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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument today in Case 08-1555, Samantar v. Yousuf.

Mr. Dvoretzky.

ORAL ARGUMENT OF SHAY DVORETZKY

ON BEHALF OF THE PETITIONER

MR. DVORETZKY: Mr. Chief Justice, and may it please the Court:

The FSIA applies to suits against foreign officials for acts taken on the state's behalf, because such suits are the equivalent of a suit against the state directly.

JUSTICE KENNEDY: Counsel, I want just to say that I have one problem with the case at the outset. And I don't mean to interrupt the organization of your argument. You might want to address it later. And of course, that goes to the other counsel, too.

I'm having difficulty seeing how the issues as presented in the brief really resolve very much. Let's assume -- I know this is not your position. Let's assume the Foreign Sovereign Immunities Act grants immunity to the state for this conduct and for a then-serving official who is its agent and for a former agent. Let's assume there is -- there is immunity. Why

1 isn't it just a -- repealed, overridden, by the later
2 enactment of the Torture Victims Protection Act?

3 I just don't see the issue structured that
4 way in the briefs and I'm puzzled by it. But I say that
5 at the outset and I really didn't mean to interrupt your
6 -- your good introduction.

7 MR. DVORETZKY: The Torture Victim
8 Protection Act creates a cause of action but is silent
9 about immunity, and therefore has to be interpreted
10 consistently with background immunity principles and
11 consistently with a preexisting statute codifying
12 immunity, rather than --

13 JUSTICE KENNEDY: What -- what authority do
14 you have for that?

15 MR. DVORETZKY: I'm sorry, could you
16 repeat --

17 JUSTICE KENNEDY: What case authority do you
18 have for that proposition?

19 MR. DVORETZKY: *Dellmuth v. Muth*, for one
20 thing. Also, the government previously argued that the
21 TVPA has to be interpreted consistent with preexisting
22 immunity principles. When Congress wants to waive
23 immunity, it knows how to do that. For example, it
24 amended the FSIA to specifically waive immunity for
25 actions against state sponsors of terrorism.

1 JUSTICE KENNEDY: It's like a -- it's like a
2 clear statement rule?

3 MR. DVORETZKY: Yes. If Congress wishes to
4 waive immunity, it has to do so expressly.

5 JUSTICE GINSBURG: If you are right about
6 that, I guess it would be the same under the Alien Tort
7 Statute. Then the Filartiga case -- if the -- if there
8 had been a quest -- request to dismiss because Filartiga
9 was a former officer, and the same thing in Karadzic,
10 none of those could have gone forward?

11 MR. DVORETZKY: If in those cases an
12 immunity defense had been asserted and it had been
13 established that the official was acting on behalf of
14 the state, then yes, immunity would apply. Those
15 defenses not asserted in those cases, though.

16 JUSTICE GINSBURG: Is there -- is there any
17 Alien Tort Statute or the torture statute that would
18 have survived, under your view, because your view is
19 it's no exception under the Foreign Sovereign Immunities
20 Act, end of case?

21 MR. DVORETZKY: Absolutely, there are
22 Torture Victim Protection Act and ATS claims that could
23 be brought. They could be brought whenever an FSIA
24 exception applies. So, for example, if an action were
25 brought against an official of a state sponsor of

1 terrorism, the FSIA exception for that would apply. If
2 a foreign state waived immunity, either explicitly or
3 implicitly --

4 JUSTICE GINSBURG: Yes, but that doesn't --
5 that's not going to happen.

6 MR. DVORETZKY: There are cases where it has
7 happened. For example, the Philippines effectively
8 waived immunity when claims were brought against Marcos.
9 So it certainly could happen.

10 Congress envisioned that the statute would
11 be interpreted consistently with immunity principles.
12 The legislative history supports that inference. There
13 are reports in the legislative history and a
14 forestatement by Senator Specter saying that the FSIA
15 could provide an immunity defense to a claim against an
16 official where the official can establish an agency
17 relationship with the state.

18 Here, there is no question that Mr. Samantar
19 was acting in an official capacity, because he is being
20 sued for his actions as a Prime Minister and as a
21 defense minister, in the midst of what was effectively
22 quelling a secessionist insurgency. That's an
23 inherent --

24 JUSTICE KENNEDY: Of course, that -- again,
25 the Torture Victim Protection Act says an individual

1 who, under actual or apparent authority or under color
2 of law of any foreign nation, subjects an individual to
3 torture.

4 Why isn't that a clear statement? And then
5 I will get off this hobby horse and you can get back to
6 talking about the FSIA.

7 MR. DVORETZKY: Well, it's not a clear
8 statement because it's only a clear statement creating a
9 cause of action. It's not a clear statement that speaks
10 to immunity. And again, where Congress has wanted to
11 waive immunity, it has done that expressly, as where it
12 waived the immunity of a foreign state for claims
13 against state sponsors of terrorism.

14 And *Dellmuth v. Muth*, I think, is on point
15 because there the Court held that even though a cause of
16 action was created that would principally apply only to
17 state agencies, that in and of itself was not sufficient
18 to waive the sovereign immunity of the states.

19 CHIEF JUSTICE ROBERTS: Well, I will jump on
20 the hobby horse even if Justice Kennedy is jumping off.

21 I mean, the -- the exception in the TVPA is
22 to the jurisdictional immunity of a foreign state. That
23 doesn't sound the way you would just establish a cause
24 of action.

25 MR. DVORETZKY: You are talking about the

1 exception in the TVPA for state sponsors of terrorism?

2 CHIEF JUSTICE ROBERTS: Yes.

3 MR. DVORETZKY: But the TVPA -- the FSIA, in
4 addition, also has a cause of action applicable to state
5 sponsors of terrorism. That's in the red brief at 17A.
6 It's 28 U.S.C. Section 1605A(c). And so in that
7 situation what Congress did was it both created a cause
8 of action against state sponsors of terrorism and their
9 officials and waived immunity.

10 In the TVPA, all that Congress did was to
11 create a cause of action. And so that cause of action
12 has to be read consistently with background principles
13 of immunity.

14 JUSTICE GINSBURG: Well, when you -- going
15 back to where you started -- you started saying the
16 officer must go together with the state, because in
17 reality it's the same thing; it's a suit against the
18 state.

19 But this is a case seeking money out of the
20 pocket of Samantar and no money from the treasury of
21 Somalia, so why is the suit against the officer here
22 equivalent to a suit against the state?

23 MR. DVORETZKY: Because the touchstone of
24 foreign sovereign immunity law, which the FSIA codified,
25 is that one nation's courts cannot sit in judgment of

1 another nation's acts. And the basis for liability that
2 is asserted in this case is Samantar's acts on behalf of
3 the state of Somalia.

4 The issue is not who pays the judgment. The
5 issue is whose acts are in question. Now, in the
6 domestic context, of course, the distinction between
7 personal liability and liability from the state may
8 matter, but that's only because --

9 JUSTICE GINSBURG: Well, that sounds like
10 you're -- you're talking about an Act of State Doctrine,
11 not that the suit against one is the equivalent of a
12 suit against the other.

13 MR. DVORETZKY: The Act of State Doctrine is
14 distinct from immunity doctrines, although they have
15 certain shared underpinnings and shared comity
16 considerations. And just as the under -- Act of State
17 Doctrine is concerned with not judging the acts of
18 foreign states, so too is foreign sovereign immunity
19 law. That's the fundamental premise of foreign -- of
20 foreign sovereignty immunity law.

21 In the domestic context, courts do sometimes
22 say that an official can be sued for personal liability
23 because he wasn't acting for the state if he violated
24 the state's controlling law. U.S. courts are able to
25 make that determination because our courts are the

1 ultimate arbiters of domestic law. U.S. courts are not
2 the ultimate arbiters of foreign law. In fact, a
3 determination that an official was not acting for a
4 foreign state because he must have violated the foreign
5 state's law or international law is precisely what
6 foreign sovereign immunity prohibits.

7 So in the foreign sovereign immunity
8 context, as long as the underlying acts are those of the
9 state, foreign sovereign immunity prohibits the case
10 from proceeding. And that is --

11 JUSTICE GINSBURG: I'm not sure that I
12 followed your distinction of the domestic law, per se,
13 because say, the Federal Tort Claims Act, to come within
14 that act and to have the government cover it, the
15 officer has to be acting within the scope of her
16 employment, however callous or reckless she may be.

