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Samantar and Executive Power

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ABSTRACT

This essay examines Samantar v. Yousuf *in the context of broader debate about the relationship between federal common law and executive power.* Samantar *represents simply the latest effort by the Executive Branch to literally shape the meaning of law through a process referred to in the literature as "executive lawmaking." While traditional accounts of executive lawmaking typically have treated the idea as a singular concept,* Samantar *demonstrates the need to bifurcate the concept into at least two different categories: acts of executive lawmaking decoupled from pending litigation and acts of executive lawmaking taken expressly in response to litigation. As* Samantar *illustrates, these latter acts of executive lawmaking raise special concerns about separation of powers and politically motivated decision-making. They counsel in favor of judicial caution in accepting such acts and, more generally, in favor of a more cautious approach to the creation of federal common law, which invites such acts.*

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In *Samantar v. Yousuf*, the Supreme Court held that the Foreign Sovereign Immunities Act generally did not cover claims against individual government officers; instead, their immunity (if any) is governed by federal common law.[1] The decision already prompted

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1. Samantar v. Yousuf, 130 S. Ct. 2278, 2292–93 (2010). The Court left open the possibility that certain suits against individual officers might constitute the functional equivalent of a suit against the state. *Id.* at 2292. Under these

academic commentary, and elsewhere I have criticized the Court's opinion for its failure to articulate a coherent theoretical basis for its exercise of federal common law as well as for its failure to offer any meaningful guidance about this important rule.[2]

This essay focuses on one particular thread in *Samantar*—namely, the role of the Executive Branch in the immunity determination after *Samantar*. Before the Supreme Court, the U.S. government took the view that the scope of the foreign official's common-law immunity turned exclusively on the Executive Branch's determination of whether the official was entitled to it.[3] The government now appears to read *Samantar* to endorse that view, and early indications suggest that courts will accept that view.[4]

The government's position raises important issues about the relationship between federal common law and executive power. That relationship arises in other contexts both before the Supreme Court and in the lower courts.[5] Consequently, *Samantar* carries implications not simply for the discrete issue of foreign official immunity but also, more broadly, for the horizontal distribution of authority among the branches of the federal government over civil cases that touch upon the foreign relations of the United States.[6]

My thesis is summarized as follows: *Samantar* represents simply the most recent effort by the Executive Branch to assert that its traditional foreign affairs power encompasses an ability to shape the meaning of federal common law. This effort must be understood

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circumstances, the Court suggested that the FSIA's protections might still attach. *Id.* With little exception, the Court offered virtually no guidance on the circumstances that would qualify for such treatment. *Id.*

2. *See* Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE 1, 6–7 (2010) (describing the numerous problems that result from reading suits against individuals into the FSIA); Peter B. Rutledge, Samantar, *Official Immunity and Federal Common Law*, 15 LEWIS & CLARK L. REV. 589, 590 (2011) (criticizing the Supreme Court for leaving open the possibility that individual foreign officials not covered under the FSIA may nevertheless still be entitled to immunity under federal common law); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669 (2011) (urging courts to look to international and domestic immunity principles as well as human rights doctrines in developing common law standards where there is little guidance from the Supreme Court).

3. Brief for the United States as Amicus Curiae Supporting Affirmance at 7–8, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) [hereinafter Samantar Amicus Brief].

4. 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]; Order, Yousuf v. Samantar, No. 1:04cv1360 (LMB/JFA) (E.D. Va. Feb. 15, 2011) (rejecting Samantar's "common law sovereign immunity defense" based entirely on the government's determination that Samantar "does not have foreign official immunity").

5. *See infra* text accompanying notes 20–27.

6. *See* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 975 (2011) (noting that sovereign state immunity determinations can implicate both federal common lawmaking and executive lawmaking, creating separation of powers concerns).

within a larger context of the various roles that the Executive Branch can play in cases that touch upon the foreign relations of the United States. Specifically, the Executive can play four roles: (a) offering their views on the proper resolution of a legal question (not unlike any other amicus curiae), (b) offering case-specific guidance to courts on the foreign relations implications of a case (such as urging dismissal of a case on grounds of comity), (c) undertaking official acts that have doctrinal implications binding on courts (such as recognizing foreign states or diplomats), and (d) affirmatively asserting that the meaning of a legal question turns exclusively on the answer given by the Executive Branch (such as the government's view in *Samantar*).

Much of the academic literature in this area traditionally collapses these last two roles into the single rubric of "executive lawmaking."[7] Contrary to that literature, *Samantar* demonstrates the need to disaggregate this single category into at least two distinct ones: cases where the Executive undertakes an act decoupled from pending litigation, and cases where the Executive undertakes an act in light of pending litigation. This latter sort of case raises troubling separation-of-powers implications, can create tension with congressional enactments, and undermines needed clarity in important areas of law. These distinct problems should prompt courts to be especially skeptical of executive lawmaking in this area and, more generally, to be more cautious about manufacturing federal common law doctrines that invite such claims by the Executive Branch to complete deference.

This essay develops this thesis in three parts. Part I briefly reviews *Samantar* and the government's position in that case. It then contextualizes the government's position by comparing it to other areas of law where the government sought to rely on the Executive Branch's foreign affairs power to influence the shape of federal common law. Part II articulates a model by which to conceptualize the various roles that the Executive Branch can play in civil litigation touching upon U.S. foreign relations. It then focuses on the role the Executive Branch sought to play in *Samantar*—what I call the "adjudicative role"—and identifies several problematic consequences when the Executive Branch is permitted to play that role. Part III anticipates and responds to several potential criticisms.

I. FEDERAL COMMON LAW AND EXECUTIVE POWER

Other essays in this symposium issue discuss *Samantar*'s history in greater detail, so I summarize only those bits of the history

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7. *See infra* note 28 and accompanying text.

essential to my argument.[8] *Samantar* involved a suit by natives of Somalia who alleged that Samantar, the former Prime Minister, first Vice President, and Minister of Defense, had authorized extrajudicial killings and torture of the plaintiffs or their family members during the 1980s.[9] During that time, the United States formally recognized the military regime, of which Samantar was a part, as the lawful government of Somalia.[10] Following the fall of the military regime, Samantar fled the country in 1991 and eventually became a resident of Virginia.[11] The district court held that Samantar was immune under the Foreign Sovereign Immunities Act (FSIA), but the Fourth Circuit reversed and held that the FSIA does not apply to individual government officers (leaving open the possibility that federal common law doctrines might protect him).[12]

After the Supreme Court granted certiorari, the Solicitor General filed a brief on the merits. In that brief, the government took the position that "principles adopted by the Executive Branch, informed by customary international law, *govern* the immunity of foreign officials acting in their official capacity."[13] According to the government, prior to the FSIA's enactment, the Executive Branch controlled the determination of whether both foreign states and their officials were entitled to a conduct-based immunity.[14] While the FSIA may have altered the mechanics by which a court determines the immunity of *foreign states*, nothing in the act or its legislative history indicated Congress's intent to alter the State Department's role with respect to *foreign officials* (present or former).[15]

Thus according to the government's argument, as in the pre-FSIA context, the Executive Branch continues to control that determination, a determination that *binds* the federal courts.[16] In other words, if the Executive Branch determines that the official is immune, the court must dismiss the official from the case. If the Executive Branch reaches the contrary conclusion, then dismissal, at least on grounds of immunity, is inappropriate.

