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NOTES ON OFFICIAL IMMUNITY IN ATS LITIGATION

William R. Casto*

INTRODUCTION

In *Samantar v. Yousuf*,¹ the U.S. Supreme Court held that foreign officials sued under the Alien Tort Statute² (ATS) are not the same as a foreign state and are not entitled to the protection of the Foreign Sovereign Immunity Act³ (FSIA). The Court, however, left open the possibility that the officials might nevertheless be entitled to some form of “immunity under the common law.”⁴ Now the lower courts, and eventually the Supreme Court, will have to grapple with this yet-to-be-defined defense. The present Article suggests some considerations that may be of value in creating a federal common law immunity for foreign officials in ATS litigation.⁵

The issue of foreign official immunity in ATS litigation arises in the context of an unusual hybrid tort action. The norm that regulates the defendant’s conduct comes from international law, which is a peculiar

* Paul Whitfield Horn Professor, Texas Tech University. I wish to thank Professors Bryan Camp, Chimène Keitner, Richard Murphy, and Ingrid Wuerth for their comments and assistance regarding the present Article.

1. 130 S. Ct. 2278 (2010).

2. 28 U.S.C. § 1350 (2006).

3. *Id.* §§ 1330, 1602.

4. *Samantar*, 130 S. Ct. at 2292–93.

5. As a technical matter, ATS litigation is a misnomer. The ATS is jurisdictional and “does not create a . . . cause of action.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004) (quoting William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479–80 (1986)); accord *id.* at 743 (Scalia, J., concurring). Instead, ATS litigation involves a highly specialized tort in which the “norm [to be] enforced . . . comes from international law,” which is a peculiar form of federal common law, and the remedy and many other aspects of the cause of action come from ordinary federal domestic law. See William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 639 (2006) [hereinafter Casto, *Common Law*]. Although the ATS is limited to aliens, an American tortured or enslaved in a foreign government by foreign officials surely would be entitled to the same cause of action, and the federal court’s subject matter jurisdiction would be available under the general federal question statute. *Id.* at 664–65. Moreover, some ATS litigation by aliens has no direct relation whatsoever to the ATS because Congress has codified and expanded the common law cause of action in the Torture Victim Protection Act of 1991. 28 U.S.C. § 1350 note (TVPA). Unless otherwise limited, the present Article uses the phrase “ATS litigation” to refer to TVPA actions and to all hybrid domestic tort actions in which the norm that the defendant is alleged to have violated comes from international law and the private remedy comes from domestic federal common law.

species of federal common law.⁶ On the other hand, the availability of the remedy and many related issues are creatures of ordinary⁷ domestic common law.⁸ Given that the doctrine of foreign official immunity operates as a defense to a federal cause of action, the defense clearly is an issue of federal, not state, law. Moreover, the defense has such clear foreign policy implications that the issue would be federal in any event.⁹

In creating the federal common law of foreign official immunity, judges will encounter a number of linguistic pitfalls that may confuse the decision-making process. One of these is jurisprudential. Over the years, American lawyers' understanding of the common law has experienced a radical change. In discussing foreign official immunity for the twenty-first century, there is a tendency for advocates and even courts to use an imagery based upon a natural law understanding of the common law that has long since been abandoned. The present Article begins with a discussion of this particular linguistic pitfall.¹⁰

Then the Article briefly notes the many meanings of the word "immunity."¹¹ There is a tendency—again among advocates—to use precedent involving one type of immunity to establish the appropriate parameters of a significantly different type of immunity.¹² The inevitable result is irritation and confusion.

Narrowing the immunity to the more precise issue of government officers' tort liability for official misconduct does not eliminate the linguistic problems. There is significant confusion regarding determinations of whether an ATS defendant has acted in an official capacity.¹³ Fortunately, Congress's enactment of the Torture Victim Protection Act of 1991 (TVPA) has provided clear guidance on this issue.¹⁴ In addition to the conundrum of official capacity, the existence of a fully elaborated federal common law system of official immunity in constitutional tort litigation may become a source of confusion. Despite the superficial similarity of labels, this system of official immunity for

6. See Casto, *Common Law*, *supra* note 5, at 641–42. International law is a peculiar species of federal common law because the federal courts lack legislative authority to make international law. No single nation has the power to create or modify international law. Therefore, American lawyers' positivist faith that judges legislate the common law does not work in this very narrow area. Instead, the courts seek to discover existing international law using all of the traditional resources of international law.

7. Ordinary in the sense that federal courts have authority to legislate rules rather than find them in international law. See *supra* note 6.

8. See William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L. REV. 671, 694–99 (2006). See generally Casto, *Common Law*, *supra* note 5.

9. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 467–68 (1964) (White, J., dissenting); see also Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1042–44 (1967). For a recent and superb analysis, see Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 954–57 (2011).

10. See *infra* notes 23–45 and accompanying text.

11. See *infra* note 51 and accompanying text.

12. See *infra* notes 38, 64 and accompanying text.

13. See *infra* notes 59–89 and accompanying text.

14. See *infra* notes 89, 149–162 and accompanying text.

domestic misconduct has little or no relevance to foreign official immunity.¹⁵

The Article concludes by explaining that the defense of foreign official immunity inevitably will involve the weighing and balancing of a number of factors.¹⁶ These factors include input from a defendant officer's government, input from the executive branch, the plaintiff's nationality, whether the alleged tort took place during military operations, and others.¹⁷

Finally, when judges confer to decide the scope of foreign official immunity, there will be an elephant¹⁸ in the room. Modern ATS litigation stems from *Filartiga v. Pena-Irala*,¹⁹ in which a federal court held that a Paraguayan police chief who tortured to death a fellow citizen in Paraguay was subject to tort liability for violating the international law against torture.²⁰ At some level, *Filartiga* is in conflict with the United States government's subsequent formal embrace of torture as an appropriate tool for implementing official policy. This conflict presents federal judges with an unsavory dilemma. Should a foreign torturer be treated the same way as an American torturer? Some judges may be inclined to protect an American torturer from personal liability to the extent that the American was only following orders. If so, these judges may feel obliged to extend similar protections to foreign torturers. The present Article suggests that under our domestic law, though not international law, there are significant distinctions between the tort liability of domestic and foreign torturers.²¹

I. CONFUSION AND FALSE STARTS

A. *The Common Law*

The *Samantar* Court's reference to foreign official "immunity under the common law"²² can be grammatically confusing because, for American lawyers, the notion of free-standing, amorphous common law no longer exists. There was a time when we spoke of the common law as a general body of law inherent in nature.²³ This natural law vision, however, has long since been supplanted by legal positivism.²⁴ Today the common law

15. *See infra* notes 90–108 and accompanying text.

16. *See infra* notes 168–180 and accompanying text.

17. *See infra* notes 168–180 and accompanying text.

18. The pun is intended.

19. 630 F.2d 876 (2d Cir. 1980).

20. *Id.* at 878.

21. *See infra* notes 123–137 and accompanying text.

22. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292–93; *see supra* note 4 and accompanying text.

23. *See* William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 907–08 (1988).

24. This Article uses a somewhat narrow concept of legal positivism that is limited to the simple idea that common law rules are legislated by judges. The idea originated with Jeremy Bentham and John Austin. *See* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1st ed. 1832); Jeremy Bentham, *Truth Versus Ashhurst*, in 5 *THE WORKS OF JEREMY BENTHAM* 233, 235 (John Bowring ed., 1843); *see also* WILFRID E. RUMBLE, *THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH*

is simply a label that refers to legal rules and principles that judges legislate. This positivist understanding of common law has held sway in the United States at least since *Erie Railroad Co. v. Tompkins*.²⁵ The Supreme Court in *Sosa v. Alvarez-Machain*²⁶ noted with specific reference to ATS litigation that the common law is “made or created” by judges.²⁷

In the judicial legislative mill, the most important grist is found in prior judicial decisions. Many, maybe most, common law rules may therefore be described as preexisting rules found in judicial precedent. Sometimes, however, judges are called upon to apply common law rules for which there is no controlling precedent. In this situation, the judges must legislate a rule founded upon complex considerations of common sense and public policy.

Two recent and thoughtful analyses of official immunity flirt with the old natural law vision of the common law. Professors Bradley and Goldsmith begin their analysis with a flat statement that “at common law in both Great Britain and the United States, suits against foreign officials for their official acts were considered suits against the foreign state and thus were subject to the state’s immunity.”²⁸ Likewise, the executive branch’s amicus brief in *Samantar*, signed by the Attorney General and the State Department Legal Adviser, notes that in enacting the FSIA, “Congress thus assumed that *existing law would continue* to govern the immunity of those officials.”²⁹ Presumably this diction referring to a preexisting common law of official immunity is simply a matter of advocacy rather than a conscious invocation of the archaic, natural law vision of the common law. In what must be dismissed as sloppy writing, courts have also indulged the anachronistic notion that common law rules of decision may exist in a vacuum devoid of mandatory precedent.³⁰

Because the common law is a system of rules and principles legislated by courts, its rules of decision cannot exist until the courts have so legislated. Therefore, any claim of a pre-existing common law rule of official

CONSTITUTION 109–43 (1985). The story of the legal profession’s shift from a natural law vision of the common law to a legal positivist vision is told in some detail in Casto, *supra* note 23.

25. 304 U.S. 64 (1938).

26. 542 U.S. 692 (2004).

27. *Id.* at 725; *see also id.* at 729 (“[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice.”).

28. Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2D 137, 141 (2010). *But see* Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT’L L. ONLINE 1 (2010), <http://www.yjil.org/docs/pub/o-36-keitner-officially-immune.pdf>. Although I disagree with the professors’ conclusions, they have provided an excellent analysis of the various considerations favoring a broad doctrine of foreign official immunity.

29. Brief for the United States as Amicus Curiae Supporting Affirmance at 19, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031 [hereinafter Brief for the United States] (emphasis added); *see also id.* at 27 (“[O]fficials generally continue to enjoy immunity.”).

