Samantar v. Yousef: The Foreign Sovereign Immunities Act and Foreign Officials

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Summary

On June 1, 2010, the U.S. Supreme Court decided unanimously in *Samantar v. Yousef* that the Foreign Sovereign Immunities Act (FSIA), which governs the immunity of foreign states in U.S. courts, does not apply in suits against foreign officials. The ruling clarifies that officials of foreign governments, whether present or former, are not entitled to invoke the FSIA as a shield, unless the foreign state is the real party in interest in the case. *Samantar*'s particular facts involve the Alien Tort Statute (ATS) and the Tort Victims Protection Act (TVPA), but the ruling applies to all causes of action against foreign officials. The ruling leaves open the possibility that foreign officials have recourse to other sources of immunity or other defenses to jurisdiction or the merits of a lawsuit, such as foreign sovereign immunity under the common law, perhaps aided by State Department suggestions of immunity. The Court also left open the possibility that Congress could enact new provisions to address the immunity of foreign officials.

Prior to the *Samantar* decision, most federal judicial circuits interpreted the FSIA to cover foreign officials as "agencies or instrumentalities" of the foreign state based on their interpretation that Congress had intended to fully codify the common law of foreign sovereign immunity. To the extent the FSIA exceptions codify sovereign immunity of states under the common law, as in the case of lawsuits based on commercial activity under the restrictive theory, the recognition of a separate theory of immunity for foreign officials may not yield results significantly different from those cases in which courts applied the FSIA. The same common law considerations some courts previously applied to determine whether a foreign official is an "agency or instrumentality" under the FSIA would likely lead to similar results where the common law is applied directly. However, where Congress enacts exceptions to the FSIA that depart from the common law, outcomes may vary from cases decided under the pre-*Samantar* approach.

This report provides an overview of the FSIA, followed by a consideration of the remaining options for foreign officials who seek immunity from lawsuits, as well as some of the questions that may emerge from each option. The report also addresses legislation considered by the 111th Congress that would have affected the immunity of foreign officials (the Justice Against Sponsors of Terrorism Act, S. 2930, 111th Cong.).

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Introduction

On June 1, 2010, the U.S. Supreme Court decided unanimously in *Samantar v. Yousef*[1] that the Foreign Sovereign Immunities Act (FSIA), which governs the immunity of foreign states in U.S. courts, does not apply in suits against foreign officials in their personal capacity. *Samantar's* particular facts involve the Alien Tort Statute (ATS) and the Tort Victims Protection Act (TVPA),[2] but the ruling applies to all causes of action against foreign officials. The ruling clarifies that all government officials, present *and* former, are not entitled to invoke the FSIA as a shield, unless the foreign state is the real party in interest in the case. In other words, whether the FSIA applies to a lawsuit naming a foreign official as defendant depends largely on whether the remedy is sought from the official personally or whether the foreign government will be responsible for paying damages or providing whatever other remedy a court may order in the event the plaintiff prevails, as would be the case if an official is sued in an official capacity. The decision rejected the interpretation of the majority of U.S. federal judicial circuits, in which foreign officials were regarded as covered by the FSIA for lawsuits based on official actions taken within the scope of their authority.

The Court stressed that the inquiry does not end with the FSIA in such cases. The ruling leaves open the possibility that other means remain available for officials to obtain immunity, including common law immunity, aided by State Department suggestions of immunity, or that Congress could enact new provisions to address the immunity of foreign officials.[3] These routes raise distinct questions that the *Samantar* decision leaves unresolved. This report provides an overview of the FSIA, followed by a consideration of the FSIA's possible application in the wake of the Supreme Court's ruling and the remaining options for foreign officials who seek immunity from lawsuits, as well as some of the questions that may emerge from each option. The report also addresses relevant legislation.

The Foreign Sovereign Immunities Act

Customary international law historically afforded sovereign states complete and absolute immunity from suit in the courts of other states. This principle was rooted in the perfect equality and absolute independence of sovereigns, as well as the need to maintain friendly relations.[4]

[1] Samantar v. Yousef, 130 S. Ct. 2278 (2010).

[2] 28 U.S.C. § 1350 (2006). The Alien Tort Statute (ATS) provides federal jurisdiction for tort suits by aliens in U.S. courts for violations of the law of nations. The Supreme Court has construed the statute to cover only those torts that were viewed as violations of the law of nations at the time of the statute's passage in 1789. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). Examples of such causes of action include torture and piracy. *See id.* The Torture Victim Protection Act (TVPA), codified as a note to 28 U.S.C. § 1350, provides a cause of action for individuals with a significant connection to the United States to sue for torture or extrajudicial killings carried out under color of law of a foreign nation. The plaintiff must exhaust the remedies within the foreign nation and must commence suit within 10 years after the cause of action arose. *See* Note to 28 U.S.C. § 1350(b)-(c) (2006).

[3] Foreign officials may also be able to invoke the act of state doctrine as a defense. Under the act of state doctrine, a court of one nation will not sit in judgment of the sovereign acts of another nation conducted within its own borders. *See* Underhill v. Hernandez, 168 U.S. 250 (1897). The act of state doctrine is a defense to the merits of a case, while sovereign immunity bars jurisdiction altogether before the merits are addressed. The doctrine is discretionary among courts and can be pled by parties as an alternative to immunity. *See Samantar*, 130 S. Ct. at 2290.

[4] *See* The Schooner Exchange, 11 U.S. (7 Cranch) 116 (1812) (holding a French warship to be immune from the jurisdiction of a U.S. court).

While each nation has full and absolute jurisdiction within its own territory, allowing it to exercise jurisdiction over all parties there, states ordinarily choose not do so with respect to other sovereign states due to considerations of comity. As Justice Marshall stated,

> Perfect equality and absolute independence of sovereigns, and ... common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[5]

During the last century, however, absolute sovereign immunity gradually gave way to a more limited application after a number of states began engaging directly in commercial activities. To allow foreign states to maintain their immunity in the courts of other states for ordinary commercial transactions was said to give them an unfair advantage in competition with private commercial enterprises. It also arguably denied private parties in other nations normal recourse to courts to settle disputes.[6] As a consequence, numerous states immediately before and after World War II adopted the "restrictive principle" of state immunity. This principle preserves sovereign immunity for most cases, but allows domestic courts to exercise jurisdiction over suits against foreign states for claims arising out of their commercial activities.