The Court's opinion says remarkably little to this point. On the assumption that federal common law does supply an official

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8. *See, e.g.*, John B. Bellinger III, *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*, 44 VAND. J. TRANSNAT'L L. 819 (2011); David P. Stewart, *The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property*, 44 VAND. J. TRANSNAT'L L. 1047 (2011).

9. *Yousuf v. Samantar*, 552 F.3d 371, 375 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010).

10. *Id.*

11. *Id.* at 374.

12. *Id.* at 383–84.

13. Samantar Amicus Brief, *supra* note 3, at 8 (emphasis added).

14. *Id.*

15. *Id.*

16. *Id.*

immunity—a question technically left open by the Court's opinion[17]—the Court states simply that it was "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 immunities."[18] This language hardly represents an express endorsement of the rule that the government urged in its brief. Admittedly, though, it can reasonably be read to endorse that view (and it appears that the government has interpreted the decision to endorse its position).[19]

Samantar is hardly the first case to raise important issues regarding the intersection of federal common law and executive power. In numerous other areas of law, both historical and recent, the Court wrestled with this horizontal allocation of power between the branches in matters of international civil litigation. Consider the following examples:

- Act of State Doctrine: In *Banco Nacional de Cuba v. Sabbatino*, the Court announced the modern form of the act of state doctrine under which courts will not sit in judgment of the validity of the acts of foreign states taken within their territory.[20] Subsequently, the Executive Branch urged the Court to adopt the *Bernstein* exception under which courts would not dismiss a case on the basis of the act of state doctrine when, in the view of the Executive Branch, the case did not endanger the foreign relations of the United States.[21]
- Alien Tort Statute (ATS): In *Sosa v. Alvarez-Machain*, the Court held that federal courts enjoyed a limited power to recognize, as a matter of federal common law, claims for violations of the law of nations at least where the relevant norm had achieved the necessary level of acceptance among civilized nations comparable to the three paradigmatic claims that existed at the

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17. *See* Rutledge, *supra* note 2.

18. Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2010). In the footnote accompanying this quote, the Court described the history of the Executive Branch's position on the FSIA and the State Department's longstanding position that the FSIA did not deal with the immunity of individual officials. *Id.* at 2291 n.19

19. *See* Samantar Statement of Interest, *supra* note 4 (conveying to the Court the Department of State's determination that the defendant was not immune from suit); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Vanderbilt Journal of Transnational Law Symposium: Foreign State Immunity at Home and Abroad (Feb. 4, 2011) (noting the State Department's historic and continued role in determining whether a foreign defendant is acting in an official capacity as an agent of a legitimate government).

20. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

21. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 759–64 (1972); Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954). *See generally* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 751–95 (4th ed. 2007) (explaining the "act of state" doctrine and exceptions to the doctrine, including the *Bernstein* exception).

time of the ATS's adoption.[22] The Court rejected the Executive Branch's view that judicial inference of a private right of action from customary international law is inconsistent with separation of powers principles.[23] However, in recognition of the Executive Branch's concern, the Court acknowledged that federal courts could engage in case-specific deference to the Executive Branch where it argued that a particular suit interfered with its ability to exercise its control over foreign relations.[24]

- Foreign Sovereign Immunities Act: In *Republic of Austria v. Altmann*, the Court held that the FSIA covered conduct predating the statute's enactment, even where the conduct occurred at a time where "absolute immunity" was the prevailing norm.[25] The Court rejected the Executive Branch's argument that foreign sovereigns were absolutely immune for such conduct.[26] Similar to *Sosa*, however, the Court acknowledged that it would consider case-specific requests by the government to dismiss such cases on the basis of their foreign policy implications.[27]

The unifying feature of these examples (and there are many others) is that they are all instances of (a) federal common law doctrines that take into account the case's foreign relations implications and (b) different roles for the Executive Branch in speaking to those foreign relations implications. In some cases, the federal common law doctrine facilitates the exercise of jurisdiction (e.g., *Sosa* and *Altmann*), and the Executive Branch can seek to trim that exercise. In other instances, the federal common law doctrine trims the exercise of jurisdiction (e.g., *Sabbatino*), and the Executive Branch can re-enforce it. The examples illustrate the need for a conceptual framework in which to think about the role of the Executive Branch across the gamut of international civil litigation matters.

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22. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

23. Reply Brief for the United States as Respondent Supporting Petitioner at 2, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339).

24. *Sosa*, 542 U.S. at 733 n.21.

25. Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004).

26. Brief for the United States as Amicus Curiae Supporting Petitioners at 14, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13).

27. *Altmann*, 541 U.S. at 702.

II. MODELS OF EXECUTIVE POWER IN INTERNATIONAL CIVIL LITIGATION

A rich literature has considered the proper role of the Executive Branch in this field.[28] While this literature does some important theoretical spadework, much work remains to be done. First, most of the literature focuses primarily on the extent to which courts should defer to executive interpretations of statutes, rather than federal common law.[29] In the statutory context, the two branches are competing for authority against the backdrop of a congressional enactment. By contrast, in the context of federal common law, it is precisely Congress's silence that supposedly gives rise to the need for interstitial lawmaking by the federal courts.[30]

Second, most accounts take a rather mono-dimensional view of what is termed "executive lawmaking."[31] Executive lawmaking is generally understood to mean legal acts undertaken by the Executive that carry doctrinal consequences for both pending and future litigation.[32] An obvious example is the recognition of a foreign diplomat or consular official; as a consequence of that act, the official (if later named as a defendant in a civil suit) may be able to claim immunity under the Diplomatic Relations Act and its accompanying conventions (the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations).[33]

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28. Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659–63 (2000) (articulating a five-part model of deference to the Executive Branch built partly on the premises underlying the *Chevron* doctrine); Derek Jinks & Neal Kumar Katyal, 116 YALE L.J. 1230 (2007) (urging a more skeptical approach toward judicial deference to the Executive Branch in this area); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007) (drawing largely on Bradley's approach to argue explicitly for deference to the Executive Branch in matters of foreign relations, focusing largely on federal statutes). For classic historical contributions to this debate in the pre-FSIA context, see Michael H. Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461 (1963) (arguing that the doctrine of judicial deference to the Executive applies most strongly in the case of political determinations in the field of foreign affairs); Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946) (arguing that the present position of Supreme Court deference to the State Department on foreign relations issues may be detrimental where the Executive Branch is performing a function that should be carried out by the courts).

29. Jinks & Katyal, *supra* note 28.

30. Milwaukee v. Illinois, 451 U.S. 304, 347 (1981).

31. *See* Bradley, *supra* note 28; Jinks & Katyal, *supra* note 28.

32. *See* Bradley, *supra* note 28, at 661 (describing Supreme Court deference to the Executive Branch's foreign affair powers, including the determination of immunity for foreign heads of state and access of foreign governments to U.S. courts).

33. Vienna Convention on Consular Relations art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. *See generally* BORN & RUTLEDGE, *supra* note 21, at 242, 255 (discussing immunity for senior governmental officials).

