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Supreme Court Preview: The *Samantar* Case and the Immunity of Foreign Government Officials

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Introduction

The 1976 Foreign Sovereign Immunities Act (FSIA) provides the exclusive framework for deciding when foreign governments are entitled to immunity from suit in U.S. courts. [1] Over the years, the Supreme Court has played an integral role in interpreting the statute. This week, the Court once again faces the task of resolving a fundamental question about the FSIA's scope.

On March 3, the Court will hear oral arguments in *Samantar v. Yousuf*, which poses two related questions of potentially far-reaching importance: (1) whether the FSIA extends immunity to individual foreign government officials acting in their official capacities, and if so, (2) whether it also provides immunity to *former* foreign officials. [2] This *Insight* examines the background of the case and the issues before the Court, and offers several thoughts about its legal and policy significance.

Background to *Samantar*

In 2004, five Somali plaintiffs-respondents before the Court-brought suit for compensatory and punitive damages under the Alien Tort Statute and the Torture Victim Protection Act. [3] They allege that during the 1980's military and intelligence agents of the Barre regime in Somalia subjected them or their family members to torture, extrajudicial killing, and other atrocities. At the time, Samantar served as the regime's First Vice President and Minister of Defense and later Prime Minister. Since 1997 he has been living in the United States. Plaintiffs contend that as a senior official Samantar knew (or should have known) and yet tacitly approved of the abuses allegedly committed by subordinates under his authority, and that he bears responsibility for the abuses they committed.

Samantar moved to dismiss, claiming FSIA immunity. The plaintiffs did not assert that their claims fell within any of the statute's enumerated exceptions

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to immunity. [4] Instead, they argued that because Samantar's actions violated international human rights law, they were outside the scope of his official authority and thus could not benefit from immunity. The district court granted Samantar's motion on the basis that, while the statute does not by its terms explicitly apply to individual officials, he was "entitled to sovereign immunity. . .for the acts he undertook on behalf of the Somali government" despite the gravity of the alleged abuses. [5]

The Fourth Circuit reversed, holding that the FSIA does not apply to individuals either in their own right or as "agencies or instrumentalities of a foreign state," and in any event does not apply to former officials. [6] It remanded the case, however, for a determination whether Samantar might be entitled to immunity under pre-FSIA common law principles.

The Fourth Circuit's decision contributed to a growing circuit split on the issue of the FSIA's application to foreign officials. As described in Curt Bradley's *ASIL Insight* last March, most courts faced with the question have held that the FSIA does cover suits against foreign officials for actions taken in their official capacity. [7] In 1990, for example, the Ninth Circuit concluded that with respect to acts in their official capacities, government officials are properly considered as "agencies and instrumentalities" for purposes of the FSIA, which was after all intended to be the exclusive means for bringing suits against foreign states and their governments. [8] In such instances, the state can be considered the real party in interest, and allowing suits outside the FSIA against individual officials for matters arising from actions taken in their official capacities would undermine the purpose of the statute. [9]

By contrast, the Seventh Circuit rejected that approach in 2005, observing that nothing in the statute or its legislative history indicates it was intended to address the acts of individual officials.[10] Since the burden lies on the party claiming immunity, it said, statutory silence could not support an inference of immunity, and in any event, had Congress intended the FSIA to cover individuals acting in their official capacity, it would have said so clearly. [11]

Interpreting the FSIA

These opposing views will be reprised before the Supreme Court. Samantar contends that individual officials acting on the state's behalf should be treated as if they are the state because their acts are those of the state itself. Such an interpretation would accord, he argues, with traditional principles of comity and reciprocity as well as the pre-1976 common law principles and practice on which the statute is based. Thus construed, the statute properly applies to former and present officials alike.

Respondents counter that the court of appeals correctly read the FSIA to apply only to states and their agencies and instrumentalities as distinct from individual officials, whose immunities (to the extent they exist) continue to be governed by common law principles, which were not abrogated by enactment of the statute. Even if the FSIA could be read to apply to individuals, its immunity cannot protect a former official like Samantar since he is no longer 'the state.' Most importantly, immunity cannot shield those responsible for grave human rights abuses such as torture and extrajudicial killing, because such acts cannot legitimately be considered to fall within the

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lawful scope of any official's authority. [12]

On one level, this would seem to be a fairly straightforward issue of statutory interpretation. Textually, the FSIA is addressed to states, including their governments and political subdivisions as well as their agencies and instrumentalities. Those latter terms include entities that are separate legal persons (such as corporations or other business entities) and either "organs" of the state or a majority of whose shares are owned by the state - criteria not readily applicable to individuals. [13] Additionally, the legislative history is less than conclusive on the issue of congressional intent. The parties urge differing interpretations based in part on extra-textual considerations, including prior and subsequent practice in the United States and foreign countries as well as cconsiderations of comity and reciprocity.