30. For example, in *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), the court purported to apply a well-established common law rule of foreign official immunity without citing a single case involving official immunity.

immunity is merely wishful thinking unless based upon empirical evidence of judicial precedent. Unfortunately, after conducting a thorough search of actual judicial precedent, the government has been able to find only one decision directly on point: a lonely and unreported trial judge's opinion.³¹ The *Samantar* Court generously commented that the precedents are "few and far between."³² In the early 1960s, the American Law Institute (ALI) conducted a far ranging exploration of foreign relations law and found nothing to suggest the existence of a general common law doctrine of foreign official immunity.³³ The 1965 *Restatement (Second) of the Foreign Relations Law of the United States* makes no mention of a general rule of foreign official immunity. In 1987, the ALI revisited the topic, and the resulting *Restatement* is also silent.³⁴

The government and Professors Bradley and Goldsmith cite a number of cases that they suggest are foreign official immunity cases, but the cases do not support the proposition for which they are proffered. The Supreme Court and the ALI agree that the immunity defenses of Heads of State and Consuls are *sui generis* and governed by rules unique to these particular officials.³⁵ Although the government and the professors presumably agree,³⁶ many of the cases that they cite fall into these *sui generis* categories.³⁷ Act-of-State cases are also cited, but like the Head-of-State cases and the consul cases, the Act-of-State cases simply do not involve foreign official immunity.³⁸

Professors Bradley and Goldsmith also cite two ancient Attorney General opinions and a smattering of English case law spread over a century and a half,³⁹ but arcane Attorney General opinions from the eighteenth century

31. See *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976).

32. *Samantar*, 130 S. Ct. at 2291.

33. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 73–82 (1965). This *Restatement* included a provision that some suits against individual officers should be treated as the functional equivalent of a suit against the state and therefore subject to dismissal under the doctrine of foreign sovereign immunity. *Id.* § 66(f). This provision, however, was not an official immunity provision. See *infra* notes 110–113 and accompanying text.

34. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 464–470 (1987).

35. See *Samantar*, 130 S. Ct. at 2285 n.6, 2289 n.12; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 464–465.

36. Brief for the United States, *supra* note 29, at 11 n.5 (Head of State).

37. See *id.* (citing *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004)); *id.* at 12 n.6 (citing *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997)); *id.* at 10–11 (citing *Heaney v. Government of Spain*, 445 F.2d 501, 504–06 (2d Cir. 1971); *Waltier v. Thomson*, 189 F. Supp. 319, 320–21 (S.D.N.Y. 1960)); see also Bradley & Goldsmith, *supra* note 28, at 144 (citing *Heaney*, 445 F.2d at 504; *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929)).

38. In *Samantar*, the Court noted that "the act of state doctrine is distinct from immunity." *Samantar*, 130 S. Ct. at 2290; see Chimène I. Keitner, *Annotated Brief of Professors of Public International Law and Comparative Law as Amici Curiae in Support of Respondents in Samantar v. Yousuf*, 15 LEWIS & CLARK L. REV. 609, 614–16 (2011).

39. See Bradley & Goldsmith, *supra* note 28, at 141–42; Keitner, *supra* note 28, at 11; Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 67–68 (2010).

cannot in any way establish a pre-existing federal common law for the twenty-first century. To repeat: today, in the twenty-first century, federal common law is legislated by federal courts. Simply put, the Attorney General of the United States has no legislative authority. Of course, the British courts do have common law authority, but their legislative authority extends to creating British common law—not federal common law. Neither the Attorney General nor the British courts have any power whatsoever to make federal common law.

The government and the professors quote from one barely relevant 1895 Second Circuit case that enunciates a rule that looks like a rule of foreign official immunity, but the Supreme Court affirmed on other grounds.⁴⁰ By traditional common law reasoning, the lower court opinion is—to be frank—clearly irrelevant,⁴¹ and even if it had relevance, the lower court's opinion is hardly persuasive. For example, suppose that a court in Texas has to determine what the common law of Texas is today on a particular issue. What kind of lawyer would come into court and argue that the common law of Texas in the twenty-first century is established by a single hundred-year-old, lower-court opinion that the Texas Supreme Court affirmed on other grounds?

The perils of divining a common law doctrine from a few cases and pronouncements scattered across a century and a half are illustrated by comparing the government's and the professors' conclusions. When the Attorney General and the State Department looked at the few barely

40. See *Underhill v. Hernandez*, 65 F. 577, 580 (2d Cir. 1895), *aff'd on other grounds*, 168 U.S. 250 (1897). The Supreme Court affirmed on the basis that the defendant was a military officer acting in time of war. *Underhill*, 168 U.S. at 253–54. Today, *Underhill* is viewed as an act-of-state decision. See, e.g., *Samantar*, 130 S. Ct. at 2290; *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 405 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). In *Underhill*, the plaintiff sought a judicial determination that a Venezuelan official had violated Venezuelan law in Venezuela. See *Underhill*, 65 F. at 578; *infra* note 41.

There was not even a suggestion that the *Underhill* defendant had violated international law. In subsequent developments, the Supreme Court has held that “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.” *Sabbatino*, 376 U.S. at 428. Today there is an overwhelming consensus that state-sanctioned torture violates international law. The brief imprisonment and apparently technical assault and battery in *Underhill* clearly did not rise to the level of torture.

41. Traditional common law reasoning emphasizes the importance of significant facts underlying a court's decision and whether a court actually addresses or was even aware of a legal issue. The lower court opinion flunks both tests. *Underhill* involved alleged torts of false imprisonment, assault, and battery committed in Venezuela by a Venezuelan official against a United States citizen. *Underhill*, 65 F. at 578. There was no allegation whatsoever that the defendant official violated international law. Moreover, *lex loci delicti*, the regnant choice-of-law theory of the late nineteenth and early twentieth century, dictated that the plaintiff's cause of action was governed entirely by Venezuelan law. See RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 377–390 (1934). Indeed, it probably was unconstitutional to apply American tort law rather than Venezuelan law to the case. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930).

Underhill did not involve even a hint that the defendant may have violated international law, and if the plaintiff had so pleaded the case, the action would have been laughed out of court.

relevant cases, they concluded that a federal common law doctrine exists, and the doctrine is that the courts in particular cases should defer, or perhaps are bound by, executive branch advice.⁴² When Professors Bradley and Goldsmith read the same meager materials, they agreed that a federal common law doctrine already exists, but they divined an entirely different rule.⁴³ They concluded that foreign officials are protected by a complete, absolute immunity.⁴⁴ If the common law already exists, why is there such obvious disagreement about the scope of its protection? Both the professors' and the government's pronouncements regarding an extant doctrine of immunity should be dismissed as misguided advocacy or wishful thinking.

To repeat: there is no extant federal common law of foreign official immunity. We long ago abandoned the now quaint notion that the common law is “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”⁴⁵ In the wake of *Samantar*, the courts are going to have to create an official immunity doctrine, and the new doctrine should be shaped using the traditional resources of common law courts. To the extent that the government and the professors offer cogent policy considerations pertinent to law in the twenty-first century, courts should pay careful attention.

B. *The Jones Case*

The British House of Lords has suggested that the concept of foreign official immunity in ATS litigation is a rule or principle found in international law. In *Jones v. Ministry of the Interior of Saudi Arabia*,⁴⁶ Lords Bingham and Hoffmann wrote that foreign official immunity from personal liability is a corollary of foreign sovereign immunity. Technically, however, they were merely construing the British version of the United States' FSIA.⁴⁷ The U.S. Supreme Court, in *Samantar*, reached the opposite conclusion with respect to the FSIA. In other words, *Samantar* and *Jones* present a common occurrence in which two high courts construing statutes from two different states reach superficially inconsistent results. Some might read *Jones* as holding that foreign sovereign immunity is mandated by international law—not domestic law—and that the international law mandate includes a corollary that nations are required to provide individual foreign officials with a tort defense of foreign official immunity.⁴⁸

42. Brief for the United States, *supra* note 29, at 10–13, 27–28.

43. Bradley & Goldsmith, *supra* note 28, at 141.

44. *Id.*

45. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

46. [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) (appeal taken from Eng.).

47. See Keitner, *supra* note 38, at 626–27.

48. See *Jones*, [2006] UKHL, ¶¶ 10–13 (Lord Bingham).

The *Jones* case, however, does not hold that international law requires a general doctrine of foreign official immunity. Although the Lords discussed international law, the precise issue before them was whether international law required that foreign officials be subject to liability, and not whether international law required that foreign officials *not* be subject to liability.⁴⁹ The closest the Lords came to specifically answering the latter question is a statement that tort actions against foreign officials are “*perhaps* not permitted by customary international law.”⁵⁰ This conjecture is a far cry from holding that international law forbids ATS litigation.

C. Sovereign Immunity and Official Capacity

In developing a doctrine of foreign official immunity, the courts inevitably will be hampered by the many meanings of the word “immunity.”⁵¹ For example, states have always been entitled to some form of sovereign immunity, but there are at least four separate doctrines of sovereign immunity under American law.⁵² As a matter of federal law, the federal government is immune from suit in state and federal courts, and a similar but separate federal doctrine protects the constituent states of the federal republic from suit in federal court.⁵³ The fifty states are also immune from suit in their own courts, but this particular immunity is largely controlled by state law.⁵⁴ As a matter of federal statutory law, foreign states are immune from suit in state and federal court.⁵⁵ Finally, the specific rules regulating these four categories of cases vary from category to category.⁵⁶

The four categories of sovereign immunity are specialized subsets of the general concept of subject matter jurisdiction. These four immunities preclude courts from adjudicating claims against the protected states. A dismissal does not address the lawfulness of the defendant’s actions or even the defendant’s liability. Rather the dismissal is simply a determination that the plaintiff has selected an inappropriate forum.⁵⁷ If an appropriate forum is available, the claim may be refiled in that forum.⁵⁸

49. See generally Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669 (2011); Keitner, *supra* note 28.

50. *Jones*, [2006] UKHL 26, ¶ 58 (Lord Hoffmann) (emphasis added).