The antiterrorism exception of the FSIA supplies another example. By placing a foreign state upon the list of state sponsors of terror, the State Department can offer plaintiffs another avenue whereby to sue foreign state defendants under the FSIA.[34] Conversely, by removing a foreign state from the list (or declining to place the state on the list), the State Department effectively cuts off that avenue of access to the courthouse.[35] Executive agreements provide still another familiar example. In some cases, such agreements can extinguish claims in civil courts against foreign governments or foreign parties.[36]

Samantar illustrates the need to disaggregate acts of executive lawmaking into two different types of activities. Recall the government's basic position: that it determines whether a foreign official is entitled to immunity, and that determination binds a court.[37] That sort of executive lawmaking raises two distinct concerns not present in other areas such as the recognition of diplomats. First, it raises more serious separation-of-powers concerns.[38] Executive determinations pursuant to a statutory mandate (like the immunity of credentialed diplomats) enjoy a congressional sanction (namely the Diplomatic Relations Act).[39] In contrast, executive determinations about the meaning of federal common law lack any such sanction.

Second, the timing of the determination raises more serious concerns about politically motivated decision making by the Executive Branch. Executive determination to credential a diplomat is decoupled from any litigation, whereas an executive determination of whether a government official is entitled to immunity is, by definition, made in the context of pending litigation. This enhances the risk that the Executive Branch will base its determination on political rather than principled grounds, either in pursuit of the State Department's political agenda or in response to external pressure from the foreign sovereign whose official is subject to the suit.

Thus, building on the prior literature in this area while at the same time addressing its limitations, I propose to differentiate between four different functions that the Executive Branch can play in matters of international civil litigation:[40]

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34. 28 U.S.C. § 1605A(c) (2006) (granting a private right of action against a foreign state that is or was a state sponsor of terrorism).

35. Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2195 (2009).

36. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654 (1981).

37. *See supra* note 13 and accompanying text.

38. *See* Jessup, *supra* note 28 (arguing that the present position of Supreme Court deference to the State Department on foreign relations issues may be detrimental where the Executive Branch is performing a function that should be carried out by the courts).

39. *See supra* note 33 and accompanying text.

40. I put to one side cases in which the Executive Branch is itself a party to the case. *See, e.g.*, Pasquantino v. United States, 544 U.S. 349 (2005) (declining to apply

- The Amicus Function: In this capacity, the Executive Branch simply files a brief urging the Court to interpret a federal common law doctrine or to resolve a question of statutory interpretation in a given way. The Executive Branch occupies a position no different than other amici curiae who may have an interest in the Court's resolution of a broad legal question. For example, in its brief in *American Isuzu Motors v. Ntsebeza*, the Executive Branch urged the Court to hold that the ATS does not support claims predicated on theories of third-party liability (like aiding and abetting liability).[41] This function raises no particular separation-of-powers concerns. The Court remains independent and free to reject the Executive Branch's view and resolve the matter a different way.

- The Prudential Function: In this capacity, the Executive Branch files a brief urging the Court to dismiss (or, less frequently, not dismiss) a case on grounds related to one of the various federal common-law doctrines such as comity or political question. A request for case-specific deference (as envisioned by the Court in *Sosa* and *Altmann*) exemplifies this sort of role.[42] In contrast to the amicus role, participation of this sort raises at least some separation-of-powers concerns. The Executive Branch is urging the Court not to observe its "unflagging obligation" to exercise jurisdiction granted by Congress.[43] Yet any fault for the compromise on the court's obligation in this regard lies not with the Executive Branch per se but with the Court for manufacturing doctrines that relax its jurisdictional obligation.[44]

- The Head of State Function: In this role, the Executive engages in an act that has consequences for civil litigation *but is decoupled from the litigation*. Examples include the recognition of diplomats,[45] the credentialing of international organizations,[46] some executive agreements,[47] and, to an extent,

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the federal common law "revenue rule" to a fraud prosecution initiated by the United States).

41. Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioners at 8, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919). In the interest of disclosure, I should note that I represented an amicus curiae in that case.

42. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004); Republic of Austria v. Altmann, 541 U.S. 677, 725–27 (2004).

43. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (citing England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415 (1964); McClellan v. Carland, 217 U.S. 268, 281 (1910); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

44. This problem is, of course, not limited to immunity determinations or, for that matter, foreign relations cases. The general critique applies more globally to common law doctrines like the political question doctrine and various abstention doctrines, just to name a few.

45. Diplomatic Relations Act, 22 U.S.C. § 254c (2006).

46. 22 U.S.C. § 288 (2006).

the decision whether to list a state as a state sponsor of terrorism.[48] In contrast to the prudential role, these actions have greater separation-of-powers consequences. The judiciary has no discretion to vary the consequences of an executive action, which may have an outcome determinative effect on litigation. Notably, however, the implications of these actions for separation-of-powers are not so worrisome because (at least as far as these examples)[49] they are often done pursuant to an express grant of congressional authority.[50] Moreover, because the executive act is decoupled from present or pending litigation, there is less concern that political considerations might be influencing the Executive Branch's determination.

- The Adjudicative Function: Here, the Executive is dictating the content of a legal doctrine to which the judiciary, again, is bound. Unlike the preceding category, however, the Executive's position is developed directly in response to present or pending litigation. Examples here include the State Department's view of its role following *Samantar*, the decision to place a state on the lists of state sponsors of terror *after* an act giving rise to litigation,[51] and some determinations about "head of state" immunity.[52] Several of these acts of executive lawmaking are most problematic for they raise the concern that the Executive Branch is, effectively, shaping the content of a legal doctrine to suit a preferred policy outcome. Moreover, to the extent the Executive is engaging in lawmaking without congressional authorization (as, for example, in the *Bernstein* letter context), it lacks the sanction of the other political branch with shared responsibility for the foreign relations power.[53]

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47. *See* BORN & RUTLEDGE, *supra* note 21, at 16–17 (describing executive agreements made either by the President and Congress or by the President alone, which take the form of international agreements that have the same legal effects as treaties).

48. 28 U.S.C. § 1605A (2006).

49. Other examples of this sort of executive lawmaking such as head of state immunity do not take place pursuant to legislative authorization. I address these in greater detail *infra*, note 127.

50. *See supra* notes 45–48.

51. 28 U.S.C. § 1605A(a)(2).

52. *See* BORN & RUTLEDGE, *supra* note 21, at 257 (describing the Executive Branch's view that its "suggestions" of immunity with respect to foreign heads of state are binding on courts).

53. By contrast, the post-conduct determination that a foreign state operated as a state sponsor of terror does not raise this problem because it occurs pursuant to congressional authorization. *See* 28 U.S.C. § 1605A (authorizing a terrorism exception to jurisdictional immunity of a foreign state where that state has been designated as a state sponsor of terror). Similarly, the Diplomatic Relations Act authorizes the President "on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission, the members of the mission, their families, and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention." Diplomatic Relations Act, 22 U.S.C. § 254c (2006).

To this point, I have justified a novel framework for thinking about the various roles played by the Executive Branch in matters of international civil litigation, and I classified *Samantar* in that framework. Now I wish to focus on why the adjudicative function (the function at issue in *Samantar*) is especially troublesome. Two concerns seem paramount.

