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Samantar v. Yousuf: Foreign Official Immunity Under Common Law

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Introduction

The recent Supreme Court decision in *Samantar v. Yousuf*[1] definitively resolved one major question about the immunities of foreign government officials from civil suits in U.S. courts; at the same time, it left several others wide open. It thereby guaranteed that the source, scope, and certainty of such immunities will continue to be litigated energetically. This Insight explores some of the questions that will likely figure prominently in that litigation.

Samantar Overview

The background of *Samantar* has been explored elsewhere.[2] As presented to the Supreme Court, the central issue was whether the Foreign Sovereign Immunities Act ("FSIA")[3] provides individual officials of foreign governments with immunity from suit for actions taken in their official capacity. The petitioner, a former Prime Minister and Defense Minister of Somalia, sought to claim the benefit of the statute in moving to dismiss a suit brought by several plaintiffs alleging that he had sanctioned widespread acts of torture and extrajudicial killing. Without admitting the allegations, Samantar argued that the actions alleged were official in nature and thus fell within the scope of the statute.

The Court rejected Samantar's contention, holding that the FSIA does *not* govern whether an individual foreign official enjoys immunity from civil suits. It affirmed the decision of the Fourth Circuit Court of Appeals and thereby resolved a circuit split against the prevailing view—first adopted in *Chuidian v. Philippine Nat. Bank*[4] —that individuals were properly characterized as agencies or instrumentalities of the state and thus within the express purview of the FSIA.[5]

As a matter of statutory interpretation, the Court said, nothing in the text of the FSIA itself suggests that the term "foreign state" should be read to include individual officials acting on the state's behalf or that they were meant to be subsumed within the definition of an "agency or instrumentality of a foreign state." Nor does the history or purpose of the Act demonstrate any Congressional intent to "lump individuals in with foreign states" with regard to immunity issues.[6] The Court's decision, written by Justice Stevens, was unanimous. However, Justices Alito, Thomas, and Scalia filed concurring opinions questioning the need for and propriety of resorting to legislative history as an interpretive tool in this case.

Legal Consequences of the Court's Ruling

While it is now settled that an individual sued for conduct undertaken in his or her official capacity cannot claim the benefits of the FSIA, the decision did not finally resolve the question of Samantar's own amenability to suit, much less the broader issue of foreign officials' immunity in other circumstances. On the contrary, the Court said that "[a]lthough Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."[7] The case was therefore remanded to the federal district court for a determination "whether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him."[8]

The decision thus endorsed the government's longstanding view, which it has advocated since the FSIA was enacted, that the statute neither conferred nor abrogated immunity for foreign officials.[9] However, the precise basis for such immunity decisions going forward is less clear. Did the Court simply endorse the government's position that immunity determinations for officials should be made, as they were prior to the enactment of the FSIA, by the Executive Branch? Or by referring to the "common law" basis of foreign official immunity, did the Court intend to suggest either that relevant principles of customary international law apply directly in such cases or that

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judges should not take into account the law and practices of other nations?

International immunities can no longer be considered merely a question of grace, comity, or convenience but must be grounded in a clear relationship to customary international law.[10] Given the national interest in U.S. participation in the progressive development of cogent international norms, the need for national uniformity in the resolution of such cases, and the sensitive foreign relations context in which the issues necessarily arise, there may be little debate that this area is presumptively one of *federal* common law. However, individual immunity decisions clearly implicate the President's constitutional authority to "send and receive" ambassadors and to conduct foreign relations.

The Solicitor General's brief contended that the determination of individual official immunity "is properly founded on non-statutory principles articulated by the Executive Branch," informed by customary international law and practice, and formally conveyed to the courts.[11] The government's immunity determinations, it said, reflect "sensitive diplomatic and foreign policy judgments" which are "ordinarily committed to the Executive as an aspect of the Executive Branch's prerogative to conduct foreign affairs on behalf of the United States."[12] The Court appeared to agree, noting that "[w]e have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."[13]

That traditional method has been followed in most cases involving head of state and head of government immunity, and more recently in the case of special diplomatic mission immunity, where the applicable principles are similarly derived from customary international law. Arguably, such cases differ from "official capacity" situations involving diplomatic and consular officials or public international organizations, their officers, employees and representatives of their member states, where the governing law is provided by relevant self-executing treaties or statutes. Whether the Court's apparent endorsement of the traditional procedure means that the government's views should be treated as determinative will be a matter of debate.