51. See generally RICHARD FALLON ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 841–941 (6th ed. 2009).

52. *Id.* ch. IX.

53. *Id.* ch. IX, §§ 1–2.

54. *Id.* at 928–36.

55. *Id.* at 768–71.

56. *Id.* ch. IX, 768–71.

57. See, e.g., U.S. CONST. amend. XI (“The *Judicial power* of the United States shall not be construed to extend . . .”) (emphasis added).

58. Because sovereign immunity is a doctrine of subject matter jurisdiction, the first court’s dismissal is not entitled to claim preclusive effect. RESTATEMENT (SECOND) OF JUDGEMENTS § 20(1)(a) (1982).

Like the word “immunity,” the phrase “official capacity”⁵⁹ is a label that is used to deal with several loosely related but significantly different problems. In *Samantar*, the Court recognized that several lower courts had held that the FSIA barred suits against individual officials.⁶⁰ As a consequence, these lower courts had to develop a set of rules to determine when an official is entitled to sovereign immunity and when the official is not. “For example,” the Supreme Court noted, “Courts of Appeals have applied the rule that foreign sovereign immunity extends to an individual official ‘for acts committed in his official capacity’ but not to ‘an official who acts beyond the scope of his authority.’”⁶¹

The phrase “official capacity” cropped up again after *Samantar* was remanded to the trial court. The executive branch determined that Mr. Samantar “does not enjoy immunity,”⁶² and the trial judge struck the defendant’s “common law sovereign immunity defense.”⁶³ The government’s treatment of Samantar’s official immunity on remand is confused and somewhat ambiguous. The Statement of Interest, or brief filed by the Department of Justice, frequently confuses the clearly different doctrines of sovereign immunity, act of state, and official immunity.⁶⁴ Cases involving these distinctly different doctrines are lumped together willy-nilly and presented as establishing a rule of foreign official immunity. More significantly, the State Department Legal Adviser’s letter obliquely suggests that foreign officials “generally would enjoy only residual immunity, unless waived, and even then only for actions taken in an official capacity.”⁶⁵ The government’s post-remand Statement of Interest apparently elaborates on this idea of an “official capacity” immunity by explaining that “[f]ormer officials generally enjoy residual immunity for acts taken in an *official capacity* while in office.”⁶⁶

59. Phrases like “scope of authority” or “scope of official authority” are sometimes used instead of official capacity. See, e.g., Stephens, *supra* note 49, at 2679–80. The *Samantar* Court apparently equated official capacity with scope of authority. See, e.g., *infra* note 61 and accompanying text. This alternative label presents the same problems as official capacity.

60. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2283 n.4 (2010).

61. *Id.* at 2291 n.17 (quoting *Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990)).

62. Statement of Interest of the United States of America at Exhibit 1, *Yousuf v. Samantar*, No. 1:04 CV 1360 (E.D. Va. Feb. 14, 2011) [hereinafter Statement of Interest] (letter from Department of State Legal Adviser Harold Hongju Koh to Assistant Attorney General Tony West).

63. See Order at 1, *Yousuf v. Samantar*, Civil Action No. 1:04 CV 1360 (E.D. Va. Feb. 15, 2011). The judge’s only explanation was that the “government has determined that the defendant does not have foreign official immunity.” *Id.*

64. See Statement of Interest, *supra* note 62, at Exhibit 1.

65. *Id.* Apparently, the immunity is “residual” because Mr. Samantar no longer holds any official position.

66. *Id.* at 7 (emphasis added). The Statement later explains:

Because the immunity belongs to the state, and not the individual, and because only actions by former officials taken in an *official capacity* are entitled to immunity . . . the Executive Branch takes into account whether the foreign state understood its official to have acted in an official capacity in determining a former official’s immunity or non-immunity.

In crafting a doctrine of foreign official immunity, the phrase “official capacity” should be avoided like the plague. The problem is that the phrase denotes two radically different concepts. First, for at least a century, a tautology lay beneath the surface of American litigation against public officers for misconduct in office. The tautology was: a state may not lawfully authorize an officer to act unlawfully.⁶⁷ Following this rule, an officer who violates the law is treated as a private citizen and is responsible just as a private citizen is responsible. The second concept of official capacity recognizes the obvious fact that many officers who violate the law nevertheless are using authority granted by the state to further some interest of the state.⁶⁸

The tautological concept of official capacity held sway in the nineteenth century. Damages actions against government officers were treated as ordinary tort actions, in which liability was premised on the tort rules regulating a private citizen.⁶⁹ Either the officer had acted unlawfully or not. If the officer committed a tort, the officer was personally liable. If not, not. For most of the nineteenth century, the idea of an official immunity protecting unlawful misconduct was at best a nascent concept.⁷⁰

The tautology was also used in suits for injunctive relief. A well-known example is found in *Ex parte Young*.⁷¹ The Minnesota legislature had enacted a measure to regulate railroad rates, and the shareholders of various railroads sued in federal court to enjoin the state’s Attorney General from enforcing the statute.⁷² The plaintiffs argued that the statute violated the federal Constitution’s Fourteenth Amendment. Before the Supreme Court, the state’s Attorney General argued that a suit against him in his official capacity to enjoin him from enforcing state law was a suit against the state.⁷³ Therefore, the Eleventh Amendment barred the federal courts from adjudicating the case.⁷⁴ The Court disagreed, however. If the state legislation violates the federal Constitution, the act could not confer lawful enforcement authority on the Attorney General.⁷⁵ In accordance with the tautology, the Attorney General “is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”⁷⁶ Notwithstanding this language, no one really

Id. at 8 (emphasis added).

67. See William R. Casto, *Innovations in the Defense of Official Immunity Under Section 1983*, 47 TENN. L. REV. 47, 61–65 (1979).

68. See *id.* at 66–73.

69. See *id.* at 61–65; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–22 (1987).

70. This approach began to shift with *Spalding v. Vilas*, 161 U.S. 483 (1896).

71. 209 U.S. 123 (1908).

72. See *id.* at 127–29.

73. See *id.* at 132.

74. See *id.*

75. See *id.* at 155–56.

76. *Id.* at 160.

believes that Attorney General Young was simply a private citizen.⁷⁷ The legal fiction of *Ex parte Young*, however, has become a vital aspect of our system of constitutional governance.⁷⁸

The nineteenth-century tautology continues to play a vital role in suits for injunctive relief, but it has been discarded in damage actions. By the middle of the twentieth century, judges had come to believe that in order to assure effective governance and individual fairness, some sort of protection should be afforded to officers who violate the law. Initially, there was a tendency to provide absolute immunity to public officers.⁷⁹ The idea of general absolute immunity, however, was discarded after the Supreme Court decided in *Monroe v. Pape*⁸⁰ that 42 U.S.C. § 1983 provided a broad cause of action against state officers who violate the Constitution. In response to the resulting flood of constitutional tort litigation, the Court legislated a complex system of official immunities that constitutes a defense for officers who have violated the Constitution.⁸¹

ATS litigation arises in a legal context that is radically different from the traditional context of purely domestic litigation against government officers. In traditional domestic litigation against officials, there is a clearly defined hierarchy of laws. State laws are trumped by state constitutions, and pursuant to the Supremacy Clause, all state laws are trumped by federal law, including the federal constitution. This clear hierarchy dictates the traditional answer to the conundrum of whether a state may lawfully authorize an officer to act unlawfully. But there is no comparable hierarchy in ATS litigation. International law and domestic law operate in two separate realms that are, to a significant degree, independent of each other. In their respective realms, international and domestic law are simultaneously supreme. There is no Supremacy Clause to resolve conflicts between domestic and international law. Since the time of Alexander Hamilton, American lawyers—at least sophisticated ones—have understood that as a matter of domestic law, a government may, if it chooses, lawfully authorize a violation of international law.⁸² When this happens, the nation's conduct is lawful under domestic law but unlawful under international law. Therefore, the offending nation or officer would be subject to the remedies of international law but not to remedies provided by the domestic law of the officer's country.

77. “The notion that the federal court injunctive relief operates only against the official in an individual capacity is pure fiction.” 1A MARTIN SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 8.04[B] (4th ed. 2011).

78. See FALLON ET AL., *supra* note 51, at 891 (“Consider . . . whether constitutional government would be workable if neither the states nor their officials were suable for constitutional violations.”); 1A SCHWARTZ, *supra* note 77, § 8.04[B] (“[*Ex parte Young*] is one of the most important decisions ever rendered by the Supreme Court.”).

79. See *Spalding v. Vilas*, 161 U.S. 483, 496 (1896). The leading cases were *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (Hand, J.), and *Barr v. Mateo*, 360 U.S. 564 (1959).

80. 365 U.S. 167 (1961).

81. See *infra* notes 101–108 and accompanying text.

82. See WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 155–56 (2006).

World War II was a watershed event in international law. For example, the war resulted in a new model of the laws of neutrality.⁸³ The war also sparked a change in the understanding of personal responsibility for violations of international human rights. The Nuremberg trials “for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, . . . that for the commission of [war] crimes individuals are responsible.”⁸⁴ We frequently hear that obedience to superior orders was not a defense for the Nazi war criminals, but the war criminals’ rejected defense went beyond simply following superior orders. Hannah Arendt has pointed out that the Nazi war criminals acted entirely consistently with their country’s constitutional order.⁸⁵ In other words, many of the Nazi war crimes clearly and without doubt were lawful under domestic German law. Nevertheless, the law-abiding officers were properly hanged or sent to prison for their violations of international law.

The American courts’ distinction between official and private capacity has been criticized as “unsound and even preposterous,”⁸⁶ and a straightforward reading of the phrase “official capacity” renders the distinction preposterous indeed. Some government torture may involve an officer’s personal misconduct, but a significant amount of torture involves abuse by officers who, like the Nazis, are merely following the law of their country. It is absurd to say that these latter officers are not acting in their official capacity. They obviously are.

