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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument today in Case 08-1555, Samantar v. Yousuf.

5 Mr. Dvoretzky.

6 ORAL ARGUMENT OF SHAY DVORETZKY

7 ON BEHALF OF THE PETITIONER

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

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

14 JUSTICE KENNEDY: Counsel, I -- I want to just
15 say that I have one problem with the case at the outset.
16 And I don't mean to interrupt the organization of your
17 argument. You might want to address it later. And it's
18 a question that goes to the other counsel, too.

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

1 isn't it just repealed, overridden, by the later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 were 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 (Laughter.)

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

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

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

25 JUSTICE KENNEDY: Of course, that -- again,

1 the Torture Victim Protection Act says "an individual
2 who, under actual or apparent authority, or under color
3 of law of any foreign nation, subjects an individual to
4 torture."

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

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

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

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

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

1 MR. DVORETZKY: You're talking about the
2 exception in the TVPA for state sponsors of terrorism?

3 CHIEF JUSTICE ROBERTS: Yes.

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

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

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

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

24 MR. DVORETZKY: Because the touchstone of
25 foreign sovereign immunity law, which the FSIA codified,

1 is that one nation's courts cannot sit in judgment of
2 another nation's acts. And the basis for liability that's
3 asserted in this case is Samantar's acts on behalf of
4 the state of Somalia.

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

10 JUSTICE GINSBURG: Well, that sounds like
11 you're -- you're talking about an "act of state" doctrine,
12 not that the suit against one is the equivalent of a
13 suit against the other.

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

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

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

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

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

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

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

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

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

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

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

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

25 For example, there have been several cases

1 involving suits against Israeli officials, and the
2 Israeli embassy communicated to the courts and to the
3 State Department that these were acts of Israel and the
4 official policy of the state.

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

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

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

24 JUSTICE SOTOMAYOR: So your --

25 JUSTICE SCALIA: Is head of state immunity

1 implicit in the Foreign Sovereign Immunities Act as
2 well?

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

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

8 MR. DVORETZKY: Do you mean, why
9 can't this --

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

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

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

1 immunity was going to cover them naturally?

2 MR. DVORETZKY: Because consular and
3 diplomatic immunity are very different in scope and in
4 purpose than state sovereign immunity.

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

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

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

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

1 MR. DVORETZKY: He could get into a car
2 accident. Diplomatic and consular immunity would
3 prevent the diplomat or the consul from being sued for
4 tort damages for a car accident in a foreign state.

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

9 So that's the distinction between official
10 conduct and conduct that may well be within the scope of
11 employment but is not entitled to the state's immunity.
12 And where Congress --

13 JUSTICE SCALIA: Can -- can you get to the
14 text of the Foreign Sovereign Immunities Act that you --
15 that you assert embraces this personal immunity?

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

22 JUSTICE BREYER: Suppose that the -- the
23 Department of the Army orders clothes for the soldiers
24 at a time when the department is a separate agency of
25 Government X in 1940. In 1950, this department is

1 bought by the Dior clothing company.

2 Now, it's a private entity, and someone would
3 like to sue the department because they didn't pay the
4 bill. It is now a private entity. They are suing them
5 for what happened years ago when they were part of the
6 state.

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

9 MR. DVORETZKY: I think this statute would
10 block the suit --

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

17 MR. DVORETZKY: Because the source of
18 immunity in that case was head of state immunity, which
19 is different from the state sovereign immunity --

20 JUSTICE BREYER: All right. And you're
21 saying if a state disappears, it no longer exists, so
22 you couldn't possibly be interfering. You couldn't
23 possibly be interfering in the workings of the state --

24 MR. DVORETZKY: If the state --

25 JUSTICE BREYER: -- you still can't sue

1 anybody --

2 MR. DVORETZKY: It was --

3 JUSTICE BREYER: -- who was part of the official
4 operation --

5 MR. DVORETZKY: If the --

6 JUSTICE BREYER: -- even though there is no
7 present interference?

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

10 JUSTICE BREYER: Why? Why?

11 MR. DVORETZKY: Because --

12 JUSTICE BREYER: Because if the state
13 doesn't exist, why is there any stronger reason
14 than in the incident where the entity is no longer
15 part of the state?

16 MR. DVORETZKY: Because ultimately, what
17 foreign sovereign immunity and this statute are
18 concerned with is protecting a foreign state's act from
19 being judged in court.

20 In your example of the Department of the
21 Army which subsequently is bought by another company,
22 and the foreign state exists, the foreign state's acts
23 are still being judged regardless of the status of that
24 department --

25 JUSTICE BREYER: Oh, no, you may have act of

1 state doctrine. At that point, the State Department
2 comes in and says: You can't maintain this suit because
3 of the act of state doctrine for the very reason you've
4 said.

5 MR. DVORETZKY: You may very well have the
6 act of state doctrine, but --

7 JUSTICE BREYER: And that's my question: Do
8 you need the act of state doctrine or does this statute
9 cover it which removes the discretion from the Executive
10 Branch to decide on a case-by-case basis?

11 MR. DVORETZKY: The act of state doctrine
12 might very well cover your hypothetical, but it's a
13 different doctrine that is not duplicative of immunity.
14 It serves different purposes. Immunity prevents the
15 suit from proceeding at the outset. It's an immunity
16 not only from liability, but an immunity from the
17 litigation process itself.

18 The act of state doctrine is a discretionary
19 doctrine, first of all. It's not automatic in the way
20 that immunity is; and, second of all, it applies only on
21 the merits; and, third, it serves different purposes
22 because it can be used even offensively and even in
23 cases where the state itself is not a party, simply to
24 establish the legality of a state's conduct within its
25 own territory. So the act of state doctrine is a

1 judge-made prudential doctrine that serves different
2 purposes than immunity.

