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In Re Terrorist Attacks on September 11, 2001: Dismissals of Claims Against Saudi Defendants Under the Foreign Sovereign Immunities Act (FSIA)

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Summary

Practical and legal hurdles, including the difficulty of locating hidden al Qaeda members and the infeasibility of enforcing judgments in terrorism cases, hinder victims' attempts to establish liability in U.S. courts against, and recover financially from, those they argue are directly responsible for the September 11 terrorist attacks. Instead, victims have sued numerous individuals and entities with only indirect ties to the attacks, including defendants who allegedly provided monetary support to al Qaeda prior to September 11, 2001. Within the consolidated case *In Re Terrorist Attacks of September 11, 2001*, one such group of defendants was the Kingdom of Saudi Arabia, several Saudi princes, a Saudi banker, and a Saudi charity. Plaintiffs argued that these Saudi defendants funded groups that, in turn, assisted the attackers.

A threshold question in *In Re Terrorist Attacks* was whether U.S. courts have the power to try these Saudi defendants. In August 2008, the U.S. Court of Appeals for the Second Circuit affirmed dismissals of all claims against the Saudi defendants, holding that U.S. courts lack jurisdiction over the claims. Specifically, the court of appeals held that in this case, U.S. courts lack: 1) subject matter jurisdiction over the Kingdom of Saudi Arabia, because the Kingdom is entitled to immunity under the Foreign Sovereign Immunities Act (the FSIA) and no statutory exception to immunity applies; 2) subject matter jurisdiction over the Saudi charity and Saudi princes acting in their official capacities, because they are "agents or instrumentalities" of the Kingdom and thus, under the FSIA, are entitled to immunity to the same extent as the Kingdom itself; and 3) personal jurisdiction over Saudi princes sued in their personal capacities, because the princes had insufficient interactions with the forum to satisfy the "minimum contacts" standard for personal jurisdiction under the Fifth Amendment due process clause.

In response to congressional inquiries, this report summarizes the FSIA and jurisdiction in cases against foreign defendants and analyzes the recent court of appeals decision.

Contents

In Re Terrorist Attacks on September 11, 2001: Dismissals of Claims Against Saudi Defendants Under the Foreign Sovereign Immunities Act (FSIA)

Numerous legal and practical obstacles, such as the infeasibility of locating al Qaeda operatives, stand in the way of victims seeking to establish liability in U.S. courts against, and recover damages from, the terrorists who planned and carried out the September 11, 2001, attacks. Victims, however, have sued numerous individuals and groups with only indirect ties to the attackers, including defendants who allegedly provided monetary support to al Qaeda prior to September 11, 2001.

In Re Terrorist Attacks on September 11, 2001, is a consolidated case that includes, among other claims, claims against the Kingdom of Saudi Arabia, several Saudi princes, a Saudi banker, and a Saudi charity.[1] Plaintiffs argued that these Saudi defendants played a "critical role" in the September 11 attacks by giving money to Muslim groups, which in turn funded al Qaeda.[2] However, in August 2008, the U.S. Court of Appeals for the Second Circuit affirmed dismissals of the claims against the Saudi defendants.[3] This report examines the legal bases for those dismissals.

Overview of the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (the FSIA) applies to all foreign states and their "agents and instrumentalities."[4] Immunity for sovereign nations against suits in U.S. courts has a long history and is based on the principle that conflicts with foreign nations are more effectively addressed through diplomatic efforts than through judicial proceedings.[5] Congress passed the FSIA to codify these long-standing principles and to clarify limitations on the scope of immunity that had emerged in international practice.[6]

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[1] *In Re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008).

[2] *Id*. at 76.

[3] *Id*. at 75-76.

[4] Foreign Sovereign Immunities Act of 1976, P.L. 94-583; codified at 28 U.S.C. §1602 *et seq.*

[5] For more on the history of foreign sovereign immunity and the FSIA, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K Elsea. *See also* Elizabeth L. Barh. *Is the Gavel Mightier Than the Sword? Fighting Terrorism in American Courts*. 15 Geo. Mason L. Rev. 1115, 1125 (2008).