In terms of the ordinary meaning of official capacity, the American courts’ traditional distinction between official and private capacity clearly is preposterous, but we have always understood this to be so. The distinction quite clearly is a legal fiction shaped by a policy decision to favor the enforcement of federal rights against government officers. The courts fully understand that the officers may be acting in their official capacity in the common sense meaning of the phrase. Nevertheless, the courts allow suits against individual officers to go forward. The fiction is most evident in *Ex parte Young* cases in which defendants are sued literally in their “official capacity.”

The independent and parallel supremacy of domestic law and international law in ATS litigation renders the traditional American distinction between private and official capacity meaningless. In domestic

83. See William R. Casto, *Advising Presidents: Robert H. Jackson and the Destroyers-for-Bases Deal*, 52 AM. J. LEGAL HIST. (forthcoming 2012).

84. *Justice Jackson’s Final Report to the President Concerning the Nurnberg War Crimes Trial* (1946), reprinted in 20 TEMP. L.Q. 338, 342 (1946). The ellipsis in this quotation covers “to prepare, incite, or wage a war of aggression [and] to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime.” *Id.*

85. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 292–94 (rev. ed. 1964).

86. Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT’L L. 853, 869 (2002).

litigation, a state's purported authorization of unconstitutional action is rejected because a state may not lawfully authorize unlawful conduct. *Ex parte Young* is the quintessential example. But in ATS litigation, a state might—as a matter of domestic law—lawfully authorize its officers to violate international law.

Many foreign countries are inclined in the context of ATS litigation to issue a formal certification that an officer who is charged with violating international law did so in the officer's official capacity. In the *Jones* case, Lord Bingham wrote, "There is . . . no suggestion that the defendants' conduct was not in discharge or purported discharge of their public duties."⁸⁷ Similarly, the government of Israel has formally stated in ATS litigation against its officers that "anything [the defendant] did . . . in connection with the events at issue . . . was in the course of [his] official duties, and in furtherance of official policies of the State of Israel."⁸⁸

There is an aspect of clever draftsmanship in some of the official capacity certificates from foreign governments. When Saudi Arabia certifies that the officers who allegedly tortured Ronald Jones acted in their official capacity, is Saudi Arabia merely saying that prison wardens inevitably have contact with prisoners and that sometimes a warden must use physical force against prisoners? If this is a plausible reading of the certificate, the foreign country's submission is silent on the issue of official authority to violate international law. Under these circumstances, there is no basis for determining that violating international law was part of the officer's official duty.

But what if the officer's government certifies, for example, that torture is indeed the government's official and lawful policy? Because a foreign government is the best judge of the meaning and effect of its own laws, the certification presumably would establish that the defendant officer had literally acted lawfully and in compliance with his country's domestic law.

In resolving the conundrum of official capacity in ATS litigation, American courts should not apply the superficial rule of *Ex parte Young* but should consider the metaprinciple behind cases like it. The courts should consider the extent to which the United States wishes to give effect to the policies embodied in clearly established rules of international law like the rules against torture, non-judicial killings, slavery, and genocide. There may be difficult foreign policy problems in some cases, but surely foreign policy implications should be resolved in significant part by reference to advice from the executive branch and not by a general rule of official immunity. In any event, clear guidance from Congress has preempted the problem of official capacity. Congress has enacted legislation such that an ATS defendant is subject to personal liability even if the official is acting

87. *Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) ¶ 11 (appeal taken from Eng.).

88. *Matar v. Dichter*, 563 F.3d 9, 11 (2d Cir. 2009). For a similar Israeli statement in another ATS case, see *Belhas v. Ya'alon*, 515 F.3d 1279, 1282 (D.C. Cir. 2008).

pursuant to his government's official and formal directive (i.e., with "actual . . . authority") to violate international law.⁸⁹

D. Official Immunity in Constitutional Tort Litigation

A possible source of guidance in shaping the defense of foreign official immunity is found in the system of official immunities that the Supreme Court has created for constitutional tort litigation. Over the last half century, the Court has elaborated a detailed and multifaceted doctrine of official immunities that provides American officials with a defense against tort claims. In these cases, the use of the word "immunity" is a misnomer. The doctrine does not affect a court's subject matter jurisdiction. Official immunity in this context is a defense on the merits.

In view of the obvious parallels between tort actions against American officials and tort actions against foreign officials, there may be a temptation to accord foreign officials the same protection that is afforded to their American counterparts. Lacunae in the *Samantar* opinion suggest, however, that the considerations implicated by suits against foreign officials may be significantly different. The Court cited or discussed a few cases involving foreign officials' assertions of official immunity,⁹⁰ but the Court never referred to the well-established official immunity accorded American officials. Moreover, the Court's opinion suggests that a State Department recommendation is pertinent to a grant of official immunity.⁹¹ The complex and well-developed doctrine of official immunity for American officials has nothing analogous to a State Department suggestion.

Furthermore, official immunity in ATS litigation implicates concerns radically different from those implicated by § 1983 immunity. The common law system of official immunity that the Supreme Court has legislated for constitutional tort litigation⁹² is well known.⁹³ The general contours of the system provide an absolute immunity to legislators, judges, and prosecutors, but only a qualified immunity to most officers performing executive branch functions. The system is very much a creature of domestic law, designed specifically to regulate civil liability arising from

89. Torture Victim Protection Act of 1991 § 2(a), 28 U.S.C. § 1350 note (2006); *see infra* notes 149–162 and accompanying text.

90. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2284–85 (2010) (citing *Heaney v. Government of Spain*, 445 F.2d 501, 504–05 (2d Cir. 1971); *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960)); *id.* at 2290 (citing *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976)); *id.* at 2291 n.17 (citing *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990)); *see also id.* at 2291 n.18 (citing a study that mentions four foreign official immunity cases).

91. *Id.* at 2291.

92. Constitutional tort litigation is founded upon 42 U.S.C. § 1983 in suits against state officers and the *Bivens* doctrine in suits against federal officers. The system of official immunities that the Court has developed is equally applicable, with one exception, to state and federal officers. The protection accorded the President is *sui generis*. FALLON ET AL., *supra* note 51, at 997 n.1.

93. *See generally* 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 ch. 7–8 (4th ed. 2010); 1A SCHWARTZ, *supra* note 77, ch. 9–9A.

American officers' alleged misconduct in the United States. By definition, the doctrine is rooted in American culture generally and especially in American legal culture. Therefore, we should be dubious about blindly applying this doctrine to the alleged misconduct of foreign officers in foreign countries.

In the United States, the separation of powers is a fundamental concept of constitutional government that limits the abuse of government authority. American executive officials know that their actions are subject to review by an independent judiciary and to political control by an independent legislature. Many other countries, however, have no comparable concept. For example, when the Republic of China was sued in federal court during the Reagan Administration, Deng Xiaoping, China's paramount leader from 1978 to 1992, reportedly told Secretary of State Shultz, "Why don't you just call that judge down in Alabama and tell him to lay off the People's Republic of China."⁹⁴ Shultz said, "Oh, we have the separation of powers, you have to understand."⁹⁵ Deng was puzzled and replied, "Well, what is the separation of powers?"⁹⁶

Moreover, the specific major policy considerations giving rise to official immunity in constitutional tort litigation are quite attenuated in ATS litigation. The domestic system of immunities, especially the qualified immunity of executive branch officers, is largely a function of two separate and distinct considerations. The Supreme Court has explained that "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole."⁹⁷ Accordingly, the domestic system of immunities stems from concerns about the impact of specific lawsuits on specific innocent⁹⁸ officers and the impact of the general availability of damages remedies upon the effective functioning of government.⁹⁹ Neither of these concerns, however, are significantly implicated by ATS litigation.

Insofar as fairness to particular individual American defendants is concerned, the Court has focused upon the problem of officers being held liable for unconstitutional misconduct that they may not have known was unconstitutional: "If the law [when the defendant injured the plaintiff] was not clearly established, an official could not reasonably be expected to

94. MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* 44 (2010) (statement of Reagan Administration State Department Legal Adviser Davis Robinson).

95. *Id.*

96. *Id.*

97. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *accord Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987); *Davis v. Scherer*, 468 U.S. 183, 194–96 (1984).

98. Even if the defendant officer ultimately is found at trial not to have violated the Constitution, the officer was still subject to the wear and tear of the litigation process, including "the costs of trial [and] the burdens of broad-reaching discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817–18).

99. *Id.* (noting that the costs of such litigation include the "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service" (quoting *Harlow*, 457 U.S. at 816)).

anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."¹⁰⁰ In other words, the doctrine of qualified immunity addresses the historical fact in American society that constitutional law changes from time to time. This problem of mutability, however, is not present in ATS litigation. The Supreme Court has held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity."¹⁰¹ No one should be allowed to claim that they did not know that torture, non-judicial killing, slavery, or genocide violates international law.¹⁰²

The other consideration giving rise to official immunity is the costs of litigation to society as a whole. These costs "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."¹⁰³ In addition, there is the danger that "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"¹⁰⁴

The costs to society in constitutional tort litigation are enormous due to the sheer volume of cases that are filed each year. The United States' domestic doctrine of official immunity is in large measure a response to *Monroe v. Pape*,¹⁰⁵ in which the Supreme Court gave an expansive interpretation to the remedies available under 42 U.S.C. § 1983. The result was "an impressive flood of litigation against state officers in the federal courts."¹⁰⁶ The author can remember quipping in the 1970s to Alfred Hill, his dissertation adviser, that "*Monroe* might be the case that launches a thousand suits and topples the countless towers of officialdom." Supreme Court justices agreed. In discussing the need for a doctrine of official immunity, then-Justice Rehnquist explained that his "biggest concern . . . is not with the illogic or impracticality of today's decision, but rather with the potential for disruption of Government that it invites."¹⁰⁷ Rehnquist continued, "The steady increase in litigation, much of it directed against governmental officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the most casual observer."¹⁰⁸

100. *Harlow*, 457 U.S. at 818.

101. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); see also *id.* at 732.

102. To be sure, there will be gray areas in each of these categories of proscribed conduct. The problem of gray areas should be dealt with through the requirement that the international norm must be defined with specificity. See Casto, *Common Law*, *supra* note 5, at 652-54.