3 In your hypothetical, Justice Breyer,
4 immunity would apply to the acts of the -- of the
5 Department of the Army because, regardless of when suit
6 is brought, those acts are still those of the state. In
7 the hypothetical where a state does not exist at all,
8 then 1604 would not come into play because there is no
9 foreign state to be held immune.

10 That's not this case, though.

11 JUSTICE SCALIA: Can I come back --
12 can I come back to the text? I -- just for a moment
13 there we were on the text of this Act --

14 (Laughter.)

15 JUSTICE SCALIA: -- that the suit is about.
16 And you said where -- where the immunity exists is at
17 604, which says a foreign state shall be immune, but
18 1603 defines a foreign state, which -- which says that
19 it includes an agency or instrumentality of a foreign
20 state.

21 And then it defines agency or
22 instrumentality in a way which, it seems to me, does not
23 include private individuals, but rather just artificial
24 legal persons.

25 MR. DVORETZKY: Section 1603(a) does not

1 define a foreign state exhaustively. It simply states
2 what a foreign state includes. We know that because, if
3 you look at 1603(b), the very next subsection, Congress
4 said what "an agency or instrumentality" means.

5 So had it meant to define exhaustively what
6 "a foreign state" means, it could have said: "A foreign
7 state" means its political subdivisions, agencies, or
8 instrumentalities. The fact that Congress said that a
9 foreign state includes a political subdivision and its
10 agencies or instrumentalities suggests that it includes
11 more than just the enumerated entities.

12 JUSTICE SCALIA: Well, I -- I would find it
13 extraordinary that it would go out of its way to say
14 that it includes the Department of Defense but would
15 leave up in the air whether it includes the Secretary of
16 Defense. I mean, I -- I -- it seems to me much more
17 likely that you would understand a foreign state to
18 include the departments of -- of that state than that
19 you would assume a foreign state to include individuals
20 who happen to be officials of the state.

21 MR. DVORETZKY: And the reason that I think
22 that Congress had to go out of its way to define what
23 constitutes an agency or instrumentality is that, at the
24 time that the FSIA was passed, there was uncertainty
25 about whether certain governmental or corporate entities

1 were included, maybe not the Department of Defense, but
2 whether certain commercial entities owned by the state
3 were entitled to the state's immunity. There was --

4 JUSTICE SCALIA: And there was no
5 uncertainty about -- about individuals?

6 MR. DVORETZKY: Precisely. There was no
7 uncertainty about whether individuals were included.
8 And so when Congress was simply continuing the common
9 law against which it passed this statute, it didn't need
10 to expressly say --

11 JUSTICE GINSBURG: How can you maintain that
12 position when the Department of State takes the position
13 that the Foreign Sovereign Immunities Act applies to a
14 state and agencies and instrumentalities, but it doesn't
15 apply to officers? If it was all that certain that they
16 didn't even have to put it in, then is -- the State
17 Department is being recalcitrant?

18 MR. DVORETZKY: The State Department asked,
19 before the FSIA was passed, to have Executive discretion
20 take -- taken away with respect to immunity
21 determinations. Congress agreed with that judgment and
22 passed the FSIA, and now the Executive Branch has to be
23 held to that judgment that was made. As far --

24 JUSTICE ALITO: It's something of a --
25 it's something of a mystery that the FSIA doesn't say

1 anything at all about this form of immunity; doesn't
2 codify it, doesn't abrogate it, doesn't preserve the
3 preexisting law. Do you have an explanation for that?

4 MR. DVORETZKY: I don't, other than the
5 explanation that I gave Justice Scalia, which is: This
6 immunity was not in question at the time that the FSIA
7 was passed, and when Congress passes a statute in an
8 area where there had been preexisting common law, this
9 Court presumes that Congress meant to incorporate and
10 continue that common law and not abrogate it unless
11 Congress has spoken directly to the contrary.

12 JUSTICE ALITO: But was this Act originally
13 drafted by the Executive? Do you know?

14 MR. DVORETZKY: I'm not sure whether it was
15 drafted by the Executive or whether it was drafted by
16 Congress, but it was passed at the request of the
17 Executive Branch because there was -- the State
18 Department was put in a position of being under
19 diplomatic pressure to grant immunity on -- on favored
20 status to certain nations who asked for it when they
21 wouldn't otherwise be entitled to it. This --

22 JUSTICE SOTOMAYOR: Is there any case by us
23 in which we -- prior to the FSIA, where we recognize
24 that an individual was immunized in the way that the
25 state was, if he was acting as an agent of the state?

1 Or were all of our cases having to do with other common
2 law doctrines?

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

8 It's unclear entirely whether this Court's
9 affirmance was on act of state or immunity grounds, but
10 also at the time that that decision was -- came down,
11 act of state and immunity doctrines were very much
12 intertwined.

13 There is no question, however, as the
14 government argues, that the common law before the FSIA
15 recognized that officials were entitled to immunity --
16 to the state's immunity for their official acts. The
17 Second Restatement, which was -- which was promulgated
18 in 1965 just before the FSIA, says that. The Second
19 Circuit's decision from 1971, just before the FSIA was
20 passed, in Heaney, says that. And it --

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

24 MR. DVORETZKY: No, Your Honor --

25 JUSTICE SCALIA: I mean -- well, I mean,

1 prior to the FSIA, you -- you had to get it from the
2 State Department, didn't you? Even the state,
3 for that matter?

4 MR. DVORETZKY: No. The -- the -- prior to
5 the FSIA, this was a common law doctrine that courts
6 would often apply without any input from the State
7 Department.

8 In the Heaney case, for example, the State
9 Department was asked to provide input and provided none,
10 and the Second Circuit nonetheless held that, using the
11 generally applicable common law principles, that the
12 official was entitled to immunity for the state's acts.

13 JUSTICE SCALIA: And what -- what if the
14 State Department came in and said no, no sovereign
15 immunity here, what would the court do? Would the court
16 be bound by that?

