Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department

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The immunity of foreign states from suit in U.S. courts is governed by a federal statute, the Foreign Soveriegn Immunities Act (FSIA). This statute does not apply to the immunity of individual foreign officials, however, as the Supreme Court recently held in Samantar v. Yousuf. *Instead, the Court reasoned, the immunity of foreign government officials is controlled by common law. But there is no extant body of federal or state common law governing foreign official immunity, and the Court did not clarify how this law should be developed going forward. The State Department claims that it holds constitutional power to make indvidual immunity determinations on a case-by-case basis that are binding on the courts, and that the immunity principles articulated by the government should be followed even in cases where it does not make a specific determination.*

I argue in this article that the executive branch lacks such "lawmaking" power. I examine the text and structure of the Constitution, functional and historical arguments, the Court's case law, and implied congressional authorization, and I reject each of these as possible grounds for the power asserted by the executive branch. Instead, I assert that the development by courts of a federal common law of individual immunity (with no binding authority in the executive branch) fits comfortably within the

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existing jurisprudence on federal common law and is preferable on functional grounds. Federal common law should be constrained in some respects, however, by the content of the FSIA, by customary international law, and by the views of the executive branch on certain discrete issues.

INTRODUCTION

The relationship between judicial and executive power in the area of foreign relations is complex and highly contested.[1] Although the war- and terrorism-related cases raising this issue are well known,[2] the Supreme Court recently opened another chapter in this debate through a more obscure case on foreign official immunity. The case, *Samantar v. Yousuf*,[3] held that the Foreign Sovereign Immunities Act ("FSIA")[4] does not apply to claims against individual government officials.[5] Had the Court reached the opposite conclusion — that the statute *does* apply — it would have avoided difficult questions about the scope of executive and judicial power. But the Court held the statute inapplicable and provided little guidance as to how immunity claims by individual foreign defendants should be resolved. The Court did note that such claims are governed by the "common law," perhaps with a role for the State Department in resolving them.[6] These casual references to "common law" and to the "State Department's role" mask deep doctrinal uncertainty and heated scholarly debate about federal common law in the area of foreign relations[7] and the power of the executive

1. *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS, DOES THE RULE OF LAW APPLY IN FOREIGN AFFAIRS? (1992); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 313–21 (1990); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 148 (1990); Daniel Abebe & Eric Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 541–44 (2011); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659–63 (2000); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 813 (1989); Robert Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1758–74 (2007); Louis Henkin, *The Foreign Affairs Powers of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 821–32 (1964); Alfred Hill, *The Law-making Power of the Federal Courts*, 67 COLUM. L. REV. 1024, 1050–55 (1967); Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168, 169 (1946); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1232–36 (2007); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 199–204 (2006); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1198–218 (2007); Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 773–76, 780–90 (2008); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 311–30 (2006); Lewis Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 45 VAND. J. TRANSNAT'L L. (forthcoming 2011) (on file with Virginia Journal of International Law Association).

2. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 793–98 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004); Korematsu v. United States, 323 U.S. 214, 224–26 (1944) (Frankfurter, J., concurring); *id.* at 233–42 (Murphy, J., dissenting); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 78–80 (1866).

3. 130 S. Ct. 2278 (2010).

4. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611 (2006).

5. *See Samantar*, 130 S. Ct. at 2282.

6. *Id.* at 2292.

7. *See* Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional*

branch to create domestic rules of decision binding on the courts.[8] The courts' resolution of these issues will have far-reaching implications for theories of federal common law and executive power generally. The fallout from *Samantar* will be significant, and not just for immunity cases.

The State Department asserts that it has complete control over foreign official immunity determinations in U.S. courts;[9] this includes the power to resolve immunity issues on a case-by-case basis as well as the power to make immunity policy binding on the courts.[10] On remand, the district court in *Samantar* accepted the State Department's argument without discussion.[11] But there are competing sources of law other than the executive branch that courts might draw on to resolve immunity issues: federal common law, international law, or state law. This choice

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Interpretation, 96 CALIF. L. REV. 699, 729–30 (2008) (responding to Craig Green's article below); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1264–70, 1291–311 (1996) [hereinafter Clark, *Federal Common Law*] (describing the general debate about federal common law, and re-conceptualizing some areas of federal common law, including the federal common law of foreign relations); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1632 (1997) (arguing that the federal common law of foreign relations should be eliminated); Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 660 (2008) (arguing for a better definition of federal common law and for its broad application); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 585–93 (2006) (describing the general debate around federal common law).

8. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 54–61 (2d ed. 1996); MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 104–08, 283–99 (2007); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1442–52 (2001); Van Alstine, *supra* note 1, at 316–59.

9. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031 at *7, *27–28 [hereinafter *Samantar* Brief]; Brief for the United States as Amicus Curiae Supporting Affirmance, Matar v. Dichter, 563 F.3d 9 (2d Cir. 2007) (No. 07-2579-cv), 2007 WL 6931924 at *6–15; Statement of Interest and Suggestion of Immunity of and by the United Sates of America, Claudia Bacaro Giraldo v. Drummond Co, Inc., No. 1:10 Civ. 00764 (D.D.C. March 31, 2011) [hereinafter *Giraldo* Suggestion of Immunity]; Statement of Interest of the United States of America at 2–4, Yousuf v. Samantar, No. 1:04 Civ. 1360 (E.D. Va. Feb. 14, 2011) [hereinafter *Samantar* Statement of Interest]. The *Samantar* Statement of Interest was signed and filed by the Department of Justice. Attached to the Statement of Interest was a letter from the State Department's Legal Advisor, Harold Hongju Koh, to the Department of Justice, asking it to convey to the court the State Department's conclusion that the Defendant, Mr. Samantar, is not immune from suit in this case. *Samantar* Statement of Interest, *supra*, at Ex. 1; *see also Giraldo* Suggestion of Immunity, *supra*, at Docs. 13-2, 1-2 (following same procedure).

10. The State Department does not always make an immunity recommendation. *See* Letter from Preet Bharara to Judge Lewis A. Kaplan, Chevron Corp. v. Donziger, No. 1:11-cv-00691 (S.D.N.Y. Feb. 15, 2011), ECF No. 114 (indicating that the State Department declines to express its views in a case raising immunity issues). The State Department maintains that courts must defer not just to its case-by-case suggestions of immunity, but also to "the generally applicable principles of immunity articulated by the Executive Branch." *See Samantar* Brief, *supra* note 9, at *7, *28.

11. Order, Yousuf v. Samantar, No. 1:04 CV 1360 (E.D. Va. Feb. 15, 2011) (ordering, based on the Statement of Interest, that the defendant was not entitled to immunity).

will have obvious significance for cases against individual foreign officials. Many of these, like *Samantar* itself, are international human rights cases based on the Alien Tort Statute (ATS) or the Torture Victim Protection Act (TVPA).[12] Individual immunity issues may also arise in cases involving commercial law, property, and other claims.[13] And, as mentioned above, the source of law that courts adopt in foreign official immunity cases will help define the courts' power to develop both federal common law in the area of foreign relations generally,[14] and the executive branch's power to create domestic law binding on the courts.[15]

This Article analyzes the State Department's claim that it controls foreign official immunity determinations in U.S. courts in the absence of a federal statute.[16] Part I considers the State Department's power in light of the text of the Constitution, history, functional arguments, and the possibility of implied congressional authorization through the FSIA. There are two lines of cases particularly relevant to the State Department's assertion of constitutional power to control immunity determinations in domestic courts. First, the *Samantar* opinion cited the World-War-II-era and pre-FSIA immunity cases *Ex parte Peru*[17] and *Republic of Mexico v. Hoffman*,[18] which were resolved either through case-by-case deference to the executive branch or based on the general immunity principles articulated by the State Department when the Department did not make a case-specific suggestion.[19] These cases

12. *See, e.g.*, Samantar v. Yousuf, 130 S. Ct. 2278 (2010); *see also* Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009); *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 81 (2d Cir. 2008); Belhas v. Ya'alon, 515 F.3d 1279, 1286 (D.C. Cir. 2008); Enahoro v. Abubakar, 408 F.3d 877, 882 (7th Cir. 2005). For more background on the *Samantar* case, see David P. Stewart, Samantar v. Yousuf*: Foreign Official Immunity Under Common Law*, 14 ASIL INSIGHTS, June 14, 2010, *available at* http://www.asil.org/files/insight100614.pdf.

13. *See, e.g.*, Abi Jaoudi and Azar Trading Corp. v. Cigna Worldwide Ins. Co., 391 Fed. App'x 173, 175 (3d Cir. 2010) (breach of contract, insurance); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002) (fraud, misrepresentation); RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382, 395 (S.D.N.Y. 2009) (tortious interference).

14. *See infra* Part II.

15. *See infra* Part I.

16. A federal statute governing foreign official immunity would be constitutional, *see* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497–98 (1983) (upholding federal stattute governing foreign state immunity), with the possible exception of some status-based immunity issues that fall within the exclusive power of the President. *See infra* Part III.C.2. A statute might also be preferable to either judicial or executive law-making, an issue that this Article does not address. This Article considers instead the respective powers of the courts and executive branch in the absence of controlling federal legislation.

17. 318 U.S. 578 (1943).

18. 324 U.S. 30 (1945).

19. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010) (citing *Hoffman*, 324 U.S. at 34–36; *Ex parte Peru*, 318 U.S. at 587–89; Compañía Española de Navegación Maritíma, S.A. v. The Navemar, 303 U.S. 68, 74–75 (1938)).

might point toward very broad executive control of immunity determinations in both state and federal courts, as the State Department maintains.[20] But both cases were in admiralty,[21] they said very little about the basis for deference to the State Department,[22] the Court has not reaffirmed them when it has had the opportunity to do so,[23] and subsequent cases have arguably undermined the basis for broad deference to the executive branch. As a practical matter, State Department resolution of immunity cases did not work well and effectively came to an end in 1976 with the enactment of the FSIA, although lower courts have continued to defer to the executive branch in a handful of head of state immunity cases.[24]

The second relevant line of cases discussed in Part I relates to the settlement of international claims by the President through the use of the sole executive agreements. Sole executive agreements are internationally binding accords concluded by the President; the agreements are not submitted to the Senate for approval as a treaty and they are not implemented by a statute. In two cases from the late 1930s and early 1940s, *United States v. Belmont*[25] and *United States v. Pink*,[26] the Court enforced sole executive agreements, effectively preempting state law.

Together with the immunity cases from the same time period, the claim settlement cases are the primary examples of the President's "lawmaking power" — where the President supplies the rule of decision binding in domestic court, pursuant to neither a statute nor a treaty.[27] Although the Court has since reaffirmed the claim settlement cases,[28] and even appeared to expand them,[29] more recently it has reasoned that they are narrowly limited to specific claim-settlement contexts based on the acquiescence of Congress, apparently rejecting the argument that they stand for a broader presidential power to make domestic law.[30] Thus the Court's recent case law in this area is unclear, raising the

20. *See Samantar* Statement of Interest, *supra* note 9, at 3.

21. Some state and lower court cases were not in admiralty. *See, e.g.*, Republic of Cuba v. Dixie Paint & Varnish Co., 123 S.E.2d 198 (Ga. Ct. App. 1961).

22. *See* Jessup, *supra* note 1, at 168–69.

23. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 789–90 n.13 (1972) (Brennan, J., dissenting, joined by Stewart, Marshall & Blackmun, JJ.).

24. *See, e.g.*, Ye v. Zemin, 383 F.3d 620, 625–27 (7th Cir. 2004); *see also infra* Part III.C.2 (discussing status-based immunity in general, and head of state immunity in particular); *see generally* Yelin, *supra* note 1, manuscript at 72–74 (collecting head of state immunity cases).

25. 301 U.S. 324 (1937).

26. 315 U.S. 203 (1942).

27. *See* HENKIN, *supra* note 8, at 54–57; Hill, *supra* note 1, at 1052–53.

28. *See* Dames & Moore v. Regan, 453 U.S. 654, 679–80 (1981).

29. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415–20 (2003).

30. *See* Medellín v. Texas, 552 U.S. 491, 530–32 (2008).

constitutional stakes in the immunity context. If the executive branch controls immunity determinations in U.S. courts, then it may also have the constitutional power to control other kinds of foreign affairs litigation, even in the absence of a federal statute or treaty. This issue is the subject of a growing number of lower court cases that illustrate the unclear boundaries of both executive lawmaking authority and federal common law.[31] In addition to analyzing the relevant case law and explaining what is at stake, Part I maintains that the State Department's constitutional arguments are not convincing. Based on constitutional text and history, the decisions in *Ex Parte Peru* and *Hoffman* were wrongly reasoned — if not wrongly decided — and the claim settlement cases provide only limited support for State Department control of official immunity determinations.

The State Department's power to make binding immunity determinations might also be defended based on congressional authorization and on functional grounds. Although the State Department has not yet explicitly advanced this argument, the FSIA might be understood as implicitly preserving the pre-FSIA executive suggestion system in official immunity cases. This reading should be rejected. The statute did not preserve the executive suggestion system because that system cannot function in the same way after the enactment of the FSIA. To apply the old system of executive control to questions of individual official immunity and the statute to questions of state immunity would create a high risk of inconsistent adjudications — even though the statute was designed to eliminate inconsistent adjudications — because issues of official and state immunity often overlap. This same point provides functional reasons to reject executive control of official immunity determinations. Even if the State Department's individual immunity determinations are generally well reasoned and meritorious — as they surely will be — there are strong grounds to conclude that executive control of official immunity determinations simply will not work well in practice *over time*, especially when the courts control determinations of foreign *state* immunity pursuant to the FSIA.

31. The Ninth Circuit recently decided a case in which the panel held that a California statute extending the statute of limitations for claims brought by victims of the Armenian Genocide was preempted by executive policy, which opposed formal recognition of the Armenian genocide. That decision was subsequently withdrawn and the panel issued a new opinion holding that the California statuate was not preempted. Movsesian v. Victoria Versicherung AG, 578 F.3d 1052, 1056–63 (9th Cir. 2009), *withdrawn*, *reh'g granted*, 629 F.3d 901, 905–08 (9th Cir. 2010); *see also In re* Assicurazioni Generali, S.P.A., 592 F.3d 113, 117–20 (2d Cir. 2010) (holding that state law was preempted by executive policy); Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 961–68 (9th Cir. 2010) (striking down state law based on federal common law of foreign relations, not executive branch policy).

Part II defends federal common law — with no determinative control by the executive branch — as the best source of law to apply in making foreign official immunity determinations. Since its decision in *Banco Nacional de Cuba v. Sabbatino*,[32] the Court has held that some matters come within the federal common law of foreign relations — including the "act of state" doctrine at issue in that case.[33] Although the act of state doctrine and sovereign immunity are conceptually quite similar, the Court has refused to link the act of state doctrine to the President's lawmaking power, concluding instead that the doctrine should be developed by the federal courts without a significant role for the executive branch.[34] For litigants and commentators who seek to limit the State Department's power in immunity cases, *Sabbatino* will offer attractive precedent. The Court has relied on federal common law infrequently in foreign affairs cases, however, in the years since *Sabbatino*.[35] Even in the act of state context, the Court has applied federal common law narrowly and has not returned to the issue of the scope or basis of federal common law in foreign affairs.[36] Foreign official immunity cases thus give the courts the opportunity to revitalize federal common law in the area of foreign relations or to reject it definitively in favor of either executive control of immunity cases or the application of state law.

As a matter of doctrine, Part II argues, official immunity determinations fall comfortably within the current ambit of federal common law. In addition to the *Sabbatino* case, both *First National City Bank v. Banco Para El Comercio Exterior de Cuba*[37] and *Boyle v. United Technologies Corp.*[38] support this result. The Court applied federal common law in *First National City Bank*, not the approach advocated by the executive branch, to resolve an immunity issue that fell outside the scope of the FSIA itself.[39] In *Boyle*, the Court determined that the liability of military contractors is governed by federal common law and created the "military contractor defense," in part to effectuate the goals of the Federal Tort Claims Act.[40] Similarly, federal common law is necessary here to effectuate the goals of the FSIA. In short, courts should apply federal common law based on the

32. 376 U.S. 398 (1964).

33. *Id.* at 423–27.

34. *Id.* at 420; *see also* W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp., 493 U.S. 400, 408–09 (1990); Nat'l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 363 (1955).

35. *See* Goldsmith, *supra* note 7, at 1632.

36. *See id.*

37. 462 U.S. 611 (1983).

38. 487 U.S. 500 (1988).

39. 462 U.S. at 620–22, 34 n.27.

40. *Boyle*, 487 U.S. at 511–13.

low interests of the states in regulating foreign official immunity, the implied wishes of Congress in federalizing the field with the enactment of the FSIA, the unique federal interests involved, and the constitutional and functional difficulties that attend wholesale deference to the executive branch.

Part II also considers foreign official immunity determinations in light of several theories of federal common law. As the rationale for applying state law to official immunity determinations is extremely weak, this discussion focuses on federal common law and separation of powers, rather than federalism specifically. The theories considered provide justifications for concluding that state law does not apply to foreign official immunity determinations, even in diversity cases, but they provide far less traction on the problem of federal court versus executive determinations of foreign official immunity. Federal courts must have some power to resolve the immunity question when they are confronted with it in cases properly before them, however, and doing so requires more than applying formalistic rules that reserve the real decision-making to the political branches.

