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Ruling burdens State Dept.

Samantar held foreign officials are not immune from human rights suits, so State will have to decide whether to assert immunity and will be subject to lobbying.

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In a decision that may result in significant diplomatic friction and stoke internal divisions within the Obama administration, the U.S. Supreme Court ruled earlier this month that foreign government officials are not protected from lawsuits for torture and human rights violations by a federal law that provides immunity for foreign governments. The decision, hailed by human rights groups, is likely to encourage more lawsuits in U.S. courts against visiting foreign officials, including Israelis and Chinese. These officials may still enjoy immunity from suit under other legal doctrines, but the State Department will be forced to assert immunity on their behalf. The Obama administration will now be buffeted by competing demands from foreign governments for protection for their officials and from human rights advocates for accountability for human rights abusers.

The case, *Samantar v. Yousuf*, involved a suit against Mohamed Ali Samantar, a former defense minister and prime minister of Somalia in the 1980s. The suit was filed by a group of Somali nationals who allege that they or their family members were tortured or killed by Somali defense forces commanded by Samantar. The plaintiffs sued under the Alien Tort Statute, a 220-year-old federal law that allows foreign nationals to bring civil suits in U.S. courts for violations of international law.

In 2007, Judge Leonie Brinkema of the Eastern District of Virginia dismissed the Somali suit, concluding that Samantar is immune under the Foreign Sovereign Immunities Act (FSIA), which codifies the customary international law rule that sovereign governments generally may not be sued in foreign courts without their consent. The majority of circuit courts had previously held that the FSIA protects not only foreign governments but also their officials. The U.S. Court of Appeals for the 4th Circuit, however, disagreed and reversed, and the Supreme Court affirmed. In a unanimous decision by Justice John Paul Stevens, the Court held that the FSIA protects only governments, not individual officials. The Court emphasized, however, that Samantar may still be entitled to common law (judicially recognized) immunities, which should be considered by the trial court. Disappointingly, the Court offered no guidance on the scope of these immunities.

In future proceedings in this case, as well as in future suits against foreign officials, the judge will now ask for (and probably defer to) the opinion of the State Department legal adviser whether Samantar and other foreign officials are entitled to immunity.

In practice, the State Department is likely to assert immunity on behalf of most foreign government officials sued for alleged human rights violations, such as Israeli officials for actions in Gaza, Russians for actions in Chechnya or Chinese for actions against dissident groups. In the past, both the Bush and Obama administrations have taken the position that current and former foreign government officials are entitled to immunity under customary international law from suit for their official acts (although not for purely private acts). The Bush administration argued that former Israeli intelligence chief Avi Dichter was immune from suit by Palestinians for targeted killings in Gaza, and the Obama administration made the same argument (in a controversial brief submitted by Solicitor General Elena Kagan) in connection with a suit by Sept. 11, 2001, victims against Saudi government officials.

Because it will have discretion whether to assert immunity, the State Department will be subject in the future to intensive lobbying by both plaintiffs and defendants. Human rights and victims groups (and their supporters in Congress and the press) will urge the Department to allow suits to go forward. But foreign governments (including those whose support the United States needs on other issues) will vehemently oppose litigation against their officials. 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. These competing pressures will exacerbate existing tensions between former human rights advocates and foreign policy pragmatists inside the Obama administration.

Whether the administration ultimately will assert immunity on behalf of Samantar himself is unclear. Its brief to the Supreme Court suggested that the executive branch would take into account Samantar's permanent residence in the United States, the nature of his acts (torture and extrajudicial killings) and the absence of a recognized government in Somalia capable of requesting immunity for him. The administration's recitation of these factors suggests that it is considering acceding to pressure from human rights groups to allow the suit to go forward. The Defense Department, however, may be reluctant to create a chink in the armor of immunity for former defense ministers when the U.S. military is itself engaged in controversial counterterrorism operations around the world.

The Supreme Court's decision removes an important statutory roadblock to human rights suits against foreign government officials in federal courts. The ruling is likely to lead to an initial increase in new lawsuits, which will continue until the State Department makes clear whether it will assert immunity in almost all cases or allow some to go forward. In the future, the State Department, rather than federal judges, will be in the hot seat in deciding issues of impunity or accountability for foreign officials for international human rights abuses.

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