17 MR. DVORETZKY: Ordinarily, the court would
18 at least defer to that. Whether it would be
19 definitively bound by -- by that or not, it would at
20 least be entitled to deference.

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

24 MR. DVORETZKY: That's probably right.
25 And -- but the real issue that prompted the FSIA --

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

4 MR. DVORETZKY: No --

5 JUSTICE SCALIA: -- under the FSIA?

6 MR. DVORETZKY: No, because the whole
7 purpose of the FSIA -- again, at the Executive Branch's
8 request -- was to take the Executive out of that process
9 and to --

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

17 The other -- I take it you have a backup
18 position that even if that's wrong, that under generally
19 accepted principles of international law, that agents
20 still have immunity. Or am I wrong about that?

21 MR. DVORETZKY: Well --

22 JUSTICE KENNEDY: I had thought when I read
23 the House of Lords opinion in Jones and they talked
24 about the statute, that they took your position, this
25 first position, that the Act just won't work unless

1 there's an agent -- immunity for the agent. But I take
2 it that even if we reject that position, you still have
3 a fallback position in the -- in the -- in further
4 proceedings on remand?

5 MR. DVORETZKY: Our position is that the
6 FSIA incorporates the common law and that Mr. Samantar
7 is entitled to immunity under the statute. If you
8 disagree with us on that, we would certainly wish to
9 assert common law defenses on remand, but we believe
10 that the statute resolves the question.

11 If the Court has no further questions, I'd
12 like to reserve my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Ms. Millett.

15 ORAL ARGUMENT OF PATRICIA A. MILLETT

16 ON BEHALF OF THE RESPONDENTS

17 MS. MILLETT: Mr. Chief Justice, and may it
18 please the Court:

19 Justice Kennedy, the hobby horse that you
20 were talking about actually goes right -- right to the
21 heart of this case, and that is of the Torture Victim
22 Protection Act, in which Congress did create a cause of
23 action, was -- that cause of action was created for -- to
24 impose a liability, personal liability, for acts that
25 were done with "actual or apparent" -- but included with

1 "actual" -- authority of the foreign state.

2 Now, if Congress believed that the FSIA
3 immunized everyone who undertook acts under color of
4 law, or at a minimum with actual authority of the
5 foreign state, that was a very empty statute.

6 Now, part of the -- part of the --

7 JUSTICE SCALIA: Ms. Millett, I think it's a
8 pretty empty statute as well to interpret the Foreign
9 Sovereign Immunities Act to immunize the Department of
10 Defense, but not the Secretary of Defense. I mean, that
11 seems very strange.

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

18 CHIEF JUSTICE ROBERTS: But the state --
19 there is -- the distinction strikes me as artificial as
20 well. We're talking about insulating state acts. The
21 only way a state can act is through people. And you're
22 saying: Well, the state is insulated, but the people
23 who do the acts for the state are not. I don't see how
24 that can -- can work.

25 MS. MILLETT: The only question here is

1 whether the Foreign Sovereign Immunities Act is the
2 source of that insulation. And the very
3 difficulty with --

4 CHIEF JUSTICE ROBERTS: Oh, well, then --
5 but the whole point of the Act was to codify what was
6 there before, and -- and it seems odd to say, well,
7 they were codifying the immunity of the state, but not
8 the immunity of the only way a state can act, which is
9 through individuals.

10 MS. MILLETT: Well, first of all, states do
11 corporate acts that are greater than the -- the whole is
12 much greater than the parts here. And the issue in this
13 case is whether the part can claim the immunity of the
14 whole, and that is a very different thing.

15 The -- the individual -- individuals may
16 act. They may act without authority; they may act
17 contrary to authority. And the problem with the FSIA,
18 which is the issue here, is there is no mechanism in it
19 for addressing, for example, whether this was
20 authorized.

21 JUSTICE SCALIA: The -- the Ministry of
22 Defense is not the whole, either. I mean, you -- you
23 acknowledge that -- that each individual piece of a
24 foreign sovereign acquires the immunity, but somehow
25 not -- not the principal officers of -- of the sovereign

1 entity. That seems to me very strange. I mean, I guess --
2 I guess you could write it that way, but I don't know why
3 anybody would want to write it that way.

4 MS. MILLETT: Well, Justice Scalia, if
5 you're going to write a statute that addresses
6 individual immunities -- in particular, what this case
7 is about, personal immunity for personal liability,
8 then those statutes look very different.

9 What's the first thing you are going to
10 want? You are going to want some way to decide what is
11 official capacity or what is on behalf of a state, and
12 you are going to want a mechanism for the foreign state,
13 or at least the State Department, to have input on that.
14 There's nothing in the Foreign Sovereign Immunities Act
15 that addresses that. You're going to --

16 JUSTICE BREYER: Well, what is your --

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

18 JUSTICE BREYER: Right. The question I
19 think, as I understand it, which is certainly why it's
20 bothering me, is: Don't think of this case. Think of
21 the set of cases where it's clear that the plaintiff is
22 suing an active state. He's suing France or he's
23 suing England or -- he's suing an active state for an
24 official act. And the judge says: I have read the
25 Foreign Sovereign Immunities Act; dismissed. Judge,

1 let me amend this. And all he does is he fills in
2 the names of the individuals, because there were some
3 individuals who did the act.

4 Now, does he suddenly fall outside the
5 Foreign Sovereign Immunities Act just because he listed
6 the names of the people who did it, and everything else
7 was the same?

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

9 JUSTICE BREYER: Well, then, this Act does
10 nothing whatsoever.

11 MS. MILLETT: No, that's -- that's not true.
12 That's not true, Justice Breyer. This Act is designed
13 to protect the state from being sued.

