issue); Statement of Interest of the United States, *Ahmed v. Magan*, No. 2:10-cv-342-GCS (S.D. Ohio Mar. 15, 2011) [hereinafter Magan Statement of Interest] (same); Statement of Interest of the United States, *Yousuf v. Samantar*, No. 1:04 CV 1360 (LMB) (E.D. Va. Feb. 14, 2011) [hereinafter Samantar Statement of Interest] (same).

53. The State Department recently suggested that President Uribe, as a former head of state, enjoys immunity from being subpoenaed to testify about acts taken in his official capacity as a government official or information obtained in such capacity. Uribe Statement of Interest, *supra* note 52, at 5–6. Further, even with respect to information sought from President Uribe that does not fall within these categories (and thus does not warrant immunity), the Department determined that the United States retains a foreign relations interest in “minimizing the burden” on him as a former head of state, and argued that plaintiffs should be required to “exhaust other reasonably available methods of procuring such information.” *Id.*

54. The State Department determined, in nearly identical filings, that neither Magan nor Samantar were entitled to immunity. The Department first noted that both defendants were former officials of the Somali government of Mohamed Siad Barre, which collapsed in 1991. Magan Statement of Interest, *supra* note 52, at 1; Samantar Statement of Interest, *supra* note 52, at 1. While the Barre regime was recognized by the United States, the United States does not currently recognize a government of Somalia. The Department acknowledged that these cases “present[] a highly unusual situation.” Magan Statement of Interest, *supra* note 52, at 8. Considering that “a former official's residual immunity is not a personal right” but is “for the benefit of the official's state,” the Department concluded that the defendants were not entitled to immunity. *Id.* Second, the Department also highlighted that both defendants had been residents of the United States for over a decade. Magan Statement of Interest, *supra* note 52, at 9; Samantar Statement of Interest, *supra* note 52, at 1. The State Department was careful to note that it was not articulating any per se rules on immunity, and it reserved the possibility that in future cases, immunity would be suggested even if a defendant was a former official of a state with no recognized government, or had chosen to permanently reside in the United States. See Magan Statement of Interest, *supra* note 52, at 8–9; Samantar Statement of Interest, *supra* note 52, at 9.

55. See Samantar Amicus Brief, *supra* note 43, at 10 (“As in suits against foreign states, the courts traditionally deferred to the Executive Branch's judgment whether an official should be accorded immunity in a given case.”); Dichter Amicus Brief, *supra* note 32, at 19–20 (explaining that courts generally do not interfere with the State Department's determination of whether an individual is immune); see also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“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.”).

to weigh in on immunity in every case or whether to promulgate a general statement of principles, akin to the celebrated letter submitted in 1952 by then Acting Legal Adviser Jack Tate articulating the views of the State Department with respect to sovereign immunity.⁵⁶ In the *Dichter* amicus brief, the government stated that the principles set forth therein were “susceptible to general application by the judiciary without the need for recurring intervention by the Executive, particularly in the form of suggestions of immunity filed on a case-by-case basis.”⁵⁷ My own view is that the Department should take both approaches at this stage—the Department should issue a statement of general rules *and* continue to file statements in each case—until a predictable body of common law develops. It is important for the Executive Branch to provide clear guidance to the federal courts in their development of common law immunities of foreign government officials in order to ensure consistency with international law and reciprocal protection for U.S. officials in foreign courts.⁵⁸

One challenge in the post-*Samantar* era will be differentiating between the various forms of common law immunity applicable to officials. Several distinct immunity doctrines are conflated from time to time, and the courts may need the State Department’s guidance in parsing the relevant customary international law, federal common law, and treaties.

The first doctrine, at issue in *Dichter* and *Samantar*, is *official-acts immunity*. This doctrine, which applies to both current and former foreign government officials, recognizes “[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority.”⁵⁹ The Executive Branch has stated that “insofar as . . . individual defendants had acted on behalf of the state, their actions were not

56. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 (1976) (advocating for the “restrictive theory” of immunity).

