

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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REPUBLIC OF SUDAN, )  
 )  
Petitioner, )  
 )  
v. ) No. 16-1094  
RICK HARRISON, ET AL., )  
 )  
Respondents. )  
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Pages: 1 through 69  
Place: Washington, D.C.  
Date: November 7, 2018

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4 Petitioner, )

5 v. ) No. 16-1094

6 RICK HARRISON, ET AL., )

7 Respondents. )

8 - - - - -

9 Washington, D.C.

10 Wednesday, November 7, 2018

11  
12 The above-entitled matter came on  
13 for oral argument before the Supreme Court of  
14 the United States at 10:03 a.m.

15  
16 APPEARANCES:

17  
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19 behalf of the Petitioner.

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23 the Petitioner.

24 KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on  
25 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 16-1094,  
5 Republic of Sudan versus Harrison.

6 Mr. Curran.

7 ORAL ARGUMENT OF CHRISTOPHER M. CURRAN

8 ON BEHALF OF THE PETITIONER

9 MR. CURRAN: Mr. Chief Justice, and  
10 may it please the Court:

11 When we're talking about a mailing and  
12 a requirement that the mailing be addressed and  
13 dispatched to a specified person, we naturally  
14 understand that to require that the mailing  
15 bear the address of the person and be sent to  
16 that address.

17 That plain meaning of 1608(a)(3) is  
18 reinforced by other features of the FSIA's  
19 service provisions. Specifically, when  
20 Congress intended there to be an intermediary  
21 between the sender and the ultimate recipient,  
22 it said so. It said that in (a)(4), where it  
23 addressed service through the U.S. Secretary of  
24 State. It said that in (b)(2), where it  
25 authorized the service through an agent in the

1 United States. No counterpart in (a)(3).

2 CHIEF JUSTICE ROBERTS: I have to say,  
3 if -- my first instinct if I wanted to mail  
4 something to the head or cabinet member in a  
5 foreign country, I would -- that would be my  
6 first thought: Why don't I deliver it to the  
7 embassy.

8 I mean, the idea of mailing it to the  
9 foreign minister in some country and assuming  
10 it's going to get there in any reasonable time,  
11 I think you're much more -- much more likely to  
12 reach him through the embassy.

13 MR. CURRAN: Yeah. Well, I -- I don't  
14 think that can be squared with the plain  
15 language of 1608(a)(3) or, again, the  
16 surrounding provisions of the FSIA's service  
17 provisions. A -- a foreign minister, the head  
18 of the Ministry of Foreign Affairs, does not  
19 have an office in -- in the diplomatic  
20 missions. So it literally would not be  
21 complying with the statutory language to send  
22 the mailing to that diplomatic mission. Some  
23 --

24 JUSTICE ALITO: Suppose somebody --  
25 suppose somebody sent you a letter addressed to

1 the White & Case office in New York City. I  
2 bet that would get to you, wouldn't it?

3 MR. CURRAN: It might get to me.  
4 Yeah, it -- it should.

5 JUSTICE ALITO: Would that not be  
6 addressed -- would that not be addressed to  
7 you?

8 MR. CURRAN: I -- I don't think it  
9 would be addressed and dispatched to me, no.  
10 My address is always held out as 701 13th  
11 Street, Washington, D.C. So that might -- that  
12 -- it might get to me, but it wouldn't be  
13 compliant with language -- with the statutory  
14 requirement like we see in (a)(3).

15 And -- and -- and, Justice Alito,  
16 furthermore, 1608(c), with the return receipt  
17 requirement, how would that square if a package  
18 was sent to me in New York City? Would the  
19 recipient up there in the mailroom sign the  
20 return receipt? That hardly guarantees, that's  
21 hardly proof of, delivery to the ultimate  
22 recipient when it's going through an  
23 intermediary in that manner.

24 JUSTICE ALITO: But it just -- I'm not  
25 so sure that the "addressed and dispatched"

1 language do the trick for you. I mean, if you  
2 went to any U.S. embassy around the world, I  
3 think you would see posted -- you would see  
4 mounted on the wall a picture of the Secretary  
5 of State, which signifies in a sense that the  
6 Secretary -- this is under the jurisdiction of  
7 the Department of State.

8 MR. CURRAN: Under the jurisdiction.  
9 Well, Justice Alito, I guess I would draw an  
10 analogy. I -- I don't know what circuits  
11 you're the circuit justice for, probably the  
12 Third Circuit perhaps. Would -- would a  
13 package sent to a federal district court in New  
14 Jersey be addressed and dispatched to Your  
15 Honor? I think not, particularly if it -- if  
16 it's accompanied by a requirement that it be a  
17 return receipt that will be evidence of, proof  
18 of, delivery.

19 JUSTICE ALITO: Yeah, it might -- it  
20 might not be. But when -- when I was on the  
21 Third Circuit, my office was in Newark, but the  
22 headquarters of the court was in Philadelphia.  
23 And I used to get mail that was addressed to  
24 me, U.S. Court of Appeals, Market Street,  
25 Philadelphia.

1           MR. CURRAN: Yeah. We're -- we're  
2 talking about a statutory provision that has to  
3 be applied literally and strictly. I say  
4 strictly because the provision, 1608(a), unlike  
5 (b), particularly (b)(3), doesn't say actual  
6 notice, does it, or anything like that? And  
7 the -- the circuit courts have concluded almost  
8 uniformly that 1608(a) requires strict  
9 compliance.

10           It's certainly not strict compliance  
11 to address a package to Newark for a Third  
12 Circuit judge.

13           JUSTICE KAGAN: But, Mr. Curran, I  
14 guess I'm wondering, the -- the statutory  
15 language does not say "at his own office." And  
16 -- and in the absence of that kind of language,  
17 I suppose this is maybe what the Chief Justice  
18 was -- was gesturing towards too, that there  
19 seems something special about the embassy  
20 situation that's not like one of these Third  
21 Circuit situations, that's just everybody  
22 understands that embassies are supposed to be  
23 the point of contact if you want to do anything  
24 with respect to a foreign government.

25           MR. CURRAN: Yeah, I -- I -- I don't



1 agree with that. I -- I think anyone who's  
2 informed or looks into it would conclude that  
3 the embassies are there to serve as diplomatic  
4 functions, not to be a catch-all recipient for  
5 service of process or other things being sent  
6 to the foreign state.

7 The -- and -- and we'll get into the  
8 Vienna Convention in a bit, but the diplomatic  
9 missions have a very specified and limited  
10 role. And it's -- and there's no suggestion in  
11 law or the -- the -- the U.N. conventions or  
12 otherwise that it's there to -- for the  
13 convenience of plaintiffs.

14 JUSTICE GINSBURG: What -- what, in  
15 fact, happened? Was this notice sent to the  
16 foreign minister?

17 MR. CURRAN: Well, that's a -- it's  
18 complicated, right? It was -- it -- it named a  
19 former foreign minister, and it said it was  
20 being sent to the Ministry of Foreign Affairs,  
21 but it was addressed and dispatched to the  
22 Sudanese embassy here in Washington, D.C., on  
23 Massachusetts Avenue.

24 JUSTICE GINSBURG: My -- my question  
25 was, did the foreign minister, the addressee,

1 receive this notice?

2 MR. CURRAN: There's nothing in the  
3 record that tells us that he did.

4 CHIEF JUSTICE ROBERTS: You say this  
5 was not -- the embassies are not there for the  
6 convenience of -- of people wanting to sue or  
7 plaintiffs, but they're there for the  
8 convenience of the host -- or the country,  
9 Sudan in this case, right?

10 MR. CURRAN: And to facilitate  
11 diplomatic communications --

12 CHIEF JUSTICE ROBERTS: Well, I --

13 MR. CURRAN: -- between the countries.

14 CHIEF JUSTICE ROBERTS: -- I would  
15 have thought it would be much more -- I mean,  
16 they tell us not -- I would have thought it  
17 would be much more convenient for them to get  
18 notice that they're going to be sued in the  
19 United States at the United States embassy. I  
20 mean, I would have thought, otherwise, it's --  
21 you know, who knows, it's going to get lost  
22 or --

23 MR. CURRAN: Yeah. Well, I --

24 CHIEF JUSTICE ROBERTS: -- much more  
25 likely for them to hear about it if you give it

1 to the embassy here.

2 MR. CURRAN: Yeah, I think that the --  
3 the amicus briefs that Your Honor has received,  
4 that this Court has received, from foreign  
5 states suggest otherwise. In fact, I think the  
6 reality is a foreign ambassador located in  
7 Washington, D.C., gets flummoxed at the  
8 prospect of receiving service of process.  
9 Doesn't know what to do with it, doesn't know  
10 what it's all about. They're generally not  
11 lawyers.

12 CHIEF JUSTICE ROBERTS: Flummoxed?

13 MR. CURRAN: Flummoxed.

14 CHIEF JUSTICE ROBERTS: The --

15 MR. CURRAN: Flummoxed.

16 CHIEF JUSTICE ROBERTS: And somebody  
17 in Khartoum isn't?

18 MR. CURRAN: Someone in Khartoum  
19 knows, ah, this is the kind of thing we see  
20 from time to time. We better get this to our  
21 legal team, the legal advisors team, or the  
22 Justice Department across the street. They --  
23 they do have a full panoply of expertise there.