14 JUSTICE BREYER: Well, it doesn't protect --

15 MS. MILLETT: You can't --

16 JUSTICE BREYER: -- the state, because all I
17 did there is I made my complaint the same, relief was the
18 same, everything was the same. I happened to go to the
19 Internet to find out who were the human beings working for
20 the state who did the thing I'm complaining did. And all
21 I did was fill their names in, in the complaint.

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

25 MS. MILLETT: Justice Breyer, there -- the

1 question is whether Congress, in the FSIA, would have
2 thought that is a suit against the state.

3 Now, there may be many reasons that they
4 would have. If they thought, in the Restatement's
5 words -- which are not just if you are doing an official
6 act. If you are doing an official act, and the exercise
7 of jurisdiction would have the effect of enforcing a
8 rule of law against the state, then you get immunized.

9 JUSTICE BREYER: So wait --

10 MS. MILLETT: That --

11 JUSTICE BREYER: -- you're saying this Act
12 is only good as against a bad lawyer? Because any
13 good lawyer would simply fill in the right names.

14 MS. MILLETT: I think --

15 JUSTICE BREYER: There is never a case where
16 this Act would give immunity if the plaintiff has a good
17 lawyer. Is that what you're saying?

18 JUSTICE GINSBURG: Ms. Millett --

19 MS. MILLETT: This Act is good against --

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

23 MS. MILLETT: That --

24 JUSTICE GINSBURG: Whether it's injunctive
25 relief or money relief, if the relief is against the

1 state, obviously, you can't dodge it by naming the
2 officer instead.

3 MS. MILLETT: That's precisely right. That
4 is the second half of the Restatement --

5 JUSTICE BREYER: Oh. Oh, that's a different
6 answer --

7 MS. MILLETT: Well, that's what I was trying
8 to say. The second half of the Restatement says you
9 have to be enforcing a rule -- the effect --

10 JUSTICE BREYER: Fine. If you're going to give
11 that answer --

12 MS. MILLETT: -- if you're enforcing a rule
13 of law against --

14 JUSTICE BREYER: -- which I thought was what
15 you would give --

16 MS. MILLETT: That's what I was trying to
17 give.

18 (Laughter.)

19 JUSTICE BREYER: -- then I have added my
20 question: Sometimes the individual, in the first set of
21 cases that Justice Ginsburg mentioned, does count as the
22 state. Sometimes the individual does not count as the
23 state. And the trouble I'm having, in this case, is to
24 work out the principle of when that individual would
25 fall within the FSIA -- as you now, via

1 Justice Ginsburg, have conceded, sometimes it does --
2 and when it doesn't.

3 And I've tried to work with the idea of
4 relief, or maybe the nature of the cause of action, or
5 maybe the time that the suit is brought, such as a time
6 afterwards. I'm not an expert. You're more of an
7 expert than I. What are the principles that determine
8 when?

9 MS. MILLETT: Well, there's -- there's two
10 levels here.

11 First of all, we'd look -- and this is --
12 Congress, presumably, was drawing on a well-established
13 domestic law analogies here. And they may not be
14 100 percent controlling here, but we have
15 well-established ways of understanding whether a -- an
16 action is against an official in -- in their official
17 capacity. We look at the form of relief, the nature of
18 the claim. I do think we need to be careful here --

19 JUSTICE ALITO: What is there to suggest that
20 Congress was looking to domestic analogies? This has
21 nothing -- immunity of officials under domestic law
22 doesn't bear very much resemblance to the immunities
23 that are available to foreign officials, does it?

24 MS. MILLETT: Well, this is a domestic
25 statute, and for Congress -- for purposes of Congress

1 deciding whether a lawsuit is a suit against a sovereign
2 or not against a sovereign, then that is obviously a
3 relevant framework.

4 And we know from two things -- the Torture
5 Victim Protection Act, that they looked at that framework,
6 but also embedded in the FSIA itself, in the Foreign
7 Sovereign Immunities Act itself, is that same
8 distinction between holding people personally liable and
9 holding the state liable.

10 In 1605A, the terrorist state exception, on
11 15a to 17a of the addendum to our brief, they create a
12 cause of action, one against the state and one against
13 the individual officials. Now, the one against the
14 individual officials is a recognition that individual
15 officials can have personal capacity liability for
16 damages, consistent with the Foreign Sovereign
17 Immunities Act. Otherwise, if -- if, under
18 Petitioner's theory, every lawsuit against an
19 individual -- and the language there, is "acting under
20 color of office or employment" -- if every suit against
21 someone under color of office or employment morphs into
22 a suit against the state, there is no cause of action
23 to create against the individual.

24 CHIEF JUSTICE ROBERTS: Ms. Millett, I
25 thought --

1 MS. MILLETT: They understood it was
2 individual liability.

3 CHIEF JUSTICE ROBERTS: I thought the
4 whole point of the FSIA was to get the Executive Branch
5 out of the business of sending letters to the court
6 every time a state was sued. The government requested
7 it for that purpose. Now they are just back into it
8 again if you say, well, you can just sue the
9 individuals.

10 And the government's position in this case
11 confirms that. They're -- they tell us the way you
12 should proceed is to look to the Executive Branch and,
13 basically, we'll send you a letter and let you know.
14 So it seems to me the whole reason you have the FSIA is
15 undermined by the position you're taking today.

16 MS. MILLETT: No, I think it's because the
17 inquiries are very different, as this case illustrates.
18 And that is -- first of all, the point of the FSIA, as
19 section 1602 says, is to codify -- as this Court's cases
20 have said, was to -- largely to codify the restrictive
21 theory of sovereign immunity, which did not apply to
22 individual immunity. It did not apply to the head of
23 state. The head of state was still immune for
24 commercial acts while a sitting head of state.