[6] *See Permanent Mission of India to United Nations v. City of New York*, 127 S.Ct. 2352,

(continued...)

The FSIA contains both a general, presumptive rule against litigation in U.S. courts and a number of exceptions permitting suits. As a general rule, foreign states, together with their agents and instrumentalities, are "immune from the jurisdiction of the courts of the United States and from the states."[7] However, the FSIA authorizes jurisdiction over foreign nations in several exceptions.[8] Namely, a foreign state is not immune from U.S. courts' jurisdiction where: 1) the foreign state has waived its immunity;[9] 2) the claim is a specific type of admiralty claim;[10] 3) the claim involves specified commercial activities;[11] 4) the claim implicates property rights connected with the United States;[12] 5) the claim arises from tortious conduct that occurred in the United States;[13] 6) the claim is made pursuant to an arbitration agreement;[14] or 7) the claim seeks money damages against a designated state sponsor of terrorism for injuries arising from a terrorist act.[15]

The exception for designated state sponsors of terrorism removes immunity for designated "state sponsor[s] of terrorism" and their "official[s], employee[s], and agent[s]" in suits involving "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act."[16] However, the exception applies

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[6] (...continued)
2356 (discussing Congress's intention to codify an understanding of immunity as restricted to public acts and to codify the real property exception existing in international practice at the time).

[7] 28 U.S.C. §1604.

[8] 28 U.S.C. §1605.

[9] 28 U.S.C. §1605(a).

[10] 28 U.S.C. §1605(b).

[11] The commercial activities exception applies if a foreign state: 1) conducts the relevant commercial activity in the U.S.; 2) performs an act in the U.S. related to the commercial activity in question; or 3) conducts commercial activity that causes a "direct effect" in the U.S. 28 U.S.C. §1605(a)(2).

[12] The property rights exception applies if: 1) rights in property have been taken in violation of international law and the property at issue (or property exchanged for the property at issue) is located in the U.S.; 2) the property at issue (or property exchanged for the property at issue) is owned or operated by the foreign state or its agent or instrumentality and the foreign state or its agent or instrumentality is engaged in commercial activity in the U.S.; or 3) "the property rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue." 28 U.S.C. §1605(a)(3),(4).

[13] 28 U.S.C. §1605(a)(5).

[14] 28 U.S.C. §1605(a)(6).

[15] 28 U.S.C. §1605(a)(7).

[16] *Id.* The terrorist state exception has served as the basis for significant litigation since Congress added the exception to the FSIA in 1996. The exception has also spurred legal disputes over attachment of assets. As a result, it has been amended several times, most recently by Section 1083 of the National Defense Authorization Act for FY2008, which added provisions regarding attachment of foreign assets to facilitate satisfaction of money
(continued...)

only to countries designated by the U.S. Department of State as state sponsors of terrorism.[17] This list currently includes Cuba, Iran, Sudan, and Syria.[18]

Jurisdiction in Cases Against Foreign Defendants

Before asserting jurisdiction to accept a case, a federal court[19] must establish its authority over the dispute involved and the parties to the litigation. In other words, courts must assert both subject matter jurisdiction over each claim and personal jurisdiction over each defendant in a case. For cases involving foreign defendants, the analyses for subject matter and personal jurisdiction differ according to whether the FSIA applies.

Subject matter jurisdiction. For claims by U.S. plaintiffs against foreign non-state defendants to whom the FSIA does not apply — for example, claims against individuals or corporations — federal law authorizes subject matter jurisdiction as long as the "amount in controversy" exceeds $75,000.[20]

In contrast, for claims against foreign states and their instrumentalities, the FSIA is a jurisdictional gatekeeper. The FSIA denies subject matter jurisdiction over claims against foreign defendants entitled to immunity.[21] Conversely, the FSIA authorizes subject matter jurisdiction over claims in which a foreign state would be entitled to immunity under the FSIA but for the application of an exception.[22]

Personal jurisdiction. Personal jurisdiction is the second threshold hurdle for assertion of judicial authority in cases involving foreign defendants. Whereas subject matter jurisdiction governs courts' power over particular claims, personal jurisdiction governs courts' power over particular defendants. Thus, even if a court

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[16] (...continued)
damages awards. P.L. 110-181. For information on suits against terrorist states, generally, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K Elsea.