17 MR. DVORETZKY: That -- and that goes to
18 when the government would be liable for the employee's
19 acts. In our case, what we are talking about here is
20 when the official can be personally liable for acts of
21 the state. And in the domestic context, we say the
22 official can be liable when he must not have been acting
23 for the state because he violated the state's
24 controlling law.

25 Foreign sovereign immunity prohibits that

1 determination with respect to the law of foreign states
2 and it prohibits U.S. courts from imposing their view of
3 international law on other courts to conclude that an
4 official must not have been acting for his state.

5 JUSTICE ALITO: How will a court determine
6 whether an official was acting within the official scope
7 of the official's responsibilities?

8 MR. DVORETZKY: Ordinarily, the foreign
9 state would tell you and that would be dispositive of
10 the matter.

11 If the foreign state doesn't tell you, you
12 would look at the nature of the allegations and the
13 complaint and see if they fall within a category of
14 conduct that is inherently viewed in -- as sovereign.
15 Atop that list --

16 JUSTICE ALITO: What if the Court can't tell
17 by looking at the complaint? Is there going to be
18 direct communication between the court and the foreign
19 government on this issue?

20 MR. DVORETZKY: A foreign government
21 ordinarily is going to -- is going to get involved in
22 the case and indicate whether it wishes to assert
23 immunity on behalf of the official or not.

24 For example, there have been several cases
25 involving suits against Israeli officials, and the

1 Israeli embassy communicated to the courts and to the
2 State Department that these were acts of Israel and the
3 official policy of the state.

4 Again, if you don't have that, though, it's
5 not going to be a difficult inquiry, typically, to look
6 and see whether inherently sovereign acts are what's at
7 issue. For example, if you have military or police
8 conduct, as this Court said in *Saudi Arabia v. Nelson*,
9 that is inherently sovereign conduct. Legislative --

10 JUSTICE SOTOMAYOR: So how is that inquiry
11 any different than the one that would go under the
12 common law head of state inquiry? What would be
13 different in the two?

14 MR. DVORETZKY: I -- I think the inquiry as
15 to whether it's an official act would be the same, but
16 head of state immunity is a different sort of immunity
17 than sovereign immunity. It's much broader, insofar as
18 it covers even personal acts by a head of state while he
19 is in office, whereas for foreign sovereign immunity,
20 what you are looking to distinguish is whether the
21 official was engaged in personal activity or whether he
22 was engaged in acts on behalf of the state.

23 JUSTICE SCALIA: Is head of state immunity
24 implicit in the Foreign Sovereign Immunities Act as
25 well?

1 MR. DVORETZKY: No. Head of state immunity
2 is a different body of common law immunity that the
3 FSIA --

4 JUSTICE SCALIA: So why can't this be a -- a
5 different body of common law?

6 MR. DVORETZKY: Do you mean, why
7 can't this --

8 JUSTICE SCALIA: No. I mean, you are saying
9 they -- they left head of state immunity to the common
10 law, did not incorporate it in the Foreign Sovereign
11 Immunities Act. Why -- why should I believe that they
12 did not do the same for -- for agent of state immunity?

13 MR. DVORETZKY: Because head of state
14 immunity is not a form of sovereign immunity. And what
15 Congress did in this act was it codified the law of
16 foreign sovereign immunity. At common law, the
17 sovereign immunity of the state was always understood to
18 extend to officials for their official acts.

19 JUSTICE SOTOMAYOR: Wait a minute. Why --
20 why -- that doesn't make any sense to me. Why would we
21 have had the creation of all of these common law
22 immunities attached to foreign individuals like consular
23 and diplomatic and heads of state if state sovereign
24 immunity was going to cover them naturally?

25 MR. DVORETZKY: Because consular and

1 diplomatic immunity are very different in scope and in
2 purpose than state sovereign immunity.

3 There are two sources of immunity that an
4 individual might be entitled to. There is the immunity
5 that flows from the state itself for official acts, and
6 there is immunity that flows from the individual's
7 office, like diplomatic and consular immunity.

8 Diplomatic and consular immunity are meant
9 to ensure that states can conduct their business without
10 tying up their officials while they are in office in
11 litigation in foreign courts over any matters, personal
12 or official.

13 JUSTICE SOTOMAYOR: I'm trying to go before
14 the act, the Foreign Sovereign Immunities Act, before it
15 was passed, because that was Congress's first statement,
16 and we have to figure out what they intended to replace
17 or not replace.

18 Before the act came in, what activities of a
19 consular office would not have been covered under the
20 foreign sovereign immunity of a state? What activity
21 could a diplomat have engaged in or a consular officer
22 have engaged in that state immunity has -- it was
23 understood at the time would not have given him or her?

24 MR. DVORETZKY: He could get into a car
25 accident. Diplomatic and consular immunity would

1 prevent the diplomat or the consul from being sued for
2 tort damages for a car accident in a foreign state.

3 Official immunity would not, because driving
4 is not considered an official policy of the state in the
5 way that, as I was saying to Justice Alito, police or
6 military conduct would be.

7 So that's the distinction between official
8 conduct and conduct that may well be within the scope of
9 employment, but is not entitled to the state's immunity.

10 JUSTICE SCALIA: Can -- can you get to the
11 text of the Foreign Sovereign Immunities Act that you --
12 that you assert embraces this personal immunity?

13 MR. DVORETZKY: Section 1603(a) -- excuse
14 me -- Section 1604 says that a foreign state shall be
15 immune from the jurisdiction of the United States and of
16 the states. When a suit is brought against an official
17 for his official act, that is effectively subjecting the
18 foreign state itself to U.S. jurisdiction.

19 JUSTICE BREYER: Suppose that the -- the
20 Department of the Army orders clothes for the soldiers
21 at a time when the department is a separate agency of
22 Government X in 1940. In 1950, this department is
23 bought by the Dior clothing company.

24 Now it's a private entity, and someone would
25 like to sue the department because they didn't pay the

1 bill. It is now a private entity. They are suing them
2 for what happened years ago when they were part of the
3 state.

4 Is it sovereign immunity, this statute that
5 blocks the suit, or some other principle?

6 MR. DVORETZKY: I think this statute would
7 block the suit --

8 JUSTICE BREYER: The statute would block the
9 suit. There is precedent with -- you know, famous
10 precedent with King Farouk, which says the opposite. It
11 says: You were king, you are not king now; therefore,
12 there may be a different principle, but we can sue you
13 now.

14 MR. DVORETZKY: Because the source of
15 immunity in that case was head of state immunity, which
16 is different from the state sovereign immunity.

17 JUSTICE BREYER: All right. And you are
18 saying if the state disappears, it no longer exists, so
19 you couldn't possibly be interfering. You couldn't
20 possibly be interfering in the workings of the state --

21 MR. DVORETZKY: If the state --

22 JUSTICE BREYER: -- you still can't sue
23 anybody who was part of the official operation --

24 MR. DVORETZKY: If the --

25 JUSTICE BREYER: -- even though there is no

1 present interference?

2 MR. DVORETZKY: If the state does not exist,
3 then I think you probably could sue the official --

4 JUSTICE BREYER: Why? Why? Because -- if
5 the state doesn't exist, why is there any stronger
6 reason than in the incident where the entity is no
7 longer part of the state?

8 MR. DVORETZKY: Because ultimately, what
9 foreign sovereign immunity and this statute are
10 concerned with is protecting a foreign state's act from
11 being judged in court.

12 In your example of the Department of the
13 Army which subsequently is bought by another company,
14 and the foreign state exists, the foreign state's acts
15 are still being judged regardless of the status of --

16 JUSTICE BREYER: Oh, no, you may have Act of
17 State Doctrine. At that point, the State Department
18 comes in and says: You can't maintain this suit because
19 of the Act of State Doctrine for the very reason you
20 have said.

21 MR. DVORETZKY: You may very well have the
22 Act of State Doctrine, but --

23 JUSTICE BREYER: And that's my question: Do
24 you need the Act of State Doctrine or does this statute
25 cover it which removes the discretion from the Executive

1 Branch to decide on a case-by-case basis?

2 MR. DVORETZKY: The Act of State Doctrine
3 might very well cover your hypothetical, but it is a
4 different doctrine that is not duplicative of immunity.
5 It serves different purposes. Immunity prevents the
6 suit from proceeding at the outset. It's an immunity
7 not only from liability, but an immunity from the
8 litigation process itself.