First, the adjudicative role raises distinct separation-of-powers considerations. Recall that the starting point of any case is an express authorization of subject matter and personal jurisdiction by Congress.[54] Many cases, moreover, will involve a congressionally created cause of action, which the federal courts are designed to vindicate. Courts resolve cases by principled, neutral application of stable, predictable rules to the facts as developed in the litigation.

Seen against this backdrop, the adjudicative function threatens separation-of-powers principles both with respect to Congress and with respect to the courts. With respect to Congress, it hinges the exercise of congressionally sanctioned jurisdiction on a post hoc executive determination.[55] To the extent that the Executive determines that an official is immune from suit, that determination undermines the congressionally sanctioned scheme of jurisdiction and relief.[56]

With respect to the judiciary, it runs the risk that the immunity determination will be the product of politically motivated decision making rather than neutral application of legal principles. To the extent that the Executive determines that an official is not immune, the determination raises the risk that it will reflect a political calculus by the Executive Branch (whether in response to foreign political pressure or, alternatively, in an effort to advance an internal political agenda). Consequently, "the Court becomes a mere errand

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54. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 275 (Robert C. Clark et al. eds., 6th ed. 2009).

55. Justice Jackson's familiar *Youngstown* framework lurks in the background here. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring). I do not develop it fully in this essay but would make several observations. First, some executive acts taken in the adjudicative capacity—specifically those authorized by Congress—raise fewer separation-of-powers concerns. As noted above, post hoc determinations that a foreign state should be listed as a state sponsor of terror or post hoc determinations about diplomatic immunity fall within this category. *See supra* notes 51–53 and accompanying text. Second, when dealing with the relationship between executive power and federal common law, cases fall somewhere between Justice Jackson's second and third category. For reasons indicated here, specifically the tension with the FSIA, I would be inclined to classify the immunity determinations envisioned by the State Department after *Samantar* in the third category. For a thoughtful explication of the relationship between *Samantar* and the *Youngstown* framework, see Wuerth, *supra* note 6.

56. *See supra* text accompanying note 43 (describing the Court's "unflagging obligation" to exercise jurisdiction).

boy for the Executive Branch which may choose to pick some people's chestnuts from the fire but not others'."[57]

The executive intrusion into the judicial prerogative is not limited to the determination of the applicable legal principle, but also extends to the factual determinations underpinning the application of that principle. Any immunity determination will turn not simply on the law, but also the facts. In a judicial setting (or even an administrative setting for that matter), the facts are developed in accordance with specified procedures and rules governing pleading and proof.[58] By contrast, the State Department's methods for gathering, weighing, and resolving conflicts among the factual propositions relevant to immunity determinations lack any such safeguards. This may be relatively innocuous in a case like *Samantar* where the key facts appear to be relatively uncontested ones (the lack of recognition of an official government and the present residence of Samantar).[59] They may be far more important in a case that turns on whether a foreign official was acting in his "official capacity."[60] Yet the government's position effectively locks courts into accepting the Executive Branch's factual determinations without any examination of either their accuracy or the processes by which they were determined.

Indeed, the threat to independent judicial determination is arguably greater under the State Department's post-*Samantar* view than was the case historically. As the Supreme Court noted in *Samantar*, prior to the FSIA, the judicial role in the immunity determination varied with the position taken by the Executive Branch.[61] When the Executive Branch recommended immunity, the Judicial Branch was bound by the recommendation and "surrendered its jurisdiction."[62] Conversely, when the Executive Branch did not respond to a foreign sovereign's request for a suggestion of "immunity," the courts could independently make the immunity determination.[63] Admittedly, in these cases, the court would attempt to approximate how the matter would come out under the State Department's standard, and the Department's refusal to file a suggestion would be strong proof that it believed the sovereign was

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57. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

58. STEPHEN C. YEAZELL, CIVIL PROCEDURE (4th ed. 1996).

59. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2283 (2010).

60. For an example of a pre-FSIA case where a party disputed the factual predicates underpinning the State Department's recommendation, see Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 723–24 (E.D. Va. 1961) (noting a factual dispute as to the ownership of the vessel as the result of a mutiny that took place prior to the U.S. Coast Guard taking control of the vessel).

61. BORN & RUTLEDGE, *supra* note 21, at 236.

62. *Samantar*, 130 S. Ct. at 2284.

63. *Id.*

not entitled to immunity.[64] Nonetheless, the ultimate determination was an independent one.

The post-*Samantar* remand, however, presents a more exceptional state of affairs. Here the Executive Branch is affirmatively filing a conclusion that the foreign official is *not* entitled to immunity[65] (rather than simply declining to file and leaving the matter for the court to decide).[66] The court then rejects the immunity claim citing nothing other than the State Department's negative filing.[67] Technically, then, the government's current view broadens the circumstances in which the Executive Branch can tie the court's hands.[68]

The risk of politicization undermines Congress's intentions in this area. A key shortcoming of the pre-FSIA regime was that

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64. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 31–32, 38 (1945) (stating that the government's failure to recognize immunity is proof of the national policy not to extend immunity); Compañía Española de Navegación Marítima, S.A., v. The Navemar, 303 U.S. 68, 71, 74 (1938); Heany v. Gov't of Spain, 445 F. 2d 501, 503 (2d Cir. 1971) (stating that the State Department's failure to suggest immunity is a significant factor to consider when deciding whether immunity should be granted).

65. *See* Samantar Statement of Interest, *supra* note 4, at 6 ("Because the Executive Branch is taking an express position in this case, the Court should accept and defer to the determination that the Defendant is not immune from suit.").

66. Ironically, shortly after it filed in *Samantar*, the State Department declined to express its views in another case. *See* Letter from Preet Bhara, to Hon. Lewis Kaplan, Chevron Corp. v. Donziger, No. 1:11-cv-00691-LAK (S.D.N.Y. Feb. 15, 2011). In the interest of disclosure, I should note that since drafting this essay I was retained to file an amicus brief in the *Chevron* litigation while it was on appeal in the Second Circuit.

67. Wuerth, *supra* note 6, at 919 & n.2.

68. *See* Order, Yousuf v. Samantar, No. 1:04 CV 1360 (E.D. Va. Aug. 1, 2007) ("The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court."). In few cases have courts wrestled with the question of whether a defendant is entitled to immunity despite an explicit filing by the State Department reaching the contrary conclusion. For a rare pre-FSIA case in which a court confronted (but declined to rule on) this "interesting question," see N.Y. & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 687 (S.D.N.Y. 1955) (holding that because jurisdiction rested on a writ of attachment against the vessel, and the attachment had been lifted, the court no longer had jurisdiction to hear the case and decide the "interesting question" of sovereign immunity).