Rulings regarding foreign sovereign immunity affect not only the functioning of governments around the world, but also the foreign policy of the United States. As a result, when the United States adopted the restrictive principle of sovereign immunity by administrative action in 1952,[7] the State Department began advising courts on a case-by-case basis whether a foreign sovereign should be entitled to immunity based upon the nature of the claim and foreign policy considerations. In 1978, Congress codified the restrictive principle in the FSIA, so that the decision no longer depended on a determination by the State Department.[8] The FSIA states the general principle that a foreign state is immune from the jurisdiction of the courts of the United States, but sets forth several limited exceptions. The primary exceptions are:

(1) Waiver ("the foreign state has waived its immunity either expressly or by implication,"),

(2) Commercial Activity ("the action is based upon a commercial activity carried on in the United States by the foreign state,"), and

(3) Torts committed by a foreign official within the United States (the "suit is brought against a foreign State for personal injury or death, or damage to property occurring in the United States as a result of the tortious act of an official or employee of that State acting within the scope of his office or employment.")[9]

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[5] *Id.* at 137.

[6] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 391 (1987).

[7] The Acting Legal Adviser of the Department of State, Jack B. Tate, stated in a letter to the Acting Attorney General that in future cases the Department would follow the restrictive principle. 26 *Department of State Bulletin* 984 (1952). Previously, when a case against a foreign state arose, the State Department routinely asked the Department of Justice to inform the court that the government favored the principle of absolute immunity; and the courts usually acceded to this advice. The Tate letter meant that the government would no longer make this suggestion in cases against foreign states involving commercial activity.

[8] 28 U.S.C. §§ 1602-11 (2006).

[9] *Id.* § 1605(a)(1)-(2), (5) (2006).

Circuit Split on Foreign Official Immunity

Following the enactment of the FSIA, the question emerged as to whether the FSIA immunizes foreign *officials* as well as foreign *states* from suit. The FSIA defines a "foreign state" to include:

> a political subdivision of a foreign state or an agency or instrumentality of a foreign state .[10]

It defines "agency or instrumentality of a foreign state" to mean any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in [28 USC § 1332(c) and (e)] nor created under the laws of any third country.[11]

The absence of any reference to foreign officials in the definitions of "foreign state" or "agency or instrumentality" led to a split among the U.S. appellate circuit courts. The majority view interpreted "foreign state" to include an official as an "agency or instrumentality of a foreign state" when acting within his or her official capacity.[12] This logic was based upon the idea that (1) the state cannot function but through individuals; (2) the suits in question were really actions against the foreign government itself; and (3) the FSIA codified the existing common law in place at the time of passage. The common law of foreign sovereign immunity, according to these courts, embraced immunity for foreign officials for their official acts, at least when the suit would have the effect of enforcing an action against the state itself.

In *Chuidian v. Phillipine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), the 9th Circuit held that a suit against a bank and bank official, in which the official instructed the bank to dishonor a letter of credit issued to the plaintiff, could not proceed under the FSIA. The court held that the official qualified as an "agency or instrumentality" because a majority interest in the bank was owned by the Phillipine government and the official was acting in his official capacity on behalf of the bank. This interpretation was applied in the human rights context in *Belhas v. Ya'Alon*, 515 F.3d 1279 (D.C. Cir. 2008), in which the D.C. Circuit held that the FSIA prohibited a suit against a former Israeli head of Army Intelligence for authorizing a military assault against Lebanon that resulted in civilian injuries and death. The court accepted an official statement from the government of Israel as proof establishing that the defendant had been acting in his official capacity, which made him an "agency and instrumentality" of Israel within the meaning of the FSIA even though he was no longer a government official. The court also held that the TVPA, which provided the cause of action for the case, did not serve as a statutory exception to the FSIA by implication, although it only applies to acts carried out under color of foreign law. The court further rejected the contention that any act in violation of international human rights law

[10] *Id.* § 1603(a) (2006).

[11] *Id.* § 1603(a)-(b) (2006).

[12] This immunity, according to the courts, did not extend to officials in their individual capacity or acting beyond their actual authority. *See, e.g.*, Chuidian v. Phillipine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990).

necessarily exceeds an official's authority and voids immunity, as there is no exception enumerated in the FSIA for violations of international human rights law.

In *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2nd Cir. 2008), the 2nd Circuit held that defendant Saudi princes could not be held liable for the consequences of providing material support to Al Qaeda through financial funding that allegedly enabled the 9/11 terrorist attacks because each prince, acting in his official capacity, qualified as an "agency or instrumentality" of the Saudi government. The court also ruled that the Saudi High Commission for Relief to Bosnia and Herzegovina, also accused of providing terrorist funding to Al Qaeda, was an "organ" of Saudi Arabia created for a national purpose and actively supervised by Saudi Arabia. Having determined that the FSIA governed immunity, the court turned to the exceptions to assess whether any would permit the suit to go forward, but found that none applied. The defendants' alleged provision of support to Muslim charities that promoted and underwrote terrorism did not constitute conduct in trade, traffic, or commerce to place it within the commercial activity exception. Moreover, the FSIA tort exception for death and personal injury did not apply to the matter, according to the court, because the terrorist act of providing material support to Al Qaeda occurred overseas, and it also sounded more in the FSIA's terrorism exception[13] than the tort exception.[14] Saudi Arabia did not fall within this terrorism exception because it had never been designated a state sponsor of terrorism.

Finally, the 2nd Circuit held in *Matar v. Dichter*, 563 F.3d 9 (2nd Cir. 2009), that while a foreign official acting in his official capacity is an agency or instrumentality of a foreign state, a *former* official is not necessarily covered as such by the FSIA. The defendant in *Matar*, a former director of Israel's General Security Service, was nevertheless entitled to immunity under the common law because, according to the court, the FSIA did not abrogate through silence the common law of sovereign immunity as it applied to former foreign officials. Accordingly, the court followed the recommendation of the State Department and declined jurisdiction to hear claims against the former official arising from civilian injuries and deaths sustained during the Israeli Defense Force's aerial bombing of a Gaza apartment complex undertaken in a successful "targeted killing" operation against a suspected terrorist leader.

