

# 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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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 them 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 you  
11 were 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.

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

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

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

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

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

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

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

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

17           MR. CURRAN: Yeah. So what --

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

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

1 State or the foreign, foreign minister, they're  
2 all getting served in their official offices in  
3 their home capital. I think it confirms that.

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

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

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

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

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

23 But -- but, furthermore, the 1973  
24 legislative history suggests that, at that  
25 time, pre-FSIA, some courts were analogizing

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

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

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

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

1     inviolability also addresses any effort to  
2     assert jurisdiction at a diplomatic mission.

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

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

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

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

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

6           Ms. Ross.

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

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

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

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

8           Now I think there is --

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

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

24          JUSTICE KAVANAUGH: What --

25          JUSTICE ALITO: Why -- why is that --



1 go ahead.

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

4 MS. ROSS: The United --

5 JUSTICE KAVANAUGH: What's the harm?

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

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

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

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

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

25 It's even more problematic if you

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

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

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

22           But I also suspect that the State  
23 Department in Washington would send it back to  
24 the embassy in Germany to -- because if -- if  
25 it was necessary to go into a German court,

1 somebody would have to find attorneys to go  
2 into the court to represent the United States  
3 in the foreign country.

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

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

8 MS. ROSS: So my understanding, Your  
9 Honor, is that the Office of Foreign Litigation  
10 actually in Washington, D.C., oversees all of  
11 that foreign litigation, and so it makes  
12 perfect sense in our system that we would want  
13 that to be coming to the Secretary of State in  
14 Washington, D.C., if at all, and in that case,  
15 under diplomatic note rather than through  
16 direct mail service.

17 But I think it's important to note  
18 that all of these questions sort of get to this  
19 idea that, well, it might make sense for  
20 service on an embassy, maybe that will, in  
21 fact, reach the foreign minister. But I think,  
22 in addition to the textual point that  
23 Mr. Curran made, which is, in subsection (b)(2)  
24 of the statute, when Congress expected an agent  
25 to accept service in the United States, that

1 was actually spelled out in the statute.

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

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

20           I would also just note that in the  
21 prior draft of the legislation that we've been  
22 discussing this morning, the -- service was to  
23 be made on an ambassador rather than -- or did  
24 not expressly say on the embassy, but everyone  
25 understood that to be where it would be. And

1 that's, in fact, why other nations raised  
2 objections to the United States, and why the  
3 United States asked -- or -- or why the State  
4 Department suggested a change to the statute.

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

15 CHIEF JUSTICE ROBERTS: You say --

16 JUSTICE SOTOMAYOR: I --

17 CHIEF JUSTICE ROBERTS: Go ahead.

18 JUSTICE SOTOMAYOR: As I understand  
19 it, 1608 is already a lower bar than what the  
20 United States itself asks for when it is sued  
21 or what other nations ask for when they're  
22 sued. So it's already different process than  
23 -- a lower process than what's normally  
24 acceptable. So what difference does it make  
25 that it's different than what you do now?

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

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

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

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

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

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

22           MS. ROSS: Mr. Chief Justice, I don't  
23 think this is an ordinary letter. This is a  
24 jurisdiction-asserting summons. It's quite  
25 literally the sovereign of the United States

1 sort of exerting its hand into the embassy and  
2 saying you better show up in court or we're  
3 going to enter a default judgment against you.

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

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

14 JUSTICE KAGAN: But why -- why is it  
15 any more of an affront if you send it to one  
16 place than if you send it to the other?

17 MS. ROSS: Well, Justice Kagan, the  
18 foreign minister -- or the foreign ministry  
19 abroad is not protected by the Vienna  
20 Convention, and so there isn't this idea that  
21 you have inviolability of those premises. So  
22 that is the way that -- that states are more  
23 likely to expect to get the service,  
24 particularly -- and (a)(4) was discussed  
25 earlier -- if it comes through diplomatic



1 channels under (a)(4).