In support of its view of deference to a conclusion that immunity is unavailable, the government cites *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945), for the proposition that courts may not broaden immunity beyond the boundaries recognized by the Executive Branch. Even assuming *Hoffman* was properly decided, that does not resolve the matter. *See, e.g.*, Jessup, *supra* note 28, at 168; Wuerth, *supra* note 2, at 924. At most, *Hoffman* stands for the proposition that a court should not extend the scope of common law immunity beyond that established by the settled practice of the Executive Branch. The case does not stand for the radically different proposition that a court is affirmatively *bound* by the Executive Branch's recommendation that an official be denied immunity. Indeed, elsewhere *Hoffman* reaffirms that "[i]n 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." *Hoffman*, 324 U.S. at 34–35.

immunity determinations easily became politicized as the Executive Branch sought to accommodate or advance its foreign policy interests through its determinations of whether a state or an official was entitled to immunity.[69] Even when the determinations were not political, the prospect of complete deference to the Executive Branch created a condition of unwanted pressure for the Executive Branch.[70] The FSIA removed these structural flaws in the system, but the conception of executive lawmaking envisioned by the State Department in *Samantar* threatens to reinstate that state of affairs.

Evolutions in the government's position on the issue of official immunity exemplify these risks. In *Matar v. Dichter*, a pre-*Samantar* case in the Second Circuit involving the immunity of a foreign official, the State Department took the opportunity in its brief to lay out the factors that would guide its own determination of whether a foreign official was entitled to immunity.[71] The test set forth in the *Matar* brief was hardly a model of clarity but at least provided a starting point for some predictability.

Since *Samantar*, the government appears to have abandoned the approach taken in the *Matar* brief almost entirely. Its post-remand statement of interest in *Samantar*, while repeating the general principles of executive control from the *Matar* brief, does not even refer to its standards.[72] At this symposium, various representatives of the State Department distanced themselves from that brief and claimed that it was the product of "another administration."[73] Such shifting views validate fears that the immunity determination will vary with the political winds rather than be the product of principled decision making if the matter were left to courts.

Administrative law provides a useful and valuable analogy here. Under general principles of administrative law, courts will defer to reasonable interpretations of ambiguous statutes by an agency vested with rulemaking authority under those statutes.[74] The interpretation can come in the form of a litigating position provided that the agency's position is principled and consistent.[75] The rationales for this deference rest on a recognition of both the agency's expertise

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69. Republic of Austria v. Altmann, 541 U.S. 677, 716 (2004) (Kennedy, J., dissenting).

70. *See id.* (noting that Congress sought to "[r]educe the foreign policy implications that "resulted from immunity determinations") (quoting H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605–06)).

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

72. *See* Samantar Statement of Interest, *supra* note 4, at 2–6.

73. Sarah H. Cleveland, Louis Henkin Professor in Human and Constitutional Rights, Columbia Law Sch., Remarks at the Vanderbilt Journal of Transnational Law Symposium: Foreign State Immunity at Home and Abroad (Feb. 4, 2011).

74. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–46 (1984); 413 C.J.S. *Public Administrative Law and Procedure* § 95 (2010).

75. Auer v. Robbins, 519 U.S. 452, 461 (1997).

relative to that of the courts, and the Executive's constitutional prerogative to "take care" that the laws are faithfully executed.[76] Measured by this standard, the current Administration's abandonment of its prior position in *Matar* would strip it of any entitlement to deference even under modest constitutionally grounded *Chevron* principles. Given the absolute deference the government is demanding in this context, the risk of intrusion on the judiciary's prerogative to "say what the law is" is even greater.[77]

A recent example, outside the sovereign immunity context, further illustrates how executive acts taken in the "adjudicative role" implicate separation-of-powers concerns. A lingering issue in federal practice is whether appellate courts have jurisdiction over interlocutory orders refusing to dismiss cases on prudential grounds such as comity.[78] Like the immunity of foreign officials, such doctrines are creatures of federal common law. In at least two instances the government took the position that "[b]ecause the United States did not *explicitly* urge dismissal predicated on the adverse foreign relations consequences of these suits, the collateral order doctrine *does not provide* jurisdiction for these appeals."[79]

Here, too, the inter-branch conflict becomes apparent. As a constitutional matter, control over the jurisdiction of the federal courts rests largely with Congress.[80] Pursuant to that power, Congress generally grants appellate jurisdiction over "final decisions" of the district courts (which the Court has interpreted to mean "final judgments").[81]

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76. RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 159 (5th ed. 2010).

77. Marbury v. Madison, 5 U.S. 137, 177 (1803).

78. *See* Rutledge, *supra* note 2, at 602 n.73 (citing Ochoa Lizarbe v. Rivera Rondon, 402 F. App'x 834, 837 (4th Cir. 2010), which "holds, with virtually no analysis, that denials of post-*Samantar* official immunity under federal common law are immediately appealable"). For recent discussions of the various roles that comity can play in international civil litigation, see for example, Donald E. Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010); William S. Dodge, International Comity in American Courts (Am. Soc'y Int'l Law Conference Paper 2009), *available at* http://www.asil.org/files/dodge.pdf.

79. Brief for the United States as Amicus Curiae at 14, Exxon Mobil Corp. v. Doe, 554 U.S. 909 (2008) (No. 07-81); Brief for the United States as Amicus Curiae Supporting Appellees at 12, Balintulo v. Daimler AG, No. 09-2778-cv (2d Cir. 2009). In the interest of full disclosure, I should note that I currently serve as counsel to an amicus curiae supporting the appellants in *Balintulo*.

80. *See* U.S. CONST. art. III; Yakus v. United States, 321 U.S. 414, 465 (1944) ("So much may be rested on Congress's plenary authority to define and control the jurisdiction of the federal courts."); DAVID CURRIE, THE CONSTITUTION OF THE UNITED STATES: A PRIMER FOR THE PEOPLE 9 (2d ed. 2000) (1988) ("While the Necessary and Proper Clause empowers Congress to make federal-court authority over these cases exclusive, it generally has not done so.").

81. 28 U.S.C. § 1291 (2006); Cunningham v. Hamilton County, 527 U.S. 198, 203 (1999) ("[W]e have repeatedly interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case.").

Exceptions to that general rule have either come through statute (such as the immediate appealability of denials of motions to compel arbitration)[82] or through judicial decision (such as the collateral order doctrine).[83] Yet the logic of the Executive Branch's position is that it can override this textual commitment and this longstanding history and, instead, hold the keys to the appellate courthouse. Just like the assertion of control over the immunity determination after *Samantar*, the government's position on the immediate appealability of orders on comity raises concerns that, when the Executive attempts to act in the adjudicative capacity, it will intrude upon the roles played by Congress and the courts.

Second, this adjudicative role for the Executive undermines the clarity and consistency so important to this area of the law. Ironically, in the same term that it decided *Samantar*, the Court announced *Hertz Corp. v. Friend*, a decision interpreting the federal diversity statute.[84] In another unanimous opinion, the Court wrote:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of the case, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake.[85]

Yet in almost every respect, the sort of adjudicative role envisioned by the State Department after *Samantar* is inconsistent with this objective. For one thing, we do not even know whether the "official immunity" test is jurisdictional. Consequently, may a court resolve the "official immunity" question before determining its jurisdiction (as in the forum non conveniens determination), or must it instead resolve jurisdictional and other non-merits issues before it can consider the "official immunity" question (as in the act of state determination)?[86] If the "official immunity" determination is not jurisdictional, can a foreign official successfully remove the case from state court?[87]

Moreover, even assuming that the foregoing impediments can be overcome, what standards will govern the "official immunity"

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82. 9 U.S.C. § 16 (2006).

83. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949) (holding appealable claims that are collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself).

84. 28 U.S.C. § 1332 (2006); Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010).

85. *Hertz Corp.*, 130 S. Ct. at 1193.

86. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432–36 (2007) (holding that a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up any other threshold objection); *see also In re* Papandreou, 139 F.3d 247, 256 (D.C. Cir. 1998) (holding that it is proper to dismiss on ground of forum non conveniens without reaching the FSIA issue).

87. *See* Rutledge, *supra* note 2, at 603–04 (discussing the risk of forum shopping by filing the case in a way to avoid federal jurisdiction).

determination? As already noted, *Samantar* provides no meaningful guidance on this question. Moreover, the government's current position provides virtually no guidance to litigants or courts.

The post-remand statement of interest in *Samantar* exemplifies the problem. Ultimately, the State Department concludes that Samantar is not entitled to immunity.[88] The precise reasons for that conclusion are, however, far from clear. For example, the government's statement explains that the State Department's determination is based "[u]pon consideration of the facts and circumstances in this case, as well as the applicable principles of customary international law."[89] Yet the government's brief does not explain how precisely it takes principles of customary international law into account (apart from a passing reference to the "official capacity" requirement for official immunity).[90]

Elsewhere, the government's brief stresses that two key facts drive its conclusion that Samantar is not entitled to immunity: (1) the lack of a recognized government in Somalia, and (2) Samantar's residence in Virginia since 1997.[91] While these facts are certainly accurate, the government's statement of interest nowhere explains why they are dispositive.[92] Nor does it explain why other facts—such as Samantar's role in the former Somali government and that, at the time of the alleged conduct, the Somali government was recognized by the United States—are seemingly irrelevant to (or less weighty) in the determination. Tellingly, the government's brief places no weight on the fact that Samantar was alleged to have violated the Torture Victim Protection Act and to have sanctioned torture, a violation of customary international law. Can one therefore infer from its failure to mention these factors that such factors are, going forward, irrelevant to the immunity inquiry?

Despite the significance of these two critical facts, the government's statement of interest elsewhere betrays the lingering unpredictability of this inquiry. For example, after identifying the centrality of the two above-referenced facts, the statement of interest contains a massive hedge:

> [The State Department's determination] has taken into account the potential impact of such a decision [denying immunity] on the foreign

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88. Samantar Statement of Interest, *supra* note 4, at 7.

89. *Id.*; *see also* Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to Tony West, Assistant Att'y Gen., U.S. Dep't of Justice (Feb. 11, 2011), *reprinted in* Samantar Statement of Interest, *supra* note 4, exhibit 1 ("In light of these circumstances, taking into account the relevant principles of customary international law, and considering the overall impact of this matter on the foreign policy of the United States, the Department of State has determined that Defendant Samantar does not enjoy immunity . . . .").

90. Samantar Statement of Interest, *supra* note 4, at 8.

91. *See id.* at 7–9.

92. *Id.*

> relations of the United States. In future cases, presenting different circumstances, *the Department could determine either 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 a civil suit for acts that were not taken in an official capacity.[93]

In other words, the two above-mentioned facts are "particularly significant," except when the State Department says they are not.

The distinction across cases, of course, may turn upon the "potential impact of such a decision on the foreign relations of the United States."[94] The letter from the State Department Legal Adviser, attached to the government's statement of interest, alludes to this matter as well.[95] Yet neither the statement of interest nor the letter explains precisely the method used by the government to weigh the foreign relations impact of the determination. This is curious because, as the government admits, one entity purporting to speak for the Somali government, the Transitional Federal Government (TFG), urged immunity on Samantar's behalf, and the United States "supports the efforts of the TFG to establish a viable central government."[96]

In light of this support (albeit in a situation where the United States does not formally recognize a government in Somalia), how precisely did the State Department take into account the impact of the determination on U.S. foreign relations when it would appear that its immunity determination undermines the efforts of an (unrecognized) entity whose efforts it apparently supports? In contrast to the relatively vague letter offered here, other statements of interest (typically offered when the Executive is speaking in the above-described prudential role) offer a much fuller explanation for how a case would or would not affect the foreign relations of the United States.[97]

Not only does the emphasis on these facts (and their relationship to U.S. foreign relations) raise a host of ambiguities, but the government appears to recognize the tension between its current "totality of the circumstances" approach and the approach set forth in

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93. *Id.* at 9 (emphasis added).

94. *Id.*

95. *Id.* exhibit 1.

96. *Id.*

97. *Compare* Brief of the United States as Amicus Curiae in Support of Affirmance at 16, Corrie v. Caterpillar Inc., 503 F. 3d 974 (9th Cir. 2007) (No. 05-36210) (describing the potential foreign policy implications that would result from adopting aiding-and-abetting ATS liability, including interfering with the Executive's ability to use economic engagement "as a method of encouraging reform and gaining leverage with that country"), *with* Brief for the United States as Amicus Curiae at 12, Exxon Mobil Corp. v. Doe, 554 U.S. 909 (2008) (No. 07-91) (noting that adjudication of respondents' state-law tort claims would interfere with the United States' conduct of foreign policy, but not explaining what the potential foreign policy implications were).

its brief before the Supreme Court. In a footnote in its statement of interest, the government acknowledges that its Supreme Court filing identified a broader array of factors potentially relevant to the immunity determination.[98] Yet now it appears to be attempting to assert even greater discretionary power:

> The identification of certain circumstances that the Executive could or might find it appropriate to take into account served to underscore the range of discretion properly residing in the Executive under the Constitution to make immunity determination in particular cases. It did not reflect a judgment by the Executive that the considerations mentioned were exhaustive or would necessarily be relevant to any particular immunity determination if, as the United States argued to the Supreme Court, the responsibility for doing so was vested in the Executive and not governed by the FSIA. The present filing reflects the basis for the Executive's immunity determination in this case.[99]

From the statement of interest one gets the sense that it is the product of such extensive inter-agency squabble.[100] At the end of the day, the process of achieving consensus around a litigating position will almost certainly prevent the government from articulating any consistent set of standards by which parties or courts can predict across cases whether immunity will attach.

At bottom, if the statement of interest in the post-remand *Samantar* proceedings is any indication, the approach adopted by the State Department hardly provides litigants and courts the sort of guidance that the *Hertz* Court deemed so essential in this area.[101]

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98. Samantar Statement of Interest, *supra* note 4, at 5 n.2.

99. *Id.*

100. As the pre-FSIA practice illustrates, such squabbles can erupt into full-blown public disagreements. Perhaps most famously, in *The Pesaro*, 255 U.S. 216 (1921), the U.S. Department of State had concluded that sovereign immunity should not be accorded, because of its view that the vessel was a commercial one (not a public one) and the dispute was purely commercial. The Department of Justice disagreed, however, and refused to submit the Department of State's views to the Court. The Pesaro, 277 F. 473, 479–80 n.3 (S.D.N.Y. 1921); Other Public Vessels, 2 Hackworth DIGEST § 173, at 429–30, 438–39.

