

Supreme Court Issues Important Decision on Retroactive Effect of Amendment to Foreign Sovereign Immunities Act

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A recent Supreme Court decision sets important precedent on the retroactive effect of legislation amending the law governing sovereign immunity in the United States. On May 18, 2020, the Supreme Court handed a victory to plaintiffs seeking compensation from the Republic of Sudan for its part in the terrorist attacks taking place outside U.S. embassies in Kenya and Tanzania in 1998. The Court held that legislation passed as an exception to the Foreign Sovereign Immunities Act (28 U.S.C. § 1602 et seq.) after the terrorist attacks that took place can nevertheless be applied retroactively to the acts of Sudan, exposing the nation to punitive damages.

In the United States, the presumption against retroactive application of laws is grounded in legal doctrines that have existed in common law prior to the formation of the nation. The presumption provides the support for several constitutional restrictions such as the ex post facto clause, the prohibition on bills of attainder, and the Due Process clause. Congress usually must contend with some or all of these constitution protections in enacting retroactive legislation.

In this case, however, there was no question raised of the constitutionality of the provision. The question before the Court was whether, as a question of statutory interpretation, a retroactive law could be applied to a foreign sovereign. Sudan had been assessed punitive damages based on a statute that had been enacted after the acts of terrorism had taken place. The statute in question, 28 USC § 1605A, created an express federal cause of action to compensate victims of acts of state-sponsored terrorism and also provided for punitive damages. The prior version of the statute, 28 U.S.C. § 1605 (a)(7), also contained an exception allowing for claims of state-sponsored terrorism, but it did not allow for punitive damages.

The Court of Appeals for the Second Circuit held that the presumption against retroactive discussed in *Landsgraf v. USI Film Products*, 511 U.S. 244 (1994), should apply in this instance to prevent the assessment of punitive damages against foreign sovereigns such as Sudan unless there was clear Congressional intent to do so. The Supreme Court did not decide whether the *Landsgraf* presumption must be applied here. The Court pointed to its retroactivity precedent as applied to foreign sovereigns in *Republic of Austria v. Altmann*, 541 U.S. 480 (1983), noting that applying sovereign immunity is a matter of “grace and comity” and presumably can be withdrawn without having to contend with the due process and equal protection concerns facing other backwards-looking legislation.

Instead, the Court found that such a presumption, if it were to apply, is overcome from the Congressional record. In this case, Congress expressly authorized punitive damages under the new cause of action, and it expressly made the remedy available to past acts of terror. These actions evince clear intent. As for the lack of a constitutional challenge, the Court noted only that no such challenge was made, and made no statements about whether such a challenge, if made, would be sustainable. The Court remanded the case back to the Second Circuit to apply the ruling to decision made on state law claims that were determined on the same reasoning that the Court rejected.

For foreign sovereigns, it should be noted that the decision is a narrow one, focusing on an exception to the FSIA expanding liability for state-sponsored terrorism. Still, the court’s decision may open the door for Congress to pass additional legislation eroding sovereign immunity for past acts.

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