2 JUSTICE KAGAN: Is there a regulation  
3 that suggests that the State Department under  
4 (a)(4) can -- can serve to the embassy if the  
5 foreign state otherwise -- if the foreign state  
6 so requests or if otherwise appropriate? So is  
7 that also a violation of the Vienna Convention?

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

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

21 And I think this is an important  
22 point, that (a)(4) is both always available and  
23 never a violation of diplomatic immunity. So  
24 it is not as though Respondents will not be  
25 able to ultimately complete service in this

1 case or in any case. It is simply a question  
2 of how that service is, in fact, delivered.

3 And, again, we think on --

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 MS. ROSS: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Shanmugam.

3 ORAL ARGUMENT OF KANNON K. SHANMUGAM

4 ON BEHALF OF THE RESPONDENTS

5 MR. SHANMUGAM: Thank you, Mr. Chief

6 Justice, and may it please the Court:

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

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

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

24 Consistent with the plain language of  
25 the FSIA, the court of appeals correctly held

1 that service in this case was proper and its  
2 judgment should be affirmed.

3 I'd like to start --

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

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

17 MR. SHANMUGAM: Justice Sotomayor, I  
18 --

19 JUSTICE SOTOMAYOR: And that's not at  
20 most embassies, except in the rare visits which  
21 are very big state things, so I -- I -- I'm not  
22 sure that you can avoid reading "addressed and  
23 dispatched" as having some sense that this is a  
24 place where this person is regularly to be  
25 found, not merely where his entity has -- does

1 some transactional business occasionally.

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

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

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

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

25 It is that the embassy is an official

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

9 If you go to the website on Sudanese  
10 --

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

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

19 JUSTICE SOTOMAYOR: Well, "addressed  
20 and dispatched" has a very sense of urgency.  
21 You're going to send it to the person and not  
22 to some far distant place from where that  
23 person may be on occasion.

24 MR. SHANMUGAM: But, Justice  
25 Sotomayor, as you are well aware, the outer

1 bound of due process, the familiar Mullane  
2 standard, is the notion that it must be  
3 reasonably calculated to give notice.

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

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

19 Isn't that the exact kind of burden  
20 that the convention was intended to avoid?

21 MR. SHANMUGAM: I do not think that  
22 there is anything strange about the distinction  
23 between a process server on the one hand and  
24 service by mail on the other.

25 If you take a look at the critical

1 piece of drafting history, the 1958 revised  
2 commentary, which really is the definitive  
3 commentary of the International Law Committee  
4 on the Vienna Convention, in the paragraph on  
5 which we rely, the very paragraph, they draw  
6 precisely this distinction.

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

16           That interferes with the functions of  
17 the embassy in a way that a mailing does not.

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

22           That's your argument. And I find it  
23 ambiguous, so we'll assume it's ambiguous. I  
24 look to purpose, Justice Sotomayor did, and I  
25 -- I cut that a little against you because you



1 had mentioned -- left one word out of your  
2 beginning. You said you want a \$300 million  
3 judgment. You left out the word default.

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

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

23           I found -- of course, we have five  
24 here, Austria, Libya, Saudi Arabia, the UAR,  
25 and the Sudan, and they all say we do it the

1 State Department's way. Then Canada, the same.  
2 Belgium, the same. Twenty-two countries have  
3 signed a -- a -- a -- a convention which says,  
4 in the absence of an existing agreement,  
5 service on a foreign country must be to the  
6 Ministry of Foreign Affairs. Okay? That's --  
7 so we got 22 more.

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

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

22 And because -- and there is an issue.  
23 And because there is an issue, they said to  
24 Congress, the state, don't do it, this isn't  
25 the way we do it. And after the state wrote

1       them that letter, they changed the law. They  
2       dropped the language that said you can serve an  
3       embassy. Okay?