24 These -- many of these diplomatic  
25 missions in Washington are skeleton staffs with

1 an ambassador, one or two assistants, and --  
2 and -- and a staff generally of -- of people of  
3 nationalities different from the sending  
4 country. So --

5 JUSTICE SOTOMAYOR: May I ask you the  
6 "address and dispatch" concept, much of the  
7 brief was centered around that being where the  
8 minister sits in the capital of the foreign  
9 state. But there are many countries where the  
10 minister -- the foreign minister doesn't  
11 necessarily sit in the capital. Or let's  
12 assume an emergency, something's happened at  
13 that minister's seat and he's now sitting --

14 MR. CURRAN: Okay.

15 JUSTICE SOTOMAYOR: -- in a nearby  
16 building --

17 MR. CURRAN: Yeah.

18 JUSTICE SOTOMAYOR: -- or in another  
19 city within the state. Or even he's decided  
20 he's going to come and spend three months in  
21 the United States. It's one of these ministers  
22 who thinks he should visit all foreign  
23 countries --

24 MR. CURRAN: Yeah.

25 JUSTICE SOTOMAYOR: -- for an extended

1 period.

2 MR. CURRAN: Well, I --

3 JUSTICE SOTOMAYOR: Is "address and  
4 dispatch" to his home in the foreign state, to  
5 his normal place of business? What -- what --  
6 what's -- how do we define it?

7 MR. CURRAN: Yeah. Well --

8 JUSTICE SOTOMAYOR: If I'm writing  
9 this opinion --

10 MR. CURRAN: Yeah.

11 JUSTICE SOTOMAYOR: -- because I don't  
12 actually think you mean to -- to say -- to add  
13 a phrase --

14 MR. CURRAN: I don't mean to add a  
15 phrase.

16 JUSTICE SOTOMAYOR: -- at the foreign  
17 state's ministry or something.

18 MR. CURRAN: It's -- it's where --  
19 where -- where the foreign minister has an  
20 address, it's got to be sent. Now I think -- I  
21 think the fair reading when it says head of the  
22 foreign -- of the Ministry of Foreign Affairs,  
23 that's implying the -- an official address and  
24 not a home address. But if it -- there -- by  
25 the way, based on my research, there aren't

1 many countries that have a minister of foreign  
2 affairs not in the state capital. I think  
3 there are about three.

4 But let -- let's -- let's use an  
5 example. Let's take South Africa, where the  
6 minister of foreign affairs has offices in both  
7 Pretoria and Capetown, but -- but,  
8 coincidentally, they -- there's also a single  
9 mailing address, but -- but in that situation,  
10 I think it would be perfectly acceptable for  
11 the package to be sent to any one of those  
12 addresses because they are all addresses of the  
13 -- of the head of the foreign ministry.

14 It's -- it's strictly a factual  
15 question, where is the address of the foreign  
16 minister? And in -- in --

17 JUSTICE SOTOMAYOR: What's his -- his  
18 or her official address, is that it?

19 MR. CURRAN: I think it should be the  
20 official address, but -- but, again, here, it  
21 wasn't sent to any address of the foreign  
22 minister.

23 JUSTICE ALITO: When this statute was  
24 enacted, do you think Congress thought that  
25 sending something "Return Receipt Requested" to

1 Khartoum, for example, was -- was a simple  
2 thing? It would be like sending something  
3 "Return Receipt Requested" to, I don't know  
4 where, someplace in the United States?

5 MR. CURRAN: Yeah. Well, we have --  
6 we have a rich record of the legislative  
7 history here, so we know a lot about what  
8 Congress, or -- or maybe more accurately, the  
9 State Department and the Department of Justice  
10 thought when they were drafting this statute in  
11 the mid-'70s.

12 On -- on that point, Congress  
13 recognized that in many situations that return  
14 receipt might not be coming back, either due --  
15 due to problems with the mail system, or a -- a  
16 declination of signing it in the foreign  
17 country.

18 But Congress was -- was strategic, and  
19 this hierarchy they set up in 1608(a) has got  
20 number 4, which is a fail-safe option that is  
21 always available, can never be rejected.

22 JUSTICE ALITO: But I'm just asking  
23 about the practicalities of this. So I assume  
24 it would be this is before the era of FedEx and  
25 -- and all that, so did -- was there a simple

1 way to do this with the U.S. Postal Service?

2 And you --

3 MR. CURRAN: Yes. Yes.

4 JUSTICE ALITO: -- you send a "Return  
5 Receipt Requested" and -- and it comes back  
6 from the far reaches of the world?

7 MR. CURRAN: Yes, but it did require  
8 the cooperation of the mail service in the  
9 foreign country. And the reliability of that  
10 wasn't always assured for sure, because there  
11 are over 100 foreign countries that this thing  
12 could be mailed to, but, again, there is --  
13 there is the catch-all.

14 And -- and -- and -- and speaking of  
15 the legislative history, here, it powerfully  
16 confirms what I propose is the natural reading  
17 of 1608(a)(3), because Congress in the initial  
18 draft that, again, was sponsored by the  
19 Department of State contemplated delivery of  
20 the service package to the embassy in  
21 Washington, addressed to the ambassador or  
22 other head of the mission.

23 And that led to a -- an immediate  
24 concern that it was transgressing the Vienna  
25 Convention and the inviolability of diplomatic



1 missions. And -- and Congress and the  
2 Department of State, therefore, changed the  
3 statute to avoid any connection with the local  
4 embassy to service of process.

5           And this is all spelled out. They  
6 issued a circular to every diplomatic mission  
7 in Washington in 1974 saying: Hey, we've got  
8 this draft bill, it talks about delivery to the  
9 ambassador. We're going to change that because  
10 we are aware of the concerns about the Vienna  
11 Convention.

12           JUSTICE GINSBURG: And yet, when the  
13 question came up to a sister nation, the U.K.,  
14 they said the Vienna Convention doesn't  
15 prohibit --

16           MR. CURRAN: Yeah, Your Honor's  
17 probably referring to the Reyes case.

18           JUSTICE GINSBURG: Yes.

19           MR. CURRAN: Yeah. But that case is  
20 -- is quite different. That case did not  
21 involve service on a foreign mission. It  
22 involved service on the residency of a  
23 diplomatic agent who was then no longer in  
24 service and who did not enjoy immunity and  
25 there was no other way to serve that former

1 diplomatic agent.

2           And in the U.K. Supreme Court  
3 decision, the court expressly distinguished the  
4 situation with a service on a foreign state or  
5 the mission of a foreign state, saying that  
6 that was precluded by Section 12 of the U.K.'s  
7 1978 immunity statute.

8           So I don't think the Reyes case is --  
9 is persuasive on -- on -- on the question we're  
10 addressing. But -- but Congress purposefully  
11 changed the -- the bill that became the FSIA to  
12 avoid any transgression of the inviolability of  
13 the diplomatic mission.

14           And the reports, the parallel reports,  
15 the House report and the Senate report, are  
16 both very express in saying we're changing the  
17 statute to avoid the Vienna Convention problem  
18 and that's why there's no delivery.

19           JUSTICE GINSBURG: But, on that, the  
20 -- the U.K. decision did -- did speak to the  
21 inviolability. They said inviolability doesn't  
22 send -- doesn't mean sending mail. It means  
23 intruding into the premises, let's say, having  
24 a police officer with an arrest warrant or a  
25 search warrant, that's what the inviolability

1 of the mission --

2 MR. CURRAN: I -- I agree. I agree  
3 that the logic of the U.K. Supreme Court's  
4 decision is problematic with respect to the  
5 Vienna Convention.

6 But I think the -- the U.K. court felt  
7 that it was boxed in with some bad facts and  
8 that it had to provide a way to have service of  
9 process against that former diplomatic agent.

10 JUSTICE KAGAN: If I could take you  
11 back, Mr. Curran, to the text of the statute.  
12 I mean, one of the notable things about  
13 1608(a)(4) which is not replicated in  
14 1608(a)(3) is that 1608(a)(4) does specify an  
15 address. You know, it says addressed and  
16 dispatched by the Clerk of the Court to the  
17 Secretary of State in Washington, D.C.

18 MR. CURRAN: Yeah. So what --

19 JUSTICE KAGAN: And -- and 1608(a)(3)  
20 does not say at his office in the Sudan.

21 MR. CURRAN: Correct. So the question  
22 is, what inference do we draw from that  
23 contrast? And I submit that the -- the proper  
24 inference to draw is it confirms that  
25 everybody's thinking that the foreign minister

1 gets served, whether it's the U.S. Secretary of  
2 State or the foreign, foreign minister, they're  
3 all getting served in their official offices in  
4 their home capital. I think it confirms that.

5 Also -- and this -- this might sound a  
6 little strange, but --

7 JUSTICE KAGAN: I guess I don't really  
8 quite understand that, because, here, they  
9 clearly thought that they had to specify when  
10 they wanted to specify, you know, at his office  
11 on -- on -- in -- in Washington, D.C.