57. *Dichter* Amicus Brief, *supra* note 32, at 21, n.*; *see also id.* at 3 (“The Executive need not appear in each case in order to assert the immunity of a foreign official, but where it does so appear, its determination is conclusive.”); *id.* at 21 (“These are principles to which future courts may refer in making immunity determinations in suits against foreign officials in which the Executive does not appear.”).

58. *Cf. id.* at 16 (“The United States asserts immunity for its own officials when they are sued in foreign courts, and thus it is important that this issue be resolved by the Executive, after careful consideration of both international law and foreign policy consequences—including, importantly, the impact on the United States’ ability to shield its officials from liability in foreign jurisdictions in cases where the United States itself is subject to suit.”).

59. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (suggesting that immunity given to foreign government officials should “extend to government agents ruling by paramount force”).

attributable to them in their personal capacity; they were instead attributable to the state, and accordingly the state was the only proper defendant in the case.”⁶⁰ A foreign official may still be accountable for his or her private acts under this doctrine.

The second doctrine is *head of state immunity*. This form of functional immunity is absolute for sitting heads of state, heads of government, foreign ministers, and other high-ranking officials.⁶¹ Such officials enjoy immunity for all acts—public and private—undertaken during or before holding office.⁶² Head of state immunity attaches only while the official holds office,⁶³ although former heads of state retain residual immunity and are afforded special consideration for official acts taken while in office.⁶⁴ The Executive Branch has filed suggestions of immunity on the basis of head of state immunity in approximately thirty cases since the mid-1960s.⁶⁵

A third doctrine is *diplomatic and consular immunity*, which is based upon the Vienna Convention on Diplomatic Relations⁶⁶ and the Vienna Convention on Consular Relations,⁶⁷ respectively, as well as a number of bilateral treaties and agreements and a body of customary international law. While in office, diplomats enjoy “near-absolute

60. Dichter Statement of Interest, *supra* note 27, at 10.

61. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, para. 51 (Feb. 14) (“[I]n international law it is firmly established that . . . certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”); *id.* para. 54 (“[T]hroughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.”).

62. Lafontant v. Aristide, 844 F. Supp. 128, 139 (E.D.N.Y. 1994) (holding that no inquiry was necessary into whether alleged wrongful act, i.e., the extrajudicial killing of a political opponent, was a private or public act, as defendant could claim head of state immunity); *see also* Arrest Warrant of 11 April 2000, 2002 I.C.J. para. 55 (holding that the duties of the Minister for Foreign Affairs are such that no distinction may be drawn between acts performed in an “official” capacity and those performed in a “private capacity”).

63. *See* Arrest Warrant of 11 April 2000, 2002 I.C.J. para. 53 (concluding that a Minister of Foreign Affairs “occupies a position such that, like the Head of State . . . he or she is recognized under international law as representative of the State solely by virtue of his or her office,” and accordingly, “throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability” (emphasis added)).

64. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 464 cmt. e (1987) (“[T]he immunity from jurisdiction to adjudicate continues after the person’s diplomatic status has ended.”). *See generally* Peter Evan Bass, Note, *Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy*, 97 YALE L.J. 299 (1988) (arguing that ex-heads of state should be given immunity).

65. *See* Bellinger, *supra* note 28 (discussing the Executive Branch’s history of suggesting head of state immunity).

66. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (recognizing the immunity of diplomatic agents).

67. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (recognizing the immunity of consular officials).

immunity in the receiving state to avoid interference with the diplomat's service for his or her government."⁶⁸ Former diplomatic officials are by treaty entitled to residual immunity "with respect to acts performed . . . in the exercise of his functions as a member of the [diplomatic] mission,"⁶⁹ and former consular officials enjoy the protections of immunity by treaty with respect to acts performed "in the exercise of his functions . . . without limitation of time."⁷⁰ While the State Department may file a statement of interest in a civil suit implicating diplomatic or consular officials, the nature of its participation in such suits is generally limited, as these classes of officials are expected to retain private counsel for representation.⁷¹

A fourth doctrine, often conflated with diplomatic immunity, is *special mission immunity*,⁷² which is based upon the need to foster high level communications between government officials who are not necessarily accredited diplomats. The State Department has filed statements of interest suggesting the immunity of foreign government officials who have travelled to the United States to conduct official business (but who are not assigned to a diplomatic or consular post in the United States), and courts have recognized these immunities.⁷³ Although this doctrine was codified in the Convention

68. *Swarna v. Al-Awadi*, 622 F.3d 123, 137 (2d Cir. 2010).

69. Vienna Convention on Diplomatic Relations, *supra* note 66, art. 39(2).

70. Vienna Convention on Consular Relations, *supra* note 67, art. 53(4).

71. See *Bellinger*, *supra* note 28 (discussing the role of the Executive Branch in cases of immunity for foreign officials).

72. See *Fourth Report on Special Missions*, U.N. Doc. A/CN.4/194 AND ADD.1-5, ¶ 189, reprinted in [1967] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/1967/Add.1 ("[It is] generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members."); see also Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 822-23 (2010) (arguing that foreign diplomatic officials temporarily in the territory of another state on "special diplomatic missions" are entitled to immunity).

73. See *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 38 (D.D.C. 2008) ("According due deference to the Executive Branch, the Court will therefore defer to the Executive's determination that Minister Bo was immune from service of process for the duration of the special diplomatic mission."); Suggestion of Immunity and Statement of Interest of the United States at 12, *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2006) (No. 1:04-cv-00649) [hereinafter *Xilai Statement of Interest*] ("Given the reasonable expectations of foreign governments sending ministerial-level representatives to the United States on special missions, permitting personal jurisdiction over Minister Bo solely on the basis of service of process during his official visit would seriously damage U.S. foreign policy interests." (emphasis added)); see also *Kilroy v. Windsor*, No. C-78-291, 1978 U.S. Dist. LEXIS 20419, at *2 (N.D. Ohio Dec. 7, 1978) (adopting the State Department's suggestion that Prince Charles was on a special diplomatic mission); Suggestion of Immunity Submitted by the United States, *Kilroy v. Windsor*, No. 78-291 (N.D. Ohio Dec. 5, 1978), excerpted in *Special Missions and Trade Delegations*, 1978 DIGEST § 3, at 643 ("The Department of State regards the visit of Prince Charles as a special diplomatic mission and considers the Prince to have been an official diplomatic envoy while present in the United States on that special mission.").

on Special Missions,⁷⁴ relatively few states have joined that treaty and the doctrine is based largely upon principles of customary international law. The potential class of foreign government officials who can claim immunity under the special mission doctrine is greater than that of head of state immunity.⁷⁵

Defining the contours of these doctrines, especially for official-acts immunity, will require significant attention and resources from the Legal Adviser's Office until a consistent body of common law develops. The State Department will also be subject to more lobbying than before, both by foreign governments on behalf of defendants and by plaintiffs and human rights groups.⁷⁶ This has happened before: between 1960 and 1972 (prior to the FSIA), the Department received forty-eight requests from foreign governments to file a suggestion of immunity on their behalf.⁷⁷

I am aware that the Department is debating whether to establish some kind of standard process for immunity requests. There are precedents upon which such a process could be modeled. Prior to the enactment of the FSIA, a foreign government generally had the option to seek a resolution of its sovereign immunity claim either before the State Department or before the court.⁷⁸ If the foreign government chose to proceed before the Department, the plaintiff, as well as the foreign government, would be invited to submit memoranda on the matter.⁷⁹ Either party could also request an informal conference before a panel of attorneys in the Legal Adviser's Office, at which both sides could present their views.⁸⁰ While I do not

74. Convention on Special Missions art. 21, Dec. 8, 1969, 1400 U.N.T.S. 231, 237 ("The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission . . . shall enjoy . . . the facilities, privileges, and immunities accorded by international law.")