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

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

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

18                So, with regard to the text, as you  
19      know, our submission is quite simple. It's not  
20      that this is an ambiguous provision. It's that  
21      it's a broad provision. And the best evidence  
22      of that is that in the very next paragraph,  
23      (a)(4), a location is specified and all of the  
24      statutes and rules that we cite in our brief, a  
25      location is specified.

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

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

24          And I would urge this Court to take a  
25          look at the policy of the United States, which

1 we cite in our brief and we provide a correct  
2 website in our supplemental letter, it's a very  
3 brief document, which makes clear that not only  
4 does the United States not accept service at  
5 its embassies; it would not accept mail service  
6 even at the State Department.

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

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

20 That is, of course, not what took  
21 place here. In all three of the lawsuits,  
22 Sudan signed the receipt. You can take a look  
23 at the Joint Appendix at page, I believe, 74,  
24 and see the return receipt for yourself. And  
25 so a country can avoid (a)(3) service, if it so

1 chooses, either altogether or at the embassies.

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

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

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

24 JUSTICE BREYER: Well, I didn't talk  
25 about retaliation, you see? So now where I am

1 is -- because I -- you'll see what I'm going to  
2 say in a second, but -- but I -- I think that  
3 -- that, yeah, maybe my purposing was -- I'm  
4 not sure how overstated, because I do worry  
5 about these small embassies, but text, you  
6 can't get me too far. You -- I mean, it's --  
7 it is ambiguous.

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

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

23 MR. SHANMUGAM: Well, let me then  
24 offer a fourth answer --

25 JUSTICE BREYER: Yeah. All right.

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

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

21                 JUSTICE SOTOMAYOR: But those are all  
22          subject to the discretion of the district  
23          court. They're not rules of -- they're not  
24          absolute rules.

25                 MR. SHANMUGAM: But I think --



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

9 That doesn't respect the dignitary  
10 expectations of all other states, including  
11 this one, the United States, that --

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

14 JUSTICE SOTOMAYOR: -- that kind of  
15 serve --

16 MR. SHANMUGAM: -- I'm sure Justice  
17 Breyer did not intend to malign Botswana. I  
18 think in the case of a --

19 JUSTICE SOTOMAYOR: No, no --

20 JUSTICE BREYER: Moreover, I know a  
21 very good lawyer in Botswana, actually.

22 (Laughter.)

23 JUSTICE BREYER: And I worked with her  
24 for quite a while. But the point is I'm just  
25 taking that as a -- it could be a totally wrong

1 example, and what that is, is that there are  
2 many countries that don't have the resources to  
3 figure out what a default judgment means, to  
4 figure out where they're going to go and they  
5 -- and to know who to transmit things to, and  
6 the chances are just much greater that the  
7 right authorities will get the piece of paper  
8 if you send it to the ministry, which is likely  
9 to be better staffed in their own country.

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

21 JUSTICE ALITO: Well, on that --

22 MR. SHANMUGAM: But, Justice  
23 Sotomayor --

24 JUSTICE ALITO: -- on the routing  
25 issue, Mr. Shanmugam, could you tell me exactly

1 what rule you would like us to apply? In your  
2 brief, you say it -- it must be sent to a  
3 location that is likely to have a direct line  
4 of communication to the foreign minister.

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

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

18 But I think that if this Court were  
19 concerned about that breadth -- and I'll  
20 explain in a minute why the Court shouldn't be  
21 -- it could draw a line around embassies  
22 because embassies certainly perform the full  
23 panoply of functions of the foreign ministry.

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

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

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

12                   It is true that this issue of service  
13 goes to personal jurisdiction under -- I  
14 believe it's Section 1330(b). And so this is a  
15 personal jurisdiction issue.

16                   I do want to say one last thing in  
17 response to Justice Alito before I forget, and  
18 that is that, you know, if the Court is  
19 concerned about consulates and U.N. missions,  
20 again, the Court could distinguish embassies on  
21 the ground that embassies perform a unique  
22 function. And, of course, a country could  
23 adopt a policy of not accepting service at its  
24 consulates or at the U.N. mission.