Part III sets out the general approach that courts should take in individual immunity cases after *Samantar*, focusing in particular on the role of the State Department. Even if the executive branch is not entitled to resolve each immunity case itself or to set out law that is binding on the courts, it is nevertheless entitled to deference on certain discrete issues, including the preconditions for the conferral of status-based immunity and its policy regarding the desirable development of customary international law. In some situtations, this will mean very significant deference to the views of the executive branch. Courts should not, however, simply replace generalized executive branch lawmaking with "substantial" deference on all issues. Also, the courts' application of federal common law should itself be constrained by the provisions of the FSIA and by the content of international law. Determinations of official immunity may in some circumstances threaten to put the United States in violation of international law, and in these cases courts should develop federal common law to avoid violations and potential violations of international law. In general, this approach will favor immunity.

I. FOREIGN OFFICIAL IMMUNITY AND EXECUTIVE LAWMAKING

This Part begins with a brief history of immunity in U.S. courts and then explores the State Department's claim that it should have the

authority to making binding determinations of official immunity.[41] It argues that the Court's cursory reasoning in *Ex parte Peru*[42] and *Republic of Mexico v. Hoffman*[43] is unconvincing in the light of the text and structure of the Constitution. This Part also concludes that conferring on the executive branch the power to make binding individual immunity determinations would expand its domestic lawmaking authority beyond the limited claim settlement context in which the Court has already recognized it. Functional reasoning that might provide the basis for executive power is undermined by pre-FSIA experience, in which executive control of state immunity determinations proved problematic and was abandoned with the enactment of the FSIA. Instead, the strongest argument in favor of complete executive control is that prior to the enactment of the FSIA the executive exercised complete discretion over official immunity, and that the statute implicitly authorized the practice to continue in cases against individual foreign officials, which are not explicitly covered by the Act itself. This argument is weakened by the fact that very few official immunity cases were decided pre-FSIA, so there is little reason infer congressional authorization. The FSIA also changes the context in which official immunity determinations are made, creating the risk that the statute will be undermined if courts make some determinations while the executive branch makes others.

A. A Short History of Foreign Sovereign Immunity

The history of foreign sovereign immunity in U.S. courts has been recounted in detail elsewhere.[44] A brief version suffices here. The doctrine dates back to Justice Marshall's 1812 opinion in *Schooner Exchange v. McFaddon*,[45] holding a French warship docked in the United States immune from suit in U.S. courts.[46] During the nineteenth and early twentieth centuries, both state and federal courts generally made immunity determinations by relying in part on customary international law.[47] Courts deferred to the executive on some questions,

41. *See supra* note 9.

42. 318 U.S. 578, 588–89 (1943).

43. 324 U.S. 30, 35–36 (1945).

44. *See, e.g.*, THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 26–253 (1970); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 27–28, 134–45 (1999).

45. 11 U.S. (7 Cranch) 116 (1812).

46. *Id.* at 136–47.

47. *See, e.g.*, Long v. Tampico, 16 F. 491, 494–95 (S.D.N.Y. 1883); Hassard v. United States of Mexico, 29 Misc. 511, 512–13 (N.Y. Sup. Ct. 1899), *aff'd* 173 N.Y. 645 (1903). Federal courts' decisions were not binding on state courts and state court decisions applying customary international law were not understood as raising federal questions. *See, e.g.*, New York Life Ins.

such as the existence of the government in question, but did not view themselves as bound by the executive's suggestion of immunity.[48] During this period, foreign sovereigns in national courts enjoyed a high level of immunity and exceptions, if any, were not widely recognized.[49] An immunity doctrine that allows no exceptions save for the consent of the sovereign is called the "absolute" or "classical" approach.[50] Beginning in the late nineteenth and early twentieth centuries, commercial activity by sovereigns increased and some nations began to recognize explicit exceptions to immunity, especially when sovereigns were engaged in trade or commerce. This is known as the "restrictive" approach.[51] U.S. courts were generally slow to embrace the restrictive approach.[52]

Immunity determinations in the United States began to change in the 1930s in a series of cases culminating in *Republic of Mexico v. Hoffman*,[53] in which the Court began to defer to the executive branch on all aspects of immunity, including its applicability in particular cases, and the law of immunity that should be applied in the absence of specific State Department guidance.[54] The State Department formally adopted the restrictive view of immunity in the Tate Letter in 1952,[55]

Co. v. Hendren, 92 U.S. 286, 286–87 (1875); De Simone v. Transportes Maritimos de Estado, 200 A.D. 82, 83–90 (N.Y. App. Div. 1922); *see also* HENKIN, *supra* note 8, at 238; Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 310–22 (2001).

48. *See, e.g.*, *Schooner Exchange*, 11 U.S. at 147 (analyzing the legal principles upon which immunity was based, but also noting that the Attorney General had requested immunity); White, *supra* note 44, at 27–28.

49. *See* Special Rapporteur on Jurisdictional Immunities of States and their Property, *Fourth Rep. on Jurisdictional Immunities of States and Their Property*, ¶¶ 51–97, Int'l Law Comm'n, U.N. Doc. A/CN.4/357 (Mar. 31, 1982) (by Sompong Sucharitkul), *available at* http://tiny.cc/onwuo (tracing immunity in French, Belgium, Italian, Egyptian, Dutch, Austrian, U.S., U.K., Philippine, Chilean, and Argentina courts and concluding that immunity was never "absolute" although acknowledging that "[s]tate practice has continued to move in favour of a generally restrictive trend since the advent of State trading and the continuing expansion of State activities in the field of economic development").

50. *See* Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Attorney Gen., Dep't of Justice (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULLETIN 984–85 (1952) [hereinafter Tate Letter].

51. LADY HAZEL FOX, THE LAW OF STATE IMMUNITY 201–11, 224–30 (2d ed. 2008).

52. *See, e.g.*, Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926) (according immunity to a commercial vessel, contrary to the views of the State Department).

53. 324 U.S. 30 (1945).

54. In 1938 the Court reasoned in dicta in *Compañía Española de Navegación Marítima S.A. v. The Navemar*, 303 U.S. 68, 74–75 (1938), that courts must follow the State Department's conclusion that immunity should be granted. In *Ex Parte Peru*, 318 U.S. 578, 588–89 (1943), the Court followed this reasoning by giving conclusive effect to an executive suggestion of immunity. The Court went further in *Republic of Mexico*, 324 U.S. at 36, and concluded that "[i]t is therefore 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."

55. *See* Tate Letter, *supra* note 50.

and the courts followed. The Court said little about its move to executive deference in *Hoffman* and its other cases. Modern courts have sometimes incorrectly suggested that the executive suggestion system has well-established history even dating back to *Schooner Exchange*, and the government argues that the courts have "traditionally deferred to the executive branch's judgment whether the foreign state should be accorded immunity in a given case."[56] This view is inconsistent with *Schooner Exchange* itself, in which the Court comprehensively evaluated the immunity claim.[57] It is also inconsistent with the Court's and scholars' contemporaneous understanding of the shift to executive control in *Hoffman*,[58] with courts' application of customary international law prior this shift,[59] and with the way that Congress understood the history of immunity when the FSIA was enacted.[60]

Scholars have noted that the move toward executive control in immunity came at roughly the same time as the Court's enforcement of executive claim settlement agreements in domestic courts and have advanced several theories to explain the shift. At least in the immunity context, the cases were decided during World War II, and the President often enjoys deference during wartime.[61] Perhaps the Court lacked the

56. *Samantar* Brief, *supra* note 9, at *6; *see also* Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010); Matar v. Dichter, 563 F.3d 9, 13 (2d Cir. 2009).

57. 11 U.S. 141–47.

58. *See Republic of Mexico*, 324 U.S. at 36 n.1 ("This salutary principle was not followed in Berizzi Bros. Co. v. S. S. Pesaro, 271 U.S. 562, 46 S. Ct. 611, where the court allowed the immunity, for the first time, to a merchant vessel owned by a foreign government and in its possession and service, although the State Department had declined to recognize the immunity."); *see also* Jessup, *supra* note 1, at 168–69 (arguing that the Court in *Hoffman* abdicated one of its functions by deferring to the State Department instead of deciding immunity issues based on international law); Note, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148, 1155–57 (1954) (describing 1938–1945 as a "period of transition" for immunity in U.S. courts, in which the views of the executive branch displaced the "traditional criteria" for immunity); Note, *Immunity from Suit of Foreign Instrumentalities and Obligations*, 50 YALE L.J. 1088, 1091–93 (1941) (describing confusion in the courts as to the weight they should accord suggestions of immunity by the State Department before the decision in *Republic of Mexico*).

59. *See* HENKIN, *supra* note 8, at 55 (describing the courts' resolution of immunity issues on "the basis of their own conclusions as to what international law required" until 1943 and the Court's decision in *Ex parte Peru*, 318 U.S. 578 (1943)); White, *supra* note 44, at 27–28 (tracing the "transformation" of immunity cases in favor of executive control).

60. *See* H.R. REP. NO. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (noting that in the early twentieth century the Supreme Court began to rely less on international law and more on the practices and policies of the State Department); *see also* GIUTTARI, *supra* note 44, at 80–83 (explaining the practice before the *Republic of Mexico* case: "[T]he executive was simply conforming to the tradition and established and followed since *The Exchange* which treated the function of determining issues of immunity and the criteria for resolving them as legal, rather than political."). *See generally* Chimene Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 71–75 (2010) (describing the shift to greater State Department control from the 1926 *Berizzi Brothers* case through *Hoffman*).

61. *See* GIUTTARI, *supra* note 44, at 160.

stomach to fight with the executive branch after the recent struggle over New Deal legislation.[62] Professor White has linked the shift toward executive power to the Court's identification of foreign affairs as constitutionally distinct from domestic matters.[63] Professors Bradley and Goldsmith suggest that after *Erie R.R. v. Tompkins*[64] the Court did not recognize customary international law as federal common law and that it accordingly looked to the executive branch's authority under the Constitution as the source for applicable law in immunity and claim settlement cases.[65]

In any event, the system of executive control ultimately proved unsatisfactory for several reasons: first, foreign governments (sometimes successfully) exerted diplomatic pressure on the State Department to resolve cases in their favor;[66] second, the State Department sometimes made immunity determinations that differed from case to case and were inconsistent with its overall policy;[67] third, foreign states sometimes did not request immunity from the State Department — or the State Department did not act upon a request — leaving the courts with little guidance as to how they should resolve the issue;[68] and, finally, the system seemed unfair to plaintiffs who frequently had little say in State Department immunity decisions.[69] As a

62. *See id.*

63. *See* White, *supra* note 44, at 192.

64. 304 U.S. 64 (1938).

65. *See* Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2161–64 (1999).

66. *See, e.g.*, *To Define the Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 34–35 (1976) (statement of Monroe Leigh, Legal Adviser, Department of State) [hereinafter Statement of Monroe Leigh] (articulating why the practice of executive control over immunity issues produced "substantial disadvantages").

67. *See id.* at 59–60 (statement of Peter Trooboff, Attorney, Covington & Burling, Washington, D.C.); *see also* Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 724–26 (E.D. Va. 1961), *aff'd* 295 F.2d 24 (4th Cir. 1961) (granting immunity to government owned commercial vessel without mentioning the Tate Letter); RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 154–55 (1964); Edwin D. Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 477 (1956) (noting that the Court's deference "embarrassed the Department of State with responsibilities for which that agency of the Government is quite unprepared and which it cannot properly assume."); Leo Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 AM. J. INT'L L. 790, 790, 793–96 (1960) (arguing that State Department's suggestions of immunity undermined the restrictive approach set out in the Tate letter).

68. *See* Republic of Austria v. Altmann, 541 U.S. 677, 690–92 (2004); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487–88 (1983).

69. *See* Statement of Monroe Leigh, *supra* note 66, at 34 ("[W]e in the Department of State and Legal Advisor's Office do not have the means of really conducting a quasi-judicial hearing to determine whether, as a matter of international law, immunity should be granted in a given case."); *cf.* Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954) (suggesting that the State Department adopt better procedures to

result, and at the request of the State Department, Congress enacted the FSIA in 1976. The statute sets out the immunity standards applicable to foreign states and their agencies, effectively eliminating the role of the State Department in cases covered by the statute. In *Samantar*, the Court held that the statute does not govern cases against foreign government officials; instead, those cases should be resolved pursuant to the "common law."

The *Samantar* opinion refers to *Republic of Mexico v. Hoffman* and *Ex Parte Peru*, but those cases do not bind the courts with respect to non-statutory immunity determinations today. Both were admiralty cases that involved the immunity of foreign vessels,[70] and both have been superseded by the enactment of the FSIA. In both cases, the Court included little reasoning to support deference to the executive branch, and the Court's other broad statements of executive power in foreign affairs during the late 1930s have been undermined by subsequent cases and events.[71] Finally, the enactment of the FSIA fundamentally changes the nature of immunity determinations in U.S. courts. The statute is not controlling with respect to claims against foreign officials, as the Court held.[72] But those claims are nevertheless resolved in the shadow of the statute itself. This may favor deference to the executive branch, especially if the statute demonstrates congressional acquiescence or approval of such deference, a claim examined below,[73] but it also means that the earlier cases are not controlling.

The foregoing introduction focused on state immunity. Individual foreign officials are also entitled to immunity in some cases; their immunity is often said to be a function of state immunity,[74] and in some countries suits against individual officials are treated as cases against the state itself.[75] For individuals, international law distinguishes

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protect the interests of plaintiffs in the resolution of immunity issues).

70. *See* Keitner, *supra* note 60, at 73–75 (arguing that *Peru* and *Hoffman* were both status-based in-rem immunity cases and that they do not control contemprorary conduct-based immunity cases). For a discussion of the distinction between conduct- and status-based immunities, see *infra* text at notes 76–80.

71. In particular, the Court's broad dicta in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) has been undermined by the Court's subsequent decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See* David Cole, Youngstown v. Curtiss-Wright, 99 YALE L.J. 2063, 2081 (1990) (referring to *Curtiss-Wright* as the "*Plessy v. Ferguson*" of foreign affairs); *see also* Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547, 554 n.21 (2007) (referring to *Curtiss-Wright* as the high-water mark of "constitutional interpretation of executive power").

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

73. *See infra* Part I.E.

74. *See* Dapo Akande & Sangeeta Shah, *Immunities of State Offcials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 822–24, 826–27 (2010).

75. *See, e.g.*, Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 A.C. 270 [10] (United Kingdom).

between status- and conduct-based immunities.[76] Status-based immunity (immunity *ratione personae*) derives from the kind of government position one holds (heads of state, other senior members of government, diplomats, members of the U.N. and special diplomatic missions) and applies against virtually all suits, regardless of the purported conduct on which they are based.[77] Diplomatic immunity is the subject of a widely-ratified treaty,[78] but head of state immunity and many other status-based immunities are not. Conduct-based immunity (immunity *ratione materiae*) protects a broad range of officials including consular officials,[79] but only for acts they perform in an official capacity. Officials who have immunity *ratione personae* while in office enjoy immunity *ratione materiae* after they leave office.[80]

B. Executive Lawmaking and the Constitution

Constitutional tensions that arise from executive control of immunity cases can be conceptualized in several ways. First, the text of the Supremacy Clause makes treaties, statutes, and the Constitution the supreme law of the land. Executive statements of interest in immunity cases preempt state law and are binding on state courts,[81] yet they do not fit comfortably within the text of the Supremacy Clause.[82] Second, even if one does not adopt a textualist view of the Supremacy Clause, broader principles of federalism are arguably in tension with the displacement of state law at the hands of the federal executive.[83] Third, the President as lawmaker undermines core structural attributes of the Constitution. It allows the creation of federal law without the Senate — and its representation of the states — and the House — with its two-year turnover of members and large body of representatives. It also removes the legislative check that operates when the President enforces laws

76. *See* LADY FOX, *supra* note 51, at 666–67.

77. *Id.*

78. Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

79. Vienna Convention on Consular Relations art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

80. *See* LADY FOX, *supra* note 51, at 667; *see also* Vienna Convention on Diplomatic Relations, *supra* note 78, art. 39(2); Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶¶ 53–54 (Feb. 14).

81. *See, e.g.*, United States of Mexico v. Schmuck, 294 N.Y. 265, 270 (N.Y. 1945); Vicente v. State of Trinidad, 372 N.Y.S.2d 369, 373 (N.Y. Sup. Ct. 1975).

82. *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 906–24 (2004) (discussing constitutional problems with executive preemption of state law).

83. *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999) (arguing that the federal government has exclusivity in conducting the nation's foreign relations).

rather than makes them himself.[84] Since the early immunity cases were decided, the Court has emphasized in *Youngstown Sheet & Tube Co. v. Sawyer*[85] and *Medellin v. Texas*[86] that lawmaking is generally a legislative function rather than an executive one.[87]

Not all deference to the executive branch qualifies as "lawmaking," however. Courts may defer, for example, to the President's interpretation of a treaty or statute, or consider State Department views on the foreign policy ramifications of a particular case, without the President becoming the source of the legal norm in question.[88] Moreover, the President may act in a way that does not have effect in domestic courts or domestic law, such as an international agreement that lacks domestic legal impact.[89] What distinguishes immunity, however, is the President's purported power to determine the law and facts in specific cases and the policy that governs future cases, as well as the conclusive effect that courts afford those determinations. Modern commentators have thus often characterized the post-*Hoffman*, pre-FSIA immunity determinations,[90] as well as the current deference afforded the President in making determinations of head of state immunity,[91] as executive branch lawmaking. This is precisely the kind of control that the State Department currently seeks,[92] and it is the subject of this Part. Whether the executive branch should be given more limited deference in immunity cases is taken up in Part III.[93]

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84. Bradford R. Clark, *Putting the Safeguards Back Into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 330–31 (2001).