A minority of circuits, however, held that foreign officials did not enjoy immunity under the FSIA. The 7th Circuit departed from the majority position in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), holding that victims who alleged torture and killings by a military junta were permitted to sue its former general because the language of the FSIA does not explicitly include heads of state within its definition of "state" or in any of the exceptions to the FSIA. The court did not agree that the FSIA term "agency or instrumentality" was meant to encompass individual officials, highlighting the fact that the terms "separate legal person" and "organ" fit a natural person, such as a foreign official, quite awkwardly. After the 4th Circuit joined the minority in *Samantar v. Yousef*, 552 F.3d 371 (4th Cir. 2009), the Supreme Court agreed to hear the challenge.

[13] 28 U.S.C. § 1605A (2006); *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008).

[14] 28 U.S.C. § 1605(a)(5) (2006). The tort exception to the FSIA has been limited to torts that occur entirely inside the United States, such as traffic accidents.

Samantar v. Yousef

Somalis living in the United States who were members of the Isaaq clan, a group of well-educated and prosperous Somalis, alleged they had been subjected to systematic persecution during the 1980s by the military regime then governing Somalia. They sued Mohamed Ali Samantar, former defense minister and prime minister of Somalia in the 1980s, claiming (1) Samantar exercised command and control over members of the Somali military forces who tortured, killed, or arbitrarily detained them or members of their families; (2) Samantar knew or should have known of the abuses perpetrated by his subordinates; and (3) Samantar aided and abetted the commission of these abuses. The expatriates sought damages from Samantar pursuant to the TVPA. Samantar fled Somalia in 1991 after the regime collapsed and took up residence in Virginia. The United States has not recognized a government in Somalia since the fall of the military regime despite the existence of a transitional government.

Samantar claimed immunity under the FSIA, arguing that the suit was based on actions he took in his official capacity and that a suit against him was the equivalent of a suit against Somalia. The district court agreed with Samantar, following the majority view that an official, even a former one, could assert immunity under the FSIA because he was acting in his official capacity on behalf of Somalia when he took the actions that were alleged to have caused the injuries. The court rejected the argument that Samantar had exceeded the scope of his authority because he allegedly violated international law. The 4th Circuit reversed, following the minority view that individual officials do not fall within the immunity of the FSIA's "agency or instrumentality" language. Even if Samantar fell within the FSIA's "agency or instrumentality" language, according to the court, the FSIA would only cover present officials due to the statute's present-tense language describing "agency or instrumentality." The case was returned to the district court to determine whether another sort of immunity might apply.

Samantar appealed the 4th Circuit's decision to the Supreme Court, arguing the FSIA should be read to provide him with immunity on the basis that (1) the examples outlined under the definition of "foreign state" and "agency or instrumentality," are non-exhaustive and merely illustrative; (2) the FSIA should be construed to codify the common law of official immunity; and (3) interpreting the FSIA otherwise undermines the comity and reciprocity the FSIA was meant to engender. The Somali plaintiffs conversely argued that (1) the plain language of the statute clearly does not cover officials; (2) the FSIA and international law exclude former officials from immunity; (3) the TVPA amounts to an exception to immunity and the FSIA must be read *in pari materia* with it; (4) torture and extra-judicial killing are not within the lawful scope of an official's authority; and (5) foreign policy decisions are for the judgment of the political branches.

The Supreme Court's decision in *Samantar* unanimously resolved the circuit split in favor of the minority position. In a detailed textual analysis largely tracking the government's brief,[15] Justice Stevens found that while individual foreign officials could "literally" fit the definition of an "agency or instrumentality," the textual clues cut against such a broad construction.[16] "Agency or instrumentality," according to the Court, was defined by the FSIA to mean an entity, which

[15] *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 17-18, Samantar v. Yousef, (U.S. 2010) (No. 08-1555).

[16] *Samantar*, 130 S. Ct. at 2286. *See contra In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71 (2d Cir. 2008).

ordinarily refers to "an organization, rather than an individual."[17] Other parts of the "agency or instrumentality" definition, according to the Court, likewise did not resolve themselves comfortably to the definition of a natural person, such as "separate legal person." The word "person" in that context, according to the Court, typically refers to the legal fiction that allows corporations to hold legal personality separate from shareholders.[18] The Court likewise described the use of the term "organ" as "awkward" when used in connection with a natural person.[19] From this textual analysis, the Court concluded that Congress simply did "not evidence the intent to include individual officials within the meaning of 'agency or instrumentality.'"[20]

While Samantar argued that the definition of "agency or instrumentality" was an illustrative list of the types of entities that could encompass a foreign state, the Supreme Court declined to stretch the definition to also cover individuals, remarking that a word can "be known by the company it keeps."[21] The Court pointed to other provisions of the FSIA where it would have made sense for the statute to mention foreign officials or provide procedures more appropriate for suits against individuals, had Congress intended for such officials to be included.[22] The Court also noted that the FSIA does expressly mention foreign officials in other contexts, showing Congress's ability to address such an issue if it chooses to do so and making the omission of officials in the definition of "agency or instrumentality" all the more significant.[23] As a result, the Court concluded that reading "foreign official" into the definition of "agency or instrumentality" would make the express mention of "foreign officials" superfluous in the provisions of the FSIA where Congress expressly employed the term.[24]

The Court also cited the history and purpose of the FSIA as evidence that Congress did not intend to encompass foreign officials within the definition of foreign state. The Court agreed with Samantar that the FSIA was meant to codify the restrictive theory of sovereign immunity along with the international and common law at the time of passage in 1978. The Court did not agree, however, that the FSIA must be interpreted as having also codified the common law as it applied to foreign officials.[25] While agreeing that statutes are generally to be interpreted consistently with the common law, Justice Stevens explained that this canon of construction only applies when the statute clearly covers an entire field formerly governed by the common law. While the FSIA was clearly meant to replace the common law in relation to the immunity of foreign states, the Court

[17] *Samantar*, 130 S. Ct. at 2286 (quoting Black's Law Dictionary 612 (9th ed. 2009)).

[18] *Id.* (citing First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983)).

[19] *Id.* at 2286-87.

[20] *Id*. at 2287.

[21] *Id.* (citing Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923)).

[22] *Id.* at *2288 (referencing service of process and remedial provisions of the FSIA, including 28 U.S.C. §§ 1608(a), 1608(a)(2), 1606, 1610) (2006)); Brief for the United States, *supra* footnote 15, at 23-24.

