

USS Cole victims are opposed at Supreme Court by unlikely Partners: Sudan and U.S.

By Robert Barnes

The road to recovery has been a long one for David Morales, who was injured during the al-Qaeda attack on the USS Cole 18 years ago last month. And he knew it would be difficult to collect the nearly \$315 million that he and others wounded in the attack were awarded in their suit against the Republic of Sudan.

But he didn't expect the case to go all the way to the Supreme Court, and he certainly didn't think he would see the Trump administration aligned with Sudan on the other side of the legal battle.

"I thought the United States would be on the side of its veterans," Morales said in a recent interview. "It was very surprising, especially with Mr. Trump in office. It seems like he is in support of veterans. It kind of hurts."

Years of litigation and millions of dollars in awards are on the line this week as the Supreme Court addresses a seemingly mundane question: whether notices of the lawsuits against Sudan were sent to the wrong address eight years ago.

The notices were addressed to the Sudanese Embassy in Washington at 2210 Massachusetts Ave. NW, where an employee signed for them. One federal appeals court has decreed that was adequate.

But Sudan says that federal law, as well as the Vienna Convention on Diplomatic Relations, requires papers to be served on the foreign minister at his official address, which in this case is in the Sudanese capital of Khartoum. A different federal appeals court has agreed with that interpretation.

Into this legal and diplomatic quagmire has stepped, ever so gingerly, U.S. Solicitor General Noel Francisco. He, as well as Saudi Arabia and Libya, filed an amicus brief agreeing with Sudan, one of four nations the State Department lists as sponsoring terrorism.

“The United States deeply sympathizes with the extraordinary injuries suffered by respondents, and it condemns in the strongest possible terms the terrorist acts that caused those injuries,” Francisco wrote in his brief to the Supreme Court.

But “litigation against foreign states in U.S. courts can have significant foreign affairs implications for the United States,” he continued, “and can affect the reciprocal treatment of the United States in the courts of other nations.”

Washington lawyer Kannon Shanmugam represents those wounded in the attack in the lawsuit being considered by the Supreme Court and, in a separate suit, the families of those killed. It has been put on hold pending the court’s decision.

“It is mind-boggling that the government has decided in this case to side with a state sponsor of terrorism and against men and women who are seeking to recover for grievous injuries suffered in the service of our country,” Shanmugam wrote in a brief to the court.

“In any event, this court should reject the government’s sloppy analysis and its dubious bottom line.”

The lawsuits arise from the deadly attack on Oct. 12, 2000, when al-Qaeda suicide bombers in a fiberglass boat detonated explosives near the destroyer Cole, which was refueling at a harbor in Yemen.

The blast killed 17 American sailors — 15 men and two women — and wounded 42 others. Years later, the suits were filed against Sudan under the Foreign Sovereign Immunities Act, alleging Sudan had supplied material support to al-Qaeda and Osama bin Laden, who lived in the country for a time.

In the case involving the wounded that the Supreme Court is hearing Wednesday, *Republic of Sudan v. Harrison*, the plaintiffs filed suit in federal court in the District and asked the clerk to send the documents to Sudan’s foreign minister at the embassy in Washington.

Someone at the embassy accepted them. But Sudan never responded to the suit, nor did its representatives put on a defense. (Sudan’s culpability is not an issue the Supreme Court is considering.) District Judge Royce Lamberth held an evidentiary hearing and entered a default judgment against Sudan in the amount of \$314,705,896.

The judgment was registered in New York in an attempt to access Sudanese assets held in three banks there. It was at that point Sudan filed notice in the case, telling the U.S. Court of Appeals for the 2nd Circuit that the judgment should be vacated because the service at the embassy did not comply with the law.

At issue is the part of the immunities act that details what a party must do to file suit against a foreign government. Relevant here is that the notice “*be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.*”

Lawyers representing Sudan say that is most naturally read to mean the package be sent to the foreign minister in that country, not to its diplomatic mission in Washington. In addition, serving process at an embassy violated an article of the Vienna Convention that says “the premises of the mission shall be inviolable.”

Those “inviolability” provisions “constitute bedrock principles of international diplomacy, are enshrined in international law and practice, and are widely accepted in the United States and beyond as prohibiting service by mail on or through a diplomatic mission,” Washington lawyer Christopher M. Curran, one of Sudan’s lawyers, told the Supreme Court in a brief.

Sudan is supported by a group of international law professors and the Kingdom of Saudi Arabia, which is implicated in the killing of columnist Jamal Khashoggi at its consulate in Turkey. “As much as any foreign state, the Kingdom has a strong interest in preserving the inviolability of foreign missions, including the longstanding prohibition against serving legal process at mission premises,” it tells the court.

More important is Sudan’s support from the United States. It does not accept notice at its embassies around the world, and ruling against Sudan would endanger the government’s “continued ability to successfully assert that it has not been properly served in these instances,” Francisco wrote in the government’s brief.

The 2nd Circuit, hearing the case of those wounded in the attack, ruled for the plaintiffs, reasoning that the notice was not served *on* the mission in Washington, but to the foreign minister *via* the personnel there. The U.S. Court of Appeals for the 4th Circuit, in the case involving the survivors of the dead, disagreed, and said the judgments should be vacated.

That is hard to explain to Lorrie Triplett, whose last glimpse of husband Andrew was in her rearview mirror, as the sailor rode a bike she had bought him back to the Cole when it was still docked in Virginia.

The money she would receive would go to care for her two daughters, whose memories of their father are faint, she said.

“To say that we don’t deserve something that should have been, it’s beyond me,” she said