103. *Harlow*, 457 U.S. at 814.

104. *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

105. 365 U.S. 167 (1961).

106. PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 950 (2d ed. 1973); see PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1242-43 (3d ed. 1988).

107. *Butz v. Economou*, 438 U.S. 478, 526 (1978) (Rehnquist, J., concurring in part and dissenting in part).

108. *Id.*

Just as the high volume of constitutional tort litigation cannot be denied, it is common knowledge that the actual volume of ATS litigation is quite low. We have had ATS litigation for over thirty years, and there has been no avalanche of litigation that might threaten the effective governance of foreign countries. The rarity of ATS litigation is not a statistical anomaly. An American court cannot gain personal jurisdiction over a foreign official unless the official has minimum contacts with the United States.¹⁰⁹ Because foreign officials rarely visit the United States, they rarely are suable in the United States. Therefore, the costs to society of ATS litigation are marginal. Does anyone believe that the judgment in *Filartiga* has deterred able citizens of Paraguay from joining the police or has dampened the ardor of Paraguayan police officers? At most, the judgment may have deterred Paraguayan torturers from coming to the United States on vacation.

II. FOREIGN OFFICIAL IMMUNITY AS A COROLLARY TO SOVEREIGN IMMUNITY

The strongest case for granting immunity in ATS litigation is when the remedy sought is, in effect, actually against a foreign state. This type of immunity, however, should not be confused with an officer's immunity from personal liability. The ALI's 1965 *Second Restatement* provided that a foreign state's sovereign immunity "extends to . . . 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.*"¹¹⁰ The ALI viewed this section's proviso as crucial: these agents of the state "do not have immunity from personal liability even for acts carried out in their official capacity" unless the suit is actually against the state.¹¹¹ The *Second Restatement's* rule of immunity is not really a rule of official immunity. The ALI presented the rule as an elaboration of sovereign immunity and indicated that if the remedy runs directly against the state, there is sovereign immunity.¹¹² But if the suit involves the official's "personal liability," sovereign immunity is not implicated.¹¹³

A clear example of a suit against an officer that actually "enforce[s] a rule of law against the state" is an action seeking injunctive relief. There is, however, much less here than meets the eye. As a practical matter, and without regard to official immunity, an ATS suit for injunctive relief is highly unlikely to arise or go forward. The general ATS problem of

109. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

110. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965) (emphasis added). The 1987 *Restatement* has no comparable provision. The reason for the deletion is unclear. Perhaps the ALI Reporters believed that FSIA occupied the field. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 451–466 (1987). The first generation of *Restatements* did not cover foreign relations law.

111. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) cmt. b.

112. *Id.*; see also *id.* § 66(f) cmt. b, illus. 2–4.

113. *Id.* § 66(f) cmt. b; see also *id.* § 66(f) cmt. b, illus. 2–3.

obtaining personal jurisdiction will persist. Moreover, as a general matter of equity jurisprudence, an American judge is quite unlikely to issue an injunction that will require the judge to supervise compliance in a foreign country.¹¹⁴

In any event, a suit for injunctive relief is obviously a suit against the state and only coincidentally a suit against the individual officer. We indulge a legal fiction in the United States that a suit to enjoin an officer from violating federal law is not a suit against a state and therefore not barred by sovereign immunity. To repeat, however, no one actually believes that the state is not the real defendant in these injunction suits. The Supreme Court created this legal fiction to give practical meaning to individual rights guaranteed by federal law. These cases involve the enforcement of U.S. laws against governments in the United States for actions taken in the United States. The fiction should not be indulged when international law is enforced against foreign governments for actions taken overseas. Indulging the fiction in suits to enjoin a foreign state's activities would fly in the teeth of FSIA.

In addition to injunction cases, if a judgment for damages will run directly against a foreign state, the suit is barred and must be dismissed unless it falls within an FSIA exception.¹¹⁵ Some may argue that if a foreign state has agreed to indemnify its officer in ATS litigation, the suit should be treated as, in essence, a suit against the state.¹¹⁶ There may be a superficial appeal to this argument, but the argument should be rejected. In the first place, there is a smoke-and-mirrors aspect to the indemnification argument. If it is correct, the state's agreement to indemnify is illusory. As soon as indemnification is offered, the suit would be dismissed with the result that the state is left with no indemnification obligation.¹¹⁷

The indemnification argument has been made in a number of constitutional tort actions involving state officials. States are protected by sovereign immunity in constitutional tort actions just as foreign countries are accorded sovereign immunity in ATS litigation. In the former cases, "every court that has considered the issue has rejected, rightly in our view, the argument that an indemnity statute brings the Eleventh Amendment into play."¹¹⁸ The courts have concluded that the decision to indemnify is a voluntary decision and is not imposed by judicial decree.

Some have worried that indemnification may wreak havoc on a foreign country's finances,¹¹⁹ but the facts do not support this theoretical concern.

114. See, e.g., *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716–17 (2d Cir. 2004).

115. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

116. See, e.g., *Bradley & Goldsmith*, *supra* note 28, at 148–49.

117. "A government may not manufacture immunity for its employees by agreeing to indemnify them." *Spruytte v. Walters*, 753 F.2d 498, 512 n.6 (6th Cir. 1985).

118. *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985). Cases decided since *Duckworth* are in accord. See 1A SCHWARTZ, *supra* note 77, § 8.10[B][2]. For two conflicting decisions of foreign courts on the issue of indemnification, see *Keitner*, *supra* note 28, at 5.

119. See, e.g., *Bradley & Goldsmith*, *supra* note 28, at 148–49.

First, it is not clear whether foreign countries actually indemnify their officers.¹²⁰ Moreover, a country surely would not indemnify an officer who has been found to have tortured people to death. Finally, as a technical matter, there is no indemnification obligation until an officer actually pays money over to someone. As a practical matter, virtually all officers held liable in ATS litigation will be either judgment-proof or have no assets in the United States to satisfy a judgment. Therefore, any indemnification obligation, if there actually is one, likely will be limited to litigation costs. The cost of defending a Saudi Arabian torturer or a Paraguayan torturer surely would not bankrupt those two nations.

A final example of suits actually against the state involves contractual disputes with a foreign state. Through artful pleading it may be possible to allege a claim against an individual officer that will, as a practical matter, provide a remedy for the plaintiff's contract dispute.¹²¹ These cases of artful pleading would eventually be dismissed on the merits. An earlier dismissal on official immunity grounds would spare the individual defendant the needless pain and agony of pretrial and trial litigation. Of course, it is difficult to see how a contract claim could be turned into an ATS claim.¹²²

III. CREATING A DOCTRINE OF FOREIGN OFFICIAL IMMUNITY

In thinking about the proper scope of foreign official immunity, a preliminary issue arises as to whether it is appropriate to accord foreign officials less protection than American domestic law would provide to American officials who violate international law. To tinker with an old expression, perhaps what is sauce for the domestic goose is sauce for the foreign gander. Put another way, how can we justify a system of laws that protects American officials who torture people but does not protect foreign officials who do the same thing?

The answer is simply put: Congress has forbidden the courts from according like treatment to American and foreign officials. As a matter of domestic federal law, the personal liability of federal officers who violate international law is entirely different from the personal liability of foreign officers. The liability of federal officers is almost entirely regulated by an extant act of Congress that does not apply to foreign officers. In sharp

120. Professors Bradley and Goldsmith try to finesse this issue by extrapolating from anecdotal U.S. practice. *Id.* at 148. Whether governments in the United States routinely indemnify their officers is far from clear. More significantly, it is difficult to believe that an American city or state would indemnify a police officer if a court has determined that the officer tortured someone to death. Moreover, we should not blindly assume that a foreign country will follow U.S. practice.

121. For example, in *Samantar*, the Court cited *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971), where the plaintiff had a contractual dispute with the Government of Spain and sued both Spain and a Spanish consul who signed the contract. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2284–85 (2010); *see also* Keitner, *supra* note 28, at 12 (citing *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 (H.L.) (appeal taken from Eng.)). These cases obviously do not involve remedies for violation of international law.

122. *See* Casto, *Common Law*, *supra* note 5, at 665 n.159.

contrast, the liability of foreign officers—at least the issue of foreign official immunity—is regulated by a common law doctrine to be developed by the courts without direct congressional guidance.

The Federal Employees Liability Reform and Tort Compensation Act of 1988¹²³ (Westfall Act) governs the liability of federal officers sued in ATS litigation.¹²⁴ In the Westfall Act, Congress balanced two important but competing goals. First was the need to provide a remedy for individuals who had suffered harm as a result of government officers' tortious activities. At the same time, Congress sought to provide officers with protection from personal liability. The Act balances these two concerns by substituting the liability of the United States for the personal liability of the officer. Under the Act, a suit against a federal officer acting within the officer's scope of employment is converted into a suit against the United States by dropping the individual defendant from the suit and substituting the United States as the sole defendant.¹²⁵ This congressional decision effectively immunizes federal officers who may be sued for violating international law. Therefore, there will never be an occasion or need to develop a common law doctrine of official immunity for ATS suits against American officers. At the same time, an individual who has suffered harm at the hands of the government is not left without a remedy. Under the Westfall Act, the United States remains immune from liability for an American officer's misconduct overseas.¹²⁶ But ATS litigation typically does not involve misconduct outside the officer's home country. If a federal police officer did in the United States what the Paraguayan police officer did in the *Filartiga* case, the United States would be subject to liability.¹²⁷

In contrast to situations governed by the Westfall Act, Congress has not enacted a statute that overtly balances a victim's and a foreign official's interests.¹²⁸ Therefore, the courts will have to fashion a system of

123. 28 U.S.C. § 2679 (2006).

124. See Casto, *Common Law*, *supra* note 5, at 662–64.

125. 28 U.S.C. § 2679; see Casto, *Common Law*, *supra* note 5, at 662–64.

126. 28 U.S.C. § 2679.