12 MR. CURRAN: Yeah, but they -- they  
13 didn't say C Street in Foggy Bottom, right?

14 JUSTICE KAGAN: Well, you know, close  
15 enough.

16 MR. CURRAN: So under the plaintiff's  
17 -- yeah, but under the plaintiff's theory, oh,  
18 if it's not precluded, then any other indirect  
19 method of service is okay too. So maybe you  
20 can send it to the White House knowing that  
21 Secretary Pompeo visits there occasionally. I  
22 -- I don't think -- I don't think that --  
23 that's the answer.

24 But -- but, furthermore, the 1973  
25 legislative history suggests that, at that

1 time, pre-FSIA, some courts were analogizing  
2 service on a foreign state with service on a  
3 foreign corporation. There's even a -- a  
4 decision by the Second Circuit that has Judge  
5 Friendly on the -- on the court that reaches  
6 that exact conclusion, that it's -- the analogy  
7 is to a foreign corporation.

8 Well, that concern and -- and the  
9 possibility that someone could try to serve a  
10 foreign corporation through a U.S. state  
11 Secretary of State was a legitimate concern at  
12 the time, and may have motivated the further  
13 specification that we're talking about, the  
14 Secretary of State in Washington, D.C., not a  
15 secretary of state in Austin, Texas.

16 And -- and as Your Honor may know, in  
17 the Magness case, that's exactly what the  
18 plaintiffs tried to do. They tried to serve  
19 process on a foreign state through the Texas  
20 secretary of state in Austin. So Congress may  
21 have been trying to clarify that that's not  
22 acceptable.

23 Now, on -- on the Vienna Convention,  
24 there's -- there's one other point I'd like to  
25 make. The -- the -- the scholars that we cited

1 and the case law that we cited indicate that  
2 inviolability also addresses any effort to  
3 assert jurisdiction at a diplomatic mission.

4 We -- we think that's pretty  
5 established. Now our friends suggest that we  
6 perhaps were -- and maybe the SG's office as  
7 well -- were trying to obscure the 1958  
8 commentary, which suggested that service could  
9 be done by mail, compliant with the Vienna  
10 Convention.

11 I -- I -- I reject any suggestion we  
12 were obscuring anything. Our -- our brief  
13 addresses in great depth the Japanese proposal  
14 voiced by Mr. Takahashi that was proposing that  
15 the actual text of the Vienna Convention,  
16 Article 22, be changed to allow service by  
17 mail.

18 That proposal was roundly rejected.  
19 It was withdrawn and never adopted. So the  
20 language of Article 22 as adopted by -- at the  
21 Vienna Convention, by the committee of the  
22 whole, indicates that the attendees at the  
23 convention recognized that service by mail  
24 would be a transgression of a foreign  
25 minister's inviolability, the foreign mission's

1       inviolability.

2                   Mr. Chief Justice, I'd like to, unless  
3       -- unless there are other questions, I'd like  
4       to reserve the rest of my time for rebuttal.

5                   CHIEF JUSTICE ROBERTS: Thank you, Mr.  
6       Curran.

7                   Ms. Ross.

8                   ORAL ARGUMENT OF ERICA ROSS FOR THE  
9                   UNITED STATES, AS AMICUS CURIAE,  
10                   SUPPORTING THE PETITIONER

11                   MS. ROSS: Mr. Chief Justice, and may  
12       it please the Court:

13                   I'd like to start off where Mr. Curran  
14       left off, which is how other states understood  
15       the Vienna Convention when it was actually  
16       enacted. I think we -- we see this through, as  
17       he also mentioned, the legislative history and  
18       really the drafting history of the FSIA itself  
19       because, when Congress considered this issue,  
20       this very issue, it initially had service by  
21       mail to an ambassador, which everyone  
22       understood to be service by mail to the  
23       embassy, in the first draft of the FSIA. And  
24       that was, in fact, rejected, as Mr. Curran  
25       noted, precisely because of this concern of

1 inconsistency with the Vienna Convention.

2 And the way that Congress knew that  
3 there was this concern was that other states,  
4 in fact, came to the State Department and said  
5 that this was a problem. And that's where you  
6 get the 1974 statement to the missions at  
7 Washington, D.C., that Mr. Curran also referred  
8 to.

9 Now I think there is --

10 JUSTICE ALITO: If the -- if the Court  
11 were to rule against you on this, how would the  
12 interests of the United States be harmed?

13 MS. ROSS: Your Honor, Justice Alito,  
14 I'm glad you asked that question. That's  
15 exactly where I was going to go next, which is  
16 that the United States does not accept service  
17 by mail on one of its embassies abroad, and  
18 that is true even if a mailroom employee signs  
19 for the package. So, in that instance, the  
20 United States sends back a diplomatic note, it  
21 informs the sender that we do not consider that  
22 to be proper service under international law,  
23 we will not be appearing in court, and we will  
24 not be honoring a default judgment.

25 JUSTICE KAVANAUGH: What --



1 JUSTICE ALITO: Why -- why is that --  
2 go ahead.

3 JUSTICE KAVANAUGH: Why doesn't it?  
4 Why doesn't the United States accept it?

5 MS. ROSS: The United --

6 JUSTICE KAVANAUGH: What's the harm?

7 MS. ROSS: So the United States  
8 doesn't accept it, Your Honor, because it's not  
9 consistent with the Vienna Convention and with  
10 international law more generally.

11 JUSTICE KAVANAUGH: But is there a  
12 more particular harm that comes from accepting  
13 it at an embassy?

14 MS. ROSS: Your Honor, I think there  
15 is an administrability harm. Now, of course, I  
16 think the violation of international law is  
17 itself sufficient.

18 JUSTICE KAVANAUGH: I understand that,  
19 but I'm more --

20 MS. ROSS: But even moving on from  
21 that, I think that the harm is that the United  
22 States has embassies all over the world,  
23 obviously, and sort of deputizing each of those  
24 to accept service on behalf of the United  
25 States is quite problematic.

1           It's even more problematic if you  
2     accept a standard like the one that my friend  
3     suggests at page 34 of their brief, which is  
4     that service would be permissible at any place  
5     likely to have a direct connection to the  
6     foreign ministry. That would open up  
7     consulates, for example. There are countries  
8     that have 40 consulates in the United States.

9           And so, if similar treatment were  
10    extended to the United States abroad, you could  
11    see that there would be a variety of places  
12    where service would be made. And that,  
13    obviously, from an administrability standpoint  
14    is quite problematic.

15           JUSTICE ALITO: I still don't -- I  
16    don't quite understand it in practical terms,  
17    although I see your point about the consulates,  
18    but say that the United States is sued in -- in  
19    Germany, and if process is served on the  
20    embassy in Germany, I assume that the embassy  
21    there would promptly send it to the State  
22    Department in Washington.

23           But I also suspect that the State  
24    Department in Washington would send it back to  
25    the embassy in Germany to -- because if -- if

1 it was necessary to go into a German court,  
2 somebody would have to find attorneys to go  
3 into the court to represent the United States  
4 in the foreign country.

5 MS. ROSS: Justice Alito, I'm not sure  
6 that's actually how it would work in practice.

7 JUSTICE ALITO: Well, okay. Yeah, how  
8 would it work?

9 MS. ROSS: So my understanding, Your  
10 Honor, is that the Office of Foreign Litigation  
11 actually in Washington, D.C., oversees all of  
12 that foreign litigation, and so it makes  
13 perfect sense in our system that we would want  
14 that to be coming --

15 JUSTICE ALITO: Okay.

16 MS. ROSS: -- to the Secretary of  
17 State in Washington, D.C., if at all, and in  
18 that case, under diplomatic note we -- rather  
19 than through direct mail service.

20 But I think it's important to note  
21 that all of these questions sort of get to this  
22 idea that, well, it might make sense for  
23 service on an embassy, maybe that will, in  
24 fact, reach the foreign minister. But I think,  
25 in addition to the textual point that

1 Mr. Curran made, which is, in subsection (b)(2)  
2 of the statute, when Congress expected an agent  
3 to accept service in the United States, that  
4 was actually spelled out in the statute.

5           It's also true that in subsection  
6 (b)(3), again, another provision governing  
7 foreign agencies and instrumentalities but not  
8 governing foreign states, there is a provision  
9 for methods of service that are reasonably  
10 calculated to provide actual notice. And so I  
11 think, when Congress wanted a looser, sort of  
12 whatever will actually get it back to the  
13 intended recipient standard, it actually said  
14 so. And we see that, again, in subsection  
15 (b)(3).

16           I would also point out that there was  
17 some discussion about subsection (a)(4) of the  
18 statute. Now I -- I think Mr. Curran spoke  
19 about the -- the many reasons why Congress  
20 might have included Washington, D.C., in (a)(4)  
21 without the -- the similar statement or express  
22 statement in (a)(3).

23           I would also just note that in the  
24 prior draft of the legislation that we've been  
25 discussing this morning, the -- service was to

1 be made on an ambassador rather than -- or did  
2 not expressly say on the embassy, but everyone  
3 understood that to be where it would be. And  
4 that's, in fact, why other nations raised  
5 objections to the United States, and why the  
6 United States asked -- or -- or why the State  
7 Department suggested a change to the statute.