25 So, if that was codified, that was a dramatic

1 change done silently in the FSIA. The reason Congress
2 would want to retain Executive Branch role here is
3 because the inquiries are different, and the first one is
4 the most elemental one in Petitioner's case and that is
5 the assertion that: I was acting in my official
6 capacity. Who decides? How do we decide? Which
7 agents? For which actions? For how long? What level
8 of immunity?

9 If the FSIA eliminated the head of state's
10 normal absolute immunity while sitting from all actions,
11 commercial or not, that's a dramatic revolution. We can
12 now sue sitting prime ministers and presidents and
13 distract them from their duties.

14 If the Foreign Sovereign Immunities Act made
15 any official's official act an act of the state -- and
16 remember, they are now every level of the foreign
17 government down to the mayor's office, and corporate
18 officials, too, so we've now eliminated the long-standing
19 principle in corporate law -- corporations also only act
20 through individuals -- that corporate liability and
21 individual liability go hand-in-hand.

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

1 the state --

2 JUSTICE SCALIA: Excuse me. The -- the
3 mechanism it provides is judicial determination of these
4 questions that -- that you say have to be determined --
5 whether he was acting within the scope of authority and
6 all that stuff.

7 MS. MILLETT: As you --

8 JUSTICE SCALIA: Isn't that what it did?
9 It took it away from the Executive, gave it --

10 MS. MILLETT: When you're interpreting the
11 language in the FSIA, like "under color of law" --
12 "under color of office," that is undoubtedly a job for
13 the court. "Official capacity" appears nowhere in the
14 FSIA. Deciding which agents will be agents of the state
15 is nowhere in the FSIA.

16 One court has applied this agency -- agent
17 principle to say that when we hire an independent
18 contractor, in the -- the United States independent
19 contractor, that gets the immunity of the foreign
20 sovereign state.

21 CHIEF JUSTICE ROBERTS: Courts -- courts
22 decide this sort of question all the time, whether
23 you're talking about principles of domestic immunity
24 or even corporate liability: Is the employee on a
25 frolic or is it a detour? Determining when an individual

1 is acting for another entity as opposed to on -- on his
2 own business, that's a very common inquiry.

3 MS. MILLETT: Not in this area, where those
4 decisions have foreign relations implications. This
5 Court has done the opposite. And it has -- it has
6 waited for the political branches to lead, and it has
7 followed. Because the decision whether we're
8 displacing head of state immunity and now we're going
9 to have commercial immunity --

10 JUSTICE BREYER: Then that -- I mean, I'm
11 sort of there. You may agree with this, that if you
12 have an individual and with what's being charged here
13 is he is, in fact, now acting as Secretary of Defense,
14 and this action is an action he took in his official
15 capacity, that's it. Forget it. This Act covers it.

16 But where you're claiming it's not and he's
17 not now a member, the reason for the Act disappears,
18 and you go back to the act of state doctrine.

19 MS. MILLETT: Justice Breyer, the -- I don't
20 think -- I think -- and this may seem a little formless,
21 but I simply think it's right, because you're dealing
22 with statutory text here.

23 It's not so much that the defense minister
24 himself becomes the state; it's that the court looking
25 at that action goes: This is really an action against

1 the state. The state is a necessary party under
2 Pimentel and must be here. You, individual, actually
3 have a common law immunity, an absolute immunity, when
4 you are, under the Restatement, sued for official acts.
5 And the effect of exercising jurisdiction would be to
6 enforce a rule of law against the state.

7 When you have those two things together,
8 both of them, you are entitled to immunity because this
9 is an action against the state. The state's a necessary
10 party. Under Republic of Philippines v. -- excuse me --
11 Pimentel, they must be joined, and that will -- then we'll
12 look at the FSIA and decide whether they can be joined
13 or not. That's the way it works.

14 It's not that individuals -- and this is a
15 problem -- that are sort of popping in and out all
16 throughout the FSIA. If it were, we need mechanisms
17 that we don't have here to deal with the very sensitive
18 decisions of which individuals. Well, how will we say
19 you're the agent? It's -- the individual can show up and
20 say I was working for the state; I was doing torture;
21 we loved torture; that was our policy -- you can imagine
22 many a government, if notified, if there was a mechanism
23 for them to come in, would say: Hang on, that was not our
24 policy. But there's no mechanism under his theory.

25 What else happens? I don't even understand,

1 under this theory, what happens. Normally, what happens
2 in these official capacity suits that we're familiar
3 with is if it really is an official capacity, then we --
4 we substitute the state, relief will run against the
5 state.

6 CHIEF JUSTICE ROBERTS: Your friend --
7 you friend --

8 MS. MILLETT: But there's no mechanism here
9 for -- I'm sorry.

10 CHIEF JUSTICE ROBERTS: Your friend said it
11 happens all the time. He cited the example of the
12 Israeli embassy is always sending letters or showing up
13 in court when their agents are -- are sued.

14 MS. MILLETT: That may be. Nobody showed up
15 in court here until we got to this Court. There was no
16 Somali government to show up to say whether this was
17 official or not, and the State Department didn't show up
18 for 2 years. What is a court supposed to do?

19 Well, it was not supposed to do what it did
20 here and declare that it's essentially recognizing the
21 transitional federal government as the government of
22 Somalia, because it didn't know what else to do. That
23 can't be right. And, again, we need to keep in mind the --
24 there is no mechanism in the text of the FSIA. This
25 Court will be engaged in an expedition of constructing

1 and reconstructing the FSIA if you are going to turn
2 it into either a Westfall substitution act with no
3 language here, or you have to turn it into a personal
4 immunity for personal liability act.

5 That's not the text. Sovereign immunity
6 has never been a personal liability from personal --
7 personal immunity from personal liability statute.

8 JUSTICE ALITO: Well, do you agree with the
9 Solicitor General's position about the preservation of
10 the immunities that existed before?

