



Somali official's immunity case raises legal, policy issues

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The federal government argues that it is up to the executive branch, not the judicial, to decide when foreign officials deserve immunity from charges of human rights abuses filed in U.S. courts.

So what is the verdict, Justice Ruth Bader Ginsburg asked the government's lawyer Wednesday, on Mohamed Ali Samantar? He has been sued by his alleged victims and accused of presiding over a Somali regime of repeated rape, abduction, summary execution and years-long imprisonment in solitary confinement.

"We are not addressing that here," said Deputy Solicitor General Edwin S. Kneedler.

It was one of several dead-ends the justices encountered in oral arguments regarding *Samantar v. Yousuf*. The central issue of the case is not whether Samantar was responsible for torture in his native land but whether his alleged victims can now bring him to court in suburban Washington.

The matter carries great policy implications for the United States and its relations with other countries, and should stand for the principle that "one nation's courts cannot sit in judgment of another nation's acts," argued Samantar's lawyer Shay Dvoretzky.

But it also exposes a seeming conflict in Congress's actions. The Foreign Sovereign Immunities Act (FSIA) protects foreign states and their "agencies and instrumentalities" from lawsuits, with a few limited exceptions. But the Torture Victim Protection Act authorizes lawsuits, and was passed specifically to ensure that those "who avail themselves of the protections and privileges of residency in the United States also bear responsibility for their actions, especially actions as significant as torture," according to a brief filed by its congressional sponsors.

At the outset of the arguments, Justice Anthony M. Kennedy pronounced himself "puzzled" by the contradiction, and the resulting hearing showed he had company.

Samantar, now 74 and living in Fairfax, held several key positions in the government of Somalia from 1980 to 1990, including defense minister and prime minister. He fled the country in 1991, first to Kenya, then Italy and finally the United States. He was sued by Bashe Abdi Yousuf and four others in 2004, who alleged Samantar was ultimately

responsible for the "torture and killing" of members of the Isaaq clan in a period of brutal civil wars.

Samantar denies the claims and says the suit cannot be brought because the foreign sovereign immunity law protects actions taken by those in official positions of government, even though the law is silent as to whether it protects individuals.

Chief Justice John G. Roberts Jr. told Yousuf's lawyer, Patricia A. Millett, such a reading made some sense.

"We are talking about insulating state acts," Roberts said. "The only way a state can act is through people."

Justice Stephen G. Breyer was troubled as well. Under Millett's theory, he said, suing the defense minister of a country would not be allowed, but filling in the name of the individual would bypass the restriction.

But Ginsburg, the most sympathetic to Millett's arguments, said there was an important difference. "This is a case seeking money out of the pocket of Samantar and no money from the treasury of Somalia," Ginsburg said. "So why is the suit against the officer here equivalent to a suit against the state?"

Millett said it was clear that Congress intended to differentiate between protecting foreign governments from suits and individuals who now seek refuge in the United States.

"Individuals who do this, consistent with international law, whatever else, individuals who engage in torture and extrajudicial killing are held personally liable in Congress's views and in the views of international law," Millett said. "And the Foreign Sovereign Immunities Act doesn't stop that."

The government's position is that the FSIA does not offer individuals immunity, but that decisions about whether the lawsuits against them may move forward should be made by the State Department.

The justices were uneasy with that, as well.

"I must say that I find it much more acceptable to have the State Department say that a particular foreign country should be let off the hook . . . than I do to leave it up to the State Department whether an individual human being shall be punished or not," said Justice Antonin Scalia.

And Justice Sonia Sotomayor noted that the judge in Samantar's case asked the Bush administration's State Department for two years for guidance on how to proceed. An answer never came.

She worried that the government's reading of the statute would "grind the courts to a halt."