127. *Filartiga* involved a Paraguayan police officer torturing a person to death in the officer's home country. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). If a federal law enforcement officer tortured a person to death in the United States, the federal officer would be subject to liability for the tort of battery. The United States would be substituted as a defendant, and the case would proceed forward as an FTCA case. 28 U.S.C. § 2679(d)(1). Although the FTCA exempts the United States from liability in a number of situations, none of the exemptions would seem to apply. The foreign tort exemption, 28 U.S.C. § 2680(k), is not relevant because the tort occurred in the United States—just like the tort in *Filartiga*. The intentional tort exemption would not apply because the exemption is not applicable in cases involving police misconduct. *Id.* § 2680(h). There is, of course, another exemption for discretionary acts, *id.* § 2680(a), but it seems unlikely that a court would hold that torturing someone to death is a discretionary act.

Limiting the above hypothetical to federal misconduct that occurs within the United States is quite appropriate. In fact, virtually all ATS suits against foreign officials involve misconduct in the official's home country.

128. At least, there is no legislation creating a system of immunities for foreign officers. The only congressional guidance comes in the TVPA, which surely precludes a rule of general immunity. See *infra* notes 149–167 and accompanying text.

immunities without direct Congressional guidance. In shaping this system of immunities, the courts might consider adopting the Westfall Act principle as federal common law,¹²⁹ but Congress has specifically forbidden the courts from doing so. The linchpin of the Westfall Act is the substitution of the government as a defendant with a limited waiver of sovereign immunity. By enacting FSIA, Congress has outlawed the substitution of a foreign state.

Even if the technicality of the Westfall Act did not exist, bedrock principles of American constitutional law nevertheless would support the disparate treatment of foreign and American officials. As a matter of domestic law, U.S. courts probably would strain to avoid judicial review of torture sanctioned by the President. Some have argued that the Constitution confers upon the President a plenary power to set aside or ignore sub-constitutional laws like acts of Congress, treaties, common law, and of course international law.¹³⁰ As Richard Nixon famously said, “When the President does it, that means that it is not illegal.”¹³¹ These theorists of plenary presidential power apparently see the President’s sound judgment as the principal limitation to this unusual power. Presumably, these theorists also see the political process writ large as an important limitation.

If the theorists of plenary presidential power are correct, the personal liability of a foreign official is entirely different from the liability of an American official acting with the President’s sanction. In ATS litigation, remedial issues like the availability of a damages remedy or official immunity are governed by domestic, sub-constitutional law.¹³² There is no doubt that the Constitution confers some scope of plenary authority upon the President,¹³³ but as a matter of domestic law, these unique presidential powers are by definition *sui generis*. The Constitution in no way confers such power upon foreign governments. Given the President’s unique status under our domestic law, the liability of foreign officials under our domestic law is entirely different from the liability of American officials acting pursuant to presidential directions.

Using the President’s *sui generis* constitutional status to distinguish between the personal liability of American officials and foreign officials is, to be sure, a fairly technical legal distinction. Nevertheless, given the Constitution’s primacy, the distinction is valid. Of course, the present author vehemently denies that the Constitution authorizes the President to

129. See Casto, *Common Law*, *supra* note 5, at 661–62.

130. See, for example, the Justice Department’s notorious torture memorandum discussed in William R. Casto, *Executive Advisory Opinions and the Practice of Judicial Deference in Foreign Affairs Cases*, 37 GEO. WASH. INT’L L. REV. 501, 503–05 (2005).

131. See *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16 [hereinafter *Nixon Excerpts*].

132. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289–93 (2010) (official immunity); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (remedy).

133. See, for example, the admirable, even awesome, discussion of the President’s commander-in-chief powers in David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008), and David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

become a hopefully benevolent dictator. For me, this distinction is quite unpalatable.

There is, however, a more palatable distinction between the personal liability of foreign and American officials. The distinction arises from the nature of the political process in the United States and in particular from our commitment to the electoral process and the concept of separation of powers. As Richard Nixon explained, even the President's power is subject to the electoral process.¹³⁴ While this process cannot curb a second-term President, the President remains—as Nixon discovered—subject to a less structured but equally potent political process.

In contrast to American officials, foreign officials frequently are not subject to the amorphous yet nevertheless powerful political constraints that we have in the United States. In particular, many countries in the world lack anything approaching a vibrant electoral process and have no commitment whatsoever to the concept of separation of powers. As Deng Xiaoping said, “[W]hat is the separation of powers?”¹³⁵ Does anyone believe that the governments of Paraguay and Saudi Arabia felt any significant domestic political heat over the torture of Joelito Filártiga¹³⁶ and Ronald Jones?¹³⁷ Given the absence of powerful political constraints comparable to the ones in our society, an American court might appropriately accord more protection to American officials than to foreign officials.

This distinction between the United States and Paraguay or Saudi Arabia should not be viewed as a version of American exceptionalism. There are countries other than the United States with a robust political culture and a commitment to separation of powers. Perhaps officials from these latter countries should be treated the same as American officials. As a practical matter, however, courts are not well equipped to make judgments about the political culture of a foreign country. Fortunately, courts do not have to make this political judgment. Any concept of foreign official immunity almost certainly will include some provision for State Department recommendations, and the political culture of a foreign country could reasonably factor into the State Department's decision making.

A. Absolute Immunity

Some have argued that in ATS litigation, foreign officials generally should receive an absolute official immunity.¹³⁸ To a degree, this argument for absolute immunity is distorted by the patently erroneous assertion that a common law doctrine of absolute immunity already exists.¹³⁹ In addition,

134. *See Nixon Excerpts, supra* note 131.

135. *See supra* note 96 and accompanying text.

136. *See supra* notes 19–20.

137. *See supra* note 46 and accompanying text.

138. Bradley & Goldsmith, *supra* note 28, at 137–38.

139. *See supra* notes 23–45 and accompanying text.

however, the argument for absolute immunity is based upon public policy considerations and congressional policy.¹⁴⁰

The United States inherited a faith in legislative supremacy from the English, and this faith, with some New World changes, is ingrained in our understanding of the law. In particular, when federal courts make federal common law, a well-regarded Supreme Court Justice has advised that where there is a pertinent statute, the common law should be “appropriate to effectuate the policy of the governing Act.”¹⁴¹ The Court as a whole has agreed: “Some [federal common law issues] will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.”¹⁴² Similarly, the Court has said with specific reference to ATS litigation that “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”¹⁴³

Experience under 42 U.S.C. § 1983 presents a good example of the influence of statutory policy upon the crafting of federal common law. Some forty years ago, the Supreme Court began the task of creating a common law of official immunity for litigation under this statutory cause of action. The Court rejected a general rule of absolute immunity. Given the statutory policy of liability, “government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms.”¹⁴⁴ If the Court created a general rule of absolute immunity, “§ 1983 would be drained of meaning.”¹⁴⁵

Supporters of a general rule of absolute immunity argue that FSIA establishes a policy of immunity,¹⁴⁶ but this argument makes no sense. FSIA is literally silent on the personal liability of foreign officials. The Court expressly held in *Samantar* that the statute “does not address an official’s claim to immunity.”¹⁴⁷ Put another way, “[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA.”¹⁴⁸

In contrast to FSIA’s deafening silence, TVPA stands as a clear statement of congressional policy in ATS litigation. Congress explicitly considered the personal liability of foreign torturers and enacted a statutory cause of action against those officials. Moreover, Congress clearly intended a broad scope of liability by using well-known terms of art to describe the scope of conduct covered by the statute. The TVPA provides that an “individual who, under actual or apparent authority, or color of law, of any

140. Bradley & Goldsmith, *supra* note 28, at 145–51.

141. *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring).

142. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

143. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004).

144. *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

145. *Id.* at 248; *accord* *Butz v. Economou*, 438 U.S. 478, 501, 503–04 (1978); *see also* *Wuerth*, *supra* note 9, at 974–75.

146. Bradley & Goldsmith, *supra* note 28, at 145–47.

147. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010).

148. *Id.* at 2291.

foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”¹⁴⁹ These terms of art have clear meanings, and Congress’s explicit adoption of these terms evidences a broad scope of liability.

The phrase “under color of law” comes from constitutional tort litigation. In the leading case, the Supreme Court explained that the phrase means “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”¹⁵⁰ In the context of ATS litigation, the phrase creates liability for foreign officials who misuse their power and violate international law without the government’s permission or authority. This is the natural reading of the phrase “color of law” and the reading actually intended by the TVPA’s drafters.¹⁵¹

If “color of law” addresses unauthorized misuse of power, “actual or apparent authority” must address some other form of misconduct. It is a sad fact of life that “in practice more than one-third of the world’s governments engage in, tolerate, or condone [torture].”¹⁵² Because color of law was developed primarily to deal with officers acting without the permission of their governments, the phrase “actual or apparent authority” would seem to extend liability to officers whose governments embrace and even formally authorize torture. For decades every American law student in the United States has been taught that the phrase “actual or apparent authority” has a well-known, black letter law meaning. It literally is hornbook law.¹⁵³ For almost a century, the ALI’s *Restatement of Agency* has been using this distinction between authority and apparent authority.¹⁵⁴ Moreover, the drafters of the TVPA reported that the statutory phrase “actual and apparent authority” was “derived from agency theory in order to give the fullest coverage possible.”¹⁵⁵

The black letter law of actual authority is clear: “An agent acts with actual authority when . . . the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.”¹⁵⁶ In the context of TVPA litigation, the agent is the

149. Torture Victim Protection Act of 1991 § 2(a), 28 U.S.C. § 1350 note (2006).

150. *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

151. “Courts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing ‘under color of law’” S. REP. NO. 102-249, at 8 (1991). Similarly, the House Report states that “[c]ourts should look to 42 U.S.C. § 1983 is [sic] construing ‘color of law.’” H.R. REP. NO. 102-367, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87.

152. S. REP. NO. 102-249, at 3.

153. See, e.g., HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP §§ 14, 23 (1979).

154. RESTATEMENT OF AGENCY §§ 7–8 (1933).

155. S. REP. NO. 102-249, at 8. Similarly, the House Report states that “[c]ourts should look to . . . agency law in construing ‘actual or apparent authority.’” H.R. REP. NO. 102-367, at 5, reprinted in 1992 U.S.C.C.A.N. 84, 87.

156. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006); accord RESTATEMENT (SECOND) OF AGENCY § 7 (1958); RESTATEMENT OF AGENCY §§ 7–8.

foreign official and the principal is that official's government. Accordingly, the TVPA explicitly extends liability to cases in which the defendant's government has approved, endorsed, or authorized the act of torture.¹⁵⁷ This category of officially sanctioned torture includes—to use the words of the TVPA committee report—the “one-third of the world's governments [that] engage in, tolerate, or condone [torture].”¹⁵⁸ The “color of law” phrase extends liability to officials whose governments do not endorse torture.

Because the concepts of actual authority and color of law seem to cover the waterfront, one wonders what apparent authority encompasses. Early hearings on a bill that eventually became the TVPA suggest that apparent authority would extend liability to private persons who act in concert with the government. For example, “[w]hen you talk about death squads in El Salvador, you may be talking about people who have no direct contact with the government, no provable official contact.”¹⁵⁹

The express words of the statute clearly extend liability to torture without regard to whether the defendant officer was acting in accordance with express laws and official policy of the officer's country or was merely following orders. Moreover, the statute's drafters seem¹⁶⁰ to have intended

157. Torture Victim Protection Act of 1991 § 2(a), 28 U.S.C. § 1350 note (2006).

158. See *supra* note 152 and accompanying text.

159. *The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the H. Comm. on Foreign Affairs and its Subcomm. on Human Rights & Int'l Orgs.*, 100th Cong. 76 (1988) [hereinafter *TVPA House Hearings*] (testimony of Michael H. Posner, Executive Director, Lawyers Committee for Human Rights). Similarly, Father Robert Drinan suggested that apparent authority addresses the situation where a foreign state says, “[W]e never, never authorized this torture. But if the individual [torturer] involved said that: I felt that it was authorized and I did it because I felt that they were—then that particular case should be reachable under this law.” *Id.* Other documents quoted in this early hearing make the same point that the “proposed statute incorporates the concept of ‘actual or apparent authority’ to avoid this dilemma by providing courts with jurisdiction over state-authorized as well as state-condoned abuses.” *Id.* at 110 (quoting Matthew H. Murray, Note, *The Torture Victim Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts*, 25 COLUM. J. TRANSNAT'L L. 673, 700 (1987)).

160. Some members of the Court are leery of legislative history. See, e.g., *Samantar v. Yousuf*, 130 S. Ct. 2278, 2293–94 (2010) (Scalia, J., concurring); *id.* at 2293 (Alito, J., concurring); *id.* (Thomas, J., concurring). For those who are not leery, the legislative history indicates an intent to provide “the fullest coverage possible.” See *supra* note 155 and accompanying text. This message, however, is somewhat garbled by the following passage:

To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state “admit some knowledge or authorization of relevant acts.” 28 U.S.C. § 1603(b). Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official.

S. REP. NO. 102-249, at 8 (1991); see 138 CONG. REC. 4176–77 (1992). This snippet flies in the face of the statutory language and the rest of the TVPA's legislative history.

The snippet's reference to FSIA and citation of § 1603(b) indicates a belief that under some circumstances a former official could be considered an “agency or instrumentality of a foreign state” if the foreign state formally embraced torture. The Supreme Court in *Samantar*, however, unanimously rejected the application of the FSIA to actions against foreign officials in their personal capacity. *Samantar*, 130 S. Ct. at 2292. The snippet is based upon bad law and should not be used to override the clear meaning of the

this broad scope of liability. To repeat: the TVPA's drafters explained that the reference to agency concepts was intended "to give the fullest coverage possible."¹⁶¹ In particular, "low-level officials cannot escape liability by claiming that they were acting under orders of superiors."¹⁶² Nor may superiors escape liability by claiming that torture is lawful under their country's domestic laws.

Finally, supporters of a general rule of absolute immunity have adduced some generally phrased policy considerations in support of their position. These glittering generalities do not, however, comport with the facts on the ground in ATS litigation.¹⁶³ For example, the supporters advance as their

statutory language. Even if the snippet were followed, it would not be applicable unless the foreign state gave a clear statement that under the foreign state's domestic law, the officer was lawfully authorized to engage in torture or extrajudicial killing.

161. *See supra* note 155 and accompanying text. Another aspect of the TVPA's legislative history lends further support to an intent to provide the fullest coverage possible. The Act originated in the 100th Congress as H.R. 1417. *See TVPA House Hearings, supra* note 159, at 81–83. In this original bill, the scope of liability was limited to "actual or apparent authority" with no mention of color of law. *Id.* at 82. In the next Congress, the House Bill (H.R. 1662) retained the original language of "actual or apparent authority," but the Senate Bill (S. 1629) substituted "color of law" for "actual or apparent authority." *See The Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the S. Comm. on the Judiciary and its Subcomm. on Immigration & Refugee Affairs*, 101st Cong. 2–3, 4–7 (1990). Finally, in the 102nd Congress, the House approved H.R. 2092, which provided for liability for conduct under either "actual or apparent authority or under color of law." *See Consideration of Miscellaneous Bills and Resolutions: Markup Before the H. Comm. on Foreign Affairs*, 102d Cong. 175–82 (1991). This language was enacted.

162. S. REP. NO. 102-249, at 9.

163. For example, Professors Bradley and Goldsmith argue that creating a doctrine of official immunity will require U.S. courts to balance "complicated domestic social tradeoffs" involving "different legal and political cultures" in foreign nations. Bradley & Goldsmith, *supra* note 28, at 148. The nature of the underlying rights in ATS litigation easily cuts through this Gordian Knot. ATS litigation is limited to a few clearly defined international rights like freedom from torture, non-judicial killing, genocide, and slavery. One wonders about the legitimacy of a foreign political culture that seeks to protect the perpetrators of such atrocious misconduct. In any event, the congressional policy judgment embodied in the TVPA trumps this concern.

The professors also worry that foreign nations may indemnify foreign officers, which will result in financial hardship. "Foreign nations," the professors say, "understandably do not trust U.S. courts to manage their public administration and fiscal matters." *Id.* at 149. But to repeat, indemnification is not required. It is voluntary. *See supra* notes 116–120 and accompanying text.

The professors also worry that international law is too vague, and the Supreme Court is not a "definitive interpreter" of international law. Bradley & Goldsmith, *supra* note 28, at 149. They suggest that the Court's interpretations of international law are "idiosyncratic." *Id.* To be sure, much of international law is vague, and the Court does, indeed, lack final legislative authority in this area, *see Casto, Common Law, supra* note 5, at 641–42, but the scope of rights enforced in ATS litigation is quite narrow, and by definition well-defined. Is it idiosyncratic to say that torture, non-judicial killing, slavery, and genocide are contrary to international law? The professors merge the right to be remedied and the remedy in ATS litigation. They say that the U.S. practice of providing a damage remedy "is viewed outside the United States as illegitimate and indeed as contrary to international law." Bradley & Goldsmith, *supra* note 28, at 149. The fact remains, however, that Congress, the Supreme Court, and the executive branch have decided that a remedy should be available. The fact that some people outside the United States may dislike these policy decisions cannot justify overturning these decisions in the guise of absolute official immunity.

“most fundamental” argument the impact of ATS litigation on foreign relations. They argue that “without clear political branch guidance, [the courts should not] pursue a course of action in litigation that threatens international discord.”¹⁶⁴ As a general proposition, this argument makes some sense, but by its own terms, the argument collapses when the political branches have provided clear guidance.

In the TVPA, Congress created a cause of action against foreign torturers without regard to whether they exceeded their authority or tortured pursuant to clear and otherwise lawful government policy. In signing the TVPA into law, the President agreed with this explicit policy. Finally, the executive branch, through the State Department’s Legal Adviser and the Attorney General, has often lent its support to ATS litigation. Indeed, in the government’s *Samantar* amicus brief, the Attorney General and the Legal Adviser implicitly rejected a general rule of absolute immunity and argued instead for a rule of immunity significantly based upon the executive branch’s ad hoc suggestion of immunity in individual cases.¹⁶⁵

Of course, the TVPA, by its terms, is limited to torture and nonjudicial killing and therefore does not apply to common law ATS litigation involving slavery and genocide. Nevertheless, as a matter of common law reasoning, the TVPA’s principle of broad liability should be adopted for ATS claims outside the TVPA’s technical scope. By tradition, U.S. courts in certain situations have adopted legislative wisdom as a common law principle for the resolution of common law issues not technically governed by the pertinent statute.¹⁶⁶ Moreover, it would be passing strange if the federal courts created a general principle of liability that is more solicitous of slavers and perpetrators of genocide than of torturers and nonjudicial killers. In the context of ATS litigation, the distinction between torture and nonjudicial killing on the one hand and slavery and genocide on the other is illusive.¹⁶⁷

B. The Proper Scope of Official Immunity

If foreign officials should not receive a general absolute immunity, what scope of immunity should they receive? Traditional rules of official immunity involve a principled approach in which courts apply general rules

Finally, the professors argue that an ATS remedy is not necessary because there may be “civil or criminal liability in the home country.” *Id.* at 150. One wonders if they actually think that Paraguay and Saudi Arabia would provide a remedy for the torture of Joelito Filártiga and Ronald Jones. What about the one-third of nations that embrace torture? *See supra* note 152 and accompanying text. To be sure, some foreign nations may provide meaningful remedies for violations of international law. *See Casto, Common Law, supra* note 5, at 659. A general rule of absolute immunity, however, is too blunt an instrument to deal with the existence of remedies in an ATS plaintiff’s home country. The TVPA’s concept of exhaustion of remedies is more finely calibrated to address this specific concern. *See id.* at 660–61.

164. Bradley & Goldsmith, *supra* note 28, at 150.

165. Brief for the United States, *supra* note 29, at 8–28.

166. *See Casto, Common Law, supra* note 5, at 660–62.