11 MS. MILLETT: Yes, as to -- as
12 individualized, the specialized immunities --

13 JUSTICE ALITO: Yes.

14 MS. MILLETT: I do -- we do agree. Now,
15 whether we -- we don't agree, I think -- we may not agree
16 100 percent on what the scope or content of that immunity is.
17 We certainly agree that head of state immunity was preserved,
18 so we can't sue the head of state at all while sitting.

19 JUSTICE ALITO: No, but whatever immunity
20 existed previously for an official or former official
21 was not abrogated by the FSIA. The FSIA just doesn't
22 address that subject at all.

23 MS. MILLETT: Our position is that the FSIA
24 does not address that. Our view of what the common law
25 did beforehand was it packed most of this into the act

1 of state doctrine. That's exactly what happened in
2 Underhill v. Hernandez, that when you start getting to
3 lower level officials who are not heads of state, who
4 are not diplomatically protected, consular protected,
5 mission on -- have mission immunity, that that -- a lot
6 of that worked through act of state doctrine, and --

7 JUSTICE ALITO: There's no -- there was
8 no immunity for someone who is the equivalent of a -- of
9 a cabinet officer, previously?

10 MS. MILLETT: There -- there --

11 JUSTICE ALITO: The minister of this or that
12 in another government -- they have no official immunity?

13 MS. MILLETT: Well, look -- and much is to be
14 debated on remand. That issue is clearly not before
15 this Court. As we look at the cases and the authorities,
16 in fact what you have are different things coming together,
17 and it can be -- a lot of times, it was act of state
18 doctrines that were going on there. But the notion that
19 individual foreign officials are not personally liable
20 for actions is just wrong, and that is because --

21 JUSTICE GINSBURG: Ms. Millett, do you agree
22 with the --

23 MS. MILLETT: -- or cannot be.

24 JUSTICE GINSBURG: Do you agree with the
25 government that it's the government's advice --

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

9 Are you in sync with the government in that
10 we are now back to the Executive -- essentially, the
11 Executive decides, not the court?

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

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

1 largely been treated as binding on the courts.

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

11 JUSTICE SCALIA: No, I gather the --

12 MS. MILLETT: -- you're going to have the
13 Executive Branch and the TVPA at war.

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

17 MS. MILLETT: Yes.

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

22 MS. MILLETT: Well, they -- that -- I'll
23 let them speak for their own position. I think
24 certainly -- certainly there are a variety of doctrines,
25 a variety of hurdles any case has to get through. And

1 it's not just the Executive's views on a case. There's
2 things like exhaustion. There's necessary party
3 inquiries. There's the act of state doctrine. There's
4 substantive limits on what one can sue for.

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

12 And what's critical, again, is the --

13 JUSTICE SCALIA: I must say --

14 MS. MILLETT: -- language that's missing --

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

24 JUSTICE KENNEDY: And your red light has
25 gone off. I could just add -- make an addition to that

1 same question. I would agree that the State Department
2 might have some expertise in telling us what the facts
3 were: Who was the government, who was -- who was in
4 office at the time, what the policies were.

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

9 MS. MILLETT: I think --

10 CHIEF JUSTICE ROBERTS: Please.

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

18 The Executive viewpoint is not -- in our
19 view, is not the sole source. And there are -- there
20 are a number of other doctrines, whether it's act of
21 state doctrine, whether it is exhaustion principles,
22 whether it's a necessary party inquiries, whether it's
23 substantive limits on, you know, law of nations
24 requirements for the Alien Tort Statute or the Torture
25 Victim Protection Act. There's forum non conveniens.

1 There are a battery of doctrines that come together to
2 very narrowly limit these actions.

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

8 CHIEF JUSTICE ROBERTS: Finish your
9 sentence.

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

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

24 CHIEF JUSTICE ROBERTS: You made that a long
25 sentence.

1 (Laughter.)

2 MS. MILLETT: I'm sorry. I apologize.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MS. MILLETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER

7 FOR THE UNITED STATES, AS AMICUS CURIAE,

8 SUPPORTING THE RESPONDENTS

9 MR. KNEEDLER: Mr. Chief Justice, and may it
10 please the Court:

11 The text, the context, the purposes, and
12 legislative history of the Foreign Sovereign Immunities
13 Act demonstrate that it was not intended to apply to the
14 preexisting common law --

15 JUSTICE SOTOMAYOR: Could you --

16 MR. KNEEDLER: -- doctrine of official immunity,
17 but rather -- yes --

18 JUSTICE SOTOMAYOR: Mr. Kneedler --

19 MR. KNEEDLER: Yes.

20 JUSTICE SOTOMAYOR: Could you -- I'm --

21 MR. KNEEDLER: I'm --

22 JUSTICE SOTOMAYOR: I'm sure one of my colleagues --

23 MR. KNEEDLER: Yes.

24 JUSTICE SOTOMAYOR: -- will get you back.

25 Could you address the practical implications of

1 your position? And by that I mean, it took 2 years
2 for the State -- for the government to respond to the
3 district court in this case. Tell us why your reading
4 of the statute would not grind the courts to a halt.

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

9 MR. KNEEDLER: Well, let me answer that in
10 two ways.

11 First, there's -- there is a very practical
12 distinction between suing the state and suing the
13 individual. The Foreign Sovereign Immunities Act is not
14 just about immunity; it's about the subject matter of
15 the courts. If a foreign sovereign is found to be
16 immune, the court has no jurisdiction over the case. So
17 to say that the individual is -- is governed by the FSIA
18 means that it would be a threshold subject matter
19 jurisdictional inquiry in every case. So in terms of
20 judicial administration, that is a problem.