[23] *Samantar*, 130 S. Ct. at 2288 (citing 28 U.S.C. §§ 1605(a)(5), 1605A(a)(1), 1605A(c) (2006)).

[24] *Id.* at 2289.

[25] This adopted the position of the U.S. government and former State Department Legal Adviser Mark Feldman that the FSIA in no way was intended by the drafters to encompass foreign officials. *See* Chimene I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, YALE J. INT'L L. ONLINE, pp. 6-7 (Spring 2010). Justice Stevens also discussed the legislative history surrounding the FSIA as further evidence that the FSIA was not intended to address individual official immunity. *See Samantar*, 130 S. Ct. at 2289 & n.12. Justices Alito, Thomas, and Scalia, in their concurring opinions, would have preferred to avoid any discussion of legislative history on the basis that the plain text of the statute adequately resolved the issue. *See id.* at 2293 (Alito, J., concurring, and Thomas, J. concurring); *id*. at 2293-94 (Scalia, J., concurring).

found no indication it was intended to cover common law *official* immunity.[26] The Court did not accept Samantar's interpretation that the common law of state immunity and official immunity were coextensive, finding the relationship between the two to be more complicated than that.[27]

The Court suggested instead that the common law is still in place to determine whether Samantar is entitled to immunity, but left the question to be determined on remand. It did cite the Restatement (Second) of U.S. Foreign Relations Law to note that there is a caveat to immunity for foreign officials that does not apply to other forms of immunity. Officials must not only have acted in an official capacity, but the suit must also have "the effect of exercising jurisdiction ... to enforce a rule of law against the state."[28] Yet the Court declined to state whether this analysis is the proper test for assessing common law official immunity. The Court also adopted the position of the government highlighting the importance of the State Department's pre-FSIA role in recommending official immunity, noting that Congress gave no indication that it "saw as a problem, or wanted to eliminate" that role. Such cases, however, appear to be few in number[29] and some of them involved suits where the foreign state itself did not qualify for immunity or court jurisdiction would not implicate enforcing law against the state.[30] Justice Stevens also left open the possibility that Samantar may be entitled to head of state immunity under the common law immunity outlined in the Restatement.[31]

The Foreign Sovereign Immunities Act: Post-*Samantar*

Following *Samantar*, individual foreign officials have limited recourse to the FSIA to shield themselves from liability in U.S. courts. The Supreme Court downplayed concerns expressed by the appellate courts that reading the FSIA to exclude cases against foreign officials would permit plaintiffs to use artful pleading to select whether the FSIA or common law would govern their suits, depending on which would be most advantageous.[32] The Court also emphasized that other means for obtaining immunity remain available for foreign officials. Going forward, foreign officials may have recourse to the common law of official immunity, possibly with the assistance of the State Department.[33] Moreover, the Court outlined three areas in which a suit against a foreign official may have to be dismissed regardless of the official's entitlement to immunity, specifically:

> (1) The absence of personal jurisdiction. (Personal jurisdiction is automatic with respect to foreign states so long as an exception to the FSIA applies, but must be obtained through

[26] *Samantar*, 130 S. Ct. at 2289. The Court declined to address its ruling in relation to international law because it was not "deciding that the FSIA bars petitioner's immunity but rather that the Act does not address the question." *Id.* at 2289 & n.14.

[27] *Id.* at 2289.

[28] *Samantar*, 130 S. Ct. at 2289 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1962)).

[29] *See id.*; Brief for the United States, *supra* footnote 15, at 7.

[30] *See Samantar*, 130 S. Ct. at 2289 (citing Greenspan v. Crosbie, 1976 U.S. Dist. LEXIS 12155 (S.D.N.Y. 1976)).

[31] *Id.* n.15 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1962)).

[32] *Id.* at 2292.

[33] *Id.* at 2291-92.

service of process against individuals, which effectively means the defendant must be found within the United States).[34]

(2) The need to join a foreign state as a necessary party pursuant to the Federal Rules of Civil Procedure (such as a case in which the foreign state itself, or an agency or instrumentality of a foreign state, is a required party because its interests are directly implicated by the subject matter of the case and its participation may be necessary to protect those interests, fully adjudicate a matter, or provide relief).[35]

(3) The need to consider the foreign state as the real party in interest[36] (such as a suit brought against an individual in her official capacity, where damages or other relief are sought against the state entity).

If a court determines that the foreign state is a required party to a lawsuit or is the real party in interest, the FSIA might require dismissal. The Court declined to view every lawsuit against a foreign official as necessarily the equivalent of a suit against the foreign state merely because it involves passing judgment on the conduct of a foreign official acting in its behalf. Justice Stevens explained that lawsuits naming foreign officials are covered by the FSIA only if they are "in all other respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity."[37] Justice Ginsburg suggested at oral argument that "whether it's injunctive relief or money relief, if the relief is against the state … you can't dodge it [sovereign immunity as a jurisdictional bar] by naming the officer … this is a case seeking money out of the pocket of Samantar and no money from the treasury of Somalia."[38]

Samantar advocated an interpretation of the FSIA that would cover officials for all actions taken in an official capacity, which would be determined based upon (1) a notification by the foreign state[39] or (2) elements of conduct demonstrating its inherently sovereign nature. An example of conduct meeting the second test, according to Samantar, would be military or police duties undertaken pursuant to orders.[40] The Court rejected Samantar's analysis, however, finding that the

[34] *See, e.g., In re* Terrorist Attacks on September 11, 2001, 718 F. Supp. 2d 456 (S.D.N.Y. 2010)(on remand from 2d Cir. following *Samantar*, dismissing case against five foreign officials for lack of personal jurisdiction).

[35] *Samantar* 130 S. Ct. at 2292 (citing FED. R. CIV. P. 19(a)(1)(B)).

[36] If the state is the real party in interest, the suit would trigger the FSIA's provisions because otherwise it would "circumvent the state's own immunity." Cf FOWLER V. HARPER, FLEMING JAMES, JR., OSCAR S. GRAY, 5 THE LAW OF TORTS § 29.9 (2nd ed. 1986) (liability of government officials in the United States). An example of circumstances in which the state is the real party in interest would be, for example, a lawsuit to compel an official to refund the purchase price under a contract or gain possession of property held by the officer on the government's behalf. *See id.* (citing numerous cases). Actions in tort to recover damages form an officer's own pocket are seldom considered to be tantamount to a suit against the state. *Id.*

[37] *Samantar*, 130 S. Ct. at 2292 (citing Kentucky v. Graham, 473 U.S. 159 (1985)).

