

United States Supreme Court Holds That The Foreign Sovereign Immunities Act of 1976 Does Not Provide Immunity to Officials of a Foreign State From Lawsuits Filed in United States Courts

The Foreign Sovereign Immunities Act of 1976 (“FSIA”) is a United States federal law that provides immunity from liability to a foreign state for its public acts. (28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611.) If a foreign defendant qualifies as a “foreign state” (or its political subdivisions, agencies, or instrumentalities) under the FSIA, it is immune from being sued in any United States Court, unless a statutory exception to immunity applies (e.g., the foreign defendant waives immunity; or agrees to submit a dispute to arbitration; or engages in a commercial activity; or commits a tort in the United States such as a traffic accident; or expropriates property in violation of international law). In addition, exceptions for torture, extrajudicial killing, aircraft sabotage and hostage-taking were added by amendment to the FSIA in connection with recent anti-terrorism laws.

Although sovereign immunity has long been recognized in the United States, there has been disagreement among the courts as to whether an individual government official is covered by the FSIA, and therefore immune to suit, or whether traditional common law rules of immunity apply. The majority of Federal Courts of Appeals concluded that individuals are covered under § 1603(b) of the FSIA as “agents or instrumentalities” of foreign states. (See e.g. *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008) (Saudi government officials entitled to immunity under the FSIA). Other courts concluded that individuals are not entitled to immunity under the FSIA, finding that the language and structure of the FSIA contemplated that entities, and not individuals, are covered by the “agency or instrumentality” definition. (See e.g. *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (former Somalian government official is not entitled to immunity under the FSIA).

The U.S. Supreme Court has now held that since an individual is not an exempt “entity” or “foreign state” as contemplated in the FSIA, foreign officials sued for conduct undertaken in their official capacities do not have immunity from lawsuits brought against them in United States courts. (*Samantar v. Yousuf, et al.*, 560 U.S. ___ (June 1, 2010).) The implication of this Supreme Court decision for foreign officials, who may have held official governmental positions and undertaken actions during times of civil unrest in their respective countries, and who then subsequently choose to reside in or travel to the U.S., is that they now expose themselves to potentially being served and hauled into United States courts. These individuals may be forced to defend themselves against lawsuits filed against them in the United States and would not be able to rely upon the FSIA for immunity protection. This decision may result in an increase in human rights lawsuits filed under the Alien Tort Claims Act (28 U.S.C. § 1350) and the Torture Victim Protection Act (Pub. L. 102-256) in the United States.

The Supreme Court did note in its recent decision that immunity may still exist for foreign officials under common law, referencing Section 66 of the Restatement (Second) of Foreign Relations Law, which states: “immunity of a foreign state...extends to...any other public minister, official or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state” Alternatively, former foreign officials who find themselves sued in the United States may also attempt to assert a defense under the “Act of State Doctrine.” Under this Doctrine, an official’s acts can be considered the acts of the foreign state, and the courts of one state will not sit in judgment of those acts when done within the territory of the foreign state.

For Further Information, Please Contact:

Nicholas P. Connon, Co-Managing Partner; Chair, Middle East Practice Group

Tel: +1.626.638.1757

Middle East Practice Group

Nicholas P. Connon, +1.626.638.1757, nconnon@connonwood.com
Paro Astourian, +1.626.371.0338, pastourian@connonwood.com

David R. Scheidemantle, +1.626.638.1752, dscheidemantle@connonwood.com
Robert A. de By, +1.626.638.1762 / +44.203.328.9010, rdeby@connonwood.com

www.connonwood.com