21 It is also a problem, as a practical matter,
22 to apply the FSIA's very reticulated standards that were
23 carefully negotiated between the Executive Branch and
24 Congress when they knew what they were dealing with.
25 They were dealing with the immunity of states and

1 the -- and the principals of states. And this is
2 reflected, as Ms. Millett said, in section 1602. That's
3 the business that Congress wanted to get -- Congress and
4 the Executive -- wanted the Executive to be out of,
5 which was the immunity of foreign states --

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

9 MR. KNEEDLER: Okay. And -- right and --

10 JUSTICE BREYER: -- and then Ms. Millett
11 sort of backed off that.

12 MR. KNEEDLER: Right.

13 JUSTICE BREYER: And that -- and if -- what I'm
14 seeing here is two extreme positions.

15 You're saying: Never, no matter what, can
16 you simply write the name "Joe Smith" under the word
17 "Niger." Okay? Can't do it. Even though every act --
18 no matter what, you write that human name in, and you --
19 this statute doesn't apply. To me, that means it never
20 applies. All right?

21 The opposite would be that never, under any
22 circumstances, can you sue an individual for a -- for
23 a -- for an official act. That seems the opposite. I
24 should think sometimes you certainly could. Maybe after
25 he has left the government. But I'm looking for the

1 principle, if I'm right, that would divide the two.

2 MR. KNEEDLER: And --

3 JUSTICE BREYER: You want to stick to your
4 extreme position? Never, just write the thing in --

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

7 JUSTICE BREYER: Well, do you want to stick to
8 that position, that all the plaintiff --

9 MR. KNEEDLER: Because this --

10 JUSTICE BREYER: -- has to do is
11 rewrite the name?

12 MR. KNEEDLER: -- this is a statute that
13 invaded the common law in the -- the background was
14 the common law in which the Executive made the
15 determinations for both foreign sovereigns and
16 individual officials. This -- and in addition,
17 it -- it affected the relationship of the
18 political branches. It had been a power of the
19 Executive Branch for foreign sovereigns. The Foreign
20 Sovereign Immunities Act took that away with the
21 agreement of the political branches.

22 There's none of -- there's no indication
23 whatsoever that Congress addressed common law
24 immunities, and there's a good reason. And that is
25 that there -- there are a lot of diplomatic

1 sensitivities about whether immunity should be
2 recognized in a particular case or not.

3 And with respect to foreign sovereigns, the
4 political branches addressed those in very precise ways.
5 There's nothing in the Foreign Sovereign Immunities Act
6 to take into account the different sensitivities that
7 might well arise with respect to foreign sovereigns --

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

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

12 JUSTICE BREYER: -- if -- if my lawyer is
13 clever enough to look up who the individuals were and
14 substitute their names?

15 MR. KNEEDLER: And -- and it would -- here's
16 one example in which it would work: If the relief was
17 going to run against the state, if there was an
18 injunction to take money out of the state treasury or to
19 convey land, for example, that would, in substance, be
20 an action against the state, just like under Ex parte
21 Young. If you tried to bring an injunction against a
22 state officer to make him pay money out of the state
23 treasury, you couldn't do that.

24 It's not because the officer being sued is
25 the state. It's that the state is a necessary party to

1 that lawsuit. The state not being joined, the suit
2 against the individual would have to be dismissed.

3 JUSTICE ALITO: Do you think as a practical
4 matter --

5 MR. KNEEDLER: That's Pimentel.

6 JUSTICE ALITO: -- there's a -- I'm sorry.
7 Do you think, as practical matter, there's a difference
8 between a \$10 million judgment against a state for
9 something that is official state policy in relation to
10 defense, and a \$10 million judgment against the current
11 foreign -- defense minister of that state for exactly the
12 same policy?

13 MR. KNEEDLER: There -- there -- there is a
14 difference in the operation of the suit. We're not
15 saying that such an official should not be immune. What
16 we are saying is that the immunity derives from the
17 common law immunity. There's a presumption against a
18 statute invading the common law, and particularly a
19 common law that was primarily shaped by the Executive.

20 There should be a strong presumption against
21 taking that flexibility away in the absence of a clear
22 statement in the statute. And as -- and -- if the -- if
23 a -- if a suit should go to judgment like that, perhaps
24 the state would indemnify the person. But we are not
25 saying that that person is not immune. A question that

1 was asked --

2 JUSTICE SOTOMAYOR: Could we go back to the
3 practical --

4 MR. KNEEDLER: Yes. To the -- and -- and I --
5 I understand the practical problem that the district
6 court faced, and the district court was very patient.

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

19 The request to the United States, to the
20 State Department for its views, arose in that context.
21 This very case at this moment arises in a context where
22 things are fluid, and -- and there are circumstances in
23 which the Executive Branch or sometimes even the
24 court --

25 JUSTICE SCALIA: That's -- that's very nice.

1 A few years ago, a Spanish magistrate allowed a lawsuit
2 to proceed, as I recall, against our Secretary of Defense.
3 And what you say is that that's perfectly okay. It's up
4 to the Spanish government to assert that that suit
5 should not proceed, and if it doesn't, it's perfectly
6 okay?

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

16 CHIEF JUSTICE ROBERTS: I wonder -- I wonder
17 if the example you give or the point you make, that
18 there's no functioning Somali Government, doesn't cut
19 the other way.

20 Let's assume you have somebody who was
21 acting in an official capacity, doing what his job
22 required, whether you like it or not, and then there's
23 a change in the Somali government; and the United States
24 likes the new Somali government. That guy is kind of
25 put out to -- to dry because he can't get anybody to say

1 what he maintains is true, which was I was acting
2 pursuant to official policy of the government.

3 MR. KNEEDLER: Well --

4 CHIEF JUSTICE ROBERTS: And the United
5 States is not going to give him the letter he needs
6 because they like the new Somali government.

7 MR. KNEEDLER: Well, under international law
8 the -- the official immunity exists for the benefit of
9 the state, not for the individual. The state can waive
10 that immunity, and the state can determine whether, as
11 happened in the Philippines case, that the -- that the
12 actions being complained of were not -- were not within
13 the official activity.