9 The Act of State Doctrine is a discretionary
10 doctrine, first of all. It's not automatic in the way
11 that immunity is; and second of all, it applies only on
12 the merits; and third, it serves different purposes
13 because it can be used even offensively and even in
14 cases where the state itself is not a party, simply to
15 establish the legality of a state's conduct within its
16 own territory. So the Act of State Doctrine is a
17 judge-made prudential doctrine that serves different
18 purposes than immunity.

19 In your hypothetical, Justice Breyer,
20 immunity would apply to the acts of the -- of the
21 Department of the Army because, regardless of when suit
22 is brought, those acts are still those of the state. In
23 the hypothetical where a state does not exist at all,
24 then 1604 would not come into play because there is no
25 foreign state to be held immune.

1 That's not this case, though.

2 JUSTICE SCALIA: I'd like to come back --
3 can I come back to the text? I think just for a moment
4 there we were on the text of this act --

5 (Laughter.)

6 JUSTICE SCALIA: -- that the suit is about.
7 And you said where -- where the immunity exists is at
8 604, which says a foreign state shall be immune, but
9 1603 defines a foreign state, which -- which says that
10 it includes an agency or instrumentality of a foreign
11 state.

12 And then it defines agency or
13 instrumentality in a way which, it seems to me, does not
14 include private individuals, but rather just artificial
15 legal persons.

16 MR. DVORETZKY: Section 1603(a) does not
17 define a foreign state exhaustively. It simply states
18 what a foreign state includes. We know that because if
19 you look at 1603(b), the very next subsection, Congress
20 said what an agency or instrumentality means.

21 So had it meant to define exhaustively what
22 a foreign state means, it could have said: A foreign
23 state means its political subdivisions, agencies, or
24 instrumentalities. The fact that Congress said that a
25 foreign state includes a political subdivision and its

1 agencies or instrumentalities suggests that it includes
2 more than just the enumerated amenities.

3 JUSTICE SCALIA: Well, I -- I would find it
4 extraordinary that it would go out of its way to say
5 that it includes the Department of Defense but would
6 leave up in the air whether it includes the secretary of
7 defense. I mean, I -- I -- it seems to me much more
8 likely that you would understand a foreign state to
9 include the departments of -- of that state than that
10 you would assume a foreign state to include individuals
11 who happen to be officials of the state.

12 MR. DVORETZKY: And the reason that I think
13 that Congress had to go out of its way to define what
14 constitutes an agency or instrumentality is that at the
15 time that the FSIA was passed, there was uncertainty
16 about whether certain governmental or corporate entities
17 were included. Maybe not the Department of Defense, but
18 whether certain commercial entities owned by the state
19 were entitled to the state's immunity.

20 JUSTICE SCALIA: And there was no
21 uncertainty about -- about individual?

22 MR. DVORETZKY: Precisely. There was no
23 uncertainty about whether individuals were included.
24 And so when Congress was simply continuing the common
25 law against which it passed this statute, it didn't need

1 to expressly say --

2 JUSTICE GINSBURG: How can you maintain that
3 position when the Department of State takes the position
4 that the Foreign Sovereign Immunities Act applies to a
5 state and agencies and instrumentalities, but it doesn't
6 apply to officers? If it was all that certain that they
7 didn't even have to put it in, then is -- the State
8 Department is being recalcitrant?

9 MR. DVORETZKY: The State Department asked
10 before the FSIA was passed to have executive discretion
11 take -- taken away with respect to immunity
12 determinations. Congress agreed with that judgment and
13 passed the FSIA, and now the Executive Branch has to be
14 held to that judgment that was made. As far --

15 JUSTICE ALITO: It's -- it's something of a
16 mystery that the FSIA doesn't say anything at all about
17 this form of immunity; doesn't codify it, doesn't
18 abrogate it, doesn't preserve the preexisting law. Do
19 you have an explanation for that?

20 MR. DVORETZKY: I don't, other than the
21 explanation that I gave Justice Scalia, which is: This
22 immunity was not in question at the time that the FSIA
23 was passed, and when Congress passes a statute in an
24 area where there has been preexisting common law, this
25 Court presumes that Congress meant to incorporate and

1 continue that common law and not abrogate it unless
2 Congress has spoken directly to the contrary.

3 JUSTICE ALITO: Was this act originally
4 drafted by the executive? Do you know?

5 MR. DVORETZKY: I'm not sure whether it was
6 drafted by the executive or whether it was drafted by
7 Congress, but it was passed at the request of the
8 Executive Branch because there was -- the State
9 Department was put in a position of being under
10 diplomatic pressure to grant immunity on -- on favored
11 status to certain nations who asked for it when they
12 wouldn't otherwise be entitled to it. They --

13 JUSTICE SOTOMAYOR: Is there any case by us
14 in which we -- prior to the FSIA, where we recognize
15 that an individual was immunized in the way that the
16 state was, if he was acting as an agent of the state?
17 Or were all of our cases having to do with other common
18 law doctrines?

19 MR. DVORETZKY: This Court's cases generally
20 had to do with other doctrines. The one possible
21 exception to that is Underhill, in which the Second
22 Circuit's decision decided the issue on foreign
23 sovereign immunity grounds and this Court affirmed.

24 It's unclear entirely whether this Court's
25 affirmance was on act of state or immunity grounds, but

1 also at the time that that decision was -- came down,
2 act of state and immunity doctrines were very much
3 intertwined.

4 There is no question, however, as the
5 government argues, that the common law before the FSIA
6 recognized that officials were entitled to immunity --
7 to the state's immunity for their official acts. The
8 second restatement, which was -- which was promulgated
9 in 1965 just before the FSIA, says that. The Second
10 Circuit's decision from 1971, just before the FSIA was
11 passed in Heaney, says that. And it --

12 JUSTICE SCALIA: Well, entitled to it, or --
13 or able to obtain a letter from the State Department
14 that would confer it upon them?

15 MR. DVORETZKY: No, Your Honor --

16 JUSTICE SCALIA: I mean, prior to the FSIA,
17 you -- you had to get it from the State Department,
18 didn't you? Even the state, for that matter?

19 MR. DVORETZKY: No. The -- the -- prior to
20 the FSIA, this was a common law doctrine that courts
21 would often apply without any input from the State
22 Department.

23 In the Heaney case, for example, the State
24 Department was asked to provide input and provided none,
25 and the Second Circuit nonetheless held that, using the

1 generally applicable common law principles, that the
2 official was entitled to immunity for the state's acts.

3 JUSTICE SCALIA: And what -- what if the
4 State Department came in and said no, no sovereign
5 immunity here, what would the court do? Would the court
6 be bound by that?

7 MR. DVORETZKY: Ordinarily, the court would
8 at least defer to that. Whether it would be
9 definitively bound by -- by that or not, it would at
10 least be entitled to deference.

11 JUSTICE SCALIA: So they didn't have to say
12 yes, but if they said no, that -- it -- pretty much
13 carried the day?

14 MR. DVORETZKY: That's probably right.
15 And -- and -- but the real issue that prompted the FSIA
16 was the --

17 JUSTICE SCALIA: Well, you -- you don't
18 assert that to be -- to be the law now, do you? Has --
19 has that been carried forward --

20 MR. DVORETZKY: No.

21 JUSTICE SCALIA: -- under the FSIA?

22 MR. DVORETZKY: No, because the whole
23 purpose of the FSIA -- again, at the Executive Branch's
24 request -- was to take the executive out of that process
25 and to --

1 JUSTICE KENNEDY: Well, and then I -- I had
2 thought -- again, correct me if I am wrong -- that
3 ultimately, in this case, whether or not within the
4 issues here present, ultimately you have two arguments.
5 One is that it's just implicit, inherent, necessary for
6 the Foreign Sovereign Immunities Act that agents be
7 covered; otherwise it won't work.

8 The other -- I take it you have a backup
9 position that even if that's wrong, that under generally
10 accepted principles of international law, that agents
11 still have immunity? Or am I wrong about that?

12 MR. DVORETZKY: Well --

13 JUSTICE KENNEDY: I had thought when I read
14 the House of Lords opinion in Jones and they talked
15 about the statute, that they took your position, this
16 first position, that the act just won't work unless
17 there is an agent -- immunity for the agent. But I take
18 it that even if we reject that position, you still have
19 a fallback position in the -- in the -- in further
20 proceedings on remand?