75. See, e.g., Xilai Statement of Interest, *supra* note 73, at 4–11 (suggesting the Chinese Minister of Commerce was entitled to immunity under the special mission immunity doctrine).

76. See, e.g., John B. Bellinger III, *Litigation Litmus Test*, WASH. TIMES, Jan. 18, 2010, <http://www.washingtontimes.com/news/2010/jan/18/litigation-litmus-test> (noting efforts of human rights groups to lobby the Administration to oppose immunity for Samantar).

77. See Letter from Charles N. Brower, Legal Adviser, U.S. Dept. of State, to Harold D. Donohue, Chairman, Subcomm. No. 2, H. Comm. on the Judiciary (July 24, 1973), reprinted in *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 34 (1973).

78. Sovereign Immunity Decisions of the Department of State, *supra* note 2, at 1019.

79. *Id.* (discussing the Department's practice of allowing memoranda and oral arguments from both the plaintiff and the foreign state regarding immunity matters at issue).

80. See Stephen C. Nelson ed., *Contemporary Practice of the United States Relating to International Law*, 64 AM. J. INT'L L. 631, 651 (1970) (describing the procedure for addressing immunity matters in the Department of State). Such

think it necessary for the Department to hold hearings in any process it devises to resolve official immunity claims, it certainly should solicit the views of the parties.

IV. A *JUS COGENS* EXCEPTION?

As we have learned from the FSIA, the exceptions to immunity truly define the rule, and the State Department likely will spend most of its energy explaining when and why immunity might *not* apply to a particular case.⁸¹ Plaintiffs undoubtedly will press for an exception to official immunity for acts that violate *jus cogens* norms, arguing that such acts can never be “official” in nature.⁸² The State Department has never agreed with that position, and it would be a mistake to do so now.⁸³

An exception for *jus cogens* violations would be contrary to current international law,⁸⁴ contrary to the longstanding positions of the career lawyers at both the State Department and Justice Department (who rightly worry about reciprocal protection for U.S. officials in foreign courts),⁸⁵ and would require the United States to reverse the position it took in *Dichter*. In *Dichter*, the U.S. government argued that “[t]he Executive does not recognize any

conferences were decidedly informal in nature; no evidence or testimony was presented, and no transcript made of the proceedings. See *Spacil v. Crowe*, 489 F.2d 614, 615 n.2 (5th Cir. 1974) (describing the State Department’s hearings).

81. See *Samantar* Amicus Brief, *supra* note 43, at 7 (discussing factors the State Department might consider when deciding whether to apply immunity).

82. A *jus cogens* norm is one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. Commonly asserted violations of *jus cogens* norms are war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman or degrading treatment or punishment. See, e.g., *Belhas v. Ya’Alon*, 515 F.3d 1279, 1286–87 (D.C. Cir. 2008) (addressing such alleged violations).

83. The State Department’s amicus brief in *Samantar* seems to leave the door open for a *jus cogens* exception. Although the government strongly re-asserted the longstanding position of the Legal Adviser’s Office that current and former officials generally enjoy immunity for their official acts, see *Samantar* Amicus Brief, *supra* note 43, at 11, the government noted that “in this case,” the Executive Branch “may also find the nature of the facts alleged” (i.e. torture) and “whether they should properly be regarded as actions in an official capacity” (i.e. can torture ever be official) “to be relevant to the immunity determination.” *Id.* at 25.

84. *Dichter* Statement of Interest, *supra* note 27, at 29–33 (arguing that a *jus cogens* exception to official-act immunity would be “out of step with customary international law”); *Dichter* Amicus Brief, *supra* note 32, at 22–25 (same).