14 JUSTICE KENNEDY: But I take it your answer
15 to Justice Scalia with reference to the indictment
16 against the Secretary of Defense, is that that's not
17 covered by the Foreign Sovereign Immunities Act. And if
18 a state interprets international law to allow the suit,
19 then it goes forward.

20 MR. KNEEDLER: No. If -- if -- if one of
21 our officials was sued in a foreign court, then we would
22 expect the dynamic to play out as -- as I have
23 described, where the United States would take the
24 position, presumably that what was being done was within
25 the scope of official conduct after investigation and

1 assert immunity, and expect that to be respected. My
2 only point is that --

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

6 MR. KNEEDLER: And the -- this --

7 JUSTICE KENNEDY: I thought that was the
8 whole purpose of the Federal -- of Foreign Sovereign
9 Immunities Act.

10 MR. KNEEDLER: It -- it was the purpose with
11 respect to foreign sovereigns, but there were good
12 reasons why the court did that, precisely because
13 immunity questions -- as I've said, this case
14 illustrates, to -- to recognize an immunity or not
15 to recognize would -- might favor one faction or another
16 in the ongoing dispute in -- in Somalia.

17 JUSTICE GINSBURG: Mr. Kneedler --

18 MR. KNEEDLER: And so the -- what --

19 JUSTICE GINSBURG: This is -- it's now
20 many years, and we still don't -- the State Department
21 has said in effect: We decide.

22 Can you tell the Court, is this defendant
23 amenable to suit or is there an immunity that would
24 cover him?

25 MR. KNEEDLER: We are not addressing that

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

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

19 There was no such conscious abrogation of
20 the Executive's critical role to make immunity
21 determinations on behalf of officials in the legislative
22 history. And this Court should not strain to read the
23 rigid provisions of the Foreign Sovereign Immunities
24 Act, which were just not tailored to the immunities
25 that the Underhill decision of this Court specifically said

1 officials have immunity for their official acts
2 exercising governmental authority.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Kneedler.

5 JUSTICE SCALIA: There were a lot of long
6 sentences in there --

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky,
9 because of that, we'll give you 5 minutes.

10 REBUTTAL ARGUMENT OF SHAY DVORETZKY

11 ON BEHALF OF THE PETITIONER

12 MR. DVORETZKY: I'll try to keep it short.

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

20 JUSTICE SOTOMAYOR: Wouldn't that be the
21 same question that you would ask invoking a common law
22 protection like head of state or act of state? Isn't it
23 -- whether it's under the FSIA or under a common law
24 theory -- the identical question?

25 MR. DVORETZKY: It is the same inquiry that

1 you would have asked under the common law in inquiring
2 whether the state's immunity extends to its officials.
3 What the FSIA did was it codified that rule, and it took
4 away Executive Branch discretion to deviate from it. If
5 you look at the Solicitor --

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

15 MR. DVORETZKY: First of all, as we argue in
16 our brief, this has not historically been a long-standing
17 power of the Executive in the way that the immunity
18 itself has been recognized under the common law. And
19 what Congress did in 1976 was it codified the substance
20 of the common law but took away that procedure. And
21 this case demonstrates exactly why it's necessary to
22 extend the FSIA to foreign officials in order to -- in
23 order to make the FSIA mean anything at all, and in
24 order to ensure the uniformity and predictability that
25 Congress intended through the statute.

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

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

19 But where he was a member of the foreign
20 state, and you want money from him, even though what he
21 did in the past was an act of a foreign state, this
22 lawsuit is not affecting him in his capacity -- is not
23 affecting the foreign state. Indeed, there isn't even
24 one. So in the first set, he falls in the FSIA. In the
25 second set, he doesn't. And you happen to have the

1 second set, and, therefore, he may still be immune for
2 what he did in the past, but that would be a different
3 docket.

4 MR. DVORETZKY: All right.

5 JUSTICE BREYER: That -- that's where this
6 is all leading me.

7 MR. DVORETZKY: Because the Restatement --
8 what the Restatement, which summarized the common laws as
9 of the time of the FSIA's enactment, says that an
10 official is immune for his acts on behalf of a state if
11 exercising jurisdiction would enforce a rule of law
12 against the foreign state. You enforce a rule of law
13 against a foreign state just as much by threatening to
14 bankrupt an official as soon as he leaves office --

15 JUSTICE GINSBURG: How does this case --

16 MR. DVORETZKY: -- as you do by issuing --

17

18 JUSTICE GINSBURG: How does this very case
19 establish a rule of law for the foreign state?

20 The Act is aimed at torturers. The remedy comes out of
21 the private pocket. How does this establish -- if the
22 thing plays out and the plaintiffs prevail, there
23 will a remedy against an individual actor; there will be
24 no relief awarded against any government. How would it
25 set a rule for the foreign government?

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

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

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

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

21 JUSTICE STEVENS: May I ask just ask one
22 quick question? Am I correct in understanding that you
23 do not contend that your client was covered by
24 1603(b)(1)?

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

1 JUSTICE STEVENS: It defines an agency or
2 instrumentality of the --

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

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

8 MR. DVORETZKY: We make that argument in the
9 alternative. Our principal argument is based --

10 JUSTICE STEVENS: It's interesting that nobody
11 has talked about that section during the entire argument.

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

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

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

23 CHIEF JUSTICE ROBERTS: It's kind of hard --
24 I mean, I assume the reason you don't rely heavily on it
25 -- because it says that an agency or instrumentality is an

1 entity. I mean, we usually don't think of individuals
2 as being entities.

3 JUSTICE STEVENS: And 1602 applies only to
4 foreign states.

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

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Counsel.

15 MR. DVORETZKY: Thank you.

16 CHIEF JUSTICE ROBERTS: The case is submitted.

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

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