8 And so I think, similarly, it sort of  
9 makes sense in the evolution of the statute to  
10 understand that when Congress moved service  
11 from the ambassador, which was understood to be  
12 at the embassy, quite literally across oceans  
13 to the foreign minister, it was similarly  
14 understood to be at the foreign ministry rather  
15 than at the -- the embassy in the United  
16 States, again, because that's something that  
17 was specifically rejected.

18 CHIEF JUSTICE ROBERTS: You say --

19 JUSTICE SOTOMAYOR: I --

20 CHIEF JUSTICE ROBERTS: Go ahead.

21 JUSTICE SOTOMAYOR: As I understand  
22 it, 1608 is already a lower bar than what the  
23 United States itself asks for when it is sued  
24 or what other nations ask for when they're  
25 sued. So it's already different process than

1 -- a lower process than what's normally  
2 acceptable. So what difference does it make  
3 that it's different than what you do now?

4 MS. ROSS: So, Your Honor, two  
5 responses to that, one practical, one legal.  
6 My practical understanding is that attempted  
7 service by mail to the embassies -- to United  
8 States embassies abroad happens nearly every  
9 day, and so that is actually a very large  
10 concern for us as a practical matter, whereas  
11 attempted service by mail to the State  
12 Department is actually much less frequent, just  
13 on the practicalities.

14 As a legal matter, obviously, we think  
15 that the United States has a reciprocity  
16 interest in having foreign litigants or foreign  
17 sovereigns brought into our courts only under  
18 the same circumstances that we ask abroad.

19 I don't think that there's a way to --  
20 to read (b)(3) that doesn't permit service by  
21 mail to the foreign state, but -- to the  
22 foreign ministry in the foreign state, and so I  
23 think our reciprocity interests really come in  
24 where we think the text is clear under (a)(3)  
25 that you can't serve on an embassy, but -- but

1 if, you know, there's any ambiguity there,  
2 that's where we think our reciprocity interests  
3 should be brought to bear.

4 I would note more generally I think  
5 the United States' interests here are not only  
6 in reciprocity; they're also in consistency and  
7 predictability, which is something that this  
8 Court noted in *Helmerich* is especially  
9 important in the context of foreign sovereign  
10 immunity because we are bringing foreign  
11 sovereigns into our courts.

12 CHIEF JUSTICE ROBERTS: But if I could  
13 ask you to pause just for a moment. You -- you  
14 -- you say in your brief on the -- the Vienna  
15 Convention that foreign nations would be  
16 affronted by sending a letter -- someone  
17 sending a letter to their embassy.

18 I -- I -- I just don't understand. I  
19 understand the idea that they don't want police  
20 officers coming and knocking on the door and  
21 saying I've got a search warrant or -- or  
22 whatever. But it's hard to imagine someone's  
23 reaction to getting a letter in the mail to be  
24 that they're affronted by it.

25 MS. ROSS: Mr. Chief Justice, I don't

1 think this is an ordinary letter. This is a  
2 jurisdiction-asserting summons. It's quite  
3 literally the sovereign of the United States  
4 sort of exerting its hand into the embassy and  
5 saying you better show up in court or we're  
6 going to enter a default judgment against you.

7 CHIEF JUSTICE ROBERTS: It's not  
8 literally them inserting their hand. It's  
9 putting the letter in the mailbox -- mail,  
10 right?

11 MS. ROSS: Your -- Your Honor, again,  
12 I think it's not just a regular letter. It is  
13 a letter that has -- or a summons that has very  
14 serious judicial consequences. And so I think  
15 it is not just your regular dropoff of mail.  
16 But I think that we --

17 JUSTICE KAGAN: But why -- why is it  
18 any more of an affront if you send it to one  
19 place than if you send it to the other?

20 MS. ROSS: Well, Justice Kagan, the  
21 foreign minister -- or the foreign ministry  
22 abroad is not protected by the Vienna  
23 Convention, and so there isn't this idea that  
24 you have inviolability of those premises. So  
25 that is the way that -- that states are more



1 likely to expect to get the service,  
2 particularly -- and (a)(4) was discussed  
3 earlier -- if it comes through diplomatic  
4 channels under (a)(4).

5 JUSTICE KAGAN: There's a regulation  
6 that suggests that the State Department under  
7 (a)(4) can -- can serve to the embassy if the  
8 foreign state otherwise -- if the foreign state  
9 so requests or if otherwise appropriate? So is  
10 that also a violation of the Vienna Convention?

11 MS. ROSS: It's not, Your Honor. Two  
12 points on that. The first is that under --  
13 again, as a practical matter, that happens  
14 quite infrequently. That is really in extreme  
15 circumstances where we either don't have an  
16 embassy abroad and don't have a protecting  
17 power that can deliver the summons.

18 But, on the -- the legal matter, under  
19 Vienna Convention Article 41, Section 2,  
20 diplomatic channels, which are a  
21 well-established way of states communicating  
22 with each other, never violate mission  
23 inviolability, so that simply isn't a concern.

24 And I think this is an important  
25 point, that (a)(4) is both always available and

1 never a violation of diplomatic immunity. So  
2 it is not as though Respondents will not be  
3 able to ultimately complete service in this  
4 case or in any case. It is simply a question  
5 of how that service is, in fact, delivered.

6 And, again, we think on --

7 JUSTICE GINSBURG: But how does -- how  
8 does that work, mechanically, the (a)(4)? So  
9 there's a quest -- request for the Secretary to  
10 send what used to be called a letter rogatory;  
11 is that what it is?

12 MS. ROSS: Well, so -- so what would  
13 happen in practice, Justice Ginsburg, is that  
14 the litigant would ask the State Department to  
15 serve abroad. It would have to show that it  
16 had not -- that (a)(1) and (a)(2) were not  
17 available and that service under (a)(3) was not  
18 successful, meaning that the return receipt did  
19 not come back.

20 And then the State Department, in the  
21 usual case, will send the materials after  
22 ensuring that they're correct or -- you know,  
23 satisfy all the statutory requirements, will  
24 send those materials to the United States  
25 embassy abroad, which will in turn transmit it

1 to the foreign ministry in the foreign state.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 MS. ROSS: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Shanmugam.

6 ORAL ARGUMENT OF KANNON K. SHANMUGAM  
7 ON BEHALF OF THE RESPONDENTS

8 MR. SHANMUGAM: Thank you, Mr. Chief  
9 Justice, and may it please the Court:

10 Sudan seeks to reverse a \$300 million  
11 judgment in favor of the USS Cole victims based  
12 on an unstated procedural requirement.

13 Sudan argues that the Cole victims  
14 improperly served their complaint by sending it  
15 to the Sudanese Embassy, a component of the  
16 foreign ministry, where it was signed for and  
17 accepted.

18 The relevant provision of the FSIA  
19 does not contain Sudan's requirement that the  
20 complaint be sent to the address of the  
21 headquarters of the foreign ministry in the  
22 foreign state. And even if the relevant  
23 provision were ambiguous, Sudan's proposed  
24 interpretation is not necessary to comply with  
25 the Vienna Convention, which does not prohibit

1 service by mail at an embassy.

2 Consistent with the plain language of  
3 the FSIA, the court of appeals correctly held  
4 that service in this case was proper and its  
5 judgment should be affirmed.

6 I'd like to start --

7 JUSTICE SOTOMAYOR: I've done a little  
8 bit of research on the service of process rules  
9 in the 50 states, and in virtually every one of  
10 them, in some manner or form, it basically says  
11 serve the person or the entity where they live,  
12 where they're doing business.

13 Now you would say this is doing  
14 business in the embassy. But since it's being  
15 addressed to the foreign minister, he is not  
16 physically there except for an occasional  
17 visit. It seems a natural understanding under  
18 most due process concerns that you serve the  
19 person where you're likely to find them.

20 MR. SHANMUGAM: Justice Sotomayor, I  
21 --

22 JUSTICE SOTOMAYOR: And that's not at  
23 most embassies, except in the rare visits which  
24 are very big state things, so I -- I -- I'm not  
25 sure that you can avoid reading "addressed and

1     dispatched" as having some sense that this is a  
2     place where this person is regularly to be  
3     found, not merely where his entity has -- does  
4     some transactional business occasionally.

5             MR. SHANMUGAM: Justice Sotomayor, I  
6     take your point about state service rules, but  
7     I think that that cuts in our favor and not  
8     against us.

9             In our brief at page 23, we cite a  
10    number of federal provisions that are to the  
11    same effect, that in a wide range of contexts,  
12    ranging from FDA notices to the Longshoreman's  
13    Act, various federal statutes and rules specify  
14    places where documents should be served.

15            They specify residences or businesses  
16    or last known addresses. And, in fact, Federal  
17    Rule 4(i)(1)(b) specifies that service of  
18    documents on the United States should go to the  
19    Attorney General of the United States at  
20    Washington, D.C.

21            And so it certainly is true that,  
22    ordinarily, one would serve documents at, you  
23    know, a home or an official address, but,  
24    ordinarily, that address is specified. And  
25    where it is not specified, our submission here

1 is a quite modest, straightforward, textual  
2 one.