[17] 28 U.S.C. §1605(a)(7)(A).

[18] 22 CFR §126.1(d).

[19] Although state courts occasionally hear cases involving foreign defendants, cases involving foreign states or foreign officials are usually removed to federal courts under 28 U.S.C. §1441(d). For this reason, this discussion focuses on jurisdiction in federal courts.

[20] 28 U.S.C. §1332(a).

[21] 28 U.S.C. §1330(a).

[22] *See Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) ("'At the threshold of every action in a district court against a foreign state, ... the court must satisfy itself that one of the [the FSIA] exceptions applies,' as 'subject-matter jurisdiction in any such action depends' on that application" (quoting *Verlinden v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1962)).

establishes jurisdiction over the subject matter of a claim, it cannot exercise its authority over a defendant for whom it lacks personal jurisdiction.[23]

Personal jurisdiction requires both statutory authority and satisfaction of Fifth Amendment due process standards. As with subject matter jurisdiction, statutory authority for personal jurisdiction over foreign defendants follows one of two distinct routes according to the FSIA's application. If the defendant is a foreign state or its agent or instrumentality, personal jurisdiction is statutorily authorized under the FSIA if subject matter jurisdiction is established.[24] Alternatively, for a defendant who is not a foreign state or its agent or instrumentality, the ordinary procedure for obtaining statutory authority for personal jurisdiction applies; typically, a federal court must find statutory authority for personal jurisdiction in the laws of the state in which it sits.[25]

However, constitutional limits apply regardless of a statutory basis for personal jurisdiction. Under the due process clause, personal jurisdiction is constitutional if: 1) defendants have had "certain minimum contacts with" the judicial forum attempting to assert jurisdiction, and 2) asserting such jurisdiction "does not offend traditional notions of fair play and substantial justice."[26] The type and quantity of contacts necessary to constitute "minimum contacts" differ according to the type of personal jurisdiction — general or specific — that applies. General jurisdiction, which allows a court to exercise jurisdiction over a foreign defendant for any claim, does not require contacts related to the specific claim in the case but instead requires "continuous and systematic" contacts with a forum.[27] Conversely, specific jurisdiction, which limits a court's jurisdiction over a defendant to claims in a particular case, involves no "continuous and systematic" requirement; instead, it requires that a defendant's contacts with the forum "relate to" or "arise out of" the claim at issue in the case.[28]

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[23] *In rem* jurisdiction is an alternative jurisdictional basis permitting suits in some admiralty cases and in cases in involving immovable property. *In rem* jurisdiction does not authorize judicial power over particular defendants; rather, it provides jurisdiction over property located in the United States. As a practical matter, *in rem* jurisdiction is unlikely to serve as a basis for a defendant to which the FSIA applies, because the FSIA's exceptions effectively cover *in rem* jurisdiction. For this reason, in *Permanent Mission of India to the United Nations v. City of New York*, a case involving real property located in the United States, the Supreme Court essentially ignored any potential analysis of *in rem* jurisdiction and focused instead on the interpretation of the property exception under the FSIA. 127 S.Ct. 2352 (2007).

[24] 28 U.S.C. §§1330(b), 1608.

[25] Fed. R. Civ. P. 4(k). However, most U.S. states' so-called "long-arm" statutes extend personal jurisdiction to the extent authorized under the U.S. Constitution. Thus, in many cases, identical statutory and constitutional analyses apply to personal jurisdiction questions.

[26] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted).

[27] *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984) (internal quotation marks omitted).

[28] *Id*. at 414 n.8.

U.S. Court of Appeals Decision in *In Re Terrorist Attacks on September 11, 2001*

In August 2008, the U.S. Court of Appeals for the Second Circuit affirmed dismissals of claims against the Kingdom of Saudi Arabia, a Saudi charity, Saudi princes, and a Saudi banker in *In Re Terrorist Attacks on September 11, 2001*.[29] Plaintiffs in the case are victims of the September 11 terrorist attacks. They alleged that the Saudi defendants had supported al Qaeda's financial backers prior to the attacks and were therefore civilly liable for plaintiffs' injuries. However, the court of appeals did not reach the merits of these allegations.