85. 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

86. Medellín v. Texas, 552 U.S. 491, 527–28 (2008) ("As Madison explained in The Federalist No. 47, under our constitutional system of checks and balances, '[t]he magistrate in whom the whole executive power resides cannot of himself make a law.'") (internal citation omitted).

87. *Cf.* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 263 (2001) (arguing that the President lacks any foreign affairs lawmaking power as a matter of text and original history).

88. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd. 504 F.3d 254, 261–64 (2d Cir. 2007).

89. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1004 (1979).

90. *See, e.g.*, HENKIN, *supra* note 8, at 54–62; Bradley, *supra* note 1, at 649; Jinks & Katyal, *supra* note 1, at 1237–38; Ku & Yoo, *supra* note 1, at 205–206; Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 55–56 (1993); Prakash & Ramsey, *supra* note 87, at 263 n.125; Van Alstine, *supra* note 1, at 367–68; Yelin, *supra* note 1, manuscript at 6. *But see* Goldsmith, *supra* note 7, at 1709 (choosing not to characterize executive suggestions of immunity as executive lawmaking and reasoning instead that they have no legal basis).

91. *See* Ye v. Zemin, 383 F.3d 620, 628–29 (7th Cir. 2004); United States v. Noriega, 117 F.3d 1206, 1211–12 (11th Cir. 1997).

92. *Samantar* Brief, *supra* note 9, at *2–6; *Samantar* Statement of Interest, *supra* note 9, at 2–6; *Giraldo* Suggestion of Immunity, *supra* note 9, at 2–4.

93. *See infra* Part III.

The Court's immunity cases that cede authority to the executive branch — *Hoffman* and *Peru* — provide little discussion or defense of the basis for lawmaking by the executive branch, but they do suggest that it rests on two grounds: first, the President is "charged with the conduct of foreign affairs,"[94] and second, the courts should not act so "as to embarrass the executive arm of the Government in conducting foreign relations."[95] The first rationale grounds executive authority on the allocation of power by the Constitution, and the second is based on functional considerations. The following Section considers both the constitutional and functional justifications, and concludes that the *Hoffman* and *Peru* cases were incorrectly reasoned in these respects. Subsequent Sections consider and reject two other potential bases for executive control in individual immunity cases: history and congressional authorization.

C. *Text and Structure: Exclusive and Independent Powers of the President*

One legal basis frequently advanced for the president's lawmaking power in general — and in immunity cases in particular — is that it is connected to the exercise of a power vested exclusively in the President by Article II of the Constitution. For claim-settlement and immunity cases, the exclusive power to recognize foreign governments is sometimes cited.[96] The President's powers to appoint and receive ambassadors[97] are widely understood to include the power to determine which foreign nations and governments the United States recognizes.[98] A decision by the United States to recognize a particular person or group that claims statehood or representation of a particular state is thus an issue within the exclusive power of the President.[99] Legislation

94. Republic of Mexico v. Hoffman, 324 U.S. 33, 35 (1945).

95. *Id.* at 35 (quoting United States v. Lee, 106 U.S. 196, 209 (1882)); *Ex Parte* Peru, 318 U.S. 578, 588 (1943) (same).

96. *See* HENKIN, *supra* note 8, at 56–65, 220; Jinks & Katyal, *supra* note 1, at 1237–38; Van Alstine, *supra* note 1, at 367–68; *see also* Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1635–36 (2007) ("During the long initial period of congressional silence regarding foreign sovereign immunity, the President arguably had residual power to influence how courts applied the doctrine because such immunity was arguably an incident of recognition"); *cf.* Yelin, *supra* note 1, manuscript at 47 (citing the executive branch's "exclusive authority to conduct the nation's diplomacy" as the basis for lawmaking in head of state immunity cases).

97. U.S. CONST. art. II, §§ 2–3.

98. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 cmt. a (1986); Sean Murphy, *The President's Power to Receive Ambassadors* (comprehensively analyzing the scope of this power) (draft manuscript on file with Virginia Journal of International Law Association).

99. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (2001) ("Political

providing that the United States no longer recognizes Canada or Kosovo, for example, would be unconstitutional.[100] The Court, however, has not based the executive suggestion system on the President's recognition power,[101] and the executive branch has advanced this argument only in passing.[102] If immunity were in the exclusive control of the President, the FSIA would be unconstitutional,[103] although a unanimous Supreme Court upheld it.[104] More fundamentally, the relationship between immunity and recognition is generally weak, as described below.

The President's lawmaking authority in the context of immunity determinations might flow instead from a concurrent power shared between the President and Congress that the President can exercise independently when Congress has not acted.[105] There remains, however, the difficulty of determining the scope and source of such a power. If the President generally cannot supply the rules of decision in state and federal cases where Congress is silent, what is the source of authority to do so here?

Perhaps although immunity itself is not within the exclusive power of the President, the President's power in this area is best understood as incidental to the exclusive power of recognition. This argument is weak, however, because foreign state and conduct-based immunities bear only a tenuous relationship to recognition.[106] Courts have accorded immunity

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recognition is exclusively a function of the Executive.").

100. *See* Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1240–45 (D.C. Cir. 2009).

101. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945); *Ex Parte* Peru, 318 U.S. 578, 588 (1943).

102. The government's brief in Samantar did not mention recognition as basis for executive power in immunity cases. *See Samantar* Brief, *supra* note 9, at *27–28. The two suggestions of immunity made after the Supreme Court's decision in Samantar both mention it briefly (in identical sentences): "[t]hus, the Executive Branch continues to play the primary role in determining the immunity of foreign officials as an aspect of the President's responsibility for the conduct of foreign relations and recognition of foreign governments." *Samantar* Statement of Interest, *supra* note 9, at 5–6; *Giraldo* Suggestion of Immunity, *supra* note 9, at 4.

103. Unlike immunity determinations, the conclusion of a sole executive agreement is an exclusive power of the President, and it is one that creates a commitment by the United States under international law. Executive determinations of immunity do not share those features. Sole executive agreements need not have domestic legal effect, however, and they may be unconstitutional to the extent that they purport to do so. *See* Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 136–38 (1998) (arguing that as matter of text and original history the President had the power to conclude some sole executive agreements, but they were not enforceable as domestic law). The Court has held that some sole executive agreements to settle foreign claims are enforceable as domestic law when very closely tied to the recognition of foreign countries or implicitly authorized by Congress. *See* Dames & Moore v. Regan, 453 U.S. 654, 682–83 (1981); United States v. Pink, 315 U.S. 203, 229–30 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

104. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497–98 (1983).

105. *Cf.* Monaghan, *supra* note 90, at 54 n.259 (noting this distinction).

106. Status-based immunities, described in more detail in Part III, bear a closer relationship to

to states not recognized by the executive branch,[107] and they have denied immunity to unrecognized states without relying on the fact of non-recognition as determinative.[108] Even for states that are recognized as such by the executive branch, immunity under the FSIA — and, before that, under the Tate Letter — does not follow automatically from recognition but instead depends upon the type of conduct involved in the suit, as well as the exact nature of the defendant when the state is not itself sued.[109] Moreover, the international law of state and individual immunity and the basis for immunity decisions in U.S. courts have evolved substantially over time in ways unrelated to the recognition of foreign states.[110] In the claim settlement context the Court has enforced sole executive agreements that were integrally related to the recognition of Soviet Union.[111] The act of state doctrine, which bears a closer relationship to recognition, is not subject to executive branch lawmaking.[112]

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recognition, and the executive branch accordingly has a more significant role in their application. *See infra* Part III.

107. *See, e.g.*, Wulfsohn v. Russian Socialist Federated Soviet Republic, 138 N.E. 24, 26 (N.Y. 1923) (granting immunity to Soviet Russia although it had not been recognized by the United States); Walley v. The Schooner Liberty, 12 La. 98, 101–02 (1838) (according immunity to warship of the Republic of Texas although it had not been recognized by the United States).

108. *See* Ungar v. Palestine Liberation Organization, 402 F.3d 274, 284 (1st Cir. 2005) (deciding PLO was not a foreign state based on principles of international law and declining to rely on the fact of non-recognition by the U.S. government, but noting that outcome would be the same); Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47–50 (2d Cir. 1991) (denying PLO immunity because it did not meet the criteria for a "foreign state;" decision did not turn on recognition); Morgan Guar. Trust Co. v. Republic of Palau, 924 F.2d 1237, 1244 (2d Cir. 1991) (holding Palau not a foreign state based on criteria from international law). *But see* The Gul Djemal, 296 F. 563, 567 (S.D.N.Y. 1921), *aff'd* 264 U.S. 90 (1924) (refusing to accord immunity to Turkish vessel because the United States had severed diplomatic relations with Turkey). After the enactment of the FSIA and the Anti-Terrorism Act, the question is whether an unrecognized nation qualifies as a "foreign state." *See* 28 U.S.C. § 1604 (2011); 18 U.S.C. § 2337 (2011).

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

110. The FSIA, enacted in 1976 for reasons unrelated to recognition, now provides the basis for most immunity determinations in U.S. courts. For developments in the international law of immunity generally, *see* LADY FOX, *supra* note 51, at 40–67.

111. *See* United States v. Pink, 315 U.S. 203, 229–30 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937). As the Court described the facts in *Belmont*: "We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet government, and normal diplomatic relations were established between that government and the government of the United States, followed by an exchange of ambassadors. The effect of this was to validate, so far as this country is concerned, all acts of the Soviet government here involved from the commencement of its existence." *Id.* at 330.

112. *See* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 408–09 (1990) (deciding not to adopt the approach of the executive branch); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695–705 (1976) (indicating that four Justices favor a commercial activity exception to the act of state doctrine, as advocated by the State Department); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765–70 (1972) (showing that three Justices favor executive control of the act of state doctrine); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 418–20 (1964) (holding act of state doctrine is governed by federal

The Court has not relied on the recognition power in the context of executive branch immunity determinations, but in *Hoffman* it referred generally to the President's power as "the political branch of the government charged with the conduct of foreign affairs."[113] The State Department also makes this argument, quoting *Hoffman*.[114] The President's lead role in foreign affairs is frequently noted by courts and commentators,[115] often in conjunction with the argument that the President is the "sole organ" for speaking on behalf of the nation in foreign affairs and needs the ability to speak with "one voice."[116]

Perhaps on this basis the President has the power to create domestic law on immunity when Congress is silent. As a matter of constitutional text, these powers are most closely linked to the President's power to negotiate treaties, to send and receive ambassadors, and perhaps the vesting of the "Executive power" in the President.[117] Sometimes the "one voice" reasoning is used to describe the power of the federal government as whole, as for example when the Court has struck down state legislation as violating the dormant Foreign Commerce Clause.[118] Even when used to describe the President's power in particular, the one voice rationale is invoked in a variety of contexts where the President is not acting alone — for example, as a tool of statutory interpretation[119] or to describe the President's power acting pursuant to statutory authorization.[120] In the lawmaking context, however, neither "foreign affairs" nor "sole organ" works as an exclusive power argument because Congress controls broad areas of foreign affairs through legislation.[121] As a concurrent powers argument they prove too much, at least standing alone. These arguments would suggest that, unless Congress had acted,

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common law).

113. Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945).

114. *Samantar* Statement of Interest, *supra* note 9, at 3; *Giraldo* Suggestion of Immunity, *supra* note 9, at 4.

115. *See* Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988) (quoting Haig v. Agee, 453 U.S. 280, 293–94 (1981)); Ludecke v. Watkins, 335 U.S. 160, 173 (1948); *see also* H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1472–1535 (1999).

116. *See* Munaf v. Geren, 553 U.S. 674, 702–03 (2008); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381–82 (2000); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Prakash & Ramsey, *supra* note 87, at 233 (2001) ("It is conventional wisdom that the President is, at minimum, the 'sole organ' of communication with foreign nations and is empowered to direct and recall U.S. diplomats.").

117. U.S. CONST. art. II, § 1.

118. *See, e.g.*, *Japan Line*, 441 U.S at 449–51; *see also* United States v. Pink, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring).

119. *See Crosby*, 530 U.S. at 381–82.

120. *See Curtiss-Wright*, 299 U.S. at 319–20.

121. Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 727 (1992).

the President could preempt state law or control the application of federal law in any foreign-affairs-related area.[122] Indeed, the Court has not placed significant reliance on these potentially broad powers as the basis for executive lawmaking, except for the passing reference in *Republic of Mexico v. Hoffman*[123] and as tied to the recognition power in *Belmont* and *Pink*.

It is difficult to see how executive control of immunity determinations can be justified based solely on constitutional text and structure.[124] On these grounds, then, *Ex parte Peru* and *Republic of Mexico v. Hoffman* were wrongly reasoned, at least with respect to executive power; in fact, they were barely reasoned at all.

State Department control of immunity determinations might be justified, however, based on history, foreign policy prerogatives, or functional reasoning rather than on the specific text or structure of the Constitution. Today, after the enactment of FSIA, implied congressional authorization might also provide the basis for executive control of official immunity determinations. These nontextual sources of authority are especially significant in the area of foreign relations, where the "President's power to act in foreign affairs does not enjoy any textual detail, [but] the historical gloss on the "executive Power" vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'"[125] The following Sections consider them in detail.

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122. HENKIN, *supra* note 8, at 54 (explaining that "[n]o one has suggested that under the President's 'plenary' foreign affairs power he can, by executive act or order, enact law directly regulating persons or property in the United States," but noting that the immunity context is an exception).

123. *But see* Baker v. Carr, 369 U.S. 186, 281 (1962) (Frankfurter, J., dissenting) (describing *Ex parte Peru* as an example of the need for the country to speak with one voice). In *United States v. Belmont*, the Court linked its reference to the President as the nation's "sole organ" to the recognition of the Soviet Union. 301 U.S. 324, 330 (1937). Other Article II powers provide little basis for a presidential power to make immunity determinations binding on the courts. The "take care" clause might give the President the power to execute treaties or international law. *See* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331 (2008). But immunity determinations are not necessarily made pursuant to either of those sources of law. Even those who argue that the Executive Vesting Clause confers significant power on the President do not maintain that it includes the power to make domestic law. Prakash & Ramsey, *supra* note 87, at 234, 256, 340–46.

124. *See* Goldsmith, *supra* note 7, at 1709–10 (the executive suggestion system has "no legal basis"); Prakash & Ramsey, *supra* note 87, at 263 n.125 (characterizing the executive control of immunity determinations as "troubling").

125. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

D. Foreign Policy Based Lawmaking and History: Garamendi

The Court's broadest decision recognizing the President's power to make domestic foreign affairs law, *American Insurance Association v. Garamendi*,[126] illustrates the Court's reliance on nontextual sources of constitutional interpretation. The case also arguably provides a basis for executive power over immunity determinations. In *Garamendi*, the President had concluded a sole executive agreement with Germany in July 2000, designed to resolve litigation in the U.S. courts against German corporations arising out of Nazi-era atrocities.[127] The executive agreement did not purport to nullify claims pending in U.S. courts on its own; instead, the agreement obligated the U.S. government to recommend that courts dismiss claims against German companies "on any valid legal ground (which, under the U.S. system of jurisprudence, will be for the U.S. courts to determine)."[128] In return, Germany set up a compensation fund for Holocaust-era claims against German corporations. For its part, California had passed legislation requiring any insurer doing business in California to disclose information about insurance policies sold in Europe between 1920 and 1940. In a five to four decision, the Court struck down the California legislation. [129]

The *Garamendi* decision might be understood as the basis for expansive lawmaking by the executive branch in foreign affairs. Unlike the *Belmont* and *Pink* decisions, the issues in *Garamendi* had little immediate connection to recognition, and — unlike both of these cases and the Court's subsequent decision in *Dames & Moore*[130] — the executive agreement in *Garamendi* did not itself expressly preempt or explicitly require preemption of domestic U.S. law. The agreement in *Garamendi* simply required the President to file a statement of interest seeking dismissal. Moreover, the *Garamendi* executive agreement said nothing about the kind of insurance policy *disclosure rules* put in place by California state law.[131] Therefore, in *Garamendi*, it was not the executive agreement itself that was given preemptive force, but the President's foreign policy. In striking down California's law, the Court relied on the long-standing practice of claim settlement by the President; the President's efforts to settle World-War-II-era claims through diplomacy instead of litigation; what it characterized as the weakness of California's interest in regulating Holocaust-era insurance issues;[132] and

126. 539 U.S. 396.
127. *Id.* at 405–06.
128. *Id.* at 436 (Ginsburg, J., dissenting) (quoting sole executive agreement).
129. *Id.* at 429.
130. *See* Dames & Moore v. Regan, 453 U.S. 654, 665 (1981).
131. *See Garamendi*, 539 U.S. at 415.
132. *See id.* at 425–26.

cases — discussed in the following Part — holding that federal common law sometimes preempts state law in foreign affairs.[133] If *Garamendi* is read broadly, it could allow the President to preempt any state law that interferes with his foreign policy objectives, even where states are legislating within traditional areas of state authority, such as insurance.[134] A broad lawmaking power for the executive branch might provide strong support for the system of executive suggestions in immunity cases.