3 It is that the embassy is an official  
4 address of the foreign ministry. It is a  
5 component, an extension, of the foreign  
6 ministry. It is certainly true, as Justice  
7 Alito suggested, that if you walk into any  
8 American embassy, you're likely to see a  
9 picture of the Secretary of State. If you go  
10 to their website, you'll see the seal of the  
11 Secretary of State.

12 If you go to the website on Sudanese  
13 --

14 JUSTICE SOTOMAYOR: But we can't  
15 ignore that it's not the place where the person  
16 usually is. And that concept, I think, is the  
17 essence of due process.

18 MR. SHANMUGAM: But I don't think that  
19 you can get that out of the phrase "addressed  
20 and dispatched." I think that the outer bounds  
21 of due process --

22 JUSTICE SOTOMAYOR: Well, "addressed  
23 and dispatched" has a very sense of urgency.  
24 You're going to send it to the person and not  
25 to some far distant place from where that

1 person may be on occasion.

2 MR. SHANMUGAM: But, Justice  
3 Sotomayor, as you are well aware, the outer  
4 bound of due process, the familiar Mullane  
5 standard, is the notion that it must be  
6 reasonably calculated to give notice.

7 And our standard gives effect to that  
8 because, as you will be aware from our brief,  
9 we think that the phrase "addressed and  
10 dispatched" requires the service pack to be  
11 sent in an expeditious manner. Now we think --

12 JUSTICE SOTOMAYOR: Isn't it -- isn't  
13 it strange to think that we have the Vienna  
14 Convention that protects the embassy from a  
15 service processor knocking on the door and  
16 hand-delivering something, but you can go in by  
17 mail and place a burden on the embassy by  
18 requiring either that it put it in its  
19 diplomatic pouch or hand-deliver it or do  
20 something else, do the mailing for you, to the  
21 foreign minister?

22 Isn't that the exact kind of burden  
23 that the convention was intended to avoid?

24 MR. SHANMUGAM: I do not think that  
25 there is anything strange about the distinction

1 between a process server on the one hand and  
2 service by mail on the other.

3 If you take a look at the critical  
4 piece of drafting history, the 1958 revised  
5 commentary, which really is the definitive  
6 commentary of the International Law Committee  
7 on the Vienna Convention, in the paragraph on  
8 which we rely, the very paragraph, they draw  
9 precisely this distinction.

10 And the reason I would submit that  
11 they draw this distinction -- and this is also  
12 captured in Lord Sumption's opinion for the  
13 U.K. Supreme Court in Reyes -- is that there is  
14 something relating to dignitary interests about  
15 personal service, the notion that some person  
16 is going to turn up at the embassy or skulk  
17 around at the embassy and wait for someone to  
18 arrive so that they can hand them a document.

19 That interferes with the functions of  
20 the embassy in a way that a mailing does not.

21 JUSTICE BREYER: All right. But I --  
22 I have a question. And Sumption's a good  
23 judge, and so I read that and paid attention to  
24 that, but I agree with you, it's textual.

25 That's your argument. And I find it



1     ambiguous, so we'll assume it's ambiguous. I  
2     look to purpose, Justice Sotomayor did, and I  
3     -- I cut that a little against you because you  
4     had mentioned -- left one word out of your  
5     beginning. You said you want a \$300 million  
6     judgment. You left out the word default.

7             It was a default judgment. And, of  
8     course, that's the concern, that's the purpose  
9     concern, that they have one ambassador, an  
10    assistant, and four people working in the mail  
11    room who are all American citizens and never  
12    even been to the country. And they don't know  
13    what to do. And you only have 60 days to  
14    answer. Okay? And so who knows what's going  
15    to happen to that piece of paper in many  
16    embassies. More than 60 days before they even  
17    get it over in their country. All right? But  
18    purpose, I'll give you something on that,  
19    because that's not my question.

20            Then I -- I thought: Well, can't get  
21    too far on purpose. Not sure about  
22    consequences. What about history and  
23    tradition? And there I asked my law clerk to  
24    go look up what other countries do, and this is  
25    what I found.

1           I found -- of course, we have five  
2 here, Austria, Libya, Saudi Arabia, the UAR,  
3 and the Sudan, and they all say we do it the  
4 State Department's way. Then Canada, the same.  
5 Belgium, the same. Twenty-two countries have  
6 signed a -- a -- a -- a convention which says,  
7 in the absence of an existing agreement,  
8 service on a foreign country must be to the  
9 Ministry of Foreign Affairs. Okay? That's --  
10 so we got 22 more.

11           And then I tried to find one the other  
12 way. Couldn't find one. Well, Sumption. And  
13 what Sumption was about is what he said. It  
14 was about a former ambassador of service in his  
15 residence. And they say foreign states are  
16 different. And then there's some language that  
17 helps you.

18           And then I looked to what we did here,  
19 and what we did here is that Congress wanted to  
20 do it your way, and State wrote them a letter,  
21 and nobody says that that Vienna Convention on  
22 inviolability is clearly yours or clearly  
23 theirs. What they say is there's an issue  
24 about it.

25           And because -- and there is an issue.

1 And because there is an issue, they said to  
2 Congress, the state, don't do it, this isn't  
3 the way we do it. And after the state wrote  
4 them that letter, they changed the law. They  
5 dropped the language that said you can serve an  
6 embassy. Okay?

7 So, so far, I have U.S. history. I  
8 have at least 22 -- 27 countries. I could find  
9 nothing the other way, except arguable dictum  
10 in a case that involves something else.

11 Now I put that long question to you  
12 because I want to give you a chance to say no,  
13 I'm wrong, there are 32 countries who do it  
14 differently, or whatever you want to say.

15 MR. SHANMUGAM: Well, I'm not going to  
16 say you're wrong, Justice Breyer, but I will  
17 address what I think were really the three  
18 parts of your question: first, text; second,  
19 policy; and, third, the practice of other  
20 countries.

21 So, with regard to the text, as you  
22 know, our submission is quite simple. It's not  
23 that this is an ambiguous provision. It's that  
24 it's a broad provision. And the best evidence  
25 of that is that in the very next paragraph,

1 (a)(4), a location is specified and all of the  
2 statutes and rules that we cite in our brief, a  
3 location is specified.

4 And so, if there is not a location,  
5 that does not connote ambiguity. It connotes  
6 breadth. And the embassy is, in the words of  
7 Justice Kagan, something special. It is the  
8 extension of the foreign ministry in the United  
9 States. And so it is quite a modest step to  
10 say that that is an address at which service of  
11 process to the foreign minister is proper.

12 Now, on the issue of policy, I think  
13 that the best response to your concern about  
14 policy -- and I acknowledge that there was a  
15 default judgment in this case, though no one  
16 can dispute that Sudan had actual notice of  
17 this case and, of course, more than actual  
18 notice of the ongoing Cole litigation, which  
19 had been going on for many years, but even if  
20 you put that aside, the simple response to all  
21 of the policy considerations offered by my  
22 colleagues on the other side is that, under  
23 (a)(3), it is completely within the control of  
24 the foreign state whether to accept (a)(3)  
25 service not only at its embassies but more

1 generally.

2           And I would urge this Court to take a  
3 look at the policy of the United States, which  
4 we cite in our brief and we provide a correct  
5 website in our supplemental letter, it's a very  
6 brief document, which makes clear that not only  
7 does the United States not accept service at  
8 its embassies; it would not accept mail service  
9 even at the State Department.

10           The sole ways in which the United  
11 States accepts service, if you look at page 2  
12 of the current version of the policy, is either  
13 through diplomatic channels or through the  
14 Hague service convention, which is what (a)(2)  
15 refers to.

16           All we are saying is that if this  
17 Court gives full effect to the language of  
18 subsection (a)(3), a country can adopt such a  
19 policy and implement such a policy. And if,  
20 for instance, some letter or package got  
21 inadvertently signed for, the country could  
22 send it back immediately.

23           That is, of course, not what took  
24 place here. In all three of the lawsuits,  
25 Sudan signed the receipt. You can take a look

1 at the Joint Appendix at page, I believe, 74,  
2 and see the return receipt for yourself. And  
3 so a country can avoid (a)(3) service, if it so  
4 chooses, either altogether or at the embassies.

5 Now, with regard to the practice of  
6 other countries, I would certainly acknowledge  
7 that (a)(3) is an unusual provision under any  
8 of our interpretations. Service of process by  
9 mail is not provided under the laws of many  
10 other countries.

11 It is true that a number of countries  
12 do provide for service of process by mail on  
13 diplomatic personnel where it's a complaint  
14 against diplomatic personnel, and that is, of  
15 course, the upshot of the law in the U.K., as  
16 Lord Sumption discusses in paragraph 15 of his  
17 opinion.

18 But I think that that illustrates why  
19 the government's interest in this case is  
20 unfounded. U.S. law has been non-reciprocal  
21 since the FSIA was enacted in 1976. U.S. law  
22 has permitted service of process by mail where  
23 many other countries do not. And yet there is  
24 no evidence of some form of retaliation against  
25 the United States, and I think it is highly

1 unlikely, with all due respect --

2 JUSTICE BREYER: Well, I didn't talk  
3 about retaliation, you see? So now where I am  
4 is -- because I -- you'll see what I'm going to  
5 say in a second, but -- but I -- I think that  
6 -- that, yeah, maybe my purposing was -- I'm  
7 not sure how overstated, because I do worry  
8 about these small embassies, but text, you  
9 can't get me too far. You -- I mean, it's --  
10 it is ambiguous.