[38] Chimene Keitner, *Square Pegs and Round Holes: Individuals and the FSIA*, Opinio Juris.org, http://opiniojuris.org/2010/03/05/square-pegs-and-round-holes-individuals-and-the-fsia/ (last visited July 2, 2010)(quoting from oral argument).

[39] Israel has undertaken this notification with their officials, which the courts have held as persuasive in assessing whether their foreign officials have acted in their official capacity for purposes of immunity. *See, e.g.*, Belhas v. Ya'Alon, 515 F.3d 1279 (D.C. Cir. 2008). The transitional Somalian government did assert that Samantar was acting in his official capacity when undertaking the acts against the Isaaq clan. However, despite the lower court's citation to the Somalian government's statement, the Supreme Court ignored Somalia's assertion. *See* Brief for the United States, *supra* footnote 15, at 5.

[40] Transcript of Oral Argument at 15, Samantar v. Yousef, (No. 08-1555) (statement of Mr. Dvoretzky, counsel for Petitioner Samantar). *See also* Roger Alford, *Samantar Insta-Symposium: Foreclosing "Official Capacity" Suits*, (continued...)

relevant issue is whether the official is being sued in his or her official capacity, not whether the conduct at issue in the lawsuit was undertaken in an official capacity.[41] The Court distinguished official capacity suits, which are in "all respects other than name to be treated as a suit against the [state] entity," from personal capacity suits, which look to impose individual liability upon a government officer for actions taken under color of law.[42]

Thus, if a lawsuit is filed against an official in his or her official capacity, the suit will be considered as one against the state itself,[43] in which case the FSIA applies.[44] If a suit is brought against an official in his or her personal capacity, the common law of foreign sovereign immunity applies, in which case the relevance of the official nature of the conduct may nevertheless be relevant to determining immunity. The Court gave little guidance regarding the application of common law immunity, leaving open the possibility that lower courts may analyze the issue based upon the traditional bases of an agency relationship. Immunity may turn on whether the state takes responsibility for the actions of its agent (the foreign official), just as it did in cases decided by interpreting the FSIA through the lens of the common law.[45]

As the *Samantar* Court noted, official immunity and state immunity will not always be coextensive.[46] There may be lawsuits in which the state is entitled to immunity over a matter, but a foreign official may still be held liable for an injury caused by actions undertaken without or in excess of authority, meaning no immunity is available unless the official is entitled to status-based immunity (such as diplomatic or head-of-state immunity).[47] There may also be cases in which the state is not entitled to immunity because an exception to the FSIA applies, but individual officials are nevertheless entitled to immunity or cannot be held personally liable for the conduct at issue.[48]

To the extent the FSIA codifies common law foreign sovereign immunity, as in the case of lawsuits based on commercial activity under the restrictive theory,[49] the recognition of a separate

(...continued)

Opinio Juris.org, http://opiniojuris.org/2010/06/02/samantar-insta-symposium-foreclosing-official-capacity-suits/ (last visited July 2, 2010).

[41] *Samantar*, 130 S. Ct. at 2292 (citing Kentucky v. Graham, 473 U.S. 159, 166 (1985)).

[42] *Id.* (noting that the lawsuit is against "petitioner in his personal capacity and seek[s] damages from his own pockets," and therefore "is properly governed by the common law because it is not a claim against a foreign state as the [FSIA] defines that term.").

[43] As stated, an example would be seeking damages from the treasury of the state rather than the individual personally. *See id.*

[44] *Id.* at 2290-91 ("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."); Brief for the United States, *supra* footnote 15, at 12-13.

[45] *See, e.g.*, Belhas v. Ya'Alon, 515 F.3d 1279 (D.C. Cir. 2008) (statement by foreign government viewed as dispositive as to whether former general acted in official capacity); Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (noting executive branch's recognition of the Israeli government's assertion that its former official acted in furtherance of official policies of Israel); *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994) (finding no immunity, relying in part on Philippine government's representation that former president's acts exceeded his authority as president).

[46] *Samantar*, 130 S. Ct. at 2292 ("And not every suit can successfully be pleaded against an individual official alone.")

[47] *See* Brief for the United States, *supra* footnote 15, at 13, 22.

[48] *See id.* at 22 ("When a suit falls within one of the exceptions to foreign sovereign immunity for contractual or other commercial activities or expropriations ... and a state, but not an individual, is appropriately held liable for the potentially huge monetary sums at stake.") (citing Greenspan, 1976 U.S. Dist. LEXIS, at *2) (Executive suggestion that officials were immune from fraud suit although state was subject to suit under commercial activities exception).

[49] 28 U.S.C. § 1605(a)(2) (2006).

theory of immunity for foreign officials may not yield results significantly different from those cases in which courts applied the FSIA directly. The same common law considerations some courts previously applied to determine whether a foreign official is an "agency or instrumentality" under the FSIA would likely lead to similar results where the common law is applied directly.[50] However, where Congress enacts exceptions to the FSIA that depart from the common law, outcomes may vary from cases decided under the pre-*Samantar* approach. For example, the FSIA terrorism exception permits suits for damages against foreign states "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources … for such an act,"[51] but only if the state is designated by the State Department as a state sponsor of terrorism.[52] Under the common law, immunity determinations for foreign officials have never depended on their state's designation as a sponsor of terrorism.[53]

Immunity determinations under the common law, however, would likely be informed by "principles articulated by the Executive Branch."[54] Future cases involving foreign official defendants may largely depend upon the State Department and the practices it develops for assessing foreign official immunity. Executive branch intervention in lawsuits against officials of U.S. allies may mitigate some of the concerns expressed by amici curiae that permitting civil suits against foreign officials will result in a flood of unfounded and politically motivated lawsuits against officials of certain states, permitting plaintiffs to effectively circumvent the sovereign immunity of those states.[55] On the other hand, State Department involvement in terrorism cases against foreign officials in the past has generated friction with Congress.[56]

Options for Official Immunity Following *Samantar*

Now that the courts can rely on the FSIA only in a limited manner to determine whether to exercise jurisdiction over lawsuits involving foreign officials as defendants, such cases will require a new framework. Such a framework may be developed by the courts through the common law, aided by an immunity determination from the State Department on a case-by-case basis, or may be created by Congress.

