

## **Shaping the next generation of FSIA suits against States—The Supreme Court affirms Presidential authority to restore Iraq's immunity before US courts but sets stage for battle over retroactivity of similar limitations in *Republic of Iraq v Beaty, et al.***

On 8 June 2009 the Supreme Court decided *Republic of Iraq v Beaty, et al.* In *Beaty* the Supreme Court determined that the President restored Iraq's sovereign immunity from suits brought under the terror exception to the FSIA in US courts when, in 2003, he exercised his congressionally granted authority to make 'make inapplicable with respect to Iraq § 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism.' The decision sends a strong message to lower courts regarding the deference that ought to be extended to Executive interpretations of congressional grants of power in the foreign policy arena. Unfortunately, the decision also compounds the tension between two competing measures for determining retroactivity with respect to the FSIA, and as a consequence will almost certainly result in split decisions among lower courts forced to grapple with new State-centric limitations on the terror exception to the FSIA.

### **Background:**

Traditionally, foreign states have been immune from suit in US Courts. However, the Foreign Sovereign Immunities Act of 1976 (FSIA) creates several exceptions to this general rule. One such exception, drafted in 1996 and codified at 28 USC § 1605(a)(7), removed immunity from a State designated as a sponsor of terrorism and responsible for or complicit in torture, extra-judicial killing, aircraft sabotage, and hostage-taking.

Following the American-led invasion of Iraq, in 2003 Congress enacted the Emergency Wartime Supplemental Appropriations Act (EWSAA, 117 Stat. 559). Section 1503 of the Act included a proviso authorizing the President to 'make inapplicable with respect to Iraq § 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism.' In 2003 President George W Bush, relying on the Congressional language and conscious of the need to prevent inter-State conflicts that might derail post-invasion reconstruction efforts, declared 'inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 . . . and any other provision of law that applies to countries that have supported terrorism' (Decision, p 4, 11). The EWSAA was set to expire one year after its passage, but expired in 2005 when the sunset provisions were extended by one year (117 Stat. 1230).

The National Defense Authorization Act for Fiscal Year 2008 (NDAA) repealed 28 U.S.C. § 1605(a)(7) but replaced it with a roughly similar exception, §1083(a). The new legislation also declared that nothing in §1503 of the EWSAA had 'ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States' (§1083(c)(4)), but also permitted the President to waive 'any provision of this section with respect to Iraq' so long as he made certain findings and so notified Congress within 30 days, §1083(d). The President's approval of the bill was conditioned on Congress' inclusion of the waiver authority, and on the same day the bill was signed into law President Bush waived 'all provisions of section 1083 of the Act with respect to Iraq' (Decision, p 4).

Prior to consolidation at the Supreme Court, *Beaty* was actually two cases, *Beaty* (480 F. Supp 2d 60, 62 (DDC 2007)) and *Simon* (529 F.3d 1187, 1188 (2008)). Respondents in *Beaty* were the children of Kenneth Beaty and William Barloon, US citizens living in Kuwait after the Persian Gulf War ended in 1991 who alleged acts of abuse perpetrated by the Saddam Hussein regime. *Simon* was itself a consolidation of cases involving claims of abuse prior to, during, and after the 1991 Gulf War similar to those alleged in *Beaty*. Both sets of respondents filed suit in early 2003 against Iraq in the United States District Court for the District of Columbia, alleging violations of local, federal, and international law.

Before either suit could be heard before the District Court, the United States Court of Appeals for the District of Columbia Circuit had the opportunity to consider whether Presidential action under the EWSAA the terrorism exception to the FSIA inapplicable to Iraq. In 2004 a divided panel concluded that the President's EWSAA authority 'is aimed at legal provisions that present obstacles to

assistance and funding for the new Iraqi Government and was not intended to alter the jurisdiction of the federal courts under the FSIA.’ (*Acree v. Republic of Iraq*, 370 F. 3d 41 (2004), para. 35).

The plaintiffs in *Beaty* and *Simon* had both invoked the terrorism exception to the FSIA, and the D.C. Court of Appeals in both cases declined Iraq's invitation to reconsider *Acree* and preserved jurisdiction over both cases (*Beaty*, 480 F. Supp 2d at 69 & *Simon*, 529 F.3d at 1190 ). Iraq sought Supreme Court review of both decisions, and certiorari was granted on 9 January 2009, whereupon the cases were consolidated (Docket for 07-1090).