11 But I still have the simple fact that  
12 every other country in the world has a  
13 different policy and we did too. And now you  
14 point out correctly that there are other ways  
15 that they could get to this same policy  
16 elsewhere in the statute if they want to.

17 And the problem is -- and I -- maybe I  
18 -- I mean this seriously, and I don't mean it  
19 to be facetious -- Botswana perhaps does not  
20 have a lawyer like you. And to turn over to  
21 these countries, often very small, often  
22 without adequate legal advice, something that  
23 departs from a simple legal rule that every one  
24 of them has followed in one form or another in  
25 the past is something that makes me nervous.

1           MR. SHANMUGAM: Well, let me then  
2 offer a fourth answer --

3           JUSTICE BREYER: Yeah. All right.

4           MR. SHANMUGAM: -- which is that you  
5 ought not to be nervous about that because  
6 there are things that countries can do in your  
7 Botswana hypothetical. One thing they can do  
8 is, if the package gets transmitted to the  
9 foreign ministry and someone sees it and says  
10 we should not have accepted service, it could  
11 be returned immediately. And applying ordinary  
12 principles of rescission, we're aware of at  
13 least one district court decision in which a  
14 court has said: Well, you returned it right  
15 away, and so we're going to treat this as if  
16 service was not effective.

17           But I think more importantly -- and,  
18 again, there is evidence of this in the lower  
19 court case law -- if a country after the fact  
20 does not, in fact, transmit the service packet  
21 appropriately, the country can come in and  
22 object to any default or to a subsequent  
23 default judgment in the country --

24           JUSTICE SOTOMAYOR: But those are all  
25 subject to the discretion of the district



1 court. They're not rules of -- they're not  
2 absolute rules.

3 MR. SHANMUGAM: But I think --

4 JUSTICE SOTOMAYOR: What happens -- I  
5 -- I hate to use a country, but let's assume a  
6 country that's more than 24-hour mailing away,  
7 and they only have a pouch once a week, it gets  
8 to them, they send it back, it's now going to  
9 take whatever amount of time to come back, and  
10 the judge says no, waiting a month, waiting six  
11 weeks is just too much time.

12 That doesn't respect the dignitary  
13 expectations of all other states, including  
14 this one, of the United States, that --

15 MR. SHANMUGAM: For the record, I'm  
16 sure that Justice Breyer --

17 JUSTICE SOTOMAYOR: -- that kind of  
18 serve --

19 MR. SHANMUGAM: -- I'm sure Justice  
20 Breyer did not intend to malign Botswana. I  
21 think in the case of a --

22 JUSTICE SOTOMAYOR: No, no --

23 JUSTICE BREYER: Moreover, I know a  
24 very good lawyer in Botswana, actually.

25 (Laughter.)

1                   JUSTICE BREYER: And I worked with her  
2 for quite a while. But the point is I'm just  
3 taking that as a -- it could be a totally wrong  
4 example, and what that is, is that there are  
5 many countries that don't have the resources to  
6 figure out what a default judgment means, to  
7 figure out where they're going to go and they  
8 -- and to know who to transmit things to, and  
9 the chances are just much greater that the  
10 right authorities will get the piece of paper  
11 if you send it to the ministry, which is likely  
12 to be better staffed in their own country.

13                   MR. SHANMUGAM: I mean, perhaps. So I  
14 think you could still have the risk of the same  
15 problem under Petitioner's and the United  
16 States' interpretation because, after all, the  
17 practical reality is that it's not the foreign  
18 minister himself or herself who's going to be  
19 responding to this lawsuit. It's going to be  
20 the equivalent of our Office of Foreign  
21 Litigation. So there's going to be a routing  
22 issue regardless. The service packet has to  
23 get to the right place.

24                   JUSTICE ALITO: Well, on that --

25                   MR. SHANMUGAM: But, Justice

1 Sotomayor --

2 JUSTICE ALITO: -- on the routing  
3 issue, Mr. Shanmugam, could you tell me exactly  
4 what rule you would like us to apply? In your  
5 brief, you say it -- it must be sent to a  
6 location that is likely to have a direct line  
7 of communication to the foreign minister.

8 So would that apply to every  
9 consulate? Would it apply to the Number 2  
10 person in the embassy, the Number 3 person in  
11 the embassy? They all have a direct line of  
12 communication.

13 MR. SHANMUGAM: I -- I think that the  
14 -- the better view is that if it is an official  
15 address of the foreign ministry that is likely  
16 to have a direct line of communication -- and I  
17 think Mr. Curran agrees that it has to be an  
18 official address, so a home address or other  
19 address would not qualify -- I think that that  
20 would satisfy our standard.

21 But I think that if this Court were  
22 concerned about that breadth -- and I'll  
23 explain in a minute why the Court shouldn't be  
24 -- it could draw a line around embassies  
25 because embassies certainly perform the full

1 panoply of functions of the foreign ministry  
2 and if you take a look at --

3 JUSTICE GORSUCH: Well, but, counsel,  
4 if we're concerned about the text --

5 JUSTICE GINSBURG: Mr. Shanmugam, can  
6 we back up? And this is -- are we -- we  
7 talking about a question of personal  
8 jurisdiction? What is the basis of subject  
9 matter jurisdiction in these suits?

10 MR. SHANMUGAM: So the basis for  
11 subject matter jurisdiction is the waiver of  
12 immunity. And, in fact, there is a federal  
13 cause of action uniquely for victims of terror  
14 attacks against state sponsors of terrorism  
15 under Section 1605(a).

16 It is true that this issue of service  
17 goes to personal jurisdiction under -- I  
18 believe it's Section 1330(b). And so this is a  
19 personal jurisdiction issue.

20 I do want to say one last thing in  
21 response to Justice Alito before I forget, and  
22 that is that, you know, if the Court is  
23 concerned about consulates and U.N. missions,  
24 again, the Court could distinguish embassies on  
25 the ground that embassies perform a unique

1 function. And, of course, a country could  
2 adopt a policy of not accepting service at its  
3 consulates or at the U.N. mission.

4 As a practical matter, I don't think  
5 it's going to matter very much, and we did look  
6 at the case law, and I think we found around  
7 three cases where parties have attempted  
8 service at consulates or U.N. missions. And I  
9 think the reason it wouldn't matter is that if  
10 there is an available address in the United  
11 States, i.e., the embassy, there's not going to  
12 be any need to attempt service on the consulate  
13 or on the U.N. mission in New York rather than  
14 in Washington, D.C.

15 And I do think that one factual point  
16 here bears emphasizing. This method of service  
17 was first attempted by my co-counsel, Mr. Hall,  
18 in the Rux case in 2004. The reason that we  
19 attempted service at the embassy was for the  
20 simple reason that, in 2004, Sudan was at the  
21 tail end of its Civil War and it was very hard  
22 even to find someone who would deliver a  
23 package to Khartoum with the requisite return  
24 receipt.

25 And so this case really illustrates

1 why this policy makes sense. It makes sense  
2 because the embassy is, indeed, the extension  
3 of the foreign ministry in the United States,  
4 and it can choose how it wants to process or  
5 transmit a service package when it is accepted.  
6 There's no requirement that it use a diplomatic  
7 pouch. And in 2018, there are faster ways of  
8 making the transmission.

9 Justice Sotomayor --

10 JUSTICE SOTOMAYOR: Are you asking us  
11 to -- are you suggesting that the U.N. embassy  
12 would be a place to effect service under this  
13 provision?

14 MR. SHANMUGAM: I think it would  
15 satisfy our statutory text -- our statutory  
16 text argument. And I heard Justice Gorsuch  
17 turning to that. Let me address that directly.

18 JUSTICE GORSUCH: Well, yes -- yes. I  
19 would think textually, you'd have a very  
20 difficult time drawing a line around embassies.  
21 I mean, you -- you suggest we might do that. I  
22 suppose we can do just about anything. But,  
23 textually, I don't see how you make that  
24 argument.

25 MR. SHANMUGAM: Well --

1 JUSTICE GORSUCH: I would think  
2 consulates, trade offices, tourism offices that  
3 are part of the ministry would all be included,  
4 I would think, under your interpretation.

5 MR. SHANMUGAM: Well, I think our  
6 textual argument is that at least the verb  
7 "dispatched" connotes some notion of  
8 expeditiousness and promptness, and we're all  
9 in agreement about the relevant dictionary  
10 definitions.

11 And I think with an embassy, ex-ante,  
12 I think it is reasonable to think that it's  
13 going to get to the foreign minister because of  
14 the direct line of communication and because  
15 embassies are directly in communication with  
16 foreign ministries all the time.

17 JUSTICE GORSUCH: Well, I'm positing  
18 all sorts of different kinds of entities that  
19 are also --

20 MR. SHANMUGAM: But I --

21 JUSTICE GORSUCH: -- directly in  
22 communication with and responsible to  
23 ultimately the foreign minister. So I'm not  
24 sure textually how I wouldn't qualify.