[50] *See, e.g.*, Chuidian v. Phillipine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990) (holding that the common law was incorporated into the FSIA).

[51] 28 U.S.C. § 1605A(a)(1) (Supp. II 2008).

[52] *Id.* § 1605A(a)(2)(A)(i)(I) (Supp. II 2008). Causes of action are also allowed against an "official, employee, and agents or agent of that [foreign] state," although the provision does not address the immunity of such officials.

[53] For a discussion of how the terrorism exception differs from other exceptions under the FSIA, see VED P. NANDA AND DAVID K. PANSIUS, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 3:36 (2009).

[54] Brief of the United States, *supra* footnote 15, at 6.

[55] *See, e.g.*, Brief of the Zionist Organization of America, The American Association of Jewish Lawyers and Jurists, Agudath Israel of America, and the Union of Orthodox Jewish Congregations of America, *Amici Curiae* In Support Of Petitioner, Samantar v. Yousef, (U.S. 2010) (No. 08-1555), *available at* http://www.scotusblog.com/wp-content/uploads/2009/12/Yousuf-Amicus-Zionist-Organization.pdf; Brief of The Kingdom of Saudi Arabia as *Amicus Curiae* in Support of Petitioner, Samantar v. Yousef, (U.S. 2010) (No. 08-1555), *available at* http://www.scotusblog.com/wp-content/uploads/2009/12/Yousuf-Amicus-Saudi-Arabia.pdf.

[56] *See, e.g.*, CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

Common Law Mechanism Aided by a Determination of the State Department on a Case-by-Case Basis

The exact nature and scope of common law foreign official immunity have engendered a good deal of debate even prior to *Samantar*, particularly when the cause of action involved high-level officials close to the head of state, former officials, or conduct alleged to violate international law. Common law immunity for officials has taken on two basic forms, namely (1) absolute immunity based upon status, as for heads of state, diplomats, and foreign ministers,[57] and (2) function-based immunity for the acts of foreign officials done in their official capacities.[58]

Functional Immunity Under the Common Law

Function-based immunity is the type called into question by *Samantar*. Some take the position that the common law gives officials the same immunity that foreign governments themselves have, but only for official acts within the scope of the individual's duties. Others believe that officials are entitled to immunity only if a lawsuit against the individual would actually impose an obligation on the foreign government. While Justice Stevens wrote for the Court, "[w]e do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity,"[59] the decision does little to clarify which circumstances will bring about that result.

Those who argue for immunity with respect to all authorized official conduct cite to Supreme Court precedent from the early 1700s through the end of the 19th century. Of particular import is the case of *Underhill v. Hernandez*, which states "because the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof."[60] Commentators view this principle, which the majority of courts have used to decide official immunity under the FSIA, as dispositive. The analysis, according to these scholars, is no different if the source of common law official immunity is international law or federal common law, because international law is generally in alignment with the position of U.S. law in this area.[61] Under this view, the scope of immunity is not affected by the status of the defendant as a current

[57] *See* BLACK'S LAW DICTIONARY, 817-18 (9th ed. 2009).

[58] *Id.*

[59] *Samantar*, 130 S. Ct. at 2290-91.

[60] Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895). *See* also 2 JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW § 179 (1906) (collecting authorities from the late 1700s through *Underhill*); *Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797) ("A person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.")

[61] *See* UN Convention on Jurisdictional Immunities of States and Their Property, art. 2(1)(b)(iv), G.A. Res. 59/38, U.N. Doc. A/RES/59/38/Annex (Dec. 16, 2004) ("State means: representatives of the State acting in that capacity"); HAZEL FOX, THE LAW OF STATE IMMUNITY 455 (2nd ed. 2008) ("any act performed by the individual as an act of the State enjoys the immunity which the State enjoys.") This law has been followed by courts around the world, according to commentators, and the FSIA is said to have codified this international law at the time of passage. *See e.g.*, Permanent Mission of India to the UN v. City of New York, 551 U.S. 193, 199 (2007); Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia (2006), UKHL 26 (2007), 1 A.C. 270, at para. 10 (United Kingdom); Jaffe v. Miller (1993), 13 O.R. 3d 745, 759 (Canada).

or former official, because so long as the act was an official one, the lawsuit effectively calls into question the conduct of the state.[62]

Those who argue that official immunity turns on whether the lawsuit actually imposes an obligation on the foreign government disagree that federal common law provides such a clear-cut test. Numerous decisions of the Department of State and early court decisions, according to commentators, deny that individual official immunity was to be accorded based on the nature of the official's actions alone.[63] They also deny that international cases support the view that foreign officials are always entitled to immunity for their official acts. They argue that many of the cases cited by scholars involve foreign statutes that define the term "state" very broadly. These laws expressly define "state" to encompass individuals, and also cover lawsuits based upon specialized circumstances, such as the request for damages from foreign state assets.[64] Under their view, comity and convenience also play a role. Immunity may be withdrawn at the will of the sovereign and is not always governed by any generally accepted common law.[65]

Deference to the Executive Branch

The *Samantar* Court seems to adopt the position of the government that immunity at common law is informed by "principles articulated by the Executive Branch"[66] and must be assessed as with deference due to the executive branch in foreign relations matters.[67] In other words, the Court suggests that courts should respect the State Department's determination of official immunity on a case-by-case basis, whenever it is given.[68]

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[62] Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 17-18 (Autumn 2009). In their pre-*Samantar* analysis, the authors explicitly reject the necessity of recourse to the FSIA's present tense language in the "agency and instrumentality" definition because of the common law backdrop. *See id.* (citing Dole Food Company v. Patrickson, 538 U.S. 468 (2003); *id.* at 18 (citing Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries 18 (1991)); Belhas v. Ya'alon, 515 F.3d 1279, 1284-86 (D.C. Cir. 2008)).

[63] Bradley and Goldsmith, *supra* footnote 62, at 6-7, 11-12 (citing early opinions from Attorney Generals eschewing official immunity even though the acts were official in nature, such as a military attack on a steamboat, and maintaining that if there had been customary international common law that official actions created official immunity it would be stated in these decisions).