21 MR. DVORETZKY: Our position is that the
22 FSIA incorporates the common law and that Mr. Samantar
23 is entitled to immunity under the statute. If you
24 disagree with us on that, we would certainly wish to
25 assert common law defenses on remand, but we believe

1 that the statute resolves the question.

2 If the Court has no further questions, I
3 would like to reserve my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Ms. Millett.

6 ORAL ARGUMENT OF PATRICIA A. MILLETT

7 ON BEHALF OF THE RESPONDENTS

8 MS. MILLETT: Mr. Chief Justice, and may it
9 please the Court:

10 Justice Kennedy, the hobby horse that you
11 were talking about actually goes right -- right to the
12 heart of this case, and that is that the Torture Victim
13 Protection Act, in which Congress did create a cause of
14 action was -- that cause of action was created for -- to
15 impose a liability, personal liability, for acts that
16 were done with "actual or apparent," but included with
17 actual, authority of the foreign state.

18 Now, if Congress believes that the FSIA
19 immunized everyone who undertook acts under color of
20 law, or at a minimum with actual authority of the
21 foreign state, that was a very empty statute.

22 Now, part of the -- part of the --

23 JUSTICE SCALIA: Ms. Millett, I think it's a
24 pretty empty statute as well to interpret the Foreign
25 Sovereign Immunities Act to immunize the Department Of

1 Defense, but not the secretary of defense. I mean, that
2 seems very strange.

3 MS. MILLETT: It doesn't seem strange, for
4 precisely the reason that we have still with us today a
5 former minister of defense when we have no Ministry of
6 Defense and no Government of Somalia whatsoever. The
7 reason is that individuals come and go. Individuals
8 engage in acts that are not acts of the state --

9 CHIEF JUSTICE ROBERTS: But the state --
10 there is -- the distinction strikes me as artificial as
11 well. We are talking about insulating state acts. The
12 only way a state can act is through people. And you are
13 saying: Well, the state is insulated, but the people
14 who do the acts for the state are not. I don't see how
15 that can -- can work.

16 MS. MILLETT: The only question here is
17 whether the Foreign Sovereign Immunities Act is the
18 source of that insulation. And the very
19 difficulty with --

20 CHIEF JUSTICE ROBERTS: Oh, well, then --
21 but the whole point of the act was to codify what was
22 there before, and -- and it seems odd to say: Well,
23 they were codifying the immunity of the state, but not
24 the immunity of the only way a state can act, which is
25 through individuals.

1 MS. MILLETT: Well, first of all, states do
2 corporate acts that are greater than the -- the whole is
3 much greater than the parts here. And the issue in this
4 case is whether the part can claim the immunity of the
5 whole, and that is a very different thing.

6 The -- the individual -- individuals may
7 act. They may act without authority; they may act
8 contrary to authority. And the problem with the FSIA,
9 which is the issue here, is there is no mechanism in it
10 for addressing, for example, whether this was
11 authorized.

12 JUSTICE SCALIA: The -- the Ministry of
13 Defense is not the whole, either. I mean, you -- you
14 acknowledge that -- that each individual piece of a
15 foreign sovereign acquires the immunity, but somehow
16 not -- not the principal officers of -- of the sovereign
17 entity. It seems very strange. I mean, I guess -- I
18 guess you could write it that way, but I don't know why
19 anybody would want to write it that way.

20 MS. MILLETT: Well, Justice Scalia, if
21 you're going to write a statute that addresses
22 individual immunities -- in particular, what this case
23 is about: Personal immunity for personal liability --
24 then those statutes look very different.

25 What is the first thing you are going to

1 want? You are going to want some way to decide what is
2 official capacity, or what is on behalf of a state, and
3 you are going to want a mechanism for the foreign state,
4 or at least the State Department, to have input on that.
5 There is nothing in the Foreign Sovereign Immunities Act
6 that addresses that. You're going to --

7 JUSTICE BREYER: Well, what is your --

8 MS. MILLETT: -- want to identify --

9 JUSTICE BREYER: Right. The question I
10 think, as I understand it, which is certainly why it is
11 bothering me, is don't think of this case. Think of the
12 set of cases where it's clear that the plaintiff is
13 suing an active state. He is suing France, or he is
14 suing England, or he is suing an active state for an
15 official act. And the judge says: I have read the
16 Foreign Sovereign Immunities Act; dismissed. "Judge,
17 let me amend this" -- and all he does is, he fills in
18 the names of the individuals, because there were some
19 individuals who did the act.

20 Now, does he suddenly fall outside the
21 Foreign Sovereign Immunities Act just because he listed
22 the names of the people who did it, and everything else
23 was the same?

24 MS. MILLETT: Yes, he does, because --

25 JUSTICE BREYER: Well, then, this act does

1 nothing whatsoever.

2 MS. MILLETT: No, that's -- that's not true.
3 That's not true, Justice Breyer. This act is designed
4 to protect the state from being sued.

5 JUSTICE BREYER: Well, it doesn't protect
6 the state, because all I did there is I made my
7 complaint the same, relief was the same, everything was
8 the same. I happened to go to the internet to find out,
9 who were the human beings working for the state who did
10 the thing I'm complaining did? And all I did was fill
11 their names in, in the complaint.

12 And I cannot imagine any complaint that
13 isn't open to that, because a -- a state can only act
14 through an individual.

15 MS. MILLETT: Justice Breyer, there -- the
16 question is whether Congress, in the FSIA, would have
17 thought that if they sued against the state.

18 Now, there may be many reasons that they
19 would have. If they thought in the restatements'
20 words -- which are not just if you are doing an official
21 act. If you are doing an official act, and the exercise
22 of jurisdiction would have the effect of enforcing a
23 rule of law against the state, then you get immunized.

24 JUSTICE BREYER: So what -- you are saying
25 this act is only good as against a bad lawyer? Because

1 any good lawyer would simply fill in the right names.

2 MS. MILLETT: I think --

3 JUSTICE BREYER: There is never a case where
4 this act would give immunity if the plaintiff has a good
5 lawyer. Is that what you are saying?

6 JUSTICE GINSBURG: Ms. Millett --

7 MS. MILLETT: This act is good against --

8 JUSTICE GINSBURG: -- I thought your point
9 is, if the relief is against the state, it doesn't
10 matter who you name as the plaintiff.

11 MS. MILLETT: That --

12 JUSTICE GINSBURG: Whether it's injunctive
13 relief or money relief, if the relief is against the
14 state, obviously, you can't dodge it by naming the
15 officer.

16 MS. MILLETT: That's precisely right. That
17 is the second half of the --

18 JUSTICE BREYER: Oh. Oh, that's a different
19 answer.

20 MS. MILLETT: Well, that's what I was trying
21 to say. The second half of the restatement says you
22 have to be enforcing a rule of law against --

23 JUSTICE BREYER: Fine. If you are going to
24 give that answer, which I thought was what you would
25 give --

1 MS. MILLETT: That's what I was trying to
2 give.

3 (Laughter.)

4 JUSTICE BREYER: -- then I can ask my
5 question. Sometimes the individual, in the first set of
6 cases that Justice Ginsburg mentioned, does count as the
7 state. Sometimes the individual does not count as the
8 state. And the trouble I'm having in this case is to
9 work out the principle of when that individual would
10 fall within the FSIA -- as you now, via
11 Justice Ginsburg, have conceded, sometimes it does --
12 and when it doesn't.

13 And I've tried to work with the idea of
14 relief, or maybe the nature of the cause of action, or
15 maybe the time that the suit is brought, such as a time
16 afterwards. I'm not an expert. You are more of an
17 expert than I. What are the principles that determine
18 when?

19 MS. MILLETT: Well, there's -- there's two
20 levels here.

21 First of all, we look -- and this is --
22 Congress, presumably, was drawing on a well-established
23 domestic law analogies here. And they may not be
24 100 percent controlling here, but we have
25 well-established ways of understanding whether a -- an

1 action is against an official in -- in their official
2 capacity. We look at the form of relief, the nature of
3 the claim. I do think we need to be careful here --

4 JUSTICE ALITO: What is here to suggest that
5 Congress was looking to domestic analogies? This has
6 nothing -- the immunity of officials under domestic law
7 doesn't bear very much resemblance to the immunities
8 that are available to foreign officials, does it?