The Court will naturally be mindful of its prior interpretations of the FSIA. In particular, it has said that Congress intended the FSIA to be a comprehensive codification of all aspects of sovereign immunity and the sole basis for obtaining jurisdiction over a foreign state in a civil case in federal and state courts. [14] Allowing official capacity suits against individuals outside the statute certainly creates the possibility of "end runs" around this goal. [15] But if the statute is read to encompass individuals acting in their official capacity (treating them as if they were ‘states'), and if it is exclusive, then it could be viewed as precluding certain actions under the Torture Victims Protection Act and the Alien Tort Statute. [16] Moreover, given the Court's decision in *Dole*, application of the FSIA to former governmental officials would appear problematic. [17]

What if the FSIA Does Not Apply to Foreign Officials?

On the other hand, if the statute does not apply to individual officials, are they left with no immunity for acts taken within their official capacities or on behalf of the state? The court of appeals did not answer that question, instead remanding the case to the district court for further consideration. Given this posture, the Supreme Court is unlikely to decide the issue, even though respondents and their *amici* argue vigorously (as part of their contention that the statute was never intended to apply to suits against individual officials) that those officials benefit from antecedent customary international law principles which survived the FSIA's enactment.

This has been, for example, the consistent view of the United States government, and the Solicitor General filed an *amicus curiae* brief urging affirmance of the decision below on this ground. It asserts that the immunity of current and former foreign officials rests on "generally applicable principles of immunity" articulated by the executive branch in "suggestions of immunity," informed by customary international law, and rooted in the executive branch's constitutional authority for the conduct of foreign affairs. [18] That of course reflects the long-standing practice by which head of state/head of government questions have in fact been addressed in U.S. courts before and after the FSIA's adoption.

Yet forsaking the relative clarity and certainty of the statute will inevitably raise other issues, including the lack of consensus about the precise content of those principles, whether they apply to former (as well as current) officials,

and whether they shield individuals from claims based on violations of the law of nations. [19] One might also anticipate strenuous challenges to the ability of the executive branch to make immunity decisions objectively (free from purely political concerns) and to the proposition that the executive's immunity determinations are necessarily binding on the courts.

Implications for U.S. Policy

Some of the briefs take passionate (and conflicting) policy positions. Samantar himself, for example, contends that excluding foreign officials from the FSIA will have adverse foreign policy and national security implications for the United States, including heighted risk of reciprocal actions against U.S. officials abroad, while the brief on behalf of former United States diplomats argues just the opposite-that "extending" sovereign immunity to individuals accused of human rights violations "would undermine our nation's vital foreign policy claim to stand for human rights and accountability." [20] In that view, at the very least no immunity should be recognized in this particular instance, since Somalia is a "failed state" with "dysfunctional" courts, the victims have no effective remedies in their country of origin, and the alleged perpetrator has chosen to live in the United States. [21] The relevance of these concerns to the issue of statutory interpretation is open to question.

Conclusion

Is this case the American *Pinochet*? [22] Probably not, at least not at this juncture. Granted, the litigation does raise broad concerns about impunity, accountability, and fidelity to fundamental norms of international law. It poses essentially the same legal conundrum faced by the Law Lords in *Pinochet*-whether torture, extrajudicial killings, and other acts which manifestly violate international human rights law should ever be considered within the proper scope of an official's duties, even if they were committed in an official capacity. And it concerns a former official, where the equitable arguments for immunity seem to carry diminished weight. But there are also significant differences, not least that *Pinochet* arose in a criminal context and on the basis of an extradition request from a third country (Spain) under the Torture Convention, rather than in a civil suit for damages. Should the Court agree with the position advanced by Samantar, these questions are unlikely to be resolved in this litigation.

About the Author

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Endnotes

[1] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611[hereinafter FSIA]. In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989), the Court said the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts."

[2] Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49, 174 L.Ed.2d 632 (Sept. 30, 2009) (No. 08-1555).

[3] Alien Tort Statute, 28 U.S.C. § 1350; Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note [hereinafter TVPA].

[4] The enumerated exceptions to FSIA immunity include, *inter alia*, waivers, commercial activities, non-commercial torts, certain acts of state-sponsored terrorism, expropriations, and enforcement of arbitral agreements and awards. *See* 28 U.S.C. §§ 1605 & 1605A.

[5] Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at 12-13 (E.D. Va. 2007).

[6] 552 F.3d at 383 (citing Dole Food Co. v. Patrickson, 538 U.S. 468 (2003)).