There are, however, reasons to read *Garamendi* narrowly, at least in the context of immunity decisions. The decision was close, with the four-Justice dissent reasoning that at least absent express preemption (based on the terms of an executive agreement, for example), the President's foreign policy objectives should not be given preemptive effect.[135] The Court itself has read *Garamendi* narrowly: in *Medellín v. Texas* the President sought to enforce a treaty obligation through a memorandum that directed Texas courts to reconsider criminal sentences for foreign defendants whose rights under the Vienna Convention on Diplomatic Relations had been violated.[136] The President relied in part on *Garamendi* and emphasized the foreign policy importance of bringing the United States into compliance with its obligations under international law and in ensuring reciprocal compliance with the treaty, interests that the Court termed "plainly compelling."[137]

The Court nevertheless rejected the President's effort to displace Texas state law. Indeed, no Justice accepted the President's argument. The Court distinguished the claim settlement cases, not as a function of the President's recognition power, but instead based on very long history of claim settlement by the President and the acquiescence of Congress in that practice.[138] The *Medellín* opinion, unlike *Garamendi*,

133. *See infra* Part II.

134. The Court noted that state conduct with foreign affairs implications that falls outside a traditional area of state authority might be subjected to field preemption and thus struck down even absent affirmative action by the federal government. 539 U.S. at 420 n.11. The Court characterized the *Garamendi* case itself as involving conflict preemption, and it characterized the state's interest as weak, in part because it viewed California as concerned with the fate of Holocaust survivors rather than insurance. *Id.* at 420–21, 425–26. Determinations of foreign offical immunity fall outside of traditional areas of state competence; the more difficult question is whether the executive can displace state law absent congressional action. The *Garamendi* opinion suggests that it has broad power to do so.

135. *See Garamendi*, 539 U.S. at 428 (Ginsburg, J., dissenting). The majority reasoned that the plaintiffs' "claim of preemption rest[s] on asserted interference with the foreign policy those agreements embody." *Id.* at 417.

136. *See* Medellín v. Texas, 552 U.S. 491, 525–26 (2008).

137. *Id.* at 524.

138. *See id.* at 531–32.

draws heavily on *Dames & Moore v. Regan* and accordingly reasons that the President's claim settlement power is "based on the view that 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,' can 'raise a presumption that the [action] had been [taken] in pursuance of its consent.'"[139] This is another potential basis for executive power in the immunity context: implied congressional authorization.

Even reasoning directly from *Garamendi*, executive power in the immunity context stands on questionable footing. Compared to immunity determinations, which were controlled by the executive branch beginning only in the 1940s and ending in the 1970s when the practice was renounced by the State Department itself and terminated by Congress, settlement by the President of claims against foreign states has a longer, better-established history[140] that has been affirmed by Congress.[141] In addition, the foreign policy objectives vindicated in *Garamendi* were very specific post-war issues that the President had spent years resolving through diplomacy. The blanket power to resolve any and all cases against foreign officials on immunity grounds does not share these features. If *Medellín* is understood as a limitation on *Garamendi's* precedential value, as I argue it should be, then the key question in the immunity context becomes one of historical practice coupled with implied congressional authorization, addressed below.

Before turning to congressional authorization, however, consider the implications of the foregoing discussion for the State Department's claim that it controls individual immunity determinations as a constitutional matter (not based on implicit or explicit congressional authorization). If this argument is accepted by the courts, it will revitalize and expand *Garamendi*. As in *Garamendi*, there is no strong textual argument in favor of executive lawmaking in individual immunity cases, leaving policy and history as the basis for executive power. Additionally, as noted above, in immunity cases — unlike *Garamendi* — the power the executive branch claims is not a one-off ability to take a major foreign policy matter out of the hands of the courts, buttressed by a related international agreement and the long history of claim settlement by the President. Instead, it is the power to resolve each and every immunity case as it sees fit, and to set out

139. *Id.* at 531 (quoting Dames & Moore v. Regan, 453 U.S. 654, 674 (1981) (further citation omitted)).

140. *See* Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1 (2003).

141. *See infra* text at notes 154–56 (discussing the International Claims Settlement Act of 1949)

immunity law binding on the courts even in cases where it does make a specific recommendation.

If the courts accept the government's position in immunity cases, it would suggest that *Medellín* was incorrectly reasoned with respect to executive power, and because the government lost that case, it may agree. It would also provide further support for executive control of litigation with potential foreign policy conflicts in other contexts, for example: cases involving conversion and replevin claims to fine art;[142] Holocaust-era insurance claims that do not involve an executive agreement;[143] state law claims arising out the Armenian Genocide;[144] state environmental initiatives;[145] and state criminal law matters, as in *Medellín*.

One purpose of the foregoing discussion is to point out the relationship between executive branch lawmaking in the immunity and other contexts; this relationship was not mentioned by the Court in *Samantar*, by the government in its briefing, or by other commentators. A second purpose is to show that lawmaking in individual immunity cases would expand executive power beyond what the text of the Constitution appears to contemplate and what contemporary case law permits. Executive lawmaking might nonetheless be justified for functional reasons or based on congressional authorization, but those bases turn out to be quite weak as the following sections discuss.

E. Congressional Authorization

The strongest basis for the State Department's claimed power to resolve official immunity cases may be implied congressional authorization by virtue of the FSIA. The Supreme Court arguably suggested as much when it noted in *Samantar* that "[w]e have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."[146] This quote could mean that Congress implicitly authorized the State Department's role in official immunity cases, but the better interpretation is the more literal one: Congress did not seek to do anything with respect to individual immunity cases, either

142. *See* Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d 1 (1st Cir. 2010).

143. *See In re* Assicurazioni Generali, 592 F.3d 113 (2d Cir. 2010).

144. *See* Movsesian v. Victoria Versicherung AG, 578 F.3d 1052 (9th Cir. 2009), *withdrawn, reh'g granted*, 629 F.3d 901 (9th Cir. 2010).

145. *See* Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); Green Mountain Chrysler Plymouth v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007); *see also* Douglas Kysar & Bernadette Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1641–49 (2008) (considering whether the President can preempt state greenhouse gas initiatives under *Garamendi*).

146. 130 S. Ct. 2278, 2291 (2010).

to authorize or eliminate the practice. This reading is supported by other language in the *Samantar* opinion: "although questions of official immunity did arise in the pre-FSIA period, they were few and far between. The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA."[147]

Finding implicit congressional authorization would put the executive suggestion system in category I of Justice Jackson's *Youngstown* framework, meaning that courts would almost certainly uphold it.[148] This approach would avoid conflict with the President, while not ruling in his favor on constitutional grounds. Courts have taken this route in other war-related and national security cases.[149] Most significantly, perhaps, in *Dames & Moore v. Regan* the Court enforced a sole executive agreement by the President that obligated the U.S. government to terminate claims pending in U.S. courts against Iran; such claims could be brought before a specially constituted claims tribunal.[150] Although it refused to situate the case in one of Justice Jackson's three *Youngstown* categories, the Court relied in part on federal legislation that gave the President broad emergency powers and on legislation that implemented his power to settle claims against foreign sovereigns.[151] At issue in the case was a claim settlement agreement that resolved a major foreign policy emergency with the lives of Americans at immediate risk — the Iranian hostage crisis.

The Court's reasoning in *Dames & Moore* applies very poorly in the context of immunity, however. Unlike the legislation relied upon in *Dames & Moore* — the IEEPA,[152] the Hostage Act,[153] and the International Claims Settlement Act[154] — the FSIA did not confer authority on the executive branch. Thus, the *Dames & Moore* Court's reasoning that "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential

147. *Id.* at 2291.

148. *See* Jennifer S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1076–77 (2008).

149. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 518–22 (2004) (plurality opinion); Regan v. Wald, 468 U.S. 222, 225–38 (1984); Dames & Moore v. Regan, 453 U.S. 654, 680 (1981).

150. *See Dames & Moore*, 453 U.S. at 656–58.

151. *See id.* at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949.").

152. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2006).

153. Hostage Act of 1868, 22 U.S.C. § 1732 (2006).

154. International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621–1645 (2006).

responsibility'"[155] does not apply to a statute designed to eliminate the President's discretion and to empower the courts to make immunity determinations.[156]

The *Dames & Moore* Court placed particular reliance on the International Claim Settlement Act, which provided an administrative apparatus for handling large groups of claims settled by the President, and which had been amended often in response to particular claim settlement agreements concluded by the President.[157] The Act thus not only recognized that the President settled claims, it also actually implemented and facilitated that power. In the immunity context, by contrast, there is no sense in which the FSIA implements or facilitates the use of executive suggestions of immunity — indeed, it was designed to eliminate such claims in most contexts. Other statutes from which the Court has inferred congressional authorization also empower the President to act, even if they do not explicitly authorize the action in question. In *Regan v. Wald*,[158] for example, the Court read parts of IEEPA broadly to authorize travel restrictions to Cuba.[159] In *Haig v. Agree*,[160] the President's revocation of a passport was upheld based on the Passport Act.[161] In *Hamdi v. Rumsfeld*, a plurality found that Congress's authorization for the use of military force included the power to detain people fighting in Afghanistan for the Taliban.[162] Consistent with the Court's reasoning in *Dames & Moore*, these statutes all delegate authority to the President, unlike FSIA. These cases, like *Dames & Moore*, have generally been criticized for empowering the President by finding congressional authorization where none existed[163] and for allowing the President to make law outside the formal

155. *Dames & Moore*, 453 U.S. at 678 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

156. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2285 (2010) (describing a main purpose of the FSIA "to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts").

157. *See Dames & Moore*, 453 U.S. at 681.

158. 468 U.S. 222 (1984).

159. *See id.* at 225–38.

160. 453 U.S. 280 (1981).

161. *See id.* at 297–98.

162. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (O'Connor, J., plurality opinion); *id.* at 583 (Thomas, J., dissenting) ("[I]n these domains [foreign policy and national security] the fact that Congress has provided the President with broad authorities does not imply — and the Judicial Branch should not infer — that Congress intended to deprive him of particular powers not specifically enumerated.").

163. *See* KOH, *supra* note 1, at 139–41; Arthur S. Miller, Dames & Moore v. Regan*: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104, 1112–13 (1982); Kevin Stack, *The Statutory President*, 90 IOWA L. REV. 539, 566–86 (2005); *see also* Patricia Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMM. 87, 145–54 (2002).

lawmaking processes.[164] Finding congressional authorization for executive branch immunity decisions based on a statute designed to restrict the President's power would only magnify these problems.

Although the FSIA was designed to transfer authority away from the State Department to the courts, it does not apply to individuals as the *Samantar* Court held, so perhaps the statute should be understood as implicitly authorizing the executive suggestion regime for cases against individuals. After all, had Congress wished to restrict executive authority in cases against individuals, FSIA offered an excellent opportunity to do so. Several things cut against this interpretation, however. As mentioned above and emphasized by the Court in *Samantar*,[165] there were few individual immunity cases in the years before the FSIA was enacted, so it is difficult to infer approval from congressional silence. This is in contrast to the long-standing, well-established history of claim settlement that the Court relied upon in *Dames & Moore* and *Garamendi*.[166] The cases and commentary prior to the enactment of the FSIA also had virtually nothing to do with official immunity and were dominated instead by a different question entirely: the application of immunity to commercial activities of nation states, including the definition and scope of commercial activity.[167]

Equally significantly, after the FSIA was enacted the political and legal contexts in which official immunity cases arise are markedly different than they were pre-FSIA, as described in the following Sections. These differing contexts are an additional reason not to infer congressional authorization. Indeed, they suggest that the State Department could act contrary to the implied will of Congress in resolving some official immunity claims. Beyond the question of congressional authorization, this discussion also illustrates functional reasons against blanket deference to the executive branch in cases brought against individual officials.

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164. Clark, *supra* note 8, at 1449–52.

165. Samantar v. Yousuf, 130 S. Ct. 2278, 2291 (2010).

166. *See* Medellín v. Texas, 552 U.S. 491, 531 (2008) (noting the over 200-year history of claim settlement).

167. *See* Sigmund Timburg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 5–20 (1976). The House Committee Report on FSIA identified four purposes of the Act: to codify the restrictive view of immunity; to transfer immunity determinations from the executive to the courts; to provide a statutory means for service of process; and to limit foreign governments' entitlement to absolute immunity from attachment. H.R. REP. NO. 94-1487, at 9–10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605–06.

1. *Pre-FSIA Executive Suggestions of Immunity in Post-FSIA Context*

Prior to the enactment of FSIA, a foreign state or official sued in state or federal court could seek a suggestion of immunity from the State Department. If the State Department recognized the immunity, then the courts accepted it; the courts generally denied immunity if the State Department did so.[168] Under the FSIA, however, it is impossible for the system to work in exactly the same way because some questions now involve statutory interpretation.

A defendant in either state or federal court today might argue that the case is actually one against the foreign state itself, as the *Samantar* opinion suggested.[169] If the case "should be treated as [an] action[] against the foreign state itself" as the real party in interest then presumably the FSIA applies to the case, whether it is brought in state or in federal court,[170] because Congress would have intended foreign states to enjoy the benefits of the statute.[171] Application of the FSIA matters — even if the outcome would be the same under federal common law — because the statute gives foreign states certain procedural advantages, such as the power to remove the case to federal court under an enlarged time frame.[172] If FSIA does not apply, the defendants' ability to remove the case at all based on subject matter jurisdiction is questionable.[173] In federal court, the "required party"

168. *See supra* text at notes 53–55.

169. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2292 (2010) ("Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the real party in interest.").

170. *Id.*; *see also* 28 U.S.C. § 1604 (2006) ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). For an example of such a state case, see Bolkiah v. Super. Ct., 74 Cal. App. 4th 984 (Cal. App. 1999).

171. In the alternative, a suit brought against an individual but treated as one "against the foreign state itself" might be understood as governed by common law, not the FSIA. If so, wholesale deference to the executive branch is no more attractive because it conflicts with the purposes of the FSIA: to reduce the risk of inconsistent adjudication and eliminate control by the executive of suits against foreign states.

172. *See* 28 U.S.C. § 1441(d) (2006) ("Any civil action brought in a State court against a foreign state as defined in § 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of § 1446(b) of this chapter may be enlarged at any time for cause shown.").

173. Note that immunity serves as a defense, and removal is generally not permitted based on a federal defense. *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986). Moreover, state courts can, and do, apply federal common law. *See* Silverstein v. Northrop Grumman Corp., 842 A.2d 881, 889 (N.J. Super. Ct. App. Div. 2001). Even if the executive suggestion system persists, it does not necessarily follow that the case is removable. *See* F.W.

analysis would take place under Rule 19, rather than the state law alternative. The key question of whether the case should be treated as an action "against the foreign state itself" — and thus whether the FSIA applies — is one of statutory interpretation.[174]

If the court receives a suggestion of immunity, this presumably means that the State Department does not believe the suit should be treated as one against the foreign state because if it were, the FSIA would apply and the State Department would lack the power to control the litigation through its immunity determinations. The Department has often not given reasons for recognizing immunity,[175] but the conclusion that the defendant should not be treated as a "foreign state" — whether the State Department states it explicitly or implicitly — is one that courts must examine themselves because it is a question of statutory interpretation. Similarly, if the State Department declines to recognize immunity, this could be based on a determination that the defendant should be treated as a foreign state (and the State Department thus lacks the power to control the immunity determination), but the courts must make this determination on their own.

If the statute does not apply in these kinds of cases, then the arguments for executive control fare no better.[176] The executive may decide that the individual should be immune when the state is not, or vice-versa. One might argue that individuals should be immune from suit for official conduct even if the state is not,[177] but the executive branch might decide otherwise if it controls immunity determinations. The risk of undermining the statutory framework is clear. The Court's statement in *Mexico v. Hoffman* that "[i]t is therefore not for the courts

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Stone Eng'g Co. v. Petroleos Mexicanos of Mexico, 42 A.2d 57, 59–60 (Pa. 1945) (state court applying executive suggestion of immunity). On the other hand, some federal courts have permitted removal based on the act of state doctrine, even where state law provided the cause of action, because of the strong federal interest in such cases. *See, e.g.*, Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997).

174. As a matter of statutory interpretation the Court has generally afforded the State Department little deference in interpreting the FSIA. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2006). In *Samantar* itself, the Court noted the State Department's interpretation of the statute, but did not appear to afford it particular weight. 130 S. Ct. at 2291 n.19. Deference would be especially inappropriate in cases like these, as the executive branch could use it to substantially broaden its control over cases against foreign officials in which the interests of the state were directly implicated.

175. *See Sovereign Immunity Decisions of the Dep't of State, May 1952 to January 1977*, 1977 DIGEST app. at 1017, 1022 [hereinafter *Sovereign Immunity Decisions*].

176. Consider a suit against an individual that seeks disbursement of government money. If the executive controls the disposition of the suit based on its control over individual immunity determinations, the statutory scheme would be eroded because the executive might apply the exceptions to immunity differently than the courts would if the case were brought directly against the state.

177. Keitner, *supra* note 60, at 68.

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"[178] cannot be followed in the same way after the enactment of the FSIA. The statute should not be seen as implicitly authorizing executive determinations of immunity based on the process that was in place when the statute was enacted because that process will have to be different post-FSIA than it was before the FSIA was enacted.

2. *Inconsistent Immunity Determinations*

In the pre-FSIA context, deference was afforded to executive branch immunity determinations in both cases against states themselves — the vast majority of cases — and in cases against individual officials. As noted above, serious problems with inconsistent adjudications emerged; in particular, the executive branch sometimes suggested immunity in a case where its prior policy was to deny immunity on essentially the same facts.[179] These kinds of conflicting outcomes are likely to recur if executive suggestions are given controlling weight in cases against individual officials.