101. Here, it is worth heeding the sage words of John Bellinger III when commenting on the federal common law or executive branch deference framework developed after *Sosa* in the context of litigation under the Alien Tort Statute:

> [C]ase-by-case participation can put the Executive Branch in a difficult spot. Foreign governments will continue to press U.S. administrations to weigh in on their behalf in ATS litigation. If the Executive is expected to weigh in when litigation presents foreign policy concerns, courts may come to infer (wrongly) from its silence in other cases that there are no such concerns. In addition, foreign governments may come to regard the Executive's decisions whether or not to file as a reflection of the United States' view of the bilateral relationship with that government. Domestically, foreign policy submissions will often be read as partisan support for the activities of foreign governments over the deserving interests of plaintiff victims.

John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 11 (2009).

This brave new world after *Samantar* undermines the FSIA's goal of "settl[ing] foreign sovereigns' prospective expectations for being subject to suit in American courts and . . . ensur[ing] fair and evenhanded treatment to our citizens who have claims against foreign sovereigns."[102]

To summarize this part, the Executive Branch performs four different functions in matters of international civil litigation: amicus, prudential, head of state, and adjudicative. These functions differ principally with respect to their effect on separation of powers principles and the extent to which they encroach upon the activities of the coordinate branches of government.

Among the four functions, the adjudicative function (the function that the State Department envisions for itself with respect to foreign official immunity determinations after *Samantar*) is most troublesome. That function undercuts the judiciary's prerogative to determine its own jurisdiction, potentially undermines Congress's legislative prerogative in this area, and undermines the clarity so essential to jurisdictional rules, a clarity that is particularly important in this area of the law. The next section anticipates criticisms of this thesis.

III. CRITICISMS AND RESPONSES

This section responds to potential objections to the view expressed above—namely, that courts should be wary of efforts by the Executive Branch to act in the adjudicative role. Here I consider two such objections—one rooted in historical practice and one rooted in head of state immunity.

The historical criticism is as follows: the Executive Branch has long enjoyed control over immunity determinations, including determinations of the immunity of foreign officials. Given that nothing in the FSIA purported to strip the Executive of that power, permitting the Executive to control the immunity determination merely continues that longstanding practice.

This argument suffers from several flaws. For one thing, it is a bit misleading. The answer turns critically on the level of generality at which it is assessed. At a high level of generality, the proposition is certainly accurate—the Executive Branch has a longstanding history of making "immunity" determinations.[103] At a greater level of specificity, however, the proposition begins to break down. *With respect to foreign government officials*, the practice is neither as

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102. Republic of Austria v. Altmann, 541 U.S. 677, 737 (2004) (Kennedy, J., dissenting).

103. Wuerth, *supra* note 6, at 924.

historically rooted nor as well established.[104] Even the government admitted in its brief in *Samantar* that there were only a few precedents on the issue,[105] and an exhaustive study of State Department determinations of official immunity in the years following the Tate Letter only turned up a few examples.[106]

This analysis naturally begs the question about the appropriate level of generality at which to evaluate executive practice. To this question, there is ample reason to suspect that the more specific level is the proper one. Here, the Court's recent decision in *Medellín v. Texas* is instructive.[107]

Medellín involved, among other things, a claim by the Executive Branch that, pursuant to its power to conduct foreign affairs, an executive order could displace state rules, such as the state procedural default rules in post-conviction proceedings.[108] In support of that position, the government cited the *American Insurance Ass'n v. Garamendi* decision, which held that a sole executive agreement displaced a California law providing for discovery from certain insurance companies and extending the statute of limitations.[109] Critical for present purposes, the *Medellín* Court rejected the government's reliance on *Garamendi* and described *Garamendi* in narrow terms, involving "a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals," which enjoyed "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."[110]

The Court contrasted the "longstanding practice" of congressional acquiescence in executive claims settlement with the "unprecedented action" of a presidential directive addressed to state courts.[111] The *Medellín* Court's skepticism over sweeping assertions of executive power and its narrow characterization of *Garamendi* suggest that it likewise would require a well established historical practice before endorsing the view that the Executive Branch enjoys

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104. *Id.*

105. Samantar Amicus Brief, *supra* note 3, at 9 ("In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit in our courts, the Court historically looked to "the political branch of the government charged with the conduct of foreign affairs" to determine whether immunity should be recognized.").

106. *See generally* Sovereign Immunity Determinations of the Department of State, May 1952 to January. 1977, 1977 DIGEST app., 1017–81.

107. Medellín v. Texas, 552 U.S. 491 (2008).

108. *Id.* at 493–94.

109. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–28 (2003); Brief for the United States as Amicus Curiae Supporting Petitioner at 13, 15, 25, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984).

110. *Medellín*, 552 U.S. at 531.

111. *Id.* at 532.

an unrestricted power over the immunity of foreign officials binding on federal courts.[112]

Moreover, the State Department's proposed approach following *Samantar*, much like the presidential directive in *Medellín*, runs the risk of intruding upon state exercises of jurisdiction. Imagine a case in which a foreign plaintiff sued a former foreign government official in state court (in a manner such that the case does not otherwise qualify for federal jurisdiction).[113] Would the State Department's power to determine the official's entitlement to immunity extend to the state court proceedings? The logic of its position suggests that it would.

For one thing, insofar as that power ultimately derives from its foreign affairs powers, other doctrines—like the act of state doctrine or the political question doctrine—suggest that the executive determination has effect in state court.[114] Moreover, as a functional matter, the State Department's power would have to extend so far; otherwise, a plaintiff could attempt to circumvent the immunity simply through creative forum shopping.[115] Thus, in an effort to effectuate its role, the State Department would be telling the state court how to exercise its jurisdiction, an assertion of executive power to which (when not backed by a congressional sanction or a longstanding practice) *Medellín* expressed great skepticism.[116]

Apart from the level of generality questions, the argument from history suffers from a separate flaw: it overlooks the fact that any assertion of executive power in this area must exist alongside the FSIA. Here it is important to note two possible versions of the historical argument. One argument is firmly rooted in the Constitution and suggests that, pursuant to its general foreign affairs powers (a proposition itself that is more a product of history and

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112. *See* Mark Weisburd, Medellin, *the President's Foreign Affairs Power and Domestic Law*, 28 PENN. ST. INT'L L. REV. 595, 624–27 (2010) (arguing that the *Medellín* opinion essentially narrows the broad language in *Garamendi* that executive agreements concerning with federal foreign policy preempt state law).

113. As I explain elsewhere, *Samantar* sets up precisely this possibility. *See* Rutledge, *supra* note 2, at 603–04.

114. *See* BORN & RUTLEDGE, *supra* note 21, at 763–64 (discussing the similarity of the foreign sovereign immunity rules, the act of state doctrine, and the political question doctrine).

115. Precisely for this reason Congress provided for the removability of suits against foreign states based on the immunity defense. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 489 (1983).