9 MS. MILLETT: Well, this is a domestic
10 statute, and for Congress -- for purposes of Congress
11 deciding whether a lawsuit is a suit against a sovereign
12 or not against a sovereign, then that is obviously a
13 relevant framework.

14 And we know from two things -- the Torture
15 Victim Protection Act, that they look at that framework.
16 But also embedded in the FSIA itself, in the Foreign
17 Sovereign Immunities Act itself, is that same
18 distinction between holding people personally liable and
19 holding the state liable.

20 In 1605A, the terrorist state exception, on
21 15a to 17a of the addendum to our brief, they create a
22 cause of action: One against the state and one against
23 the individual officials. Now, the one against the
24 individual officials is a recognition that individual
25 officials can have personal capacity liability for

1 damages, consistent with the Foreign Sovereign
2 Immunities Act. Otherwise, if -- if -- under
3 Petitioner's theory, every lawsuit against an
4 individual, in the language there, is acting under color
5 of office or employment. If every suit against someone
6 under color of office or employment morphs into a suit
7 against the state, there is no cause of action to create
8 against the individual.

9 CHIEF JUSTICE ROBERTS: Ms. Millett, I
10 thought --

11 MS. MILLETT: They understood it was
12 individual liability.

13 CHIEF JUSTICE ROBERTS: -- I thought the
14 whole point of the FSIA was to get the Executive Branch
15 out of the business of sending letters to the court
16 every time a state was sued. The government requested
17 it for that purpose. Now they are just back into it
18 again if you say: Well, you can just sue the
19 individuals.

20 And the government's position in this case
21 confirms that. They're -- they tell us the way you
22 should proceed is to look to the Executive Branch and
23 basically, we will send you a letter and let you know.
24 So it seems to me the whole reason you have the FSIA is
25 undermined by the position you are taking today.

1 MS. MILLETT: No, I think it's because the
2 inquiries are very different, as this case illustrates.
3 And that is -- first of all, the point of the FSIA, as
4 Section 1602 says, is to codify -- as this Court's cases
5 have said, was to -- largely to codify the restrictive
6 theory of sovereign immunity which did not apply to
7 individual immunity. It did not apply to the head of
8 state. The head of state was still immune for
9 commercial acts while a sitting head of state.

10 So if that was codified, that was a dramatic
11 change done silently in the FSIA. The reason Congress
12 would want to retain Executive Branch role here is
13 because the inquiries are different, and the first one is
14 the most elemental one in Petitioner's case and that is
15 the assertion that: I was acting in my official
16 capacity. Who decides? How do we decide? Which
17 agents? For which actions? For how long? What level
18 of immunity?

19 If the FSIA eliminated the head of state's
20 normal absolute immunity while sitting from all actions,
21 commercial or not, that's a dramatic revolution. We can
22 now sue sitting prime ministers and presidents and
23 distract them from their duties.

24 If the Foreign Sovereign Immunities Act made
25 any officials' official act an act of the state -- and

1 remember, they are now every level of the foreign
2 government down to the mayor's office, and corporate
3 officials, too, so we've now eliminated the longstanding
4 principle in corporate law -- corporations also only act
5 through individuals -- that corporate liability and
6 individual liability go hand-in-hand.

7 The -- the FSIA did not uproot all that and
8 it provides no mechanisms. That's why we need to return
9 to the common law immunity. Now, what happens when you
10 have a case that, in effect, is seeking relief against
11 the state --

12 JUSTICE SCALIA: Excuse me. The -- the
13 mechanism it provides is judicial determination of these
14 questions that -- that you say have to be determined;
15 whether he's acting within the scope of authority and
16 all that stuff. Isn't that what it did? Took it away
17 from the executive, gave it to the --

18 MS. MILLETT: When you were interpreting the
19 language in the FSIA, like "under color of law" --
20 "under color of office," that is undoubtedly a job for
21 the court. "Official capacity" appears nowhere in the
22 FSIA. Deciding which agents will be agents of the state
23 is nowhere in the FSIA.

24 One court has applied this agency -- agents
25 principle to say that when we hire an independent

1 contractor, in the -- the United States independent
2 contractor, that gets the immunity of the foreign
3 sovereign state.

4 CHIEF JUSTICE ROBERTS: Courts decide this
5 sort of question all the time, whether you are talking
6 about principles of domestic immunity or even corporate
7 liability: Is the employee on a frolic or is it a
8 detour? Determining when an individual is acting for
9 another entity as opposed to on -- on his own business,
10 that's a very common inquiry.

11 MS. MILLETT: Not in this area, where those
12 decisions have foreign relations implications. This
13 Court has done the opposite. And it has -- it has
14 waited for the political branches to lead and it has
15 followed. Because the decision whether we are
16 displacing head of state immunity and now we are going
17 to have commercial immunity --

18 JUSTICE BREYER: Then that -- I mean, I'm
19 sort of there. You may agree with this, that if you
20 have an individual -- and if what's being charged here
21 is he is, in fact, now acting as secretary of defense,
22 and this action is an action he took in his official
23 capacity, that's it. Forget it. This act covers it.

24 But where you are claiming it's not and he's
25 not now a member, the reason for the act disappears and

1 you go back to the Act of State Doctrine.

2 MS. MILLETT: Justice Breyer, the -- I don't
3 think -- I think -- and this may seem a little formless,
4 but I simply think it's right, because you are dealing
5 with statutory text here.

6 It's not so much that the defense minister
7 himself becomes the state; it's that the court looking
8 at that action goes: This is really an action against
9 the state. The state is a necessary party under
10 Pimentel and must be here. You, individual, actually
11 have a common law immunity, an absolute immunity, when
12 you are under the restatement sued for official acts.
13 And the effect of exercising jurisdiction would be to
14 enforce a rule of law against the state.

15 When you have those two things together,
16 both of them, you are entitled to immunity because this
17 is an action against the state. The state's a necessary
18 party. Under Republic of Philippines v. Pimentel, they
19 must be joined, and then we'll -- then we'll look at the
20 FSIA and decide whether they can be joined or not.
21 That's the way it works.

22 It's not that individuals -- and this is the
23 problem -- are sort of popping in and out all throughout
24 the FSIA. If it were, we need mechanisms that we don't
25 have here to deal with the very sensitive decisions of:

1 Which individuals. Well, how will we say you are the
2 agent? If the individual can show up and say: I was
3 working for the state; I was doing torture; we loved
4 torture; that was our policy, you can imagine many a
5 government, if notified, if there is a mechanism for
6 them to come in would say: Hang on, that was not our
7 policy. But there is no mechanism under his theory.

8 What else happens? I don't even understand,
9 under this theory, what happens. Normally, what happens
10 in these official capacity suits that we are familiar
11 with is if it really is an official capacity, then we --
12 we substitute the state, relief of one against the
13 state. But there is no mechanism here for --

14 CHIEF JUSTICE ROBERTS: Your friend said it
15 happens all the time. He cited the example of the
16 Israeli embassy is always writing letters or showing up
17 in court when their agents are -- are sued.

18 MS. MILLETT: That may be. Nobody showed up
19 here until we got to this Court. There was no Somali
20 government to show up to say whether this was official
21 or not and the State Department didn't show up for two
22 years. What is a court supposed to do?

23 Well, it's not supposed to do what it did
24 here and declare that it is essentially recognizing the
25 transitional federal government as the government of

1 Somalia because it didn't know what else to do. That
2 can't be right. And we need to keep in mind the --
3 there is no mechanism in the text of the FSIA. This
4 Court will be engaged in an expedition of constructing
5 and reconstructing the FSIA. If you are going to turn
6 it into either a Westfall substitution act with no
7 language here, or you have to turn it into a personal
8 immunity for personal liability act.

9 That is not the text. Sovereign immunity
10 has never been a personal liability from personal --
11 personal immunity from personal liability statute.

12 JUSTICE ALITO: Well, do you agree with the
13 Solicitor General's position about the preservation of
14 the immunities that existed before?

15 MS. MILLETT: Yes, as to -- as to
16 individualized, the specialized immunities, I do -- we
17 do agree. Now, whether we -- we don't agree, I think --
18 we may not agree 100 percent on what the scope or
19 content of that immunity is. We certainly agree that
20 head of state immunity was preserved, so we can't sue
21 the head of state at all.

22 JUSTICE ALITO: No, but whatever immunity
23 existed previously for an official or former official
24 was not abrogated by the FSIA. What's to say it just
25 doesn't address that subject at all?