After the FSIA, there are also additional risks. If the executive suggestion system is retained in claims against individual officials, claims against states themselves will nevertheless still be governed by the FSIA with very little or no deference to the executive branch.[180] But there are many issues of potential overlap in resolving these two types of claims, substantially raising the costs and likelihood of inconsistent adjudications. Consider, for example a case in which both an individual and an alleged state entity are sued.[181] One approach would be to conclude that individual officials are immune from suit for all actions taken in their "official capacity," which would at times make individuals immune even when the state is not because the conduct falls into one of the FSIA exceptions for state immunity such as commercial activity or waiver.[182] This is consistent with international law and U.S.

178. 324 U.S. 30, 35 (1945).

179. *See infra*, text at notes 66–69; *see also* John B. Bellinger III, *Ruling Burdens State Dept.*, NAT'L L.J., June 28, 2010, at 47 (predicting that the result of *Samantar* will be to subject the State Department "to intensive lobbying by both plaintiffs and defendants").

180. *See* Republic of Austria v. Altmann, 541 U.S. 677, 701 (2006) (explaining that the views of the executive branch regarding FSIA's reach "merit no special deference").

181. *See, e.g.*, *Sovereign Immunity Decisions*, *supra* note 175, at 1062–63 (discussing *Cole v. Heidtman* (S.D.N.Y. 1968) (concerning a case against a labor orgnazation and its officials); *id.* at 1075 (discussing *Semonian v. Crosbie, Gov't of the Province of Newfoundland, et al.* (D. Mass. 1974) (concerning a suit against the Province of Newfoundland and its officials)); *id.* at 1053 (discussing *Kendall v. Kingdom of Saudi Arabia* (S.D.N.Y. 1965) (involving a suit against Kingdom of Saudi Arabia, King Faisal, and other Saudi officials)).

182. This appears to have been the case in *Greenspan v. Crosbie*, in which the officials were immune because the acts were taken in their official capacity, but the state was not immune as to

practice with respect to head of state and other *status*-based immunities, which protects individuals even when they are engaged in conduct for which their governments would not be immune.[183]

Alternatively, officials may not enjoy immunity for all official conduct, but instead just have the immunity that the state enjoys, meaning, for example, that officials are *not* immune from suit for conduct that is "official" but also commercial in nature. For example, in *Cole v. Heidtman*, the State Department applied the Tate Letter and concluded that a West Indies Labour organization and its officials were not immune from suit because the types of activities that they conducted were commercial (like those of a private empolyment agency) and thus "of a private nature."[184] The Department seemed to be reasoning that the private, commercial nature of the activities in question precluded immunity for the government official, even accepting that the agency in question was a state agency and the individual was acting within the scope of his employment.[185] This is arguably consistent with the approach of the Restatement Second in effect when the FSIA was enacted,[186] and arguably with the Second Circuit's analysis in *Heaney v.*

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the claim that the state breached a settlement agreement. *See id.* at 1076–77 (discussing *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976). The *Samantar* opinion notes this divergence between official and state immunity. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2290–91 (2010). An example of this approach in the human rights context could include a defendant that allegedly commits torture in his official capacity, but the activity in which he was engaged was commercial. The state would not be immune from suit if the commercial activity exception applied, although the official would be immune, assuming that the action was an official one. Under the approach discussed in the next paragraph, however, the individual's immunity follows that of the state, so neither would be immune. The point here is that if the executive controls immunity determination, the risk of inconsistent adjudications is especially acute under the second approach because different decision-makers would be make an identical determination, at least with respect to the question of whether the conduct qualifies as commercial.

183. *See* LADY FOX, *supra* note 51, at 707–08 (discussing this point with respect to diplomatic immunity, one form of status based immunity).

184. *Sovereign Immunity Decisions*, *supra* note 175, at 1063 ("In the opinion of the Department of State, the activities under consideration are of a private nature under the standards set forth in the Tate Letter.").

185. *See id.*

186. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965) ("The immunity of a foreign state under the rule stated in § 65 extends to . . . . (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state . . . ."). Illustration 2 to Section 66 makes the point explicit: "X, an official of the defense ministry of state A, enters into a contract in state B with Y for the purchase of supplies for the armed forces of A. A disagreement arises under the contract and Y brings suit in B against X as an individual, seeking to compel him to apply certain funds of A in his possession to satisfy obligations of A under the contract. *X is entitled to the immunity of A.*" *Id.* cmt. b, illus. 2 (emphasis added). Thus, to determine whether X is immune, an examination of A's immunity is necessary. If the commercial activity exception applied, for example, the case could still go forward against A. If Y wins, Y could presumably compel X to pay out the funds of State A.

Government of Spain.[187] If official immunity is determined as a function of state immunity, there is more potential for inconsistent adjudications after the FSIA because courts would make the determination about commercial activity for the purposes of state immunity, and the State Department would make the determination for the purposes of individual immunity, although precisely the same conduct may be at issue. Thus, courts and the executive branch might reach conflicting conclusions regarding the commercial nature of the conduct.

The State Department might have reasoned in *Cole v. Heidtman*, by contrast, that the agency itself was not a foreign state, and that immunity should be denied to both the agency and the individual on that basis. This highlights another post-FSIA problem with inconsistent adjudications — if the State Department controls immunity of foreign officials, this presumably includes determining whether the individual is or was actually a government official. This could directly conflict with the courts' determinations about whether the entity that employs the official qualifies as a foreign state, including agencies and instrumentalities.[188] If the executive branch reaches its conclusion first, it is hard to see why courts would not follow that determination for the case against the state, as well. Otherwise, inconsistent legal conclusions would be rendered in the same case with respect to two different defendants. These kinds of difficulties could apply to other issues as well, such as those for waiver,[189] property, tort claims, and claims related to terrorism.[190] The potential costs of inconsistent adjudications post-FSIA are thus higher than they were pre-FSIA because they could occur in the same factual situation to related parties and even in the

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Comment B makes clear that conduct based immunity of public officials is limited to these circumstances: "Public ministers, officials, or agents of a state described in Clause (f) of this Section do not have immunity from personal liability even for acts carried out in their official capacity, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state or unless they have one of the specialized immunities referred to above." *Id.* cmt. b, illus. 2.

187. 445 F.2d 501, 503–04 (2d Cir. 1971) (analyzing whether the official's conduct was commercial in nature, rather than simply according immunity to all official conduct).

188. *See* 28 U.S.C. § 1605(a)–(b) (2006).

189. *See* Ku, *supra* note 47, at 315–18 (describing inconsistent waiver determinations in state and federal courts prior to the enactment of FSIA).

190. *See* 28 U.S.C. § 1605(a) (2006); *id.* § 1605A. For example, the risk is clear for determinations under 28 U.S.C. § 1605(a)(5) (non-commercial tort exception), which makes states liable for certain tortious acts of theirs officials and employees when they are "acting within the scope of [their] office or employment." *Id.* If the official and the foreign state are both sued, federal courts will determine whether the official acted within the scope of his or her employment for the purposes of determining the immunity of the foreign state. But if the executive suggestion system is re-introduced, then the executive branch will determine whether the individual acted in his or her official capacities for the purpose of the determining the immunity of the official. The risk of inconsistent adjudications for different defendants based on the same facts in the same case is thus high. Allowing federal courts to apply federal common law to official immunity claims allows the courts to minimize this risk or eliminate it entirely.

same case. They are also higher because the effect may be to push courts toward accommodating the interests of the executive branch, even in claims against states themselves, undermining the intentions of Congress in enacting the FSIA.

Individual immunities will not always track state immunities. International law treats some individual immunities differently from state immunities.[191] U.S. law does as well, as the Court made clear in *Samantar* itself.[192] The point here, however, is that sometimes individual and official immunity will raise identical or nearly identical questions. After the FSIA, there is a real risk that executive determinations of individual immunity will undermine the statutory scheme with respect to state immunity. This risk did not exist before the enactment of the FSIA, and it suggests that Congress did not implicitly authorize the executive to control all individual immunity determinations when it enacted the statute.

3. *Increase in Cases*

Another difference between the pre-FSIA and the post-*Samantar* litigation against individual officials is a likely increase in the number of cases filed against current and former government officials, assuming that plaintiffs are able to obtain personal jurisdiction over such defendants. Before the FSIA was enacted there was little reason to sue both the state and the official in most cases. The State Department controlled immunity decisions and would likely reach the same immunity conclusion for each defendant, as it generally did before FSIA was enacted. Before *Samantar*, most courts had held that the FSIA covered individuals as well,[193] leaving little or no opportunity for State Department suggestions of immunity. After *Samantar*, however, plaintiffs have greater incentives to sue both the state and an individual, especially if they expect the State Department to be sympathetic to their claim. Plaintiffs also have a greater incentive to sue the individual even if they believe the state is immune because the two cases could now be treated differently. To some extent, both points will be true even if the

191. *See* LADY FOX, *supra* note 51, at 667–734.

192. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2289–91 (2010). Relying on the text of the statute, the Court reasoned that the possibility of disparate treatment of individual and state immunity cases did not mean that the FSIA should be interpreted as applying to individual defendants. The Court did not address, however, whether that possibility suggests that the FSIA should not be read as implicit authorization of the executive suggestion system. *Id.*

193. *See, e.g.*, *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 81 (2d Cir. 2008); Belhas v. Ya'alon, 515 F.3d 1279, 1283 (D.C. Cir. 2008); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388–89 (5th Cir. 1999); Chuidian v. Phillipine Nat'l Bank, 912 F.2d 1095, 1101–03 (9th Cir. 1990). *But see* Enahoro v. Abubakar, 408 F.3d 877, 882 (7th Cir. 2005).

executive branch is not given control over immunity decisions, but the incentives to file against individual defendants are likely magnified if the executive controls the disposition of those cases, because plaintiffs will hope that the courts might be sympathetic even if the executive branch is not and vice-versa.

The more predictable and transparent the government's immunity determinations are, the less likely an increase in cases will occur. The government's proposed approach suggests, however, that its immunity determinations will be neither. In its brief to the Supreme Court in *Samantar* itself, for example, the executive might have said merely that former officials are immune from suit for their official conduct, which included the actions alleged in this case, or that immunity was not appropriate because Somalia currently lacks a government recognized by the United States. Instead, the government's brief listed a number of considerations that it could "reasonably find" appropriate to consider, including: the residency of the parties; the cause of action in the case; and the lack of recognition of the government of Somalia.[194] In the government's hands, immunity determinations are thus likely to be opaque and difficult to predict — increasing the incentives to sue individual defendants even if it appears likely that they should be immune from suit. An increase in cases also increases the possibility of inconsistent adjudications and an executive suggestion system that undermines the operation of the FSIA in cases against states and their agencies.

4. *New Statutes: the TVPA, the Rediscovery of the ATS and Other Statutes*

Another difference between the pre- and post-FSIA contexts is the enactment federal statutes that create or authorize causes of action in many cases brought against foreign officials. The *Peru* and *Hoffman* decisions, as noted above, were common law admiralty cases involving the immunity of vessels. The lower courts extended those decisions to other contexts, including breach of contract and tort as well as cases brought under federal statutes having nothing in particular to do with international law or foreign relations.[195] The *Samantar* case is based on

194. *Samantar* Brief, *supra* note 9, at *7; *see also Samantar* Statement of Interest, *supra* note 9, at 4–5 n.2 (repeating these factors).

195. *See* Isbrandtsens Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971) (addressing an admiralty issue); Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964) (addressing an Arbitration Act issue); Ocean Transp. Co., Inc. v. Gov't of the Republic of the Ivory Coast, 299 F. Supp. 703 (E.D. La. 1967) (addressing a breach of contract issue); *In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952) (addressing a Sherman Act issue); *Sovereign Immunity Decisions*, *supra* note 175,

the Torture Victim Protection Action (TVPA) of 1991[196] and the Alien Tort Statute (ATS) of 1789[197] that went largely unused until the late 1980s.[198] Other cases against individual officials in the lower courts have been brought under these statutes, as well as the terrorism amendments to the FSIA that create a cause of action against government officials for certain acts of terrorism.[199]

These statutes make post-FSIA cases quite different from pre-FSIA cases because they are specifically directed at conduct that may violate international law and that involves foreign relations. Questions of immunity may well be closely related to questions of statutory interpretation. For example, TVPA creates a cause of action against those who engage in torture or extrajudicial killing while acting under the color of state law.[200] In TVPA cases, plaintiffs have argued that individual government officials who engage in torture should not be categorically immune from suit because that would make the vast majority of plausible defendants immune.[201] In pre-FSIA cases, by contrast, the statutory cause of action had nothing to do with international law. The drafters of the statute were unlikely to have considered immunity, and few cases under any particular statute actually involved foreign defendants who claimed immunity. Taking the pre-FSIA immunity scheme and superimposing it on post-FSIA cases would neglect this difference in the kinds of cases brought today, and is another reason not to read FSIA as implicitly authorizing the pre-FSIA practice of executive suggestions.

5. *State Department Immunity Determinations:* Youngstown *Category III?*

Giving the State Department control over immunity determinations would be contrary to the implied will of Congress, at least following the Court's reasoning in a recent case involving the enforcement of a decision of the International Court of Justice (ICJ).[202] The examples provided above demonstrate that the resolution of some immunity determinations would undermine the statutory scheme — an individual

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at 1072 (discussing *Vicente v. State of Trinidad and Tobago*, 372 N.Y.S.2d 369 (N.Y. Sup. Ct. 1975) (addressing a negligence issue)).

196. Pub L. No. 102-256, 106 Stat. 73 (1992).

197. Act of June 25, 1948, ch. 646, 62 Stat. 869 (codified at 28 U.S.C. § 1350 (2006)).

198. The Alien Tort Statute was enacted in 1789, but was rarely used until the late 1980s. *See* Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

199. *See* 28 U.S.C. § 1605A(c) (2006).

200. *Id.*

201. *See, e.g.*, Belhas v. Ya'alon, 515 F.3d 1279, 1288 (D.D.C. 2008); Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F. Supp. 2d 19, 29–30 (D.D.C. 2007).

202. *See* Medellín v. Texas, 552 U.S. 491 (2008).

immunity determination that made a determination of "agency or instrumentality" status that ran contrary to the statute, for example — but not every immunity determination would fall into this category. One might argue for a case-by-case determination, but it is equally plausible that the threat of inconsistent adjudications demonstrates that Congress simply did not intend to vest this power with executive branch.

The Supreme Court recently categorized the President's efforts to enforce a judgment of ICJ as falling within the third *Youngstown* category in *Medellín v. Texas*.[203] The Court reached this conclusion based on the UN Charter, which it reasoned did not make ICJ judgments in U.S. courts.[204] Because such judgments could not be directly enforced by courts as domestic law, the Court reasoned, Congress implicitly prohibited the President from enforcing them in federal court.[205] But the UN Charter says very little about ICJ judgments and nothing at all about presidential power or the enforceability of ICJ judgments in domestic legal systems.[206] Moreover, the general confusion around the doctrine of self-execution makes it difficult to infer anything about presidential power from this implied decision of the treaty-makers that ICJ judgments should not be self-executing.[207] In comparison to this reasoning in *Medellín*, official immunity determinations by the executive would fall even more clearly within category III because the FSIA explicitly stripped the executive of its power and comprehensively addressed many immunity issues.[208]

F. Functional Considerations

A final argument in favor of executive control is functional. The executive branch is best situated to know the foreign policy and legal implications of granting or denying official immunity based on its conduct of diplomacy, its access to information, and its role in developing customary international law. As the government has put it, "[T]he historical practice of deferring to the Executive's determinations as to immunity arose out of the Executive's traditional prerogative with respect to the sensitive diplomatic and foreign-policy judgments implicated by immunity questions."[209]

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203. *See id.* at 526–27.

204. *See id.* at 508–12.

205. *See id.* at 525–28.

206. *See id.* at 508–09.

207. *See* Ingrid Wuerth, Medellín*: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 6–8 (2009).

208. *See* Republic of Austria v. Altmann, 541 U.S. 677, 690–91 (2004).

209. *See Samantar* Brief, *supra* note 9, at *7.

One difficulty with this argument is canvassed above: after the enactment of the FSIA, having the executive make some immunity determinations and the courts make others creates a high risk of inconsistent determinations, which may over time undermine diplomatic objectives and the confidence of other countries. A second difficulty with this argument is that the history of immunity in the United States demonstrates that courts are best equipped functionally to make most immunity determinations. As recounted above, the difficulties that the executive encountered with immunity determinations led to the enactment of FSIA in the first place.[210] These problems were generated by the demands placed on the State Department by foreign governments; by the fact that in most countries immunity is a judicial determination; by the lack of adequate opportunity for plaintiffs to be heard in the process; and by difficulties created when the State Department did not express an opinion or made determinations that seemed inconsistent with earlier cases or its overall immunity policy.[211] Returning immunity to the courts resolved these problems.

More fundamentally, experience under the FSIA demonstrates that although an occasional state immunity decision might have high foreign policy stakes, most do not.[212] The fact of executive determination itself can make immunity issues more delicate and touchy — as under the pre-FSIA system — because states might come to believe that a denial of immunity reflects more about their lack of power and influence than it does about the law of immunity. In the hands of the courts (at least acting pursuant to a statute), the vast majority of immunity determinations do not appear to raise major foreign policy problems. To

210. *See supra* text at notes 66–69.

211. *See id.* As Monroe Leigh, State Department Legal Advisor put it, under the executive suggestion system "the State Department becomes involved in a great many cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something . . . in practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures." Statement of Monroe Leigh, *supra* note 66, at 35.