These questions promise to take on particular significance in light of the evolving contours of international law and practice regarding the scope of foreign official immunity. In a given case, the first issue will necessarily be to determine whether the individual in question was in fact a governmental official acting within an official capacity. That determination will often require an assessment of foreign law as well as the weight to be accorded to the views (if any) of the foreign government in question. An even more difficult task will be determining whether an individual should be held accountable, for instance, for egregious violations of international law such as torture, genocide, war crimes, or crimes against humanity when his or her responsibility is based only on actions taken in an official governmental capacity. Making this decision at the outset of the litigation, with respect to jurisdiction and on the basis of allegations that could prove unsubstantiated, will be problematic. The Supreme Court expressly left this issue open, noting only that the district court had rejected the argument that Samantar had necessarily acted beyond the scope of his official authority by allegedly violating international law.[14]

Neither is there a consensus about whether immunity is or should be available to shield former officials like Samantar. Even when it might be justified to accord immunity to a currently serving foreign official, the question remains whether she is amenable to suit after leaving office. Here again, the Court noted but did not express a view on the issue.[15]

Finally, the Court was careful to emphasize that in some cases where individual foreign officials are sued, the "sovereign immunity" of the state itself might still be relevant. It said, for example, that "we do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity."[16] Just what those circumstances or the proper test for making the distinction might be is not clarified, but the Court indicated several potentially relevant factors. The question might turn, for instance, on whether "the effect of exercising jurisdiction would be to enforce a rule of law against the state,"[17] or whether the state is the "real party in interest"[18] or an indispensable party.[19] In short, "[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law. And not every suit can successfully be pleaded against an individual official alone."[20]

Conclusion

Human rights advocates might generally be pleased that individual officials can no longer claim immunity under the FSIA. But nothing in the decision signals open season for suits against such officials. Significant issues remain to be litigated, among them whether the Torture Victim Protection Act of 1991 (which creates a civil cause of action against any individual who "under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture or extrajudicial killing) reflects congressional intent to override the "common law" of foreign official immunity.[21]

About the Author

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Endnotes

[1] Samantar v. Yousuf, No. 08-1555, slip op. (U.S. June 1, 2010), *available at* http://supreme.justia.com/us/560/08-1555.

[2] *See, e.g.*, David P. Stewart, *Supreme Court Preview: The Samantar Case and the Immunity of Foreign Government Officials*, 14 ASIL Insights, Mar. 2, 2010 (and references therein), *available at* http://www.asil.org/insights100302.cfm; *see also* Chimène Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE (2010), at 1, *available at* http://www.yjil.org/index.php?option=com_content&view=article&id=139:officially-immune-a-response-to-bradley-and-goldsmith&catid=7:online-articles.

[3] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602-1611 (1976) [hereinafter FSIA].

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

[5] *See, e.g.*, *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71 (2d Cir. 2008).

[6] *Samantar*, No. 08-1555, slip op. at 16.

[7] *Id*. at 19.

[8] *Id*. at 20.

[9] Brief for the United States as Amicus Curiae Supporting Affirmance at 27, Samantar v. Yousuf, 130 S. Ct. 49 (2009) (No. 08-1555) [hereinafter Brief for the United States].

[10] *See* Schooner Exchange v. McFaddon, 11 U.S. 116 (1812) (discussing the historical basis of sovereign immunity); *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) (stating that the doctrine of sovereign immunity is entirely discretionary and not grounded in law). Despite this statement in *Verlinden*, one can look in vain for a discussion of the notion of comity in *Schooner Exchange*. The current Court seems inclined to the *Verlinden* view.

[11] Brief for the United States, *supra* note 9, at 6, 14.

[12] *Id.* at 28.

[13] *See id.* at 17 n.19 (observing the Department of State's view that the FSIA had left "intact" its role in official immunity cases).

[14] *See id.* n.3 (stating that the Court need not reach the issue in light of its holding that the FSIA did not govern, and expressly declining to reach the argument that an official is not immune under the FSIA for acts of torture and extrajudicial killing).

[15] *Samantar*, No. 08-1555, slip op. at 4, n.5.

[16] *Id*. at 16 (discussing and distinguishing the act of state doctrine). However, the point recalls the broader view of the U.K. House of Lords in Jones v. Saudi Arabia, [2006] UKHL 26 (holding, *inter alia*, that under the relevant U.K. statute, the State's immunity precludes the suit against the individual official through whom the State acted). Lord Hoffman noted, for instance, that "as a matter of international law, the same immunity against suit in a domestic court which protects the state itself also protects the individuals for whom the state is responsible." *Id*. ¶ 66. According to Lord Bingham of Cornhill, "[i]nternational law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies."

[17] *Samantar*, slip op. at 15 (quoted from RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1987) with the caveat in n.15 that "[w]e express no view on whether Restatement § 66 correctly sets out the scope of the common law immunity applicable to current or foreign officials").

[18] *Samantar*, slip op. at 19 (citing Kentucky v. Graham, 473 U.S. 159 (1985)) (explaining that in some cases, suits against officials acting in their official capacity "should be treated as actions against the foreign state itself, as the state is the real party in interest").

[19] *Id.* (citing Republic of Philippines v. Pimentel, 553 U.S. 851 (2008)).

[20] *Samantar*, slip op. at 18; and *id.* n.20 (observing that plaintiffs will have to establish personal jurisdiction over the individual defendant without the benefit of the special provisions of the FSIA).

[21] Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 (1992).