25                   As a practical matter, I don't think

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

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

21           And so this case really illustrates  
22    why this policy makes sense. It makes sense  
23    because the embassy is, indeed, the extension  
24    of the foreign ministry in the United States,  
25    and it can choose how it wants to process or

1 transmit a service package when it is accepted.  
2 There's no requirement that it use a diplomatic  
3 pouch. And in 2018, there are faster ways of  
4 making the transmission.

5 Justice Sotomayor --

6 JUSTICE SOTOMAYOR: Are you asking us  
7 to -- are you suggesting that the U.N. embassy  
8 would be a place to effect service under this  
9 provision?

10 MR. SHANMUGAM: I think it would  
11 satisfy our statutory text -- our statutory  
12 text argument. And I heard Justice Gorsuch  
13 turning to that. Let me address that directly.

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

20 MR. SHANMUGAM: Well --

21 JUSTICE GORSUCH: I would think  
22 consulates, trade offices, tourism offices that  
23 are part of the ministry would all be included,  
24 I would think, under your interpretation.

25 MR. SHANMUGAM: Well, I think our

1 textual argument is that at least the verb  
2 "dispatched" connotes some notion of  
3 expeditiousness and promptness, and we're all  
4 in agreement about the relevant dictionary  
5 definitions.

6           And I think with an embassy, ex-ante,  
7 I think it is reasonable to think that it's  
8 going to get to the foreign minister because of  
9 the direct line of communication and because  
10 embassies are directly in communication with  
11 foreign ministries all the time.

12           JUSTICE GORSUCH: Well, I'm positing  
13 all sorts of different kinds of entities that  
14 are also --

15           MR. SHANMUGAM: But I --

16           JUSTICE GORSUCH: -- directly in  
17 communication with and responsible to  
18 ultimately the foreign minister. So I'm not  
19 sure textually how I wouldn't qualify.

20           MR. SHANMUGAM: Well, I think it's  
21 just that it is less likely to arrive in an  
22 expeditious manner if you send it to a tourist  
23 office and the like. That may very well not be  
24 a component of the foreign ministry. I think  
25 we're in agreement, again, that it has to be an

1 official address of the foreign ministry at a  
2 minimum. I do want to say --

3 JUSTICE GORSUCH: A second question if  
4 I might.

5 MR. SHANMUGAM: Sure.

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

15 And when Congress speaks so clearly  
16 about the question of diplomatic means in one  
17 place, we tend to usually think it's excluded  
18 elsewhere. What do we do about that?

19 MR. SHANMUGAM: Well, I don't think  
20 that that hurts us, and, in fact, I think that  
21 (a)(4) helps us in numerous respects. The  
22 first is, of course, the plain text argument  
23 that, there, Congress specified a location for  
24 the initial delivery to the --

25 JUSTICE GORSUCH: I understand that



1 argument. That's not my question.

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

9 And the way that (a)(4) service  
10 operates is that you deliver the service packet  
11 first to the Secretary of State.

12 Interestingly, and somewhat responsive to Mr.  
13 Curran's point, you know, the Secretary of  
14 State has a lot of buildings even in  
15 Washington, D.C. And the State Department on  
16 its website for the last --

17 JUSTICE GORSUCH: All right. All  
18 right. Now let's -- let's get to the question,  
19 all right?

20 MR. SHANMUGAM: Yeah. Well, I'm --  
21 I'm -- I'm -- I'm not meaning to filibuster. I  
22 -- I just -- I want to make sure that the Court  
23 understands how this actually operates.

24 JUSTICE GORSUCH: We understand that  
25 the State Department is large. My question is

1 just, it speaks there that the Secretary will  
2 then use diplomatic means to get the service  
3 effected.

4 MR. SHANMUGAM: Correct.

5 JUSTICE GORSUCH: And there is an  
6 express discussion of diplomatic means.

7 MR. SHANMUGAM: Correct.

8 JUSTICE GORSUCH: And its presence in  
9 (4) would suggest its absence in (3) was not  
10 accidental under our normal canons of  
11 interpretation. Now I'm telling you something  
12 you already know.

