



Supreme Court Holds That Amendments To The Foreign Sovereign Immunities Act Retroactively Authorized Punitive Damages Against Foreign State Sponsors Of Terrorism

***Opati v. Republic of Sudan*, No. 17-1268**

Decided May 18, 2020

Today, the Supreme Court held 8-0 that the Foreign Sovereign Immunities Act (“FSIA”) amendments of 2008 authorize punitive damages in suits against foreign states based on conduct predating the amendments.

Background:

In 1998, al Qaeda set off truck bombs outside the United States embassies in Kenya and Tanzania, killing or injuring thousands. Victims sued Sudan under the FSIA’s “terrorism exception” to sovereign immunity, claiming that the nation materially supported the bombings by sheltering al Qaeda. As originally enacted in 1996, the terrorism exception did not create a cause of action against foreign states, leaving these claims to proceed under state-law causes of action. But in 2008, Congress amended the exception to (1) create a private cause of action against foreign states for punitive damages and other remedies, 28 U.S.C. § 1605A(c); and (2) allow claims based on pre-amendment conduct to proceed under this cause of action, 2008 National Defense Authorization Act § 1083(c). The district court ultimately awarded the plaintiffs billions of dollars in damages, including \$4.3 billion in punitive damages. But the D.C. Circuit held that the 2008 FSIA amendments did not authorize punitive damages for pre-amendment conduct with

“Even if we assume . . . that Sudan may claim the benefit of Landgraf’s presumption of prospectivity, Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using § 1605A(c)’s new federal cause of action.”

Justice Gorsuch,
writing for the Court

sufficient clarity to overcome the presumption against retroactive legislation. Because the claims against Sudan arose out of pre-amendment conduct, the court vacated the punitive damages award. The United States supported the plaintiffs as *amicus curiae*.

Issue:

Does the Foreign Sovereign Immunities Act permit recovery of punitive damages from foreign states for terrorist acts occurring prior to the passage of the current version of the statute in 2008?

Court's Holding:

Yes. The plain text of the 2008 amendments permits plaintiffs proceeding under § 1605A(c)'s federal cause of action to seek and win punitive damages for past conduct.

What It Means:

- Under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), courts generally presume that legislation operates only prospectively unless Congress clearly states that the law applies retroactively. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Supreme Court limited the reach of that presumption in litigation against foreign states under the FSIA, holding that the presumption did not apply to the original FSIA's codification of "restrictive" sovereign immunity. But today, the Court held that the 2008 FSIA amendments authorize punitive damages for past conduct with sufficient clarity to satisfy the presumption even assuming it applied.
- The Court rejected Sudan's suggestion that special constitutional concerns raised by retroactive punitive damages support a "super-clear statement" requirement beyond the normal presumption against retroactivity. The Court explained that when litigants believe the retroactive application of a statute raises constitutional questions, "the better course is . . . to challenge the law's constitutionality, not ask a court to ignore the law's manifest direction."
- The Court remanded for the lower courts to address, in the first instance, the availability of retroactive punitive damages under state-law causes of action against foreign sovereigns. This question remains important for non-American plaintiffs, who are ineligible for the federal cause of action under the current terrorism exception.
- The Court's decision continues Gibson Dunn's record of successfully representing victims of international terrorism before the Supreme Court. In *Bank Markazi v. Peterson*, 136 S. Ct.

Gibson Dunn represented the winning parties:

Monicah Okoba Opati, et al.

Gibson Dunn Named
Appellate Firm of the Year



1310 (2016), Gibson Dunn successfully represented victims of terrorism against a claim by the Central Bank of Iran challenging the constitutionality of a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772, that had made available for postjudgment execution nearly \$2 billion in assets held in New York for Iran's Central Bank.

The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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