Instead, the court held that U.S. courts lack jurisdiction over the claims against the Saudi defendants.[30] The legal bases for this holding were lack of subject matter jurisdiction under the FSIA and lack of personal jurisdiction. The most significant aspects of the court of appeals' opinion were interpretations of the FSIA, namely: 1) its interpretation of "agent or instrumentality" under the FSIA as extending both to the Saudi charity and to individuals sued in their official capacities, and 2) its interpretation of the commercial activities and torts exceptions under the FSIA as having a narrower scope than plaintiffs had advocated.

The court's holding facilitates a relatively broad scope of foreign sovereign immunity, and therefore, a relatively narrow scope of subject matter jurisdiction over foreign officials and government-controlled entities. This decision is generally in line with other circuit court rulings. In addition, language within the opinion reflected the court's deference to the FSIA's underlying emphasis on resolving disputes with foreign actors through diplomatic rather than judicial channels.

Background. *In Re Terrorist Attacks* is a case consolidated for pre-trial purposes in the U.S. District Court for the Southern District of New York.[31] The Second Circuit Court of Appeals opinion reviewed dismissals of only a subset of the claims at issue in the case.

Plaintiffs in *In Re Terrorist Attacks* are individuals and businesses injured by the September 11 terrorist attacks. They brought claims based on state and federal tort law and various federal laws, including the Torture Victim Protection Act, for injuries suffered as a result of the attacks.[32]

The dismissed claims fall into four categories: 1) claims against the Kingdom of Saudi Arabia; 2) claims against four Saudi princes in their official capacities; 3) claims against the Saudi High Commission for Relief to Bosnia and Herzegovina (the SHC), a charitable organization operated in connection with the Saudi government;

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[29] 538 F.3d 71.

[30] *Id*. at 75-76.

[31] *Id.* at 78.

[32] *Id*. at 75.

and 4) claims against a banker and Saudi princes in their personal capacities.[33] Underlying all of the claims was the allegation that defendants had "played a critical role in the September 11 attacks by funding Muslim charities that, in turn, funded al Qaeda."[34]

The court affirmed dismissals of the first three sets of claims for lack of subject matter jurisdiction under the FSIA. Because the FSIA precludes courts from asserting jurisdiction over claims against foreign states, one of the FSIA exceptions must apply before a U.S. court may assert jurisdiction over the Kingdom of Saudi Arabia or any of its "agencies or instrumentalities." As discussed below, the Second Circuit held that none of the FSIA exceptions applied.

The fourth set of claims (those brought against princes in their personal capacities) fell outside of the scope of the FSIA. Nonetheless, as discussed below, the court dismissed those claims for lack of personal jurisdiction.

Charity and princes as "agents and instrumentalities" of the Kingdom. Because a foreign state's "agent or instrumentality" is entitled to the same immunity to which its state itself is entitled under the FSIA, a key threshold question was whether the SHC and the princes sued in their official capacities qualified as agents or instrumentalities under the FSIA. The FSIA defines "agency or instrumentality" as any entity which is: 1) a "separate legal person, corporate or otherwise"; 2) "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and 3) not a U.S. citizen or created under the laws of a third country.[35]

The SHC "charity". Whether the SHC was an agent or instrumentality turned on whether it was an "organ" of the Kingdom of Saudi Arabia.[36] The court applied a multi-factor test, derived from a previous Second Circuit decision and from decisions from other circuits, to determine whether SHC was such an "organ."[37] Specifically, the court applied the following five criteria: "1) whether the foreign state created the entity for a national purpose; 2) whether the foreign state actively supervises the entity, 3) whether the foreign state requires the hiring of public employees and pays their salaries, 4) whether the entity holds exclusive rights to some right in the [foreign] country; and 5) how the entity is treated under foreign state law."[38] Emphasizing that the Saudi government had formed SHC and paid its

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[33] *Id.* at 76-78.