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

14 JUSTICE GORSUCH: So what's the --  
15 what's the answer to it?

16 MR. SHANMUGAM: That's a somewhat  
17 different argument, I think, from the arguments  
18 that Sudan and the United States have made, and  
19 so let me address it directly.

20 JUSTICE GORSUCH: Let's -- let's say I  
21 disagree with that.

22 MR. SHANMUGAM: Yeah. So I -- I don't  
23 think that the reference to diplomatic channels  
24 in any way excludes service at diplomatic  
25 premises, and that's for the simple reason that

1 I think diplomatic channels has a very  
2 well-defined meaning at law. And if you take a  
3 look at --

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

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

20 And, indeed, if you take a look at the  
21 regulation, if you're interested in (a)(4), I  
22 think the government's own regulation is quite  
23 informative. It's 22 CFR 93.1. It's cited in  
24 the briefs. And it --

25 JUSTICE GORSUCH: You're counting on

1 (a)(3) that -- that the embassy's going to send  
2 it through a diplomatic pouch or otherwise to  
3 the foreign ministry, right?

4 MR. SHANMUGAM: Or some other means.  
5 But, again, diplomatic channels, it's a defined  
6 term and it refers to communication from one  
7 sovereign to the other.

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

18 JUSTICE KAVANAUGH: As a practical  
19 matter, as a practical matter, is that hard to  
20 accomplish? In other words, the system going  
21 forward, if we were to say you can't do it at  
22 embassies, is there a problem going under that  
23 mechanism?

24 MR. SHANMUGAM: Well, you know, the  
25 problem is that I don't think it's necessarily

1 certain that you'll be able to attain service.  
2 We're certainly hopeful that we will be able to  
3 attain service under (a)(4) in the Kumar case,  
4 but, again, you know, this Court has to give  
5 effect to Congress's judgment.

6 JUSTICE KAVANAUGH: Are you aware of  
7 any problems trying to effectuate service  
8 generally under (a)(4)?

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

11 JUSTICE KAVANAUGH: It could, but are  
12 --

13 MR. SHANMUGAM: -- if there's not a  
14 diplomatic relationship.

15 JUSTICE KAVANAUGH: Does it --

16 MR. SHANMUGAM: I mean, that's the  
17 bottom line, right, is that if there is not a  
18 diplomatic relationship, there are not going to  
19 be diplomatic channels.

20 But I think, tellingly, the regulation  
21 for (a)(4) service contemplates the possibility  
22 of service of process at the embassy in the  
23 United States of the foreign state, which I  
24 think belies the notion that this is somehow  
25 forbidden by the Vienna Convention.

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

5 MR. SHANMUGAM: I'm not aware of an  
6 example. I can't say that I've actually  
7 researched that specific question, but, of  
8 course, we're interpreting above all a federal  
9 statute here. And Congress established a  
10 hierarchy.

11 And, Justice Breyer, to the extent  
12 that (a)(3) is unusual, I think the telling  
13 fact is that Congress preferred (a)(3) service  
14 to (a)(4) service.

15 JUSTICE KAVANAUGH: But you're saying  
16 --

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

21 MR. SHANMUGAM: Well --

22 JUSTICE BREYER: Unusual, I mean.

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

1 JUSTICE BREYER: Yeah.

2 MR. SHANMUGAM: -- so that a party is  
3 completely out of luck.

4 JUSTICE BREYER: That's right.

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

14 JUSTICE SOTOMAYOR: How many of them  
15 have embassies in the United States where  
16 there's no diplomatic relations?

17 MR. SHANMUGAM: Well, I think that  
18 that is, you know, to be fair, an -- an unusual  
19 situation. And it certainly is true that  
20 there, with any luck, one of these mechanisms  
21 is going to succeed. And (a)(4) does exist as  
22 a fallback.