212. As noted below, in *Republic of Austria v. Altmann*, 541 U.S. 677, 700–02 (2004), the Court left open the possibility of case-by-case deference to the executive branch where state immunity is implicated, but the government has apparently sought such deference infrequently, and the courts have hesitated to rely on this rationale in resolving cases. *See, e.g.*, City of New York v. Permanent Mission of India to the UN, 446 F.3d 365, 377 n.17, (2d Cir. 2006), *aff'd on other grounds*, 551 U.S. 193 (2007). *But see* Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57 (2d Cir. 2005) (dismissing case raising Nazi-era claims, based in part on efforts of executive branch to resolve claims diplomatically). The government does express its views in some foreign relations related cases, of course, even when the issue involved is not subject to executive branch lawmaking. The question here is whether there is something different about cases against foreign officials that make executive lawmaking especially compelling from a functional perspective.

the extent that they do, the Court has left open the possibility of case-by-case deference to the executive.[213]

If anything, determinations of individual official immunity are generally less likely to raise major foreign policy issues than determinations of state immunity. States are likely to have a strong interest in cases brought directly against them. Cases brought against officials, by contrast, are often brought against former government officials and states may not care whether they are immune from suit. Recall, for example, that for years immunity played almost no role in ATS and TVPA cases at all; many defendants who might have raised that issue did not.[214] Of course, some states may care a great deal about immunity of their former officials[215] — but they care a great deal about their own immunity as well, yet FSIA (with little or no deference to the executive branch) has not generated major foreign policy problems.

The government's own description of how it plans to handle immunity determinations suggests that the pre-FSIA problems will persist if the executive suggestion regime is applied to official immunity determinations. Rather than articulating a clear set of governing principles and setting a goal of following them unless compelled to do otherwise, the executive has made clear that each immunity determination will involve potentially "complex considerations" as part of a multi-factor balancing test.[216]

G. Conclusion

Executive control of immunity determinations would expand executive power beyond *Garamendi* because immunity determinations lack the long history of claim settlement, and because they would apply not just to specific foreign policy conflicts with foreign countries, but would instead potentially apply to every immunity determination regardless of its significance or foreign policy implications. Executive control is inconsistent with *Medellín*'s understanding of *Garamendi* and with the Court's refusal to defer to the executive in the act of state context. Moreover, executive control lacks the implicit authorization of Congress that the court relied upon in *Dames & Moore* and emphasized in *Medellín*. There is a good case that the executive suggestion regime

213. *See Republic of Austria*, 541 U.S. at 701–02.

214. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 9 (noting with respect to the immunity defense that "[f]or thirty years international human rights litigation in U.S. courts has developed with little attention to a lurking doctrinal objection to the entire enterprise").

215. *See, e.g.*, Matar v. Dichter, 563 F.3d 9, 11 (2d Cir. 2009).

216. *Samantar* Brief, *supra* note 9, at *7–8; *see also Samantar* Statement of Interest, *supra* note 9, at 5.

would even fall into *Youngstown* Category III after the enactment of FSIA, at least pursuant to the Court's analysis in *Medellín*. Finally, there are functional reasons to think that State Department determinations of official immunity will not work well in practice. FSIA was enacted in part to "free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to '[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'"[217] Deferring to the executive branch on all issues of officer immunity would undermine these purposes of the statute.

II. FEDERAL COMMON LAW OF FOREIGN RELATIONS

Immunity determinations for foreign officials might be vested with the federal courts as a form of federal common lawmaking, rather than with the executive branch. Deference to the executive branch may still be appropriate for some issues[218], but its immunity determinations would not always be conclusive on the federal courts, and it would not have the power to set federal policy binding on the courts. Federal common lawmaking is more frequent and spans a broader range of subjects than lawmaking by the executive branch. And if immunity issues fit poorly into the most common rationale for executive branch lawmaking — enumerated powers of the President or implied authorization by Congress — they fit somewhat more easily into most rationales advanced for federal common lawmaking in foreign affairs. Also, immunity determinations as a form of federal common law comport better with the Court's language in *Samantar*, where it characterized the applicable law as "common law."[219] Nevertheless, there are those who oppose federal common law whole cloth,[220] and those who think that the federal common law of foreign relations is illegitimate.[221] Federal common law has also been applied anemically by the Supreme Court in foreign relations cases.[222] Thus, although many rationales for federal common law apply fairly readily to immunity determinations, judicial resolution of such claims through federal common law nevertheless represents a contested exercise of federal judicial power.

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217. Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983) (quoting H. R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606).

218. *See infra* Part III.C.

219. Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010).

220. *See, e.g.*, Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutional" Perspective*, 83 NW. U. L. REV. 761, 765–68 (1989).

221. *See, e.g.*, Goldsmith, *supra* note 7.

222. *See id.* at 1713.

To some extent, the constitutional tensions in the creation of federal common law mirror those of executive branch lawmaking. There is a federalism issue, as *Erie* makes clear, because state law is preempted not by a federal statute, but instead by the law created by federal courts themselves.[223] Courts make federal common law that binds the states without going through the procedural processes required of treaties and legislation in Articles I and II of the Constitution.[224] After *Erie*, federal courts have no general power to supplant state law in diversity cases, although the Supreme Court has repeatedly held that they do have the power make federal common law where authorized to do so by a federal statute or where certain federal interests are at stake.[225] Lawmaking by the federal courts also arguably usurps a function reserved by the Constitution to the politically accountable legislative process, creating a separation of powers problem.[226]

The constitutional tensions are arguably not as acute for federal common law as for executive branch lawmaking, however. Courts, unlike the executive branch, have long exercised broad common-lawmaking power, even if the creation of *federal* common law is contested post-*Erie*.[227] They also have the primary responsibility for applying statutes, the Constitution, and treaties in cases properly before them: this interpretive function is often closely connected to federal common lawmaking, which is generally justified with reference to a federal statute or the presence of strong federal interests which are sometimes linked to the structure of the constitution.[228] In any event, even if contested, federal common lawmaking post-*Erie* spans a broader range of substantive areas from procedural questions to admiralty, the military contractor defense, interstate disputes, and cases affecting the rights and obligations of the United States as a party.[229]

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223. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

224. *See* Clark, *supra* note 8, at 1338–46, 1403–04.

225. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 614–715 (6th ed. 2009).

226. *See* Thomas Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 328–30 (1992). *But see* Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1571–73 (2008).

227. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 725–26 (2004).

228. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) ("But we have held that a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts' so-called 'federal common law.'") (internal citations omitted).

229. *See, e.g.*, *id.* at 504–12 (military contractor defense); United States v. Little Lake Misere Land Co., 412 U.S. 580, 592–94 (1973) (rights and obligations under contracts made by the United States); Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 20–21 (1963) (admiralty); Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943) (rights and duties of the United States

A. Sabbatino *& Other Cases*

An examination of the Court's federal common law case demonstrates that their reasoning extends to individual immunity determinations after *Samantar* — and also supports judicial control of such determinations even when the executive branch has offered an opinion or a suggestion of immunity. These cases, discussed below, include first, those applying the act of state doctrine; second, a case resolving an issue of foreign state immunity not directly addressed by FSIA; and third, a government contractor defense case that did not raise foreign relations questions.

The Court's most significant case on the federal law of foreign relations is *Banco Nacional de Cuba v. Sabbatino*[230] from 1964. Cuba expropriated sugar located in Cuba but owned by U.S. nationals; the sugar was then sold to a business in New York. The U.S. purchaser did not pay Cuba for the sugar, however, but instead transferred the money to *Sabbatino*, the receiver for the U.S. company that had owned the sugar before expropriation. Cuba sued for conversion, and Sabbatino argued in defense that the expropriation violated international law and should not be enforced.[231] The Supreme Court held for Cuba pursuant to the act of state doctrine, which prevents courts from scrutinizing the validity of acts of foreign governments in their own territory; the Court made clear that the doctrine applied as a matter of federal common law and displaced New York state law.[232] The opinion reasons that neither sovereignty itself, nor international law, nor the Constitution compelled courts to apply the act of state doctrine.[233] Nevertheless, the doctrine has in the Court's words "constitutional" underpinnings[234] — surely one of the rare occasions on which the Court has used quotation marks around "constitutional" without making clear what it was quoting. In any event, the Court identified what appeared to be three constitutional aspects of the act of state doctrine: a) a concern that if courts scrutinize the validity of foreign acts of state, it may prove detrimental to U.S. foreign policy and embarrassing to the executive branch;[235] b) the "uniquely federal" nature of the doctrine, and the ability of state courts to undermine the "purposes behind the doctrine" if "left free to develop their own

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under commercial paper); Hinderlinder v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (interstate disputes); *see generally*, FALLON, JR. ET AL., *supra* note 225, at 614–715.

230. 376 U.S. 398 (1964).

231. *See id.* at 400–08.

232. *See id.* at 424–25. *Erie* was not intended to apply to this issue, the Court reasoned, in light of its potential impact on international relations. *Id.* at 425.

233. *See id.* at 421–23.

234. *Id.* at 423.

235. *See id.* at 423–24.

rules;"[236] c) the doctrine's reflection of "the proper distribution of functions between the judicial and political branches" of the government.[237]

Much of the reasoning in *Sabbatino* applies readily to immunity determinations; indeed, the doctrines of immunity and act of state are similar and have a common origin.[238] Immunity protects states and their officials from suits in foreign courts, and the act of state doctrine protects government actions within their own territory from challenges in foreign courts. In both contexts, the legislative branch has ultimate control over the issue — a federal statute would be controlling on both states and the executive branch[239] — and the difficult question is how courts should resolve cases when Congress has not acted. Ignoring either doctrine may create foreign policy difficulties and conflict with other nations.[240] This risk may be higher in the immunity context, because immunity — unlike the act of state doctrine — is in some contexts *required* by international law.[241] Immunity decisions thus risk putting the United States in violation of international legal obligations,[242] while the Supreme Court has reasoned that the act of state doctrine does not involve this risk.[243] Federal interests predominate in the immunity context for these reasons and others. Although state

236. *Id.* at 424.

237. *Id.* at 427–28.

238. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 693–94, 705 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972) (plurality opinion) ("The separate lines of cases enunciating both the act of state and sovereign immunity doctrines have a common source in the case of *The Schooner Exchange v. McFaddon*."); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (stating that the act of state principle extends to the "immunity of individuals"); Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812) (describing the connection between the territorial jurisdiction of states and "the exemption of the person of the sovereign from arrest or detention within a foreign territory").

239. Both immunity determinations (with the excpetion of some aspects of status-based immunity within the exclusive control of the President, *see infra* Part III.C.2), and the act of state doctrine are ultimately within the control of Congress. In the Second Hickenlooper Amendment, Congress restricted use of the act of state doctrine. Second Hickenlooper Amendment to the Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2006)). The courts subsequently rejected the act of state defense in *Sabbatino* on remand. *See* Banco Nacional de Cuba v. Farr, 383 F.2d 166, 178 (2d Cir. 1967).

240. *See Sabbatino*, 376 U.S. at 432–34 (act of state); Case Concerning Jurisdictional Immunities of the State (Ger. v. It.), Press Release, 2008 I.C.J. 1 (Dec. 23) (detailing application of the Federal Republic of Germany initiating suit against Italy based on domestic courts' failure to accord immunity to Germany), *available at* http://tiny.cc/5d4r8.

241. *See, e.g.*, Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) (ruling that a Belgian arrest warrant for the then Minister of Foreign Affairs of the Democratic People's Republic of the Congo violated the Minister's immunity from the criminal jurisdiction of another state).

242. *See, e.g.*, *Sabbatino*, 376 U.S. at 436–37.

243. *See id.* at 421–22.

courts have historically decided immunity questions,[244] they have generally done so based on international law or general law, rather than state law.[245] The field has been effectively federalized since the *Hoffman* and *Peru* cases and the enactment of the FSIA.

A significant difference between federal common lawmaking in *Sabbatino* and in the immunity context is the position of the executive branch. The executive branch in *Sabbatino* stated that the expropriation violated international law, but was also clear that it did not want to take a position in the case.[246] Applying federal common law allowed the executive to stay out of the case entirely; it also meant that the courts did not evaluate whether the expropriation decree violated international law — they simply enforced the decree. In the immunity context, by contrast, the State Department wants to control immunity determinations on a case-by-case basis.[247] In addition, if courts resolve immunity decisions, they will not always be abstaining from issues of foreign policy and international law, but instead resolving such issues. These issues arose in First National City Bank v. Banco Nacional de Cuba.[248] Cuba argued that the act of state doctrine barred a counterclaim against it, but the State Department stated that under the circumstances presented by the case the act of state doctrine should not apply.[249]

The Court recognized that the *First National City Bank* case offered an opportunity to unite the immunity and act of state lines of cases by deferring to the executive branch. Three justices reasoned that the Court should do exactly that, relying on the historical and functional similarities between the two doctrines.[250] Six justices, however, writing three separate opinions, refused to give the executive branch the power to resolve act of state cases.[251] Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun, rejected the analogy between act of state and immunity, in part because he questioned whether the executive had too much control over immunity determinations, and in part because he thought that both doctrines should be used to keep the courts

244. For recent examples, *see* Bolkiah v. Super. Ct., 88 Cal. Rptr. 2d 540, 542 (Cal. Ct. App. 1999) (deciding whether the defendant, who claimed immunity, qualified as a foreign state under the FSIA); Gugliani v. Shipping Corp. of India, Ltd., 526 So. 2d 769, 770–71 (Fla. Dist. Ct. App. 1988) (determining that the defendant was a foreign state and thus immune from suit under the FSIA); United Mexican States v. Ashley, 556 S.W.2d 784, 785–86 (Tex. 1977) (holding Mexico immune based on federal cases, not the FSIA).

245. *See supra* note 47.

246. *See Sabbatino*, 376 U.S. at 420.

247. *See Samantar* Statement of Interest, *supra* note 9.

248. 406 U.S. 759 (1972).

249. *See id.* at 764–65.

250. *See id.* at 765–68 (Rehnquist, J., joined by Burger, C.J., and White, J.).

251. *See id.* at 770–73 (Douglas, J., concurring); *id.* at 773–76 (Powell, J., concurring); *id.* at 766–96 (Brennan, J., dissenting, joined by Stewart, Marshall & Blackmun, JJ.).

from resolving the merits of certain cases where international law is uncertain and foreign policy concerns are in play.[252] Deferring to the executive branch in *First National City Bank* meant deciding the case — and the views of the executive as to the preferred outcome on the merits were clear.[253] Although this second reason — keeping courts away from difficult issues — was part of what led Justice Brennan to reject the analogy to immunity in the *First National City Bank* case itself, in fact both immunity and act of state determinations can under some circumstances involve sensitive questions in the initial determination of when to apply them, and with respect to the merits of the case itself. Since the *First National City Bank* case, the Court has refused the executive's bid for case-by-case deference in act of state cases.[254]

There is no good reason to treat executive control differently in the act of state and immunity contexts. The basis for executive branch lawmaking is weak for both. The lines of cases diverged after the *Peru* and *Hoffman* cases made immunity an executive determination, and *Sabbatino* and *First National City Bank* refused to make act of state an executive determination. The concern expressed in the act of state context that executive determinations could politicize act of state determinations proved to be true in the immunity context, leading Congress to enact FSIA, as described above. By contrast, the concern that judges are ill-equipped to apply the act of state doctrine has proven false. Post-*Samantar*, courts have the opportunity to unite immunity and the act of state lines of cases by applying federal common law to immunity issues that fall outside the FSIA.

Second, an important Supreme Court case on immunity issues not covered by FSIA supports the application of federal common law to foreign official immunity determinations. In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*[255], the Court held that the FSIA did not apply to determine the substantive liability of a government-owned Cuban corporation.[256] Rejecting both Cuban and New York law,[257] as well as the analysis suggested by the executive branch,[258] the Court applied federal common law based on international law, prior federal common law decisions, and the goals of Congress with enactment of the FSIA.[259] These are precisely the grounds upon

252. *See id.* at 789 n.15 (Brennan, J., dissenting).
253. *See id.* at 783–84.
254. *See supra* note 39.
255. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983).
256. *See id.* at 620–21.
257. *See id.* at 621–22 n.11.
258. *See id.* at 634 n.27.
259. *See id.* at 623–34.

which individual immunity determinations should be made by the courts post-*Samantar*.

Finally, immunity determinations by federal courts are also consistent with federal common law cases raising domestic rather than foreign issues. Perhaps the best example is *Boyle*, in which the court determined that the liability of military contractors is governed by federal common law and created the "military contractor defense."[260] A federal statute — the Federal Tort Claims Act — provided a defense for government officials, but not for private contractors. The Court reasoned that unless private contractors were also immune under federal common law, some suits against them would "produce the same effect sought to be avoided by the FTCA exemption."[261] Similar reasoning holds in the FSIA context. Federal common law should enable courts to keep official immunity determinations consistent with the immunity of states where necessary to avoid undermining the statute itself.[262] As in *Boyle* and *Sabbatino*, the interests implicated here are "uniquely federal."[263] As in *Boyle*, the statute in question (FTCA or FSIA) does not extend to a certain kind of defendant — such as a private contractor or a foreign official — but federal common law ensures that the non-statutory cases do not undermine the statutory scheme put in place by Congress.

B. Why Not International Law?

One of the most significant debates in both federal common law and foreign relations law concerns the status of customary international law as federal common law.[264] Some argue that customary international law is federal common law, as one of the "enclaves" of federal common law that emerged after *Erie*.[265] Others maintain that customary international

260. Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

261. *Id.* at 511.

262. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2286 (2010) ("Congress responded to the inconsistent application of sovereign immunity be enacting the FSIA in 1976."); Verlinden v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1980) ("[FSIA was enacted because] sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied."); *see also* Rep. of Austria v. Altmann, 541 U.S. 677, 690–92 (2004) (citing inconsistent application of immunity principles as reason for enactment of FSIA).