### **The Court Opinion:**

In a unanimous opinion drafted by Justice Scalia the Supreme Court reversed *Acree* (and the Court of Appeals decisions that had relied on it), and held that U.S. Federal courts lost jurisdiction in May 2003 over claims brought against Iraq based on crimes committed during the rule of Saddam Hussein. In arriving at this conclusion the Supreme Court made three determinations: (1) that *Acree* was incorrectly decided and the EWSAA in fact granted the President authority to make the FSIA terror exception inapplicable to Iraq; (2) that nothing in the NDAA alters this conclusion; and (3) that laws that alter the rules of foreign service immunity are not operating retroactively when applied to pending cases.

The Court began with a broad but brief discussion of Presidential and Congressional powers, writing with regard to grant of presidential authority in the EWSAA:

To a layperson, the notion of the President's suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign affairs. See *United States v Curtiss-Wright Export Corp.*, 299 U. S. 304, 322–324 (1936) (canvassing precedents from as early as the ‘inception of the national government’). The granting of Presidential waiver authority is particularly apt with respect to congressional elimination of foreign sovereign immunity, since the granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch. [ . . . ] It is entirely unremarkable that Congress, having taken upon itself in the FSIA to ‘free the Government’ from the diplomatic pressures engendered by the case-by-case approach [ . . . ] would nonetheless think it prudent to afford the President some flexibility in unique circumstances such as these.

The Court went on to examine the text of the EWSAA, concluding that the *Acree* court was over-reliant on the fact that the Presidential authority contained in the EWSAA appeared as a proviso (the general purpose of which ‘is to except something from the enacting clause, or to qualify and restrain its generality’) rather than as a separate enacting clause or a principal clause (which typically *do* create independent power's) in its 2004 decision (Decision, p 7). The Supreme Court also rejected *Acree's* argument that the FSIA (and its exceptions) were not statutes that imposed 'sanctions', and thus were not covered by the grant of Presidential authority in the EWSAA, in concluding that ‘[s]tripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of munitions (both of which are explicitly mandated by §586F(c) of the Iraq Sanctions Act)’ (Decision, p 10). Finally, the Court clarified that it was unnecessary to justify the President's suspension of § 1605(a)(7) by locating some specific congressional intent to that effect. The entire purpose, the Court wrote, of a ‘generally phrased residual clause’ is to serve ‘as a catchall for matters not specifically contemplated—known unknowns, in the happy phrase coined by Secretary of Defense Donald Rumsfeld (Decision, p 10).

Turning to the issue of the impact of the NDAA on *Acree*, in *dicta* the Supreme Court acknowledged that §1083(c)(4) looked ‘like a ratification by Congress of the conclusion reached in the *Acree* decision’ (Decision, p 12). However, because the EWSAA had expired the subsequent legislation could not be read to retroactively amend that legislation. Moreover, ‘it is doubtful whether Congress can retroactively claw back power it has given to the Executive, invalidating Presidential action that was valid when it was taken.’ (Decision, p 12). Finally, the Court will interpret disputed legislative language based on subsequent legislation only if the subsequent legislation has some

'substantive effect' on the earlier legislation. Because the NDAA contains language limiting, at the President's discretion (which he chose to exercise), its applicability to Iraq, it is without effect on the EWSAA and 'adds nothing to [its] analysis.' (Decision, p 13).

In its final analysis the Court addressed the claims of respondents that the EWSAA grant of power ought to be read so as not to operate in a retroactive manner. After examining the language of the EWSAA and finding no explicit bar or policy reason to prevent on retroactive application the Court also determined that the legislation did not fall within the judicial presumption against retroactivity. 'Laws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights,' the Court wrote, 'are not operating retroactively when applied to pending cases. Foreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely "in shaping their primary conduct." (Decision, p 15).

### **Analysis:**

Justice Scalia elides a cannon of statutory construction in *Beatty* consistent with his opinion in *Landgraf v USI Film Products*, in which he expressed disdain for the idea of examining legislative intent when considering the retroactivity of a statute. Doing so, he wrote, 'converts the 'clear statement' rule into a 'discernible legislative intent' rule' and can cut against the plain meaning of the text (*Landgraf*, 511 U.S. at 287 (Scalia, J, concurring in the judgment)). More surprising is the decision of Justices Stevens and Kennedy not to explicitly rely on evidence of congressional intent with respect to the retroactive nature of the EWSAA. In *Republic of Austria v Altmann* Justice Stevens evinced a willingness to look beyond the text of a provision and towards congressional intent to determine retroactivity when the plain language and structure was unclear (*Altmann*, 541 US at 689 (Stevens, J.) and Justice Kennedy expressed his dissatisfaction with deference to Executive interpretations of grants of authority (*Altmann*, 541 US at 735-36 (Kennedy, J, dissenting)). It may be, of course, that both Justices truly found the grant of authority offered in the EWSAA clear in its application to ongoing cases against Iraq. In reality however, because the EWSAA proviso lacks a clear mandate to that effect, an observer can only conclude either that all the Justices were satisfied with the Court's superficial examination of congressional intent, mentioned in *dicta*, that '[t]he Government was at the time spending considerable sums of money to rebuild Iraq [and] [w]hat would seem perplexing is converting a billion-dollar reconstruction project into a compensation scheme for a few of Saddam's victims' (which is incorrect—nothing in the EWSAA could be read as creating compensation scheme) or that all judges are sending a strong message that the judiciary ought 'to be especially wary of overriding apparent statutory text supported by executive interpretation in favor of speculation about a law's true purpose' (Decision, p 11).