1 MS. MILLETT: Our position is that the FSIA
2 does not address that. Our view of what the common law
3 did beforehand was it passed most of this into the Act
4 of State Doctrine. That is exactly what happened in
5 Underhill v. Hernandez, that when you start getting to
6 lower-level officials who are not heads of state, who
7 are not diplomatically protected, consular protected,
8 mission on -- have mission immunity, that that -- a lot
9 of that worked through Act of State Doctrine, and --

10 JUSTICE ALITO: There's none of -- there was
11 no immunity for someone who is the equivalent of a -- of
12 a cabinet officer previously?

13 MS. MILLETT: There -- there --

14 JUSTICE ALITO: Minister of this or that in
15 another government, they have no official immunity?

16 MS. MILLETT: And much is to be debated on
17 remand. That issue is clearly not before this Court.
18 As we look at the cases and the authorities, in fact,
19 what you have are different things coming together, and
20 it can be -- a lot of times it was Act of State
21 Doctrines that were going on there. But the notion that
22 individual foreign officials are not personally liable
23 for actions is just wrong, and that is because -- or
24 cannot be.

25 JUSTICE GINSBURG: Do you -- do you agree

1 with the government that it's the government's advice --
2 the government said -- in the old days, the tape letters
3 went out in all these cases. Now, they no longer go out
4 when we are dealing with a state itself or a state
5 agency, but we still -- the executive -- basically, as I
6 read the government's position, the government is
7 saying: The Executive Branch decides. We tell the
8 Court. And if we don't tell the Court that this person
9 can be sued, then the person can't be sued.

10 Are you in sync with the government in that
11 we are now back to the executive -- essentially, the
12 executive decides, not the Court?

13 MS. MILLETT: I don't think that is the
14 exclusive one, and I think, as this Court explained even
15 in Altmann, deference given -- respectful deference is
16 always going to be given when the Executive Branch
17 weighs in, because these are foreign -- cases that have
18 foreign policy implications.

19 I don't think it's a rubber-stamp on the
20 part of the courts. As this Court said in Altmann, it
21 depends on whether they are speaking with particularized
22 specialty. If they come in and say: Mr. Samantar was
23 the head of state, we are done. I don't think
24 there's -- would like to think of something; I can't
25 think of anything that would save us from that. If they

1 say who a head of state is, then that, I think, has
2 largely been treated as binding on the Court.

3 If they say someone -- they've determine
4 someone was acting in an official capacity, that is
5 going to receive --- either what are communicated from a
6 foreign state or based on principles that they have --
7 that is going to carry weight, but it's not going to
8 necessarily mean you automatically dismiss when you
9 have -- you could have times where -- in the Executive
10 Branch that anyone acting under color of law should be
11 immunized. Then you're going to have the Executive
12 Branch and the TVPA at war.

13 JUSTICE SCALIA: I gather the State
14 department asserts the right to say: Yes, he was acting
15 in a -- in an official capacity, but sock it to him.

16 MS. MILLETT: Yes.

17 JUSTICE SCALIA: I mean, the -- the State
18 Department wants to be able to decide whether
19 individuals will be held liable, whether they were
20 acting in an official capacity or not; isn't that it?

21 MS. MILLETT: Well, they -- that -- I will
22 let them speak for their own position. I think
23 certainly -- certainly there are a variety of doctrines,
24 a variety of hurdles any case has to get through. And
25 it's not just the executives' views on a case. There is

1 things like exhaustion. There's necessary party
2 inquiries. There's the Act of State Doctrine. There is
3 substantive limits on what one can sue for.

4 You know, the Torture Victim Protection Act
5 is Congress's judgment that individuals who do this,
6 consistent with international law, whatever else,
7 individuals who engage in torture and extrajudicial
8 killing are held personally liable in Congress's views
9 and in the views of international law. And the Foreign
10 Sovereign Immunities Act doesn't stop that.

11 And what is critical, again, is the language
12 is missing --

13 JUSTICE SCALIA: I must say that I find it
14 much more acceptable to have the State Department say
15 that a particular foreign country should be let off the
16 hook, which is what they used to do with the Tate
17 letters, than I do to leave it up to the State
18 Department whether -- whether an individual human being
19 shall be -- shall be punished or not. I -- I somehow
20 find that less within the realm of the -- of the foreign
21 affairs power of the State Department.

22 JUSTICE KENNEDY: And your red light has
23 gone off. I could just add -- make an addition to that
24 same question. I would agree that the State Department
25 might have some expertise in telling us what the facts

1 were: Who was the government, who was -- who was in
2 office at the time, what the policies were.

3 But it's just not clear to me what body of
4 principles the State Department looks to, to make this
5 determination that, as Justice Scalia said, Smith is
6 immune and Jones isn't.

7 MS. MILLETT: I think --

8 CHIEF JUSTICE ROBERTS: Please.

9 MS. MILLETT: May I -- the -- first of all,
10 whether one thinks it's the right rule or not, the FSIA
11 doesn't tell us any way of answering who was in official
12 capacity and getting input, at a minimum, from the
13 foreign government whose mantle this individual is
14 trying to wrap themselves in. So the FSIA is not the
15 source.

16 The executive viewpoint is not -- in our
17 view, is not the sole source. And there are -- there
18 are a number of other doctrines, whether it's Act of
19 State Doctrine, whether it is exhaustion principles,
20 whether it's the necessary party inquiries, whether it's
21 substantive limits on, you know, law of nations
22 requirements for the Alien Tort Statute or the Torture
23 Victim Protection Act. There is forum non conveniens.
24 There are a battery of doctrines that come together to
25 very narrowly limit these actions.

1 And what the State Department looks for
2 is -- what it has said is that it has -- it has a
3 pattern of decision-making, factors it lays out in its
4 brief that I think it finds, it says it finds,
5 influential in the process. But in -- forgive me for --

6 CHIEF JUSTICE ROBERTS: Finish your
7 sentence.

8 MS. MILLETT: But in any given case, the
9 role of the Executive Branch is going to have more or
10 less deference based on whether it is speaking something
11 within its traditional expertise: Are you a head of
12 state? Were you a diplomat?

13 But when it comes to war -- and I -- I'm not
14 saying it would, but if it were to come to war with the
15 very elements of the Torture Victim Protection Act and
16 say that torture by an individual can be immunized just
17 because it was done under color of law, then I think the
18 Court has a very difficult concern that was flagged in
19 Altmann to resolve, and I think we might draw a
20 different -- we would definitely come to a different
21 answer than the Executive Branch in that situation.

22 CHIEF JUSTICE ROBERTS: You made that a long
23 sentence.

24 (Laughter.)

25 MR. DVORETZKY: I'm sorry. I apologize.

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
2 Mr. Kneedler.

3 ORAL ARGUMENT OF EDWIN S. KNEEDLER
4 FOR UNITED STATES, AS AMICUS CURIAE,
5 SUPPORTING RESPONDENTS

6 MR. KNEEDLER: Mr. Chief Justice, and may it
7 please the Court:

8 The text -- the context, the purposes and
9 legislative history of the Foreign Sovereign Immunities
10 Act demonstrate that it was not intended to apply to the
11 preexisting common law doctrine of official immunity,
12 but rather --

13 JUSTICE SOTOMAYOR: Mr. Kneedler, could
14 you -- I'm sure one of my colleagues will get you
15 back -- could you address the practical implications of
16 your position? And by that I mean: It took two years
17 for the State to -- for the government to respond to the
18 district court in this case. Tell us why your reading
19 of the statute would not grind the courts to a halt.

20 What happens when Justice Breyer's situation
21 arises? Someone takes a complaint against the state and
22 just substitutes the names of the persons. What -- why
23 wouldn't the courts come to a grinding halt?

24 MR. KNEEDLER: Well, let me answer that in
25 two ways.

1 First, there is -- there is a very practical
2 distinction between suing the state and suing the
3 individual. The Foreign Sovereign Immunities Act is not
4 just about immunity; it's about the subject matter of
5 the courts. If a foreign sovereign is found to be
6 immune, the court has no jurisdiction over the case. So
7 to say that the individual is -- is governed by the FSIA
8 means that it would be a threshold subject matter
9 jurisdictional inquiry in every case. So in terms of
10 judicial administration, that is a problem.

