

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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.
23 Sometimes --

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 in -- 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: I -- I -- I don't agree

1 with that. I -- I think anyone who's informed
2 or looks into it would conclude that the
3 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, the legal advisors team, or the Justice
22 Department across the street. They -- they do
23 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 many

1 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 or her
18 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 and 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 the 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, but Congress was -- was strategic.

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

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

1 to do this with the U.S. Postal Service? And
2 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 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 -- on the court that reaches that
5 exact conclusion, that it's -- the analogy is
6 to 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 under 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. But I also suspect
22 that the State Department in Washington would
23 send it back to the embassy in Germany to --
24 because if -- if it was necessary to go into a
25 German court, somebody would have to find

1 attorneys to go into the court to represent the
2 United States in the foreign country.

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

5 JUSTICE ALITO: Well, okay. How would
6 it work?

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

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

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

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

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

1 objections to the United States, and why the
2 United States asked -- or -- or why the State
3 Department suggested a change to the statute.

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

14 CHIEF JUSTICE ROBERTS: You say --

15 JUSTICE SOTOMAYOR: I --

16 CHIEF JUSTICE ROBERTS: Go ahead.

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

25 MS. ROSS: So, Your Honor, two

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

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

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

25 I would note more generally I think

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

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

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

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

1 saying you better show up in court or we're
2 going to enter a default judgment against you.

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

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

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

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

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

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

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

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

1 of how that service is, in fact, delivered.

2 And, again, we think on --

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MS. ROSS: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Shanmugam.

2 ORAL ARGUMENT OF KANNON K. SHANMUGAM

3 ON BEHALF OF THE RESPONDENTS

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

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

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

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

23 Consistent with the plain language of
24 the FSIA, the court of appeals correctly held
25 that service in this case was proper and its

1 judgment should be affirmed. I'd like to start
2 --

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

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

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

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

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

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

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

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

24 It is that the embassy is an official
25 address of the foreign ministry. It is a

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

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

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

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

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

23 MR. SHANMUGAM: But, Justice
24 Sotomayor, as you are well aware, the outer
25 bound of due process, the familiar Mullane

1 standard, is the notion that it must be
2 reasonably calculated to give notice.

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

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

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

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

24 If you take a look at the critical
25 piece of drafting history, the 1958 revised

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

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

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

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

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

1 beginning. You said you want a \$300 million
2 judgment. You left out the word default.

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

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

22 I found -- of course, we have five
23 here, Austria, Libya, Saudi Arabia, the UAR,
24 and the Sudan, and they all say we do it the
25 State Department's way. Then Canada, the same.

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

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

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

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

1 dropped the language that said you can serve an
2 embassy. Okay?

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

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

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

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

25 And so, if there is not a location,

1 that does not connote ambiguity. It connotes
2 breadth. And the embassy is, in the words of
3 Justice Kagan, something special. It is the
4 extension of the foreign ministry in the United
5 States.

6 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 didn't know who to transmit things to, and the
6 chances are just much greater that the right
7 authorities will get the piece of paper if you
8 send it to the ministry, which is likely to be
9 better staffed in their own country.

10 MR. SHANMUGAM: I mean, perhaps. 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 explain
20 in a minute why the Court shouldn't be, it
21 could draw a line around embassies because
22 embassies certainly perform the full panoply of
23 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.

11 So you are using diplomatic means
12 there, aren't you?

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

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

1 JUSTICE GORSUCH: You're counting on
2 (a)(3) that -- that the embassy is going to
3 send it through a diplomatic pouch or otherwise
4 to the foreign ministry, right?

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

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

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

25 MR. SHANMUGAM: Well, you know, the

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

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

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

12 JUSTICE KAVANAUGH: It could, but are
13 --

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

16 JUSTICE KAVANAUGH: Does it --

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

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

1 forbidden by the Vienna Convention.

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

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

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

16 JUSTICE KAVANAUGH: But you're saying
17 --

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

22 MR. SHANMUGAM: Well --

23 JUSTICE BREYER: Unusual, I mean.

24 MR. SHANMUGAM: -- no, I took your
25 question to be whether I'm aware of any cases

1 of (a)(4) service failing --

2 JUSTICE BREYER: Yeah.

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

5 JUSTICE BREYER: That's right.

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

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

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

24 JUSTICE KAVANAUGH: But the point --

25 MR. SHANMUGAM: But, of course, our

1 whole point about the inequity --

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

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

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

17 JUSTICE KAVANAUGH: But that --

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

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

1 actually, it is a big deal.

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

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

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

24 JUSTICE ALITO: What would be the
25 consequences in this particular case if you had

1 to go back and if we were to rule against you
2 and you succeed in achieving service under
3 (a)(4)? Is there any indication that Sudan
4 would appear?

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

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

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

1 litigation. We're talking about an objection
2 that was raised in the very -- at the very last
3 minute in response to turnover orders. And
4 that would be the height of unfairness to the
5 Cole victims.

6 The judgment of the Second Circuit
7 should be affirmed.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 You have two minutes remaining, Mr.
11 Curran.

12 REBUTTAL ARGUMENT OF CHRISTOPHER M. CURRAN
13 ON BEHALF OF THE PETITIONERS

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

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

23 MR. CURRAN: Well --

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

1 on?

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

9 JUSTICE GINSBURG: But that's not the
10 --

11 MR. CURRAN: -- was delivered to the
12 --

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

16 MR. CURRAN: Yeah.

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

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

25 So, it depends --

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

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

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

12 MR. CURRAN: Yes.

13 JUSTICE BREYER: Now, did we know when
14 they really knew about it, before the default
15 or after the default?

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

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 11:05 a.m., the case
2 was submitted.)
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