263. *Boyle*, 487 U.S. at 505–06.

264. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004); Curtis Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1829 (1998); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after* Erie, 66 FORDHAM L. REV. 393, 435–61 (1997).

265. *See* Stephens, *supra* note 264, at 443–47.

law is only federal law when authorized by the political branches.[266] This debate is long-standing and increasingly nuanced.[267] For our purposes, the significant aspect is that the international law of foreign state and head of state immunity is sometimes cited as an example of federal common law applied by the federal courts without explicit incorporation by the political branches.[268] Moreover, in earlier immunity cases courts often applied customary international law, even if it is unclear whether they applied it as what could be characterized today as federal common law.[269] Determinations of foreign official immunity could significantly contribute to this debate if courts either accept or explicitly reject customary international law as federal common law.

Although international law is likely to be relevant to the resolution of individual immunity issues as described in Part III, courts are unlikely to apply customary international law directly. That is, they may use international law and practice as one interpretive tool in developing federal common law, without relying on it as controlling.[270] Immunity determinations are not an auspicious context for courts to rely on customary international law alone, in part because of the uncertainty of some aspects of immunity law.[271] In many countries — as in the United States — foreign state immunity has been codified by statute over the past fifty years, and this often makes the interplay between domestic and international law difficult to tease apart.[272] Moreover, as described above, the FSIA is the background against which courts should make immunity determinations, and the Act may differ from international law in some respects.

C. *Why Not State Law?*

Federal courts might apply state law to resolve immunity issues, at least in diversity cases.[273] Applying state law solves any federalism

266. *See* Bradley & Goldsmith, *supra* note 264, at 876.

267. *See generally* William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007) (describing the debate in light of the Court's decision in *Sosa v. Alvarez-Machain*).

268. *See* Koh, *supra* note 264, at 1829 n.25; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 382–83 (1997).

269. *See supra* notes 47 and 59.

270. For examples, see *infra* Part III.B.

271. *See* David Stewart, *The U.N. Convention on Jurisdictional Immunities of States and their Property*, 99 AM. J. INT'L L. 194 (2005). In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–24 (2001), the Court was unwilling to apply international law in the expropriation context, in part because its content was unclear.

272. *See* LADY FOX, *supra* note 51, at 20–25, 218–22.

273. *Cf.* Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989) (applying California state

objections, and it might put immunity determinations in the hands of politically accountable state legislatures if they choose to pass legislation.[274] For those skeptical of both federal common law and executive branch lawmaking, state law is the obvious alternative.[275]

State law is a poor source of law in immunity cases, however, underscoring the importance of interstitial federal common lawmaking in this context. Foreign state immunity has never been a traditional issue of state regulation. Although state courts have resolved immunity issues, they have done so generally based on customary international law or general rather than state law.[276] Unlike the Court's much-criticized decision in *Zschernig v. Miller*,[277] where the Court applied federal common law (also termed dormant foreign affairs preemption) to preempt state inheritance laws that arguably impacted foreign relations,[278] applying federal common law to foreign official immunity does not displace a traditional area of state authority. After the Supreme Court's decision in *Republic of Mexico v. Hoffman*, states deferred to executive immunity determinations until 1976 when Congress put immunity cases in federal court.[279] There is no general body of state law on foreign state and individual immunity.[280]

Other reasons mentioned above in the discussion of *Sabbatino* also weigh against the application of state law. In particular, there are strong federal interests involved in determining the immunity of foreign governmental officials; these decisions fundamentally impact the welfare of the nation as a whole, and risk disapproval by foreign nations, diplomatic fall-out, international complaints, and even all-out war. Most cases raising foreign official immunity will be brought under federal statutes. It makes little sense to apply federal common law to those cases while applying state law to diversity cases, in part because

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law to determine whether a Chinese official acted within the scope of his office under the FSIA's tortious act exception); *see* 28 U.S.C. § 1605(a) (2006); *see also* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN U.S COURTS 219–346 (Aspen 4th ed. 2007) (discussing *Liu* and the relationship between state and federal law in cases governed by the FSIA).

274. *Cf.* Clark, *Federal Common Law*, *supra* note 7, at 1308–11 (arguing that foreign state immunity is beyond the legislative competence of the states).

275. *See* Goldsmith, *supra* note 7, at 1622–25; Clark, *supra* note 8, at 1330–31. Professor Goldsmith notes that "nontraditional foreign relations matters" are especially troubling areas of federal common law, but immunity is a traditional foreign relations issue. *See* Goldsmith, *supra* note 7, at 1622–23, 1677.

276. *See* Ku, *supra* note 47, at 307–08.

277. 389 U.S. 429 (1968).

278. *See id.* at 430–32.

279. *See* Ku, *supra* note 47, at 321.

280. *Cf.* De Sylva v. Ballentine, 351 U.S. 570, 580–81 (1956) (drawing on the "ready-made body of state law" to define a term in the federal Copyright Act); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 958–60 (1986).

this would make immunity determinations especially unpredictable and potentially inconsistent, which makes it hard for foreign government and their officials to predict when they are subject to suit in U.S. courts.

Finally, the FSIA evinces a very strong preference for a federal forum in which to resolve issues of foreign state immunity. It provides relaxed deadlines for removal,[281] and it permits removal even of cases based on state law causes of action where there is no Article III diversity. The Supreme Court considered the constitutionality of federal subject matter jurisdiction in cases involving only aliens — and thus lacking Article III diversity[282] — and unanimously upheld the statute, emphasizing the importance of both a federal forum and substantive federal law to resolve issues of foreign state immunity.[283] Although the FSIA itself does not formally apply to official immunity determinations, application of state law to official immunity issues would risk exactly the kind of inconsistent adjudications that the statute was enacted to avoid.[284] Application of federal common law, rather than state law, does not necessarily mean cases will be resolved in federal court, but it does make that more likely.[285] In any event, federal common law, even if applied by state courts, is subject to review by the Supreme Court while state law is not; application of federal law thus advances the purposes evinced by FSIA. As the Court reasoned in *Verlinden*:

> Congress, pursuant to its unquestioned Article I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states.[286]

D. Theories of Federal Common Law

Resolving foreign official immunity through federal common law is also consistent with the dominant theories of federal common law. The broadest theories of federal common law extend the power of the courts to the limits of federal power generally (even if not advocating that

281. *See supra* note 172 and accompanying text.

282. *See* Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1923); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

283. *See* Verlinden v. Cent. Bank of Nigeria, 461 U.S. 480, 493–94, 496–97 (1983).

284. *See supra* Part I.E.2.

285. *See supra* note 173; *see generally* Anthony J. Bellia, *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005) (describing state courts' application and development of federal common law).

286. *Verlinden*, 461 U.S. at 497.

courts always exercise this power);[287] official immunity determinations fit easily within this justification, as Congress has the power to regulate foreign state and official immunity.[288] Narrower understandings of federal common law are more specifically linked to the structure (or interpretation) of the Constitution or to federal statutes. Virtually every theorist to specifically consider foreign state or official immunity has favored application of some form of federal common law over state law,[289] even those generally skeptical of federal common law.[290]

The interesting question about theories of federal common law is thus not so much whether they favor the displacement of state law (they do) but whether they have anything to say about federal judicial lawmaking versus lawmaking by the executive branch. Broad theories of federal common law maintain that the *Erie* doctrine imposes no limitations on the power of courts to make federal common law beyond the limits on federal power generally.[291] The executive has no comparable lawmaking power as argued in Part I; these theories arguably thus make the choice between executive and judicial control an easy one. But many read *Erie* as having a strong separation of powers component that limits lawmaking by federal judges,[292] a view with support in the case-law.[293]

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287. *See* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 806–07, 842–46 (1989); Green, *supra* note 7, at 615–22; *see also* Field, *supra* note 280, at 887–88 ("[T]he only limitation on courts' power to create federal common law is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule." This approach "finds the formulation of federal common law permissible in the face of silent or ambiguous federal enactments whenever that lawmaking seems the most reasonable course.").

288. *See Verlinden*, 461 U.S. at 493–94, 496–97.

289. *See, e.g.*, Hill, *supra* note 1, at 1042.

290. *See* Clark, *Federal Common Law*, *supra* note 7, at 1306–11; *see also* Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 515, 538–39 (2002); A. M. Weisburd, *State Courts, Federal Courts, International Interests*, 20 YALE J. INT'L L. 1, 62 n.337 (1995); *cf.* Ernest Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 505 (2002) (noting in this context that state law should not apply but that "federal common law should most often take the form of federal choice of law rules"). Similarly, scholars skeptical of federal common law generally tend to support its application in foreign affairs. *See, e.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 7 (1985); *see also* Clark, *Federal Common Law*, *supra* note 7, at 1292 (describing the foreign affairs as one of the "more prominent modern enclaves of federal common law"); Goldsmith, *supra* note 7, at 1632 ("[T]here is a remarkable consensus about the legitimacy of the federal common law of foreign relations."). Professor Goldsmith is a likely exception: he rejects *Sabbatino* (in favor of state law), and would apparently reject federal common law immunity determinations in favor of state law as well. *See id.* at 1619–24, 1709–10.

291. *See supra* note 287.

292. *See* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 877 (2007); Clark, *Federal Common Law*, *supra* note 7 at 1261–62, 1268–71, 1274–76; Thomas W. Merrill, *supra* note 291, at 15–19; Paul J. Mishkin, *Some Further Last Words on* Erie *— The Thread*, 87 HARV. L. REV. 1682, 1683 (1974).

293. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004); City of Milwaukee v. Illinois,

On these accounts, federal common law puts lawmaking in the hands of federal judges who lack political accountability,[294] and it is in tension with (or downright contrary to) the Supremacy Clause and the vesting of lawmaking power in the legislative branch.[295]

If the objection to federal common lawmaking is based on the judicial branch's lack of political accountability, the response in this context seems straightforward: where possible, the executive branch (as one of the political branches) should control immunity determinations. But if this objection is merely functional (as opposed to being based on the text of the Constitution), then it can be counterbalanced by other functional considerations. Here, those point strongly away from executive determinations of foreign official immunity, especially in light of the goals of the FSIA.[296]

Focusing on potential Supremacy Clause problems that purportedly make both executive branch and judicially created federal common lawmaking illegitimate, Professor Clark argues that what is often termed federal common law is acceptable because it concerns matters beyond the legislative power of states and vindicates the power of the federal political branches.[297] The purpose of federal common law in this context is to apply background rules — like customary international law — that avoid judicial interference with matters of foreign affairs assigned by the Constitution to the political branches.[298] Foreign state immunity purportedly serves as an example.[299] This, however, is an inaccurate understanding of what federal courts do in the immunity context.[300] Rather than simply applying international law to allow the political

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451 U.S. 304, 313–14 (1981).

294. *See* Merrill, *supra* note 290 at 25–27; *see also* Ku & Yoo, *supra* note 1, at 201–02 (emphasizing the greater political accountability of the executive branch as compared to the judiciary).

295. *See* Clark, *Federal Common Law, supra* note 7, at 1261–62, 68–71, 74–76.

296. *See supra* note 259 and accompanying text.

297. *See* Clark, *Federal Common Law, supra* note 7, at 1251–52. Professor Hill advanced a similar argument. *See* Hill, *supra* note 1, at 1042–50, 1057–59.

298. Clark, *Federal Common Law, supra* note 7, at 1251–52, 1311 ("In sum, rules of decision like those applied in *Sabbatino* and *The Schooner Exchange* are binding in both federal and state courts, not because they are 'federal judge-made law' and thus constitute 'the supreme Law of the Land,' but because the judiciary's failure to apply them would interfere with powers assigned by the Constitution exclusively to the political branches of the federal government.").

299. *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 7, 66–69 (2009); Clark, *Federal Common Law, supra* note 7, at 1306–11.

300. Professor Hill, whose analysis is similar to Clark's with respect to the displacement of state law, has a far broader view of the federal courts' power to develop federal common law. Unlike Cark, he does not re-conceptualize federal common law as constitutional law in the immunity context, and he is clear that the executive does not control immunity determinations unless they come within the executive branch's constitutional power to make law. *See* Hill, *supra* note 1, at 1058. Professor Hill notes that the scope of independent executive power in foreign affairs is a vexing and difficult question. *Id.*

branches to act; courts will have to instead develop law on a number of questions — waiver,[301] who qualifies as a foreign official,[302] whether the action should be considered one against the state itself,[303] whether ultra vires acts should be accorded immunity,[304] whether torture or other acts that violate *jus cogens* norms should be accorded immunity,[305] the status of the official's government,[306] the significance of the defendant's residence in a foreign state.[307] Some of these questions are the subject of dispute in international law; some should be answered with reference to the statutory scheme in place after enactment of the FSIA. None affords clear answers in every case, and none should be resolved simply by attempting to determine the risk of "judicially generated resentment."[308] Making immunity determinations in these cases is not just a matter of determining that state law is displaced on separation of powers grounds,[309] nor can each of these decisions be re-characterized as a question of constitutional interpretation.

Although Clark links the pre-FSIA immunity determinations by the executive to the President's recognition power, suggesting that the President controls immunity determinations as a constitutional matter, this analysis is cursory and unconvincing.[310] If immunity determinations are reserved for Congress, by contrast (as Clark agrees is the case for the act of state doctrine),[311] then courts should refuse to allow the executive to control those determinations as it has in the act of state context. As argued above, however, the courts' own power to develop federal common law is not simply a reflection of the political branches'

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301. *Compare* The Sao Vicente, 281 F. 111 (2d Cir. 1922), *with* De Simone v. Transportes Maritimos de Estado, 192 N.Y.S. 815 (N.Y. App. Div. 1922) (state and federal courts reaching different conclusions as to whether entering a general appearance waived a state immunity defense).

302. *See supra* note 186 and accompanying text.

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

304. *See* Mizushima Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct*, 29 DENV. J. INT'L L. & POL'Y 261, 280–87 (2001).

305. *See* Jane Wright, *Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit*, 30 OXFORD J. LEGAL STUD. 143, 144–47 (2010).

306. *See Samantar* Statement of Interest, *supra* note 9, at 7–10 (reasoning that a Somali defendant was not entitled to immunity based in part on the lack of a recognized government in Somalia).

307. *See id.* (making determination of no immunity based in part on the defendant's residence in the United States).

308. Anthony Bellia, Jr. & Bradford Clark, *The Political Branches and the Law of Nations*, 85 NOTRE DAME L. REV. 1795, 1810 (2010).

309. *Cf.* Henry P. Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 762–63 (2010) (making a similar point and noting that Clark views *Boyle* as a case "of state law interference with the constitutional prerogatives of the national government, even though no member of the Court treated it as such").

310. *See* Clark, *supra* note 96, at 1635–36.

311. Bellia & Clark, *supra* note 299, at 88 n.477.

ultimate control of immunity determinations. Indeed, unlike the executive branch, courts *must* do something in immunity cases properly before them — deny immunity, accept immunity, apply state law, apply international law (by making contested decisions about its controversial and evolving content), defer to the executive branch when it expresses an opinion, and so on.

Immunity thus nicely demonstrates the functional need for interstitial lawmaking by the federal courts in cases properly before them: applying state law is a poor alternative, the executive branch does not always weigh in and there are strong functional disadvantages to its complete control of immunity issues, international law is in some respects contested and arguably incomplete, consistency with the federal statute is important, and there are strong federal interests involved. The executive branch may have lawmaking power in discrete contexts based on Article II, but it lacks the interstital, gap-filling power of the Article III federal courts. Article III jurisdiction alone does not give courts the power to create federal common law, but it does explain why courts may do so interstitially based on other aspects of the constitution (federal supremacy in some aspects of foreign affairs) and statutes (like the FSIA and the FTCA) while the executive lacks this power. Not surprisingly, as noted at the outset, the Court has accepted federal common law by the courts in a variety of contexts, including immunity determinations that fall outside the FSIA, as well as the act of state doctrine.[312]

III. APPLYING FEDERAL COMMON LAW IN IMMUNITY CASES

The analysis in the foregoing Part concluded that courts should apply federal common law to resolve post-*Samantar* claims of official immunity. This Part considers how the courts should make immunity determinations pursuant to federal common law, building on the analysis in the first two Parts of the article. As described below, courts should resolve any questions that may also arise under FSIA in ways that are consistent with the statute.[313] Courts should also resolve immunity questions to avoid violations or potential violations of international law. Finally, although wholesale deference to the executive branch should be rejected, deference is nevertheless appropriate with respect to certain discrete questions, particularly where status-based immunity is claimed or where international law is in a state of flux or

312. *See* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 613 (1983); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–27 (1964).

313. *See infra* Part III.A.

development. These three constraints[314] in rough order of importance — the statute, international law, deference to the executive branch on certain issues — limit and shape how courts should develop the federal common law of immunity. Each is considered in turn below.

A. Statutory Constraints

This constraint on the development of federal common law follows from one of the reasons to apply federal common law rather than case-by-case determinations by the executive branch: the avoidance of individual immunity determinations that are inconsistent with the statutory scheme governing foreign states.[315] For issues like waiver, and the question of whether an organization — and hence its employees — should be characterized as a foreign state, and even perhaps the applicability of certain exceptions to immunity, determinations of individual immunity should not be inconsistent with determinations of state immunity under the statute. This also follows from an understanding of the statute as part of the basis for federal common lawmaking. Thus FSIA in some respects constrains the courts' development of federal common law in cases against foreign officials.