[64] *Id.* at 9-10, 12-13 (citing numerous cases and maintaining that the UN Convention on Jurisdictional Immunities of States and Their Property has not been signed by the United States nor has entered into force). *See also* Brief of Professors of Public International Law and Comparative Law as *Amici Curiae*, In Support of Respondents at 19-28, Samantar v. Yousef (U.S. 2010) (No. 08-1555) (citing numerous cases). Commentators' citation to *Jones v. Saudi Arabia* (UK) is also rebutted by scholars because in the UK the presumption is one of immunity and the court based its ruling on the broader UK immunity statute. *See id.* at 29-34.

[65] *See* William S. Dodge, *Samantar Insta-Symposium: What Samantar Doesn't Decide*, Opinio Juris.org (citing Schooner Exchange v. McFaddon, 11 U.S. 116, 136-37, 146 (1812); The Santissima Trinidad, 20 U.S. 283 , 353 (1822); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)).

[66] Brief for the United States, *supra* footnote 15, at 6.

[67] *Id.* at 7-8.

[68] *Samantar*, 130 S. Ct. at 2291 ("We 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.") The government had argued that this State Department role would be colored by customary international law, however, nowhere in *Samantar* is customary international law invoked as the touchstone for analysis by the State Department. *See*, Brief for the United States, *supra* footnote 15, at 6, 14.

The FSIA was enacted to lessen the role of the State Department in court cases involving foreign sovereigns.[69] The State Department's susceptibility to diplomatic and political pressures to recommend immunity in a given action resulted in inconsistent treatment of foreign sovereigns, and the practice was becoming burdensome on the State Department. The State Department thus supported the FSIA and did not object to losing its role in assessing sovereign immunity claims against foreign states, including their agencies and instrumentalities. However, it seems given the internal immunity resolutions of the State Department in the year of the FSIA's passage[70] that the State Department still claimed a role in determining immunity for foreign officials.[71] This role at the time entailed recommendations to the Department of Justice as to whether to grant official immunity in a court proceeding. This recommendation, while not dispositive in determining the scope of conduct-based immunity, was often deferred to by the Department of Justice and the courts.[72]

The Justice Department and the State Department suggested in *Samantar* that the State Department should continue its role in recommending immunity for foreign officials in light of the threat of reciprocal international legal action and the sensitive diplomatic as well as foreign policy judgments that go into immunity determinations.[73] Yet it is unclear whether this role will be similar in scope to the State Department's role before the enactment of the FSIA with respect to foreign officials. In the few prior cases in which the State Department made recommendations to the courts, deference was most often extended in the context of diplomatic or head of state immunity (status based immunities, rather than conduct based immunities). The modern emergence of human rights lawsuits may present legal and political issues unlike cases in which the State Department involved itself prior to passage of the FSIA. In any event, the pre-FSIA framework did not constitute absolute deference to the executive; there were notable instances where the courts did not defer to the executive.[74]

Some argue that the greater the dependence on, and deference to the State Department, in any case in which the defendant is a foreign official, the greater the likelihood courts will grind to a halt as they await an immunity determination from the executive branch.[75] Another concern is that reliance on the State Department for suggestions of immunity will in practice result in inconsistent outcomes, as was sometimes the case with respect to lawsuits against foreign states prior to the FSIA. Moreover, some predict that an increased role for the State Department will result in its constant buffeting by competing demands from foreign governments whose officials are sued and from human rights advocates seeking accountability for human rights abusers on behalf of victims. Increased lobbying could also be expected from others with interests in such

[69] *See Samantar*, 130 S. Ct. at 2291 & n.18 ("It is our [the State Department's]judgment ... that the advantages of having a judicial determination greatly outweigh the advantage of being able to intervene in a lawsuit.").

[70] Prior to the passage of the FSIA the State Department conducted an internal review for all petitions for suggestions of sovereign and official immunity. These rulings were published, similar to the decisions of courts of general jurisdiction. *See, e.g.*, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW (1977).

[71] *See* DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 1020 (1977) ("These decisions ... may be of some future significance, because the Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of the foreign states and their political subdivisions, agencies and instrumentalities.").

[72] *See* Keitner, *supra* footnote 38, at n. 15; Bradley and Goldsmith, *supra* footnote 62, at 11.

[73] *See* Brief for the United States, *supra* footnote 15, at 27-28. The government declined to address whether Samantar would be entitled to immunity.

[74] *See, e.g.*, Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926)(foreign government-owned merchant vessel not liable to suit *in rem*); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464.

[75] *See* Keitner, *supra* footnote 38.

lawsuits, including commercial and banking interests who have a stake or perceive their assets to be at risk. Finally, one former U.S. official argues that "the administration must also consider the reciprocal impact on current and former U.S. officials, if it opens the door to lawsuits against foreign officials in the United States."[76] This reciprocal impact is of particular concern to the Department of Defense due to the controversial counterterrorism operations it engages in around the world.[77]

Official Immunity by Statute

Congress could regularize immunity determinations of foreign officials' immunity by amending the FSIA to account for them or by enacting a wholly new statute to encompass foreign officials. The FSIA could be amended by altering the definition of "agency or instrumentality" to clearly cover an individual official. The definition of "state" could also be broadened explicitly to cover all foreign officials, or perhaps foreign officials in certain instances, as other legislatures around the world have done.[78] A separate clause within the FSIA explicitly providing immunity for foreign officials under certain circumstances might also be considered.

Congress could also look at amending statutes that provide specific causes of action, such as the TVPA, expressly to address immunity. The TVPA, enacted in 1991, is the primary means for victims of human rights abuses to seek remedy in U.S. courts,[79] but some have expressed concern that it will become a dead letter if defendants are entitled to assert common law immunity in addition to other forms of immunity.[80]

Proposed Amendments to the FSIA: The Justice Against Sponsors of Terrorism Act

No legislation has yet been introduced in response to the *Samantar* decision; however, legislation to amend the FSIA was introduced in the 111th Congress that would have effectively immunized foreign officials with respect to their official actions in most cases by substituting the foreign

[76] John B. Bellinger III, *Ruling Burdens State Department* 47, NAT'L L.J. (June 28, 2010). To date in most instances the State Department has been likely to assert immunity on behalf of most foreign government officials sued for alleged human rights violations, including Israeli, Russian, Chinese, and Saudi Arabian officials for controversial actions in Gaza, Chechnya, China, and the September 11th terrorist attacks, based on the theory that current and former officials are entitled to immunity from lawsuits under customary international law for their official acts. *Id.* With respect to *Samantar*, the State Department suggested it might recommend withholding immunity, and cited factors such as (1) the defendant's permanent residence in the United States, (2) the nature of the acts, and (3) the absence of a recognized government capable of requesting immunity on behalf of the official. *See id*; Brief for the United States, *supra* footnote 15, at 7.