[34] *In Re Terrorist Attacks,* 538 F.3d at 76.

[35] 28 U.S.C. §1603(b).

[36] *See* definition, 28 U.S.C. §1603(b).

[37] *In Re Terrorist Attacks,* 538 F.3d at 85-86 (citing *Filler v. Hanvit Bank,* 378 F.3d 213, 217 (2d Cir. 2004)).

[38] *Id.*

employees, the court held that the SHC was an organ, and thus was an "agent or instrumentality," of the Kingdom.[39]

Officials. The plaintiffs sued four Saudi princes for actions taken within their official capacities.[40] All four princes hold positions of power in the SHC; three of the princes are members of the country's "Supreme Council of Islamic Affairs," the body responsible for monitoring and approving "Islamic charitable giving both within and outside the Kingdom"; and the fourth prince is the SHC's president, in addition to his roles as a provincial governor and crown prince.[41]

Although several other federal courts of appeals have ruled on the extension of foreign sovereign immunity to foreign officials, treatment of officials under the FSIA was a question of first impression for the Second Circuit.[42] Raising a number of textual arguments and referencing the FSIA's legislative history, the court held that individuals acting within their official capacities are indeed "agents or instrumentalities" of their states and are therefore entitled to immunity under the FSIA to the same extent as their states.[43] The court noted that at the time the FSIA was enacted, Congress expressed a desire to codify common law principles, one of which was that immunity extends to a state's officials.[44] The court also emphasized the potential erosion of immunity for foreign states if immunity extended only to government actions distinct from the actions of officials as individuals, noting that "the state cannot act except through individuals."[45]

The Second Circuit Court of Appeals' holding is consistent with the conclusions of five of the six other federal courts of appeals that have considered whether an individual may be protected as an agent or instrumentality.[46] Only the Court of Appeals for the Seventh Circuit reached the opposite conclusion. In *Enahoro v. Abubakar*, the Seventh Circuit rejected a military junta general's immunity claim.[47] Focusing on the text of the FSIA, the *Enahoro* court held that the phrase "separate

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[39] *Id.*

[40] The four princes named were Prince Salman bin Abdulaziz al-Saud, Prince Sultan bin Abdulaziz al Saud, Prince Naif bin Abdulaziz al-Saud, and Prince Turki al-Faisal bin Abdulaziz al Saud. *Id*. at 77.

[41] *Id*.

[42] *Id*. at 80-81.

[43] *Id*. at 81-85.

[44] *Id*. at 81-83.

[45] *Id*. at 84.

[46] The Fourth, Fifth, Sixth, Ninth, and the D.C. Circuits have held that officials acting within their official capacities are "agents or instrumentalities" of their countries for the purpose of the FSIA. *See Velasco v. Gov't of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-03 (9th Cir. 1990).

[47] 408 F.3d 877 (7th Cir. 2005).

legal person, corporate or otherwise" within the "agency or instrumentality" definition in the statute, together with a lack of statutory references to individuals, suggested a lack of congressional intent to extend immunity to individuals.[48] Specifically, it held that if Congress had intended "separate legal person" to encompass individuals, it would have used more natural language, rather than a phrase often intended in law to refer to corporations.[49] In *In Re Terrorist Attacks*, the Second Circuit characterized the Seventh Circuit as an "outlier" on this issue.[50]

Relevant FSIA Exceptions. After holding that the FSIA applied not only to the Kingdom of Saudi Arabia but also to Saudi officials and the SHC as an agency or instrumentality of the Kingdom, the court of appeals next examined whether any FSIA exception applied. First, the court held that the terrorist state exception did not apply because the U.S. State Department has not designated the Kingdom of Saudi Arabia as a state sponsor of terrorism.[51] Next, although the court found two other exceptions — the commercial activity and torts exceptions — "potentially relevant,"[52] neither exception applied to the Saudi defendants.

Commercial activities exception. To support their argument that the commercial activities exception should apply to the Saudi defendants, the *In Re Terrorist Attacks* plaintiffs characterized defendants' charitable contributions to Muslim groups as a form of money laundering.[53] The court rejected this characterization as incompatible with the Supreme Court's interpretation of the commercial activities exception.