25 MR. SHANMUGAM: Well, I think it's

1 just that it is less likely to arrive in an  
2 expeditious manner if you send it to a tourist  
3 office and the like. That may very well not be  
4 a component of the foreign ministry. I think  
5 we're in agreement, again, that it has to be an  
6 official address of the foreign ministry at a  
7 minimum. I do want to say --

8 JUSTICE GORSUCH: A second question if  
9 I might.

10 MR. SHANMUGAM: Sure.

11 JUSTICE GORSUCH: What do we do about  
12 the fourth subsection, which does specify  
13 diplomatic means, addressed to the Secretary of  
14 State, if you -- if you failed under 3, you go  
15 to 4, and 4 says then you send it to the  
16 secretary of state here in Washington, the  
17 United States Secretary of State, and -- and  
18 the Secretary will then use diplomatic means to  
19 get it to the appropriate folks.

20 And when Congress speaks so clearly  
21 about the question of diplomatic means in one  
22 place, we tend to usually think it's excluded  
23 elsewhere. What do we do about that?

24 MR. SHANMUGAM: Well, I don't think  
25 that that hurts us, and, in fact, I think that



1 (a)(4) helps us in numerous respects. The  
2 first is, of course, the plain text argument  
3 that, there, Congress specified a location for  
4 the initial delivery to the --

5 JUSTICE GORSUCH: I understand that  
6 argument. That's not my question.

7 MR. SHANMUGAM: Yes. And I -- I think  
8 to be sure, (a)(4) is, you know, the fallback.  
9 It is potentially available. In the Kumar case  
10 where the Fourth Circuit rejected our  
11 interpretation, we're in the process of  
12 attempting service right now under (a)(4) and  
13 working with the State Department to do that.

14 And the way that (a)(4) service  
15 operates is that you deliver the service packet  
16 first to the Secretary of State.  
17 Interestingly, and somewhat responsive to Mr.  
18 Curran's point, you know, the Secretary of  
19 State has a lot of buildings even in  
20 Washington, D.C. And the State Department on  
21 its website for the last --

22 JUSTICE GORSUCH: All right. All  
23 right. Now let's -- let's get to the question,  
24 all right?

25 MR. SHANMUGAM: Yeah. Well, I'm --

1 I'm -- I'm -- I'm not meaning to filibuster. I  
2 -- I just -- I want to make sure that the Court  
3 understands how this actually operates.

4 JUSTICE GORSUCH: We understand that  
5 the State Department is large. My question is  
6 just, it speaks there that the Secretary will  
7 then use diplomatic means to get the service  
8 effected.

9 MR. SHANMUGAM: Correct.

10 JUSTICE GORSUCH: And there is an  
11 express discussion of diplomatic means.

12 MR. SHANMUGAM: Correct.

13 JUSTICE GORSUCH: And its presence in  
14 (4) would suggest its absence in (3) was not  
15 accidental under our normal canons of  
16 interpretation. Now I'm telling you something  
17 you already know.

18 MR. SHANMUGAM: Well, it's a --

19 JUSTICE GORSUCH: So what's the --  
20 what's the answer to it?

21 MR. SHANMUGAM: That's a somewhat  
22 different argument, I think, from the arguments  
23 that Sudan and the United States have made, and  
24 so let me address it directly.

25 JUSTICE GORSUCH: Let's -- let's say I

1 disagree with that.

2 MR. SHANMUGAM: Yeah. So I -- I don't  
3 think that the reference to diplomatic channels  
4 in any way excludes service at diplomatic  
5 premises, and that's for the simple reason that  
6 I think diplomatic channels has a very  
7 well-defined meaning at law. And if you take a  
8 look at --

9 JUSTICE GORSUCH: But -- but -- but --  
10 but your reading of (3) is that it has to get  
11 to the foreign minister. And the only way it  
12 can get to the foreign minister, you say it  
13 will happen effectively and with great  
14 dispatch, if I give it to the embassy and maybe  
15 a few other places. So you are using  
16 diplomatic means there, aren't you?

17 MR. SHANMUGAM: Well, we are -- I -- I  
18 -- I would hesitate to say that we're using  
19 diplomatic means other than in the very generic  
20 sense, Justice Gorsuch, which is to say that in  
21 any form of (a)(3) service, you know, you are  
22 going through the foreign ministry. The  
23 question is, how are you going through the  
24 foreign ministry?

25 And, indeed, if you take a look at the

1 regulation, if you're interested in (a)(4), I  
2 think the government's own regulation is quite  
3 informative. It's 22 CFR 93.1. It's cited in  
4 the briefs. And it --

5 JUSTICE GORSUCH: You're counting on  
6 (a)(3) that -- that the embassy's going to send  
7 it through a diplomatic pouch or otherwise to  
8 the foreign ministry, right?

9 MR. SHANMUGAM: Or some other means.  
10 But, again, diplomatic channels, it's a defined  
11 term and it refers to communication from one  
12 sovereign to the other.

13 You know, that is what diplomatic  
14 channels means. And so, if you look at the  
15 relevant regulation, it sets out the various  
16 ways in which that occurs. And it is certainly  
17 true, as Ms. Ross said, that the -- that the --  
18 probably the most common way this occurs is  
19 that the State Department sends a service  
20 packet to the United States Embassy in  
21 Khartoum, and it attempts to deliver the  
22 service packet.

23 JUSTICE KAVANAUGH: As a practical  
24 matter, as a practical matter, is that hard to  
25 accomplish? In other words, the system going

1 forward, if we were to say you can't do it at  
2 embassies, is there a problem going under that  
3 mechanism?

4 MR. SHANMUGAM: Well, you know, the  
5 problem is that I don't think it's necessarily  
6 certain that you'll be able to attain service.  
7 We're certainly hopeful that we will be able to  
8 attain service under (a)(4) in the Kumar case,  
9 but, again, you know, this Court has to give  
10 effect to Congress's judgment.

11 JUSTICE KAVANAUGH: Are you aware of  
12 any problems trying to effectuate service  
13 generally under (a)(4)?

14 MR. SHANMUGAM: Well, I think it could  
15 break down if there is not --

16 JUSTICE KAVANAUGH: It could, but are  
17 --

18 MR. SHANMUGAM: -- if there's not a  
19 diplomatic relationship.

20 JUSTICE KAVANAUGH: Does it --

21 MR. SHANMUGAM: I mean, that's the  
22 bottom line, right, is that if there is not a  
23 diplomatic relationship, there are not going to  
24 be diplomatic channels.

25 But I think, tellingly, the regulation

1 for (a)(4) service contemplates the possibility  
2 of service of process at the embassy in the  
3 United States of the foreign state, which I  
4 think belies the notion that this is somehow  
5 forbidden by the Vienna Convention.

6 JUSTICE BREYER: In your research, did  
7 you find a single example, any example of  
8 someone tried (a)(4) and they couldn't get it  
9 done?

10 MR. SHANMUGAM: I'm not aware of an  
11 example. I can't say that I've actually  
12 researched that specific question, but, of  
13 course, we're interpreting above all a federal  
14 statute here. And Congress established a  
15 hierarchy.

16 And, Justice Breyer, to the extent  
17 that (a)(3) is unusual, I think the telling  
18 fact is that Congress preferred (a)(3) service  
19 to (a)(4) service.

20 JUSTICE KAVANAUGH: But you're saying  
21 --

22 JUSTICE BREYER: I thought it was  
23 usual. My -- my point, which you seem to agree  
24 with, is the research shows it's not -- oh, the  
25 (a)(3) you mean to the embassy is usual?

1 MR. SHANMUGAM: Well --

2 JUSTICE BREYER: Unusual, I mean.

3 MR. SHANMUGAM: -- no, I took your  
4 question to be whether I'm aware of any cases  
5 of (a)(4) service failing --

6 JUSTICE BREYER: Yeah.

7 MR. SHANMUGAM: -- so that a party is  
8 completely out of luck.

9 JUSTICE BREYER: That's right.

10 MR. SHANMUGAM: And I think that if  
11 there would be such a case, it would be in a  
12 context in which the United States has no  
13 diplomatic relations and, therefore, there are  
14 no diplomatic channels. And, of course, that's  
15 not an unlikely possibility in the event of a  
16 state sponsor of terrorism, which is, after  
17 all, the context in which (a)(3) is most likely  
18 to be significant.

19 JUSTICE SOTOMAYOR: How many of them  
20 have embassies in the United States where  
21 there's no diplomatic relations?

22 MR. SHANMUGAM: Well, I think that  
23 that is, you know, to be fair, an -- an unusual  
24 situation. And it certainly is true that  
25 there, with any luck, one of these mechanisms

1 is going to succeed. And (a)(4) does exist as  
2 a fallback.

3 JUSTICE KAVANAUGH: But the point --

4 MR. SHANMUGAM: But, of course, our  
5 whole point about the inequity --

6 JUSTICE KAVANAUGH: Counsel, the point  
7 -- the point you're making is it's not a big  
8 deal to allow service at an embassy, even  
9 though the United States objects and even  
10 though, as Justice Breyer points out, no other  
11 country appears to allow that.