85. See, e.g., Chuidian Statement of Interest, *supra* note 6, at 11 (“Finally, reciprocity concerns argue strongly for such immunity. Subjection of United States government officials to suits abroad for their official activities would greatly undercut the immunity from foreign court jurisdiction to which the United States is entitled.”).

exception to a foreign official's immunity for civil suits alleging *jus cogens* violations . . . [and] the recognition of such an exception would be out of step with international law and could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis."⁸⁶ Indeed, the Second Circuit agreed with the government's position in *Dichter*, stating that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity,"⁸⁷ and it has subsequently reaffirmed that holding.⁸⁸

The reciprocity point is very important, and not a trivial concern for former U.S. officials. The United States continues to engage in controversial military and intelligence operations around the world, and former Secretary of Defense Robert Gates and former Director of the Central Intelligence Agency Leon Panetta have already been threatened with suits in foreign countries for drone attacks.⁸⁹ Once the United States agrees to lift immunity for foreign government officials, it begins to craft state practice that could expose U.S. officials to suits abroad.⁹⁰ Plaintiffs would certainly allege that certain actions by U.S. officials violate *jus cogens* norms, and would argue that, as a result, such U.S. officials are not entitled to immunity. The strong interest of the United States in safeguarding

86 *Dichter* Amicus Brief, *supra* note 32, at 4 (emphasis added); *see also id.* at 22 ("The Executive . . . is responsible for asserting immunity for U.S. officials abroad and must integrate those assertions with the approach at home—knowing that any refusal by the United States to afford foreign officials immunity could prompt foreign jurisdictions to respond in kind when U.S. officials are sued in their courts. . . . Thus, courts have deferred to the Executive's conclusion that customary international [law] does not recognize any *jus cogens* exception to foreign official immunity.").

87. *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009).

88. *See Carpenter v. Republic of Chile*, 610 F.3d 776, 779–80 (2d Cir. 2010) ("There is no general *jus cogens* exception to FSIA immunity.").

89. *See* Reza Sayah, *Pakistani Man Sues U.S. over Drone Strikes*, CNN.COM, Dec. 1, 2010, http://articles.cnn.com/2010-12-01/world/pakistan.drone.attack.lawsuit_1_drone-strike-drone-attacks-innocent-victims?_s=PM:WORLD (exemplifying lawsuits brought against the United States).

90. *See Dichter* Amicus Brief, *supra* note 32, at 25 ("Given the global leadership role of the United States, our own officials are at special risk of being subjected to politically driven lawsuits abroad in connection with controversial U.S. military operations."); *cf.* *Tabion v. Mufti*, 877 F. Supp. 285, 293 (E.D. Va. 1995) ("To protect United States diplomats from criminal and civil prosecution in foreign lands with differing cultural and legal norms as well as fluctuating political climates, the United States has bargained to offer that same protection to diplomats visiting this country. Because not all countries provide the level of due process to which United States citizens have become accustomed, and because diplomats are particularly vulnerable to exploitation for political purposes, immunity for American diplomats abroad is essential. And, understandably, reciprocity is the price paid for that immunity."); Chuidian Statement of Interest, *supra* note 6, at 11 ("Finally, reciprocity concerns argue strongly for [a determination of official acts] immunity. Subjection of United States government officials to suits abroad for their official activities would greatly undercut the immunity from foreign court jurisdiction to which the United States is entitled.").

its officials from suits abroad counsels adherence to established international law regarding suits against foreign officials in the U.S. courts.

V. CONCLUSION

After more than thirty years, the Legal Adviser's Office finally got what it asked for. It is the dog that caught the car and it will now have to decide what to do with it. In 1973, the Attorney General and Secretary of State wrote to the Speaker of the House of Representatives that "[t]he transfer of this function [of making immunity determinations] to the courts will also free the Department [of State] from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department" to do so.⁹¹ I wonder whether, in a few years time, the Legal Adviser's Office will be in that same situation again, seeking another kind of FOIA—a "Foreign Officials Immunities Act"—just as 40 years ago it sought the FSIA to relieve the burden and political pressure of having to file statements of sovereign immunity in every case. I am not advocating the adoption of an official immunities statute at this time, but the Executive Branch may find such a statutory framework desirable in the future.

91. *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 34 (1973).