23 JUSTICE KAVANAUGH: But the point --

24 MR. SHANMUGAM: But, of course, our  
25 whole point about the inequity --

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

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

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

16 JUSTICE KAVANAUGH: But that --

17 MR. SHANMUGAM: -- precisely because a  
18 country can adopt a policy and simply decide  
19 not to accept (a)(3) service.

20 JUSTICE KAVANAUGH: But I -- if I were  
21 starting afresh like the Chief Justice's first  
22 question, I -- I might agree with you, but the  
23 United States and all the countries in the  
24 Vienna Convention all seem to say, actually, it  
25 is a big deal.



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

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

17           So the idea of service of process by  
18           mail is not somehow alien. It's just that  
19           Congress, in adopting (a)(3), did do something  
20           a little bit unusual in providing a mechanism  
21           for service of process by mail, even for  
22           litigation against foreign sovereigns.

23           JUSTICE ALITO: What would be the  
24           consequences in this particular case if you had  
25           to go back and if we were to rule against you

1 and you succeed in achieving service under  
2 (a)(4)? Is there any indication that Sudan  
3 would appear?

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

15 And, again, as this case comes to the  
16 Court, it comes to the Court on the assumption  
17 that Sudan accepted service here,  
18 notwithstanding Sudan's late effort to cast  
19 doubt on that proposition. And so,  
20 notwithstanding Sudan's judgment to accept  
21 service under (a)(3), we would have to start  
22 over at this late phase.

23 And we're not even talking about an  
24 objection that was raised in the underlying  
25 litigation. We're talking about an objection

1 that was raised in the very -- at the very last  
2 minute in response to turnover orders. And  
3 that would be the height of unfairness to the  
4 Cole victims. The judgment of the Second  
5 Circuit should be affirmed.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 You have two minutes remaining, Mr.  
9 Curran.

10 REBUTTAL ARGUMENT OF CHRISTOPHER M. CURRAN  
11 ON BEHALF OF THE PETITIONER

12 MR. CURRAN: Justice Alito, Sudan is  
13 committed to appearing and defending itself.  
14 It believes that the default judgment was  
15 ill-founded. It has substantial defenses, and  
16 it would like to contest the charges.

17 JUSTICE ALITO: Is there -- do you  
18 want to suggest that the -- the government of  
19 Sudan had forgotten about the Cole incident or  
20 didn't realize that this litigation was going  
21 on?

22 MR. CURRAN: Well --

23 JUSTICE ALITO: It didn't get notice?  
24 It didn't know that this litigation was going  
25 on?

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

8           JUSTICE GINSBURG: But that's not the  
9           --

10          MR. CURRAN: -- was delivered to the  
11          --

12          JUSTICE GINSBURG: The question is,  
13          did Sudan have actual notice? Mr. Shanmugam  
14          said a few times --

15          MR. CURRAN: Yeah.

16          JUSTICE GINSBURG: -- it did. And --  
17          and you're not contesting that, in fact, Sudan  
18          had notice?

19          MR. CURRAN: We can't contest that  
20          someone at the embassy knew about the case  
21          through plaintiff's counsel. We have no idea  
22          whether responsible people in Khartoum knew  
23          about the litigation. So it depends --

24          JUSTICE BREYER: Did they know about  
25          it before the 60-day period for replying and

1 preventing the default judgment passed?

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

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

10 MR. CURRAN: Yes.

11 JUSTICE BREYER: Now do we know when  
12 they really knew about it, before the default  
13 or after the default?

14 MR. CURRAN: Yeah, I think it was  
15 after the motion for default judgment but  
16 before the default judgment itself, okay?  
17 That's -- that's my assessment of the record.

18 My -- my colleague, Mr. Shanmugam,  
19 advocates a reading of 1608(a)(3) that is broad  
20 and unpredictable and leaves too much  
21 creativity for plaintiffs and courts.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24 (Whereupon, at 11:05 a.m., the case  
25 was submitted.)

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