The Court's recognition that the crimes alleged occurred before the passage of the terrorism exception to the FSIA and suggestion in *dicta* that the 'President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts' (Decision citing *Saudi Arabia v. Nelson*, 507 US 349, 351 (1993), p 17) is also noteworthy. Technically, this should be irrelevant to the Court's retroactivity analysis. *Altmann* gave no indication that the retroactivity of FSIA-related laws would be judged based on the expectation of claimants, and lower courts have typically applied *Altmann* acknowledging that it 'deems irrelevant the way an entity would have been treated at the time of the alleged wrongdoing' (*Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. 21. Supp. 2d 423, 433 (E.D.N.Y. 2001)). Moreover, in *Altmann* the Court addressed the idea of treating the exception provisions of the FSIA differently than its body with respect to retroactivity, holding that ' . . .it would be anomalous to presume that an isolated provision (such as the expropriation exception [ . . .]) is of purely prospective application absent any statutory language to that effect'. This conclusion is certainly of more direct applicability to future retroactivity determinations than the decision in *Saudi Arabia*, cited by the unanimous Court, which primarily analyzed the expression 'based upon a commercial activity' within the meaning of the first clause of 1605(a)(2) of the FSIA and contains no discussion of State or Claimant expectations.

Finally, the case appears to have compounded the disagreement over how to apply the judicial presumption against retroactivity to the FSIA. Divergent approaches to this problem were first brought to light in *Altmann* over whether or not the FSIA should be subjected to a *Landgraf analysis*. According to *Landgraf*, if a statute alters substantive rights it does not apply retroactively, but if it concerns matters that are purely procedural it may be retroactive. Justice Stevens, writing for the majority in *Altmann*, wrote that the 'FSIA defies such categorization' (*Id.* at 124 S.Ct. 2240) and analyzed the thematic structure and purpose of the FSIA so as to account for its '*sui generis* context'. Justice Scalia, however, rejected Stevens' approach in his *Altmann* concurrence, applied *Landgraf*, and concluded that the FSIA 'affects substantive rights only accidentally, and not as a necessary and intended consequence of the law' (*Id.* at 2256 (Scalia, J, concurring)) and as such should be applied retroactively.

By describing the EWSAA proviso that allows the President to modify the FSIA as a law ' . . . that merely alter[s] the rules of foreign sovereign immunity, rather than modif[ies] substantive rights' the unanimous *Beatty* Court implies, but does not make explicit, that § 1503 had been scrutinized through the lens of *Landgraf* rather than *Altmann*. The Court's opacity with regard to the test applied is likely to result in a split between lower courts when they consider the retroactivity (or lack thereof) of the recently passed Libya Claims Resolution Act, which in Section 5(a)(1)(B) eliminated the jurisdiction of U.S. Courts over claims brought under § 1083 against Libya and contains no clear instruction regarding pending cases, as well as any other limitations on FSIA jurisdiction Congress may legislate or the Executive may push for.

*Republic of Iraq v Beatty, et al.*, 556 US \_\_\_\_ (2009) available at <http://www.google.com/search?q=iraq+v.+beatty&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a>

Emergency Wartime Supplemental Appropriations Act, 2003, 117 Stat. 559 available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01559:@@D&summ2=m&>

National Defense Authorization Act for Fiscal Year 2008 available at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.1585:>

*Acree v. Republic of Iraq*, 370 F. 3d 41 (2004) available at <http://bulk.resource.org/courts.gov/c/F3/370/370.F3d.41.03-5232.html>

*Landgraf v. USI Film Prods.*, 511 US 244 (1994) available at <http://www.law.cornell.edu/supct/html/92-757.ZO.html>

*Republic of Austria et al. v. Altmann*, 541 US 677 (2004) available at <http://www.law.cornell.edu/supct/html/03-13.ZO.html>

*Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. 21. Supp. 2d 423, 433 (EDNY 2001) available at <http://caselaw.findlaw.com/data2/circs/2nd/019442pv2.pdf>

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