[77] Bellinger, *supra* footnote 76.

[78] *See* Brief of Professors of Public International Law, *supra* footnote 64, at 20-28 (listing of broader sovereign immunity statutes from around the world).

[79] Beth Stephens, *Samantar Insta-Symposium: The View from the Counsel's Table*, Opinio Juris.org, http://opiniojuris.org/2010/06/03/samantar-insta-symposium-the-view-from-the-counsels-table/ (last visited July 2, 2010).

[80] Efforts to persuade courts that the TVPA implicitly abrogates status-based immunity or immunity under the FSIA have consistently failed. *See, e.g.*, Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd* 563 F.3d 9 (2d Cir. 2009) (immunity under FSIA or common law sovereign immunity); Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), *aff'd in part* 386 F.3d 205 (2d Cir. 2004), *cert. denied* 547 U.S. 1143 (2006) (head-of-state and diplomatic immunity).

government as defendant. A Senate bill, the Justice Against Sponsors of Terrorism Act (S. 2930),[81] would have amended the tort exception to the FSIA explicitly to provide that acts of "extrajudicial killing, aircraft sabotage, hostage taking, terrorism, or the provision of material support or resources ... for such an act,"[82] fall within the tort exception to the FSIA, even if some of the actions taken to facilitate the terrorist acts occurred overseas.[83] The bill supported expanded jurisdiction over foreign states and their officials, finding that those who provide material support to terrorist organizations that threaten the security of the United States "necessarily direct their conduct at the United States, and should reasonably anticipate being haled into court in the United States to answer for such activities."[84] The bill would have eliminated the limitation in the tort exception to injuries resulting from conduct by officials in their official capacity, revoking immunity foreign governments currently retain for acts of their officials conducted without authority or in a personal capacity by requiring the substitution of the state as defendant in place of officials in any suit based on an act or omission of an official when acting within the scope of his or her duty.[85]

These proposed amendments to the FSIA received mixed reaction from witnesses at the hearings to consider the legislation. Of particular concern:

(1) Such a provision could undermine the FSIA's codification of important long-standing principles of international law that protect foreign governments and the United States from lawsuits in each other's courts based on government activities.

(2) Such a provision could expose U.S. allies such as Israel to lawsuits in U.S. courts.

(3) Foreign governments could respond in kind and remove immunity provisions that currently protect U.S. officials from lawsuits abroad.

(4) Courts could find themselves entangled in the assessment of foreign sovereign immunity, and with it foreign policy matters, which are viewed as best left to the State Department.[86]

Others, however, supported the bill as a means to:

(1) provide appropriate redress for victims of terrorism,

(2) limit the role of the State Department in immunity determinations so that it would not be subject to excessive political pressures, and

[81] S. 2930, 111th Cong. (2010) (currently pending before the Senate Judiciary Committee).

[82] *Id.* § 3(a)(1)(B).

[83] It appears that the injury or death would still have to occur within the United States for the tort exception to apply. This broader tort exception would cover the provision of state sponsored material support to terrorist organizations without respect for which government is implicated. Such support is already subject to civil and criminal penalties when provided by individuals who are not officials of any government. *See* 18 U.S.C. §§ 2333(a), 2339A-C (2006).

[84] S. 2930, 111th Cong. § 2(a)(8) (2010).

[85] *Id.* § 4(a) provides that "any claim based on an act or omission of an official or employee of a foreign state or of an official or employee of an organ of a foreign state, while acting within the scope of his office or employment, shall be asserted against the foreign state or organ of the foreign state."

[86] *Evaluating the Justice Against Sponsors of Terrorism Act, S. 2930: Hearing of the Crime and Drugs Subcommittee of The Senate Judiciary Committee*, 111th Cong. (2010) (statement of John B. Bellinger, III former Legal Adviser to the Department of State and National Security Council).

(3) clarify an error in prior interpretation of the FSIA tort exception that excludes terrorist acts that occur within the United States from its purview.[87]

Conclusion

The *Samantar* decision has clarified that the FSIA does not govern lawsuits against foreign officials, current or former. However, the Court emphasized the narrowness of its ruling, noting that it did not decide that foreign officials are not entitled to immunity at all. Rather, specific cases involving foreign officials as defendants will follow ordinary rules governing civil procedure and jurisdiction in courts to determine whether a particular suit can go forward. If a court determines that a particular suit, although it names one or more specific officials as the adversarial party, is really a lawsuit against a foreign state, then the FSIA will govern the suit. Lawsuits against individual officials will be significantly limited with respect to the damages plaintiffs are entitled to recover. A judgment against an official need not be paid from the coffers of the state, and other remedial forms of relief may be unavailable or ineffective if exercised only against specific officials. In cases that do proceed against foreign officials, the defendants may be entitled to immunity under the common law or may be able to assert other defenses to jurisdiction or liability that would not be available to a defendant state.

For these reasons, the Supreme Court appeared to be relatively unconcerned with the predictions by some lower courts and amicus curiae that reading the FSIA to cover foreign states—but not officials of foreign states—would lead to the effective gutting of the FSIA. To the extent that the common law framework of foreign sovereign immunity envisions an increased role for the State Department, possible harmful effects on U.S. foreign policy may be mitigated. On the other hand, Congress and the executive branch have not always seen eye-to-eye regarding lawsuits against foreign states or their officials.[88] The *Samantar* decision does not seem to question Congress's authority to enact a new statutory framework to govern official immunity in the event that any of the negative predictions, or perhaps unpredictable outcomes, comes to pass.

[87] *Id.* (statement of the Hon. Abraham D. Sofaer, former Legal Adviser to the State Department, and former federal judge in the Southern District of New York); *id*. (statement of Richard D. Klingler, former General Counsel and Legal Adviser to the National Security Council staff). These witnesses, however, did not call for the complete removal of the role of the executive in immunity recommendations to the Court, instead stating that such recommendations may aid in illuminating the foreign policy effects of a court's immunity determination. *See id.* (statement of Mr. Klingler).

[88] *See, e.g.*, CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

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