11 It is also a problem, as a practical matter,
12 to apply the FSIA's very reticulated standards that were
13 carefully negotiated between the Executive Branch and
14 Congress when they knew what they were dealing with.
15 They were dealing with the immunity of states, and
16 the -- and the principles of states. And this is
17 reflected, as Ms. Millett said, in Section 1602. That's
18 the business that Congress wanted to get -- Congress and
19 the executive -- wanted the executive to be out of,
20 which was the immunity of foreign state --

21 JUSTICE BREYER: But all you have to do is
22 write a different word in. Now, that's the question --

23 MR. KNEEDLER: Okay. Right and --

24 JUSTICE BREYER: -- and -- and Ms. Millett
25 sort of backed off that. And that -- and if -- what I'm

1 seeing here is two extreme positions.

2 You are saying: Never, no matter what, can
3 you simply write the name "Joe Smith" under the word
4 "Niger," okay? Can't do it. Even though every act --
5 no matter what, you write that human name in, and you --
6 this statute doesn't apply. To me, that means it never
7 applies. All right?

8 The opposite would be that never, under any
9 circumstances, can you sue an individual for a -- for
10 a -- for an official act. That seems the opposite. I
11 should think sometimes you certainly could. Maybe after
12 he has left the government. But I'm looking for the
13 principle, if I'm right, that would divide the two.

14 You want to stick to your extreme position?
15 Never, just write the thing in --

16 MR. KNEEDLER: I don't -- I don't regard the
17 position as extreme at all. It's exactly --

18 JUSTICE BREYER: Do you want to stick to
19 that position: That all the plaintiff has to do is
20 rewrite the name?

21 MR. KNEEDLER: Because this is -- because
22 this is a statute that invaded the common law in the --
23 the background, which is the common law in which the
24 executive made the determinations for both foreign
25 sovereigns and individual officials. This -- and in

1 addition, it -- it affected the relationship of the
2 political branches. It had been a power of the
3 Executive Branch for foreign sovereigns. The Foreign
4 Sovereign Immunities Act took that away with the
5 agreement of the political branches.

6 There is none of -- there is no indication
7 whatsoever that Congress addressed common law
8 immunities, and there is a good reason. And that is
9 that there -- there are a lot of diplomatic
10 sensitivities about whether immunity should be
11 recognized in a particular case or not.

12 And with respect to foreign sovereigns, the
13 political branches address those in very precise ways.
14 There is nothing in the Foreign Sovereign Immunities Act
15 to take into account the different sensitivities that
16 might well arise with respect to foreign sovereign --

17 JUSTICE BREYER: That's an excellent reason.
18 Can you give me one single example ever of a complaint
19 that would ever be dismissed under this statute --

20 MR. KNEEDLER: It would -- it would --

21 JUSTICE BREYER: -- if -- if my lawyer is
22 clever enough to look up who the individuals were and
23 substitute their names?

24 MR. KNEEDLER: And -- and it would -- here's
25 one example in which it would work. If the relief was

1 going to run against the state, if there was an
2 injunction to take money out of the state treasury or to
3 convey land, for example, that would, in substance, be
4 an action against the state, just like under Ex parte
5 Young. If you tried to bring an injunction against a
6 state officer to make them pay money out of the state
7 treasury, you couldn't do that.

8 It's not because the officer being sued is
9 the state. It's that the state is a necessary party to
10 that lawsuit. The state not being joined, the suit
11 against the individual would have to be dismissed.

12 That's --

13 JUSTICE ALITO: Do you think as a practical
14 matter, there is a -- I'm sorry. Do you think as
15 practical matter there is a difference between a
16 \$10 million judgment against a state for something that
17 is official state policy in relation to defense, and a
18 \$10 million judgment against the current foreign defense
19 minister of that state for exactly the same policy?

20 MR. KNEEDLER: There -- there -- there is a
21 difference in the operation of the suit. We are not
22 saying that such an official should not be immune. What
23 we are saying is that the immunity derives from the
24 common law immunity. There is a presumption against a
25 statute invading the common law, and particularly a

1 common law that was primarily shaped by the executive.

2 There should be a strong presumption against
3 taking that flexibility away in the absence of a clear
4 statement in the statute. And as -- and -- if the -- if
5 a -- if a suit should go to judgment like that, perhaps
6 the state would indemnify the person. But we are not
7 saying that that person is not immune. A question that
8 was asked --

9 JUSTICE SOTOMAYOR: Can we go back to the
10 practical --

11 MR. KNEEDLER: Yes. And -- and -- and I --
12 I understand the practical problem that the district
13 court faced and the district court was very patient.

14 I think it's important to appreciate,
15 though, the -- the -- this case really illustrates the
16 sensitivities of -- of foreign official immunity. This
17 is -- this is a claim of foreign official immunity by a
18 former official of a collapsed state in a -- in Somalia,
19 as some of the briefs point out, there has not been a
20 functioning central government since 1991. There are a
21 number of factions. On the ground in Somalia, the
22 absence of a central government has led to foreign
23 governments coming in and exercising influence, to
24 domestic terrorist groups and to piracy off the -- off
25 the coast of Somalia.

1 The request to the United States, to the
2 State Department for its views arose in that context.
3 This very case at this moment arises in a context where
4 things are fluid, and -- and there are circumstances in
5 which the Executive Branch or sometimes even the
6 Court --

7 JUSTICE SCALIA: That's -- that's very nice.
8 A few years ago, a Spanish magistrate allowed a lawsuit
9 to proceed as I recall against our secretary of defense.
10 And what you say is that that's perfectly okay. It's up
11 to the Spanish government to assert that that suit
12 should not proceed, and if it doesn't, it's perfectly
13 okay?

14 MR. KNEEDLER: It -- such a suit would not
15 be perfectly okay, because, I mean, it would depend on
16 the circumstances. But as was pointed out with respect
17 to the suits against the two Israeli defense ministers,
18 in that circumstance the Israeli Government said,
19 listen, these two officers were acting on behalf of --
20 of the government when they carried --that's the Dichter
21 case and the -- and the case this Court had from the
22 Second Circuit last term.

23 CHIEF JUSTICE ROBERTS: I wonder -- I wonder
24 if the example you give or the point you make, that
25 there is no functioning Somali Government, doesn't cut

1 the other way.

2 Let's assume you have somebody who was
3 acting in an official capacity, doing what his job
4 required, whether you like it or not, and then there is
5 a change in the Somali Government; and the United States
6 likes the new Somali government. That guy is kind of
7 put out to -- to dry because he can't get anybody to say
8 what he maintains is true, which was I was acting
9 pursuant to an official policy of the government.

10 MR. KNEEDLER: Well --

11 CHIEF JUSTICE ROBERTS: And the United
12 States is not going to give him the letter he needs
13 because they like the new Somali Government.

14 MR. KNEEDLER: Well, under international law
15 the -- the official immunity exists for the benefit of
16 the state, not for the individual. The state can waive
17 that immunity and the state can determine whether, as
18 happened in the Philippines case, that the -- that the
19 actions being complained of were not within the official
20 activity.

21 JUSTICE KENNEDY: But I take it your answer
22 to Justice Scalia with reference to the indictment
23 against the secretary of defense, is that that's not
24 covered by the Foreign Sovereign Immunities Act. And if
25 a state interprets international law to allow the suit,

1 then it goes forward.

2 MR. KNEEDLER: No. If -- if -- if one of
3 our officials was sued in a foreign court, then we would
4 expect the dynamic to play out as -- as I have
5 described, where the United States would take the
6 position, presumably that what was being done was within
7 the scope of official conduct after investigation and
8 assert immunity, and expect that to be respected. My
9 only point is --

10 JUSTICE KENNEDY: But that just goes back to
11 the Tate letter era, where we wait to get a-- an e-mail
12 from the State Department to tell us what to do.

13 MR. KNEEDLER: And the --

14 JUSTICE KENNEDY: I thought that was the
15 whole purpose of the Federal -- of Foreign Sovereign
16 Immunities Act.

17 MR. KNEEDLER: It -- it was the purpose with
18 respect to foreign sovereigns, but there were good
19 reasons why the Court did that, because -- precisely
20 because immunity questions, as I've said this case
21 illustrates, to -- to recognize that an immunity or not
22 to recognize would -- might favor one faction or another
23 in the ongoing dispute in -- in Somalia. And so the --

24 JUSTICE GINSBURG: Mr. Kneedler -- this
25 is -- it's now many years, and we still don't -- the

1 State Department has said in effect, "We decide. " Can
2 you tell the Court, is this defendant amenable to suit
3 or is there an immunity that would cover him?