12 And -- and my response in addition to  
13 that is, is it really a big deal to, from your  
14 perspective going forward, I know about this  
15 case, but going forward as a system, to go  
16 through the (a)(4) mechanism rather than (a)(3)  
17 at -- at an embassy?

18 MR. SHANMUGAM: Well, I would flip  
19 that around and say that it's not a big deal to  
20 permit service on the embassy under (a)(3) --

21 JUSTICE KAVANAUGH: But that --

22 MR. SHANMUGAM: -- precisely because a  
23 country can adopt a policy and simply decide  
24 not to accept (a)(3) service.

25 JUSTICE KAVANAUGH: But the -- but I



1 -- if I were starting afresh like the Chief  
2 Justice's first question, I -- I might agree  
3 with you, but the United States and all the  
4 countries in the Vienna Convention all seem to  
5 say, actually, it is a big deal.

6 MR. SHANMUGAM: But I think that there  
7 are two separate questions. The first is, does  
8 the Vienna Convention prohibit service of  
9 process by mail? And there I would  
10 respectfully submit that all of the relevant  
11 indicia -- the language of Article 22, the  
12 drafting history, the commentary, including the  
13 U.K. Supreme Court's decision in Reyes -- point  
14 in our favor.

15 The second is, what is the current  
16 practice of other countries? And while it is  
17 certainly true that (a)(3) is unusual with  
18 regard to lawsuits against foreign sovereigns,  
19 I don't think that it's as unusual with regard  
20 to lawsuits against diplomatic personnel, like  
21 the lawsuit at issue in Reyes.

22 So the idea of service of process by  
23 mail is not somehow alien. It's just that  
24 Congress, in adopting (a)(3), did do something  
25 a little bit unusual in providing a mechanism

1 for service of process by mail, even for  
2 litigation against foreign sovereigns.

3 JUSTICE ALITO: What would be the  
4 consequences in this particular case if you had  
5 to go back and if we were to rule against you  
6 and you succeed in achieving service under  
7 (a)(4)? Is there any indication that Sudan  
8 would appear?

9 MR. SHANMUGAM: Well, I think that's a  
10 question for Mr. Curran, but we would certainly  
11 have to start over in this case. And I think  
12 that the reason why that is particularly  
13 inequitable here is because, in this case, we  
14 would essentially be held to have failed to  
15 serve properly by failing to comply with a  
16 requirement that does not appear on the face of  
17 the statute and in a context in which Sudan  
18 unquestionably had actual notice of the  
19 litigation.

20 And, again, as this case comes to the  
21 Court, it comes to the Court on the assumption  
22 that Sudan accepted service here,  
23 notwithstanding Sudan's late effort to cast  
24 doubt on that proposition. And so,  
25 notwithstanding Sudan's judgment to accept

1 service under (a)(3), we would have to start  
2 over at this late phase.

3 And we're not even talking about an  
4 objection that was raised in the underlying  
5 litigation. We're talking about an objection  
6 that was raised in the very -- at the very last  
7 minute in response to turnover orders. And  
8 that would be the height of unfairness to the  
9 Cole victims. The judgment of the Second  
10 Circuit should be affirmed.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 You have two minutes remaining, Mr.  
14 Curran.

15 REBUTTAL ARGUMENT OF CHRISTOPHER M. CURRAN  
16 ON BEHALF OF THE PETITIONER

17 MR. CURRAN: Justice Alito, Sudan is  
18 committed to appearing and defending itself.  
19 It believes that the default judgment was  
20 ill-founded. It has substantial defenses, and  
21 it would like to contest the charges.

22 JUSTICE ALITO: Is there -- you want  
23 to suggest that the -- the government of Sudan  
24 had forgotten about the Cole incident or didn't  
25 realize that this litigation was going on?

1 MR. CURRAN: Well --

2 JUSTICE ALITO: It didn't get notice?  
3 It didn't know that this litigation was going  
4 on?

5 MR. CURRAN: Well, we -- we do have a  
6 bona fide concern about the way the service  
7 package was sent, right? Page A-75 of the  
8 Joint Appendix shows -- is the Postal Service  
9 record, and it shows that the package was not  
10 actually delivered to the embassy but, in  
11 fact --

12 JUSTICE GINSBURG: But that's not the  
13 --

14 MR. CURRAN: -- was delivered to the  
15 --

16 JUSTICE GINSBURG: The question is,  
17 did Sudan have actual notice? Mr. Shanmugam  
18 said a few times --

19 MR. CURRAN: Yeah. But --

20 JUSTICE GINSBURG: -- it did. And --  
21 and you're not contesting that, in fact, Sudan  
22 had notice?

23 MR. CURRAN: We can't contest that  
24 someone at the embassy knew about the case  
25 through plaintiff's counsel. We have no idea

1 whether responsible people in Khartoum knew  
2 about the litigation. So it depends --

3 JUSTICE BREYER: Did they know about  
4 it before the 60-day period for replying and  
5 preventing the default judgment passed?

6 MR. CURRAN: I don't know and there's  
7 nothing in the record on that. But, again,  
8 actual notice --

9 JUSTICE BREYER: Well, you know -- you  
10 know that they knew as of -- as of when? The  
11 process is mailed. They have to return it.  
12 Sixty days later they're eligible for a  
13 default, and default was entered. Okay?

14 MR. CURRAN: Yes.

15 JUSTICE BREYER: Now do we know when  
16 they really knew about it, before the default  
17 or after the default?

18 MR. CURRAN: Yeah, I think it was  
19 after the motion for default judgment but  
20 before the default judgment itself, okay?  
21 That's -- that's my assessment of the record.

22 My -- my colleague, Mr. Shanmugam,  
23 advocates a reading of 1608(a)(3) that is broad  
24 and unpredictable and leaves too much  
25 creativity for plaintiffs and courts.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. The case is submitted.

3 (Whereupon, at 11:05 a.m., the case  
4 was submitted.)

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<b>\$300</b> [2] <b>34:10 40:5</b>	<b>74</b> [1] <b>45:1</b>	<b>add</b> [2] <b>12:12,14</b>	<b>almost</b> [1] <b>7:7</b>
<b>1</b>	<b>9</b>	<b>addition</b> [2] <b>26:25 63:12</b>	<b>already</b> [3] <b>28:22,25 57:17</b>
<b>100</b> [1] <b>15:11</b>	<b>93.1</b> [1] <b>59:3</b>	<b>address</b> [26] <b>7:11 11:6 12:3,20,23,24 13:9,15,18,20,21 18:15 34:20 36:23,24 37:4 42:17 43:10 50:15,18,18,19 52:10 53:17 55:6 57:24</b>	<b>although</b> [1] <b>25:17</b>
<b>12</b> [1] <b>17:6</b>	<b>A</b>	<b>addressed</b> [11] <b>6:14,23 8:21 15:21 18:15 35:15,25 37:19,22 38:9 55:13</b>	<b>altogether</b> [1] <b>45:4</b>
<b>1330(b)</b> [1] <b>51:18</b>	<b>a)(1)</b> [1] <b>33:16</b>	<b>addressee</b> [1] <b>8:25</b>	<b>ambassador</b> [9] <b>10:6 11:1 15:21 16:9 22:21 28:1,11 40:9 41:14</b>
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<b>1605(a)</b> [1] <b>51:15</b>	<b>a)(3)</b> [20] <b>27:22 29:24 33:17 43:23,24 44:18 45:3,7 58:21 59:6 61:17,18,25 62:17 63:16,20,24 64:17,24 66:1</b>	<b>addressing</b> [1] <b>17:10</b>	<b>ambiguous</b> [5] <b>34:23 40:1,1 42:23 46:10</b>
<b>1608</b> [1] <b>28:22</b>	<b>a)(4)</b> [22] <b>27:17,20 32:2,4,7,25 33:8 43:1 56:1,8,12,14 59:1 60:8,13 61:1,8,19 62:5 63:1,16 65:7</b>	<b>adequate</b> [1] <b>46:22</b>	<b>american</b> [2] <b>37:8 40:11</b>
<b>1608(a)</b> [3] <b>7:4,8 14:19</b>	<b>a-75</b> [1] <b>67:7</b>	<b>administrability</b> [2] <b>24:15 25:13</b>	<b>amicus</b> [2] <b>10:3 22:9</b>
<b>1608(a)(3)</b> [4] <b>15:17 18:14,19 68:23</b>	<b>able</b> [3] <b>33:3 60:6,7</b>	<b>adopt</b> [3] <b>44:18 52:2 63:23</b>	<b>amount</b> [1] <b>48:9</b>
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<b>1973</b> [1] <b>19:24</b>	<b>absence</b> [3] <b>7:16 41:7 57:14</b>	<b>advice</b> [1] <b>46:22</b>	<b>another</b> [3] <b>11:18 27:6 46:24</b>
<b>1974</b> [2] <b>16:7 23:6</b>	<b>absolute</b> [1] <b>48:2</b>	<b>advisors</b> [1] <b>10:21</b>	<b>answer</b> [4] <b>19:23 40:14 47:2 57:20</b>
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