167. This is not to say, however, that ad hoc political considerations might not lead to disparate treatment in particular cases.

to specific cases, but none of the traditional, principled approaches fit ATS litigation. A general absolute immunity is contrary to pertinent acts of Congress, judicial precedent, and the views of the executive. The qualified immunity used in constitutional tort litigation will not work because ATS cases, by definition, involve a narrow range of well-known norms like torture, non-judicial killing, slavery, and genocide.

Similarly, the concept of official capacity is of little value because it is based upon a legal fiction that simply does not fit ATS litigation. If official immunity turns on whether the defendant acted in an official capacity, the defense is either too broad or too narrow. In the United States, we pretend that an officer who acts unlawfully is not acting in an official capacity. Adopting this legal fiction in ATS litigation would, in effect, eliminate official immunity because torturers, murderers, slavers, and fomenters of genocide are by definition acting unlawfully. On the other hand, if official capacity is construed to encompass conduct related to the defendant's jobs, virtually all ATS defendants would be protected.

Professor Beth Stephens has suggested that the defense of foreign official immunity will inevitably turn on a number of ad hoc factors or considerations.¹⁶⁸ Her suggestion should be followed. There will be little predictability to this approach, but torturers and murderers have no valid reliance interest. In reaching ad hoc conclusions in particular cases, none of the relevant factors should be conclusive in all cases.

1. The Defendant Officer's Government

If the defendant's government is unwilling to certify that the defendant's actions were authorized, the defense of official immunity ordinarily should not be available. There is some confusion, however, about the reason for this conclusion. Some have argued that the purpose of official immunity is to protect the interests of foreign states. Thus, the United States' brief to the Supreme Court in *Samantar* noted that "a foreign state may seek to waive the immunity . . . because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state."¹⁶⁹ Statements like this should not be read literally. Actually, the defense of official immunity is based primarily on the foreign policy interests of the United States and not directly on the interests of a foreign government. Usually the United States' foreign policy interests will at least partially be furthered by supporting the announced preference of the foreign government, but this will not always be the case.

Suppose, for example, that the United States has given strong support to a particular government, but that government has been ousted. Or suppose that the United States arranges for a particular government to abdicate in order to avoid a violent and bloody revolution. In each example, the new government might wish to waive the deposed officers' official immunity.

168. See Stephens, *supra* note 49, at 2709.

169. Brief for the United States, *supra* note 29, at 26; see also Statement of Interest, *supra* note 62, at Exhibit 1.

The United States may recognize the new government, yet for foreign policy reasons might recommend official immunity for the deposed officers.

2. Executive Branch

Although executive branch recommendations regarding official immunity should not be conclusive,¹⁷⁰ the executive nevertheless inevitably will play an important role in judicial determinations of official immunity. In making recommendations, the executive inevitably will be guided by political or policy considerations rather than legal principles. Experience with somewhat similar State Department recommendations, before Congress enacted the FSIA, is instructive. In 1952, the United States adopted a restrictive approach to foreign sovereign immunity that recognized a commercial transaction exception, and for the next twenty-four years, the courts relied upon executive judgment to determine whether a particular suit fell within the exception.¹⁷¹ The working assumption was that the executive was administering a legal principle—the commercial transaction exception. Congress eventually became dissatisfied with leaving the matter to the executive branch. Among other things, “foreign nations often placed diplomatic pressure on the State Department [O]n occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive [commercial transaction] theory.”¹⁷² There is no reason to expect that experience in respect of executive recommendations regarding official immunity will be any different.

Actually, political considerations will play an even greater role in respect of official immunity than they did regarding pre-FSIA determinations of sovereign immunity. In advising the courts before the FSIA, the executive was ostensibly administering a principled legal exception to sovereign immunity. In the case of official immunity, there is no principled basis for the executive to premise its analysis of the issue. The concepts of absolute and qualified immunity will not work. Nor is the notion of official capacity of any use.

The absence of a legal principle to guide the executive in its recommendations does not mean that executive recommendations are entirely a function of raw politics. For example, on remand in *Samantar*, the executive based its recommendation against official immunity on the fact that the defendant’s native country of Somalia currently has two separate governing entities, each claiming to be the government of Somalia.¹⁷³ One putative government sought to waive the defendant’s

170. For an excellent and comprehensive analysis of this issue, see Wuerth, *supra* note 9.

171. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–89 (1983). For an excellent short history, see Wuerth, *supra* note 9, at 924–29.

172. *Verlinden*, 461 U.S. at 487 (relying upon statements of the State Department Legal Adviser); accord *Samantar v. Yousuf*, 130 S. Ct. 2278, 2285 (2010); *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004); see also Wuerth, *supra* note 9, at 927.

173. Statement of Interest, *supra* note 62, at Exhibit 1.

immunity, while the other sought to invoke immunity. The United States recognized neither government.¹⁷⁴ Under these circumstances, the recommendation against official immunity is persuasive.

Given the lack of any legal principle to shape the granting of official immunity, executive silence—like Sherlock Holmes’s dog in the night—should speak volumes. The absence of an executive recommendation usually should result in a judicial determination of no immunity. In this regard, the executive frequently is dilatory in making recommendations.¹⁷⁵ A court could reasonably conclude as a practical matter that if the executive delays making a recommendation for a long time, the particular litigation lacked significant foreign policy considerations or perhaps that very real, but conflicting, considerations caused the delay. If the executive eventually recommends immunity in the eleventh hour, the recommendation should be given little weight unless reasons are presented for the inordinate delay.

3. Other Factors

Given the ad hoc nature of the process, other factors should be pertinent in particular cases. The plaintiff’s citizenship may be important. Courts may be more solicitous to the claim of a United States citizen who has been tortured or enslaved in a foreign country. In addition, ATS litigation that involves the judicial review of combat operations implicates another factor that should be considered. In two cases, Israeli military officers have been sued for the excessive use of force in military operations that caused the deaths of innocent civilians.¹⁷⁶ The international law of war with respect to targeting civilians is well established and universally accepted. It is a war crime to launch an attack with knowledge that there will be an incidental loss of civilian life if the civilian losses “would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁷⁷

Many years ago, Justice Robert Jackson wrote:

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. . . . The very essence

174. *Id.*

175. For example, in *Samantar*, the trial court initially stayed proceedings to allow the State Department to have input. *Samantar*, 130 S. Ct. at 2283. After two years, the matter was still under consideration by the State Department. *Id.*

176. In *Belhas v. Ya’alon*, 515 F.3d 1279 (D.C. Cir. 2008), the Israeli army, as part of its combat operations in Lebanon, shelled a United Nations compound and killed over a hundred civilians. *Id.* at 1281–82. In *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), the Israeli army bombed an apartment complex in order to kill a Hamas leader. The bombing killed fourteen people and injured others. *Id.* at 10–11.

177. Rome Statute of the International Criminal Court art. 8, § 2(b)(iv), July 17, 1998, 2187 U.N.T.S. 90. For an excellent discussion, see Richard Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT’L L. 683 (2009).

of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage.¹⁷⁸

He continued: “In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal.”¹⁷⁹

Determining whether civilian casualties caused by a particular military action are clearly excessive is an incredibly difficult and controversial process.¹⁸⁰ Because the reality of combat operations is far removed from the quiet of a judge’s chamber, courts should be reluctant to exercise judicial review over combat decisions. Nevertheless, the undesirability of second guessing combat decisions should be treated as only a significant factor affecting official immunity. There may be cases in which the underlying misconduct shocks the conscience or the executive branch recommends against a grant of official immunity.

C. *The Nature of an Official Immunity Dismissal*

Official immunity in § 1983 is a defense on the merits, and a dismissal is entitled to claim preclusion. But insofar as ATS litigation is concerned, the considerations giving rise to official immunity are significantly different. Section 1983 cases often arise from official conduct that was not clearly unconstitutional, and officials are protected under this circumstance of ambiguity. In contrast, the problem of ambiguous rules of conduct is not nearly so severe in ATS litigation. In *Sosa*, the Court held that the international norm must be clearly established and defined. More significantly, if in granting foreign official immunity, courts give significant weight to the political judgment of either the executive branch or of a foreign government, foreign official immunity is radically different from § 1983 official immunity.

The direct influence of an extralegal political agenda has significant consequences for classifying foreign official immunity as more similar to a jurisdictional rule than a defense on the merits. The simple fact is that politics change. A torturer or slaver who used to be in the in crowd may wind up on the outs. There may be a change of government in the United States or in the foreign country that changes the pertinent extralegal political calculus. The practical possibility of the political winds blowing in a different direction is enhanced by the long, ten-year statute of limitations applicable to ATS litigation.¹⁸¹ If the original reason for a *sui generis* grant of foreign official immunity disappears, the need for a continuing grant to that official disappears.

178. *Koramatsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting).

179. *Id.* at 245. Jackson advanced this point as a consideration rather than a flat rule. In *Koramatsu*, Jackson believed that this consideration was overridden when the executive branch affirmatively sought judicial approval in a criminal prosecution of an unconstitutional military decision. *See id.* at 245–46.

180. *See Rosen, supra* note 177, at 744–48.

181. Torture Victim Protection Act of 1991 § 2(c), 28 U.S.C. § 1350 note (2006). Moreover, given the extralegal political nature of foreign official immunity, an official immunity dismissal should continue the tolling of the statute of limitations.

CONCLUSION

As these notes have suggested, the judicial task of legislating a doctrine of foreign official immunity is fraught with linguistic difficulties. The concepts of sovereign immunity and official immunity address entirely different problems. Likewise, the defense of official immunity developed for constitutional tort litigation stems from concerns that have little or no relevance to ATS litigation. Courts should be particularly leery of invoking the deceptively simple phrase “official capacity.” The task of legislating a doctrine of foreign official immunity cries out for a functional approach that eschews labels like sovereign immunity and official capacity. Determinations should be ad hoc and not based upon general legal principles. The scope of a foreign official’s immunity in a particular case inevitably will turn on a judicial balancing of a number of considerations.