4 MR. KNEEDLER: We are not addressing that
5 here. The court of appeals remanded for consideration
6 of common law head of state and other immunities.
7 Suggestions of immunity traditionally have been tendered
8 to the district court. And the legislative history of
9 the Foreign Sovereign Immunities Act shows, clearly
10 says, that the official type immunities -- using the
11 word official immunity, head of state immunity,
12 diplomatic immunity, consular immunity -- those things
13 are not addressed by the Foreign Sovereign Immunities
14 Act.

15 Section -- section 1602 shows that Congress
16 wanted to take the executive away because the government
17 was being pressured by foreign governments with respect
18 to the restrictive theory with respect to commercial
19 activities. And that's where the pressure was being
20 applied and the Executive Branch wanted to get out of
21 that business, and agreed to; if you read 1602, it
22 specifically refers to commercial activities.

23 There was no such conscious abrogation of
24 the executive's critical role to make immunity
25 determinations on behalf of officials in the legislative

1 history; and this Court should not strain to read the
2 rigid provisions of the Foreign Sovereign Immunities
3 Act, which were just not tailored to the immunities.
4 The Underhill decision of this Court specifically said
5 officials have immunity for their official acts
6 exercising governmental authority.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Kneedler.

9 JUSTICE SCALIA: There were a lot of long
10 sentences in that.

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky,
13 because of that, we will give you five minutes.

14 REBUTTAL ARGUMENT OF SHAY DVORETZKY
15 ON BEHALF OF THE PETITIONER

16 MR. DVORETZKY: I will try to keep it short.

17 I would like to make three points. First of
18 all, when a suit is brought against a -- an official or
19 former official, the only question that a court will
20 need to answer under the FSIA is whether the acts
21 challenged are those of the state. That's a
22 determination that the courts can readily make and are
23 accustomed to making. By contrast --

24 JUSTICE SOTOMAYOR: Wouldn't that be the
25 same question that you would ask invoking a common law

1 protection like head of state or act of state? Isn't it
2 -- whether it's under the FSIA or under a common law
3 theory -- the identical question?

4 MR. DVORETZKY: It is the same inquiry that
5 you would have asked under the common law in inquiring
6 whether the state's immunity extends to its officials.
7 What the FSIA did was it codified that rule and it took
8 away Executive Branch discretion to deviate from it. If
9 you look at the --

10 JUSTICE SOTOMAYOR: Isn't that the very
11 point? If the inquiry is the same under the FSIA and
12 under the common law, and we are unsure what Congress
13 intended in the FSIA, because it certainly doesn't
14 explicitly say it covers individual acts, shouldn't we
15 defer to the executive's decisionmaking in what is --
16 has been, for centuries now, within its jurisdiction?
17 Why should we take that power away when the inquiry
18 would be the same under either doctrine?

19 MR. DVORETZKY: First of all as we argue in
20 our brief this has not historically been a longstanding
21 power of the executive in the way that the immunity
22 itself has been recognized under the common law. And
23 what Congress did in 1976 was it codified the substance
24 of the common law but took away that procedure. And
25 this case demonstrates exactly why it's necessary to

1 extend the FSIA to foreign officials in order to -- in
2 order to make the FSIA mean anything at all, and in
3 order to ensure the uniformity and predictability that
4 Congress intended through the statute.

5 If you look at the factors that the
6 Solicitor General proposes to take into account in this
7 case -- I am looking at page 7 of the Solicitor
8 General's brief -- Petitioner's residence in the United
9 States rather than Somalia, the nature of the acts
10 alleged, the invocation of a particular statutory right,
11 the -- the state of the government in Somalia -- these
12 are factors that have no basis in the common law that
13 the FSIA codified. No case has ever held that a foreign
14 official or former official loses immunity for official
15 acts on the basis of these sorts of factors.
16 Moreover --

17 JUSTICE BREYER: Why can't you say that if
18 the person, the individual you are suing, is a member of
19 a foreign state, is engaged in the kind of activity that
20 you are complaining about, is subject to the orders of
21 the foreign state, and the relief would affect the
22 foreign state, you are suing the foreign state?

23 But where he was a member of the foreign
24 state, and you want money from him, even though what he
25 did in the past was an act of a foreign state, this

1 lawsuit is not affecting him in his capacity -- is not
2 affecting the foreign state. Indeed there isn't even
3 one. So in the first set, he falls in the FSIA. In the
4 second set, he doesn't. And you happen to have the
5 second set, and therefore, he may still be immune for
6 what he did in the past, but that would be a different
7 doctrine.

8 MR. DVORETZKY: All right.

9 JUSTICE BREYER: That -- that's where this
10 is all leading me.

11 MR. DVORETZKY: Because the restatement --
12 what the restatement which summarized the common laws as
13 of the time of the FSIA's enactment says that an
14 official is immune for his acts on behalf of a state if
15 exercising jurisdiction would enforce a rule of law
16 against the foreign state. You enforce a rule of law
17 against a foreign state just as much by threatening to
18 bankrupt an official as soon as he leaves office as you
19 do by issuing an injunction.

20 JUSTICE GINSBURG: How does -- how does the
21 very case establish a rule of law for the foreign state?
22 The act is aimed at torturers. The remedy comes out of
23 the private pocket. How does this establish -- if the
24 thing plays out and the plaintiffs -- the prevail, there
25 will a remedy against an individual actor, there will be

1 no relief awarded against any government. How would it
2 set a rule for the foreign government?

3 MR. DVORETZKY: Because enforcing a judgment
4 against a foreign official, threatening to bankrupt the
5 person as soon as he or she leaves office, has just as
6 much effect on the state itself as -- as enforcing a
7 judgment directly against the state. It will force
8 officials to conform their conduct on behalf of --

9 JUSTICE GINSBURG: Never mind that this
10 person has long lived in the United States, in Virginia
11 will have no effect -- will have no effect whatever on
12 the government of Somalia?

13 MR. DVORETZKY: But the -- the rule that the
14 government proposes, and the courts would presumably be
15 left to apply on their own in the many cases like this
16 one and the 9/11 litigation against the Saudis where the
17 government doesn't weigh in, that rule does not draw
18 those neat lines.

19 Why, for example, would we know that a prime
20 minister who comes to visit the United States has not
21 spent enough time here in order to have his official
22 immunity abrogated?

23 JUSTICE STEVENS: May I ask just ask one
24 quick question? Am I correct in understanding that you
25 do not contend that your client was covered by

1 1603(b)(1)?

2 MR. DVORETZKY: 1603(b)(1) is the --

3 JUSTICE STEVENS: Is designed --

4 MR. DVORETZKY: We do argue that in the
5 alternative. We think our principal argument is that --

6 JUSTICE STEVENS: The principal argument is
7 not based on the text. You do make that argument in the
8 alternative?

9 MR. DVORETZKY: We make that argument in the
10 alternative. Our principal argument states --

11 JUSTICE STEVENS: Nobody has talked about
12 that section during the entire argued.

13 MR. DVORETZKY: Our principal argument is
14 based on the text of 1604, which is that in -- that
15 subjecting the official --

16 JUSTICE STEVENS: If they don't qualify
17 under 1603(b)(1), it's kind of hard to get the statute
18 to apply to it at all.

19 MR. DVORETZKY: I respectfully disagree,
20 Your Honor, because 16 (b)(1) defines agencies or
21 instrumentalities. And an official, like an agency or
22 instrumentality, is the means through which the state
23 acts. And, so, if the foreign state --

24 CHIEF JUSTICE ROBERTS: It's kind of hard --
25 I mean, I assume the reason you don't rely heavily on it

1 because it says that an agency or instrumentality is an
2 entity. I mean, we usually don't think of individuals
3 as being entities.

4 JUSTICE STEVENS: 1602 applies only to
5 foreign states.

6 MR. DVORETZKY: 1602 applies to states, and
7 our argument is that exercising jurisdiction over the
8 official in the circumstances like these would be
9 exercising jurisdiction over the state.

10 An entity, Your Honor, is not -- is not
11 automatically read to include a person, but it doesn't
12 preclude persons, either, as the Ninth Circuit held in
13 Chuidian.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Counsel, the case is submitted.

16 (Whereupon, at 11:08 a.m., the case in the
17 above-entitled matter was submitted.)

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