B. International Law

International law should also constrain the courts' development of federal common law. International law is generally relevant to the interpretation of FSIA, and federal common law should be developed with international law as an important source of interpretive principles.[316] More specifically, the *Charming Betsy*[317] canon of statutory interpretation has some significance in developing federal common law. Generally, the canon applies pursuant to the implied wishes of Congress and because it implements separation of powers

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314. Background principles of domestic common law of immunity (including the pre-FSIA immunity practice) may inform foreign official immunity determinations as well. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2D 137 (2009); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. (forthcoming May 2011) (manuscript at 29–33), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689247. The opinions and representations of foreign states may also play a role in federal courts' immunity determinations. *Id.* at manuscript 45–47.

315. *See supra* Part I.E.2.

316. *See, e.g.*, Samantar v. Yousuf, 130 S. Ct. 2278, 2289 (2010) (referring to international practice in the interpretation of the FSIA); Permanent Mission of India to the UN v. City of New York, 551 U.S. 193, 199 (2007) (noting that the codification of international law was a purpose of the FSIA).

317. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (reasoning that, when possible, domestic statutes should be construed not to conflict with the law of nations).

principles.[318] On the first point, FSIA was enacted in part to bring U.S. practice in conformity with international law.[319] Indeed, the history of immunity is one in which the U.S. courts have been cautious, granting immunity even when not required by international law and where foreign countries may not have done so.[320] Although the FSIA was designed in some ways to restrict immunity, the backdrop to the statute was the courts' hesitance to lift immunity even for commercial activity. Thus even though some aspects of FSIA itself may not provide immunity that is arguably required by international law,[321] Congress would not have intended — or expected — *courts* to deny an immunity required by international law. Courts should avoid violations of international law for a second reason: the basis for federal common lawmaking arises in part from the federal government's control over foreign relations issues, which is textually vested in the political branches generally, if not the executive branch specifically. As the Court emphasized in *Sabbatino*, courts should refrain from creating conflicts with other nations and from resolving contested questions of international law in ways that might create foreign policy problems.[322]

C. Back to the Executive Branch

1. Substantial Deference Instead of "Lawmaking"?

Even if the executive branch lacks the absolute power to make immunity determinations in individual cases or to determine the law that governs the cases in which it does not make a specific immunity recommendation, perhaps courts should afford substantial deference to the State Department on both issues. One might argue that State's views — both on individual cases and on the development of the law — should prevail unless they are unreasonable. This might be said to avoid the "lawmaking" problem analyzed in Part I of this article because "substantial deference" is not the same thing as absolute control. The lawmaking problem cannot be resolved in this way, however, because it does not identify the basis for "substantial deference" by the courts to the executive branch.

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318. The *Samantar* Court refused to consider the *Charming Betsy* canon of interpretation in determining whether the FSIA addressed Mr. Samantar's immunity, but the canon is nevertheless relevant in applying federal common law to determine whether he is immune or not. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2290 & n.14 (2010). If a decision denying immunity threatens to put the United States in violation of international law, courts should opt for immunity unless a statute compels them to reach the opposite conclusion.

319. *See, e.g.*, *Samantar*, 130 S. Ct. at 2289; *Permanent Mission of India*, 551 U.S. at 199.

320. *See* GIUTTARI, *supra* note 44, at 120.

321. *See* Stewart, *supra* note 271, at 205–06.

322. 423 U.S. at 427–33.

One basis might be that the executive is the source of the law itself based on its independent constitutional powers. Although that basis for deference is significant in status-based immunity cases discussed below,[323] Part I explained why it does not apply to immunity determinations generally.[324] Delegation by Congress might provide another basis for deference, as in the *Chevron* context.[325] But, as we have seen, the FSIA does not delegate power to the executive. To the contrary, the statute's purpose was to restrict the role of the executive branch, at least in cases against foreign states.[326] A third potential basis for deference is the executive branch's unique role in the development of customary international law. This basis for deference may be relevant to particular issues that arise in some cases, as detailed below,[327] but it does not provide the basis for deference on all immunity issues in all cases. A fourth basis for deference might be the executive branch's expertise on particular questions of fact or with respect to the content of international law.[328] Indeed, when specific issues arise for which the executive has special expertise (perhaps the content of customary international law), the court should give careful consideration to its views, but again this does not provide the basis for overall deference on the outcome of cases or the content of the applicable law in every case. Finally, the Supreme Court has suggested in the context of both the FSIA and ATS cases that under certain circumstances the executive might be entitled to case-by-case deference.[329] This possibility has been criticized,[330] particularly in the FSIA context, and the Court has not acted on it. If case-by-case deference becomes accepted in foreign affairs generally, it might also apply to *particular* cases raising individual immunity claims, but it would not necessarily apply in all such cases and would not provide the basis for deference to the executive branch on the law of immunity in cases in which it did not specifically intervene.

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323. *See infra* Part III.C.2.

324. *See supra* Part I.

325. *See* Bradley, *supra* note 1, at 668–72 (analyzing *Chevron* deference in the foreign affairs context); *see generally* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 551–80 (analyzing how courts should determine if statutes delegate interpretative authority to agencies under *Chevron*).

326. *See* Rep. of Austria v. Altmann, 541 U.S. 677, 691 (2004).

327. *See infra* Part III.C.3.

328. *See* Bradley, *supra* note 1, at 661–62.

329. *See Rep. of Austria*, 541 U.S. at 701–02 (FSIA); Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 & n.21 (2004) (ATS).

330. *See Rep. of Austria*, 541 U.S. at 734–37 (Kennedy, J., dissenting).

2. *Status-Based Immunity*

As described above, international law distinguishes between status- and conduct-based immunities.[331] With respect to status-based immunity, complete deference is due to the executive branch on the recognition of the state and on whether the individual claiming immunity holds the government position to which immunity is accorded (e.g., President, Foreign Minister).[332] Because status-based immunity in foreign domestic courts follows almost always as a matter of course from these determinations, courts will rarely have a role to play in head of state and other status-based immunity cases. This is consistent with the current case law.[333] One situation in which courts may have a limited role, however, is where it is unclear whether head of state or other status-based immunity applies to the governmental position that the individual holds, such as Minister of Defense, Foreign Minister, or special diplomatic missions.[334] Here, the courts should develop federal common law based on customary international law and, to the extent that international law is unclear or in a state of development, afford deference to the executive as to the desirable content of international law.[335]

3. *Developing Customary International Law: Conduct-Based Immunity*

With regard to conduct-based immunity, deference may be appropriate to the executive branch where international law is uncertain or in a state of flux, especially to the extent that the executive consistently seeks to promote particular norms of customary international law, rather than deference as to the outcome of particular cases.[336] Even if the executive branch is entitled to no particular

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331. *See supra* notes 76–80 and accompanying text.

332. *See supra* Part I.C. Absolute deference to the decision about whether an individual holds a particular position is based on the close relationship between this determination and the President's exercise of the power to "receive Ambassadors." *See* U.S. CONST. art. II, § 3.

333. *See* Ye v. Zemin, 383 F.3d 620, 625–26 (7th Cir. 2004).

334. *See* Weixum v. Xilai, 568 F. Supp. 2d 35, 37–38 (D.D.C. 2008); Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 51–61 (Feb. 14); *see also* LADY FOX, *supra* note 51, at 671–72 (discussing English cases providing immunity for foreign Ministers of Defense and Commerce). *But see* Yelin *supra* note 1, manuscript at 65–71 (arguing that the executive branch should control all aspects of head of state immunity in U.S. courts based on the exclusive power to conduct diplomacy).

335. *See, e.g.*, *Weixum* 568 F. Supp. 2d at 37–38 (granting immunity to China's Secretary of Commerce who traveled to the United States as part of a special diplomatic mission based on an executive suggestion of immunity, noting that immunity was consistent with international law, and citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 464, cmt. i).

336. *See* Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*,

deference as the courts develop federal common law generally, the domestic law of immunity as developed by the United States may serve as evidence of the content of international law[337] (making deference appropriate), or the executive branch may have particular expertise as to the content of customary international law (making deference appropriate on this basis).

Certain issues raised by conduct-based immunity serve as examples. Public officials not entitled to status-based immunity are entitled conduct-based immunity for actions taken in their official capacity.[338] Under international law, such suits are generally considered suits against the state itself.[339] This is also the approach taken by the U.K. courts in interpreting its immunity statute.[340] Although the Supreme Court in *Samantar* held that "foreign state" in the FSIA does not include actions against individual officials and thus did not adopt the U.K. approach, it did suggest that under the common law officials would be immune from suit for some official conduct. [341]

One difficult question under both domestic and international law is how to define "official conduct" for immunity purposes. As an example, consider cases like *Samantar* in which the defendant, a government official or former government official not entitled to status-based

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85 NOTRE DAME L. REV. 1931, 1956–59 (2010) (making this argument in the Alien Tort Statute context); *Cf.* Peter Bowman Rutledge, Samantar *and Executive Power*, 45 VAND. J. TRANS. L. (forthcoming 2011) (manuscript at 6–8) (on file with the Virginia Journal of International Law Association) (arguing that separation of powers concerns are especially acute when the executive branch performs an "adjudicative function" in which it seeks deference to views developed in the context of ongoing or pending litigation).

337. *See, e.g.*, Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 45 (Feb. 14); Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 147 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *available at* http://www.unhcr.org/refworld/docid/40276a8a4.html (citing Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)); *see also* ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 10 (2005) (citing domestic court decisions as evidence of customary international law); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 52 (7th ed. 2008) (same); 1 OPPENHEIM'S INTERNATIONAL LAW 26 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (same); LADY FOX, *supra* note 51, at 20–25; MALCOM N. SHAW, INTERNATIONAL LAW 78 (5th ed. 2003) (same); Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 975–80 (2004); Wuerth, *supra* note 336, at 1956 n.133.

338. *See supra* notes 79–80 and accompanying text.

339. *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 2, ¶ 1(b)(iv), U.N. Doc. A/RES/59/38 (Dec. 16, 2004) (defining "State" to mean "representatives of the State acting in that capacity"); Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 A.C. 270 (United Kingdom); AUST, *supra* note 337, at 164 (2005).

340. *See Jones*, [2006] UKHL 26.

341. Samantar v. Yousuf, 130 S. Ct. 2278, 2290–91 (2010) ("We do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity. But it does not follow from this premise that Congress intended to codify that immunity in FSIA.").

immunity, allegedly committed torture in some capacity connected to his office. Is he immune from suit because the torture was conducted in his "official capacity?" This is an area of international law that is contested and in some state of evolution,[342] particularly because immunity for some international crimes has been eroded through treaties that grant broad jurisdiction over certain offenses and/or deny immunity.[343] The executive branch might take the position that under international law, immunity should not protect individuals who have committed torture, either because torture is a *jus cogens* violation or on other grounds. This position has some support in international law and jurisprudence.[344] In order to receive deference under the principles advanced here, the executive branch would need to take this position generally as to the development of international law — not just in specific cases in which it seeks to effectuate a particular outcome.[345] Deferring to the executive branch under these cirumstances prevents a decision by a U.S. court that that would count as evidence of a customary international norm at odds with the norm advanced by the executive branch.

Note, however, that even if customary international law is developing in the immunity context, denying immunity to individual foreign

342. *See* Curtis A. Bradley & Lawrence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, SUP. CT. REV. (forthcoming 2011) (manuscript at 16–29), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719707; Stephens, *supra* note 314, manuscript at 21–30; Wright, *supra* note 305, at 144.

343. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85; Rome Statute of the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S. 90; Regina v. Bartle, *ex parte* Pinochet, 38 I.L.M. 581 (H.L. 1999) (U.K.); U.N. Secretariat, *Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat*, Int'l Law Comm'n, UN Doc A/CN.4/596 36 (Mar. 31, 2008) (describing recent criminal cases); Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 407–33 (2004).

344. *See supra* note 264; *see also* Al-Adsani v. United Kingdom, 34 Eur. Ct. H.R. 11, ¶¶ 61, O-I1–O-V3 (2002) (eight dissenting judges reasoned that immunity from civil suit is not available to states for alleged violations of *jus cogens* norms); Andrea Gattini, *War Crimes and State Immunity in the* Ferrini *Decision*, 3 J. INT'L CRIM. JUST. 224 (2005).

345. *See* Tate Letter, *supra* note 50. The Tate Letter itself serves as an example. The letter announced that the State Department no longer supported absolute immunity for foreign states, but instead adopted the "restrictive approach" which afforded no immunity for commercial acts. The move was based in part on changes in the practices of other countries (and hence in customary international law). Significantly, the letter disavowed any power to "control the courts." Even after the Tate Letter was issued, however, courts continued to defer the executive branch on a case-by-case basis (even when its immunity determinations were not consistent with the Tate Letter itself). *See supra* note 67. This Article argues against the latter practice while providing a legal basis for affording deference to the views expressed in the letter itself. Note that even under the Tate Letter many difficult questions of law remained, including the distinction between commercial and non-commercial acts. *See* Victory Transp., Inc v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964).

officials in some civil cases may be reasonably seen as a violation of international law, the uncertain or evolving state of the norm notwithstanding.[346] Indeed, immunity is an important principle of international law about which states care a great deal: witness the International Court of Justice cases,[347] the draft convention,[348] and the extensive litigation in the European Court of Human Rights.[349] Denial of immunity by U.S. courts to foreign officials thus risks putting the United States in violation of international law with unclear diplomatic and foreign policy risks. This runs counter to the limitations imposed on courts in a variety of domestic cases described above, including the rationale behind the *Charming Betsy* canon and the Court's reasoning in the *Sabbatino* case.

So one can easily imagine a conflict between the *Charming Betsy* doctrine and deference to the executive branch as to the desirable content of customary international law in areas of potential uncertainty. Although in the context of statutory interpretation there are good reasons to favor the *Charming Betsy* canon over deference to the executive branch,[350] the factors are somewhat more complex in immunity cases where federal common law is developed as a defense. That is, in the *Charming Betsy* context, where the interpretation of a federal statute is at issue, Congress's interests as embodied in the statute serve as an important interpretive backdrop. In immunity cases, by contrast, state law may generate the cause of action, meaning that no federal statute is directly involved. In addition, a federal statute creating the cause of action may have nothing to do with international law, or it might be explicitly designed to redress violations of international law. The *Samanatar* case falls in the latter category, as the ATS and TVPA,[351] which respectively authorize and create causes of action, are

346. *See Zhang v. Zemin*, (2008) 251 ALR 707, ¶¶ 20–23 (Austl.) (granting immunity to Chinese officials); Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 A.C. 270 (U.K.) (holding that Saudi officials accused of torture were entitled to immunity under international and British law); Case Concerning Jurisdictional Immunities of the State (Ger. v. It.), Press Release, 2008 I.C.J. 1 (Dec. 23) (detailing complaint by Germany that Italy violated international law because its domestic courts refused to give Germany immunity for civil cases alleging World War II related violations of international law), *available at* http://tiny.cc/5d4r8.

347. *See, e.g.*, Case Concerning Jurisdictional Immunities of the State, 2008 I.C.J. 1; Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

348. *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 16, 2004).

349. *See Jones*, [2006] UKHL 26; Al-Adsani v. United Kingdom, 34 Eur. Ct. H.R. 11, ¶¶ 61, O-I1–O-V3 (2002).

350. *See* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 338–50 (2005).

351. *See* Alien Tort Statute, 28 U.S.C. § 1350 (2006); Torture Victim Protection Act of 1991,

specifically designed to redress violations of international law, including torture. Indeed, broad immunity for officials renders the TVPA itself virtually (although not entirely) useless. In this context, where congressional and executive action point in the same direction — no immunity — courts should follow their lead, even if it risks putting the United States in violation of customary international law. Of course, this analysis presupposes that the executive branch takes the general position that allegations of torture do not trigger immunity.

CONCLUSION

The law governing immunity of foreign state officials sits at the intersection of several important debates in domestic and international law. It pits executive lawmaking versus federal common lawmaking in an area where international law may be changing, and potential foreign policy fallout is real. Contrary to the argument currently advanced by the State Department, the practice of binding executive branch immunity determinations lacks solid constitutional footing. If the executive branch's argument is accepted by the courts, it will not be easily cabined because it is based on broad and general statements of executive authority over foreign affairs. In many other substantive areas, lower courts are struggling to define the scope of executive preemption based on its foreign policy goals. The resolution of the question of executive power in the immunity context will have important ramifications in these and other future cases. Given this context, it is important to note that executive control of immunity determinations has demonstrated functional disadvantages, threatens to undermine the statutory scheme put in place by Congress in FSIA, and would expand executive lawmaking power beyond that currently recognized by the Court. Federal common lawmaking, by contrast, better effectuates the goals of FSIA and fits comfortably within the constitutional basis for federal common lawmaking as generally articulated by both the Court and commentators.

The immunity of foreign officials is also one aspect of a broader debate about state immunity for human rights violations, and it raises its own difficult questions about the legal relationship between individual officials and the governments that they serve. U.S. courts resolving official immunity issues should do so based on the statute, where it is relevant. They should also endeavor to avoid violations or potential violations of international law, based on both the inferred intentions of Congress and the basis for federal common lawmaking authority. This

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

practice will generally favor immunity. Deference to the executive branch is also appropriate, however, in limited circumstances. Where the executive branch has taken a position on the development of international law that is unclear or in flux — and that position is one the executive branch would like to see reflected in customary international law generally, not just on a case-by-case basis — the courts should generally follow the executive. This preserves the President's power to help shape the contours of customary international law, but does not afford the President absolute control over particular cases or over the domestic law of immunity generally.