116. *Medellín*, 552 U.S. at 531–32. Admittedly, *Medellín* might be distinguished on the ground that the intrusion in that case concerned final state criminal judgments, as opposed to pending civil cases. As the Court has expressed elsewhere, the state's exercise of its police powers in the criminal context is an especially important component of our federalism. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (commenting on the "sensitive relation between federal and state criminal jurisdiction" in the context of the states' police power).

jurisprudence than text)[117] the Executive controls immunity determinations.[118] The problem with this argument is that, under its logic, the FSIA unconstitutionally intrudes upon that power.[119]

A second, more modest version of the argument is that the Executive Branch has interstitial authority to make immunity determinations subject to congressional override if Congress chooses to regulate the matter by statute (as it did in the FSIA). Under that version of the argument, the need for compatibility between any executive exercise of authority and a parallel congressional enactment becomes clear. Unreviewable State Department determinations about the immunity of foreign officials are inconsistent with that model. Such unreviewable determinations raise a host of questions, such as whether the immunity exceptions are parallel, what law determines whether the government official was acting in his official capacity, and the removability of the case to federal courts.[120] Thus, the historical argument does not justify a system of complete deference to the Executive Branch.

The second objection to the position offered here concerns its implications for head of state immunity.[121] Regardless of how official immunity should be determined, it remains the case that the Executive Branch determines whether a foreign official qualifies as a head of state.[122] When the Executive so determines, that determination binds the lower courts and requires them to dismiss the case against the head of state.[123] This determination is not

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117. *See* BORN & RUTLEDGE, *supra* note 21, at 18 (acknowledging executive foreign affairs powers "[d]espite fairly modest textual foundation in the Constitution.").

118. *See* Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 925–26 (2011) ("[Deference to] Executive Branch determinations of foreign sovereign immunity . . . [is] grounded in the Constitution's separation of powers and the Executive Branch's lead role in foreign affairs.").

119. *See* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 304 (1986) ("[Pressured] for change . . . the State Department had become an advocate for transferring the resolution of sovereign immunity disputes to the courts. . . . The executive branch sent a first draft of the FSIA to Congress early in 1973.").

120. *See* Rutledge, *supra* note 2, at 597–605 (providing analysis of these questions).

121. Similar questions arise with respect to special missions immunity, another foreign relations immunity rooted entirely in federal common law and predicated on executive lawmaking. *See* Convention on Special Missions, *opened for signature* Dec. 16, 1969, 1400 U.N.T.S. 231 (entered into force June 21, 1985) (outlining international agreements regarding bounds of special missions immunity); Li Weixum v. Bo Xilai, 568 F. Supp. 2d 35, 38 (D.D.C. 2008) (collecting cases on executive branch involvement in special missions immunity); *Draft Articles on Special Missions with Commentaries*, [1967] 2 Y.B. Int'l L. Comm'n 347, U.N. Doc. A/CN.4/SER.A/1967/Add.1 (clarifying the intended bounds of special missions immunity). On this point, I thank Ed Swaine for his guidance.

122. *See* BORN & RUTLEDGE, *supra* note 21, at 239 (observing that recognition of foreign entities "has been left largely to the discretion of the U.S. Executive Branch").

123. *See, e.g.*, Wei Ye v. Jiang Zemin, 383 F.3d 620, 630 (7th Cir. 2004) ("We are required to defer to the decision of the Executive Branch."); United States v. Noriega,

limited only to premiers of the state, but can extend to senior ministers acting on the premier's behalf as well as family members.[124]

I acknowledge that head of state immunity raises a particular challenge to the view advanced here. Like official immunity determinations after *Samantar*, it exemplifies the sort of executive activity I have characterized as adjudicative.[125] Those determinations are being made without any congressional authorization.[126] Moreover, as I understand from conversations with current and former State Department employees who have been involved in such determinations, they often are made after the Executive Branch is aware of the pending litigation, in contrast to the credentialing of diplomats. Thus, if my criticism of adjudicative determinations by the Executive Branch is accurate, then head of state immunity doctrine at least is in need of revision.

Ultimately, though, I do not think that the view offered here is inconsistent with the current doctrine of head of state immunity.[127] The critical distinction between head of state immunity and foreign official immunity (as in *Samantar*) is that the Executive Branch's role to make head of state immunity enjoys an explicit constitutional basis. Specifically, Article II vests the Executive with the power to "make treaties" and to "receive Ambassadors and other public Ministers."[128] These are among the few powers related to the maintenance of foreign affairs that the Constitution expressly confers on the Executive Branch.[129]

Once one accepts the textual basis for these powers, it naturally follows that the Executive Branch must have the ability to engage in interstate relations with heads of state. Immunity then becomes necessary to facilitate those interstate relations. Thus, head of state immunity represents a limited area, traceable to an express constitutional provision, where the Executive Branch appropriately enjoys an adjudicatory role.

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117 F.3d 1206, 1212 (11th Cir. 1997) ("[W]here the Executive Branch either *expressly* grants or denies a request to grant immunity, court must follow that direction . . . ."). *See generally* BORN & RUTLEDGE, *supra* note 21, at 257 (discussing head of state immunity and the weight given by courts to the views of the Executive Branch).

124. *See* BORN & RUTLEDGE, *supra* note 21, at 255 (concluding that head of state immunity extends beyond heads of state themselves).

125. *See supra* Part II.

126. *Id.*

127. Here, I wish to express my gratitude to Lewis Yelin for his thoughts on this point, as we both have grappled with the conceptual relationship between head of state immunity and foreign official immunity under *Samantar*.

128. U.S. CONST. art II, § 2.

129. *See* BORN & RUTLEDGE, *supra* note 21, at 18 n.123 (noting the Constitution's "not especially impressive" grants of foreign affairs authority to the President).

By contrast, foreign official immunity stands on very different footing. Such immunity determinations advance neither the Executive Branch's power to "make treaties" nor its power to "receive" ambassadors and public ministers.[130] Rather, as the State Department appears to conceptualize it, foreign official immunity concerns an assessment of (a) the acts taken by the foreign official (often on foreign sovereign territory) and (b) any present circumstances (such as the position of the current government or the whereabouts of the foreign defendant) that affect the official's amenability to jurisdiction.[131] Such determinations neither explicitly nor implicitly implicate these textually conferred powers of the Executive Branch.

IV. CONCLUSION

Samantar represents the latest iteration in an ongoing debate about the relationship between federal common law and executive power. While the Executive Branch can fulfill various roles in litigation touching upon the foreign relations of the United States, the adjudicative role, which is the role apparently granted to the government in foreign official immunity determinations after *Samantar*, is the most problematic (at least when it is not pursuant to a congressional mandate). That role raises significant separation-of-powers concerns and undermines the clarity so essential in cases of this sort.

This conclusion carries two important implications. First, courts should be wary of efforts by the Executive Branch to extend its adjudicatory role into other areas. Second, and perhaps more controversially, these concerns counsel more generally against judicial adventures into the field of federal common law, particularly where that exercise of federal common law sits at best uncomfortably alongside a congressional statute regulating a closely related area. The Court would be far better to refrain from such adventures and thereby spark Congress to fill the gap in its statutory scheme.[132]

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130. U.S. CONST. art II, § 2.

131. *See* Samantar Amicus Brief, *supra* note 3, at 6 ("[T]he Executive reasonably could find it appropriate to take into account petitioner's residence in the United States . . . the nature of the acts alleged . . . and the lack of any recognized government of Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity . . . .").

132. *See* Rutledge, *supra* note 2, at 606–08 (advocating similar judicial pressure on Congress to close the doctrinal gaps in sovereign immunity law).

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