[7] Curtis A. Bradley, *Foreign Officials and Sovereign Immunity in U.S. Courts*, ASIL INSIGHT, Mar. 17, 2009, *available at* http://www.asil.org/insights090317.cfm. By comparison, U.S. law affords narrower immunities to domestic officials for claims arising from their official actions. *See generally* Curtis A. Bradley & Jack Landman Goldsmith III, *Foreign Sovereign Immunity and Domestic Officer Suits* (Harvard Public Law, Working Paper No. 10-06),12 GREENBAG 2D 137 (2010).

[8] Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990).

[9] The doctrinal basis for recognizing the immunity for current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." Underhill v. Hernandez, 65 F. 577 at 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897). In his *ASIL Insight*, *supra* note 7, Bradley argues for subsuming individual officials within the definition of the state itself. More usually, however, courts have analogized individuals to 'agencies and instrumentalities' (as *Chuidian* did). *See, e.g.*, *In re* Terrorist Acts on Sept. 11, 2001, 538 F.3d 71 (2d Cir. 2008).

[10] Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005).

[11] *Id.* The 7th Circuit had previously declined to extend the FSIA to heads of state, either under the definition of the state itself or under the rubric of "agency or instrumentality." Instead, it applied traditional common law principles of head of state immunity. *See* Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004).

[12] Brief for Petitioner at 22-23, *Samantar*, 130 S. Ct. 49 (No. 08-1555); Brief for Respondent at 25-26, *Samantar*, 130 S. Ct. 49 (No. 08-1555). These briefs, as well as those of the various *amici curiae* in support of petitioner and respondent, are available online at the American Bar Association's Preview of Supreme Court Cases, *at* http://www.abanet.org/publiced/preview/briefs/feb2010.shtml#samantar; and Scotuswiki, *at* http://www.scotuswiki.com/index.php?title=Samantar_v._Yousuf.

[13] The FSIA distinguishes between "states" and their "agencies and instrumentalities." *Compare* 28 U.S.C. §§ 1603(a) *and* (b).

[14] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

[15] In *Chuidian*, *supra* note 8, the court of appeals said that permitting such suits "would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." 912 F.2d at 1102.

[16] In response, one might argue that the TVPA, enacted after the FSIA, implicitly carved out an exception to the exclusivity rule, even though Congress did not address the issue of immunity in the statute or the legislative history.

[17] Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) (status of an FSIA defendant determined at time of suit).

[18] *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar*, 130 S. Ct. 49 (No. 08-1555). The United States contends that "the immunity enjoyed by a foreign official generally survives his departure from office" and that "[a]ffording former officials residual immunity from civil suits in their official capacity is consistent with customary international law." *Id.* at 11. This view accords with several recent judicial decisions. *See* Belhas v. Ya'Alon, 515 F.3d 1279 (D.C. Cir. 2008), and Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (common law principles of immunity apply to former officials). *See also* John R. Crook, *Second Circuit Recognizes Common Law Immunity of Former Senior Israeli Intelligence Official, in Contemporary Practice of the United States Relating to International Law*, 103 AM. J. INT'L L. 584 (2009).

[19] *See, e.g.*, Brief for Professors of Public International Law and Comparative Law as Amici Curiae Supporting of Respondents at 5, *Samantar*, 130 S. Ct. 49 (No. 08-1555), sharply challenging the assertion that pre-1976 common law immunized a foreign state's officials for their official acts and arguing that there was in fact no "blanket shield from personal liability for universally recognized international law violations, even if such violations were committed by individuals who held government positions." It further argues that "[b]ecause former foreign officials. . .are private individuals who no longer represent their respective governments, they cannot claim status-based immunity from the jurisdiction of U.S. courts." *Id.* at 19.

[20] Brief for Petitioner at 34-41, *Samantar*, 130 S. Ct. (No. 08-1555); Brief for Former United States Diplomats As Amici Curiae In Support of Respondents at 22, *Samantar*, 130 S. Ct. 49 (No. 08-1555) (while simultaneously asserting that former U.S. officials "are already significantly protected from foreign suits by the act of state and other judicial doctrines, as well as by American diplomacy." *Id.* at 10). *See also* Brief for Retired Military Professionals as Amici Curiae in Support of Respondents at 8, *Samantar*, 130 S. Ct. 49 (No. 08-1555) ("granting immunity to Samantar would call into question the U.S. commitment to accountability, thus increasing the risk of torture and abuse for our troops, prisoners of war, and civilians overseas").

[21] Brief for Former United States Diplomats, *supra* note 20, at 17.

[22] In 1999, the U.K. House of Lords decided, in the context of an extradition request from Spain, that former Chilean President Augusto Pinochet was not entitled to immunity from charges of torture committed in Chile. There were differing opinions, however, on the reasons for that conclusion and considerable discussion on whether torture by government officials could ever be an "official" act. *See, e.g.*, Regina v. Bartle, *ex parte* Pinochet, [1999] 2 All E.R. 97, 38 .IL.M. 91 (1999).