The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act."[54] The court noted the "circularity" of this definition and relied upon the U.S. Supreme Court's definition of "commercial activity"(for the context of the FSIA exception) as "the *type* of actions by which a private party engages in 'trade and traffic or commerce.'"[55] Under this definition, the court noted that the appropriate focus in determining whether an action constitutes "commercial activity" is on an action's nature rather than its purpose. With this framework, the court upheld the district court's finding that defendants' "charitable contributions" fell outside the scope of the commercial

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[48] *Id*. at 881-82.

[49] *Id*. ("Given that the phrase 'corporate or otherwise' follows on the heels of 'separate legal person,' we are convinced that the latter phrase refers to a legal fiction — a business entity which is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the the FSIA, it would have done so in clear and unmistakable terms.")

[50] *In Re Terrorist Attacks*, 538 F.3d at 81.

[51] *Id*. at 75.

[52] *Id*. at 80.

[53] *Id*. at 90-91.

[54] 28 U.S.C. §1603(d).

[55] *In Re Terrorist Attacks*, 538 F.3d at 91 (citing *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992)).

activities exception by reason of their non-commercial nature, regardless of the contributions' alleged money laundering purpose.[56]

Torts exception. Finally, the court rejected the torts exception as inapplicable to claims against the Saudi defendants. Specifically, the court noted that Congress's purpose in enacting the torts exception was to create liability for incidents, such as traffic accidents, that occur in the United States.[57] Furthermore, the court was concerned about the effect that an expanded torts exception would have on the other FSIA exceptions. It emphasized that if the exception were expanded to include all conduct conceivably characterized as tortious, the torts exception would "vitiate" the terrorist state exception's limitation to designated terrorist states.[58]

Princes sued in their personal capacities. For claims made against a Saudi banker and against several Saudi princes for actions taken in their personal capacities, subject matter jurisdiction was not precluded by the FSIA. However, the court upheld the district court's determination that it lacked personal jurisdiction over the Saudi defendants sued in their personal capacities.[59]

Specifically, the court concurred with the district court's finding that the princes sued in their personal capacities lacked sufficient contacts with the forum to permit personal jurisdiction under the constitutional "minimum contacts" standard. Plaintiffs argued that the minimum contacts test was satisfied because the defendants had purposefully directed activity at the judicial forum by supporting the attacks. The court rejected this argument, acknowledging that it had been a successful argument in cases where defendants were "primary participants" in the terrorist acts but holding that the banker and princes' activities were too attenuated from the actual attacks to satisfy due process requirements.[60] Similarly, the court rejected the plaintiff's argument that potential foreseeability of the terrorist attacks was a sufficient basis for establishing minimum contacts.[61] It noted that foreseeability alone is insufficient to pass constitutional muster for personal jurisdiction; instead, the constitutional standard requires "intentional" conduct, "expressly aimed" at residents in the forum.[62]

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[56] Because it determined that the contributions fell outside of the scope of "commercial activities," the court did not decide whether money laundering or other criminal acts could constitute "commercial activities" under the FSIA. *Id.* at n.17.

[57] *Id.* at 87.

[58] *Id.* at 88.

[59] *Id.* at 96

[60] *Id.* at 93-95.

[61] *Id.* at 94-95.

[62] *Id.*

Conclusion

In *In Re Terrorist Attacks*, the U.S. Court of Appeals for the Second Circuit joined several other federal courts of appeals which have interpreted the FSIA's "agent or instrumentality" definition as encompassing foreign individuals sued in their official capacities. The court also adopted narrow interpretations of the commercial activities and torts exceptions under the FSIA. Those threshold interpretations undergirded the court's legal bases for dismissing claims against various Saudi defendants for lack of jurisdiction. Thus, the court of appeals' decision restrains efforts by September 11 victims and other plaintiffs seeking recovery in U.S. courts against foreign officials and government-controlled entities like the Saudi charity.

Despite its impact on the plaintiffs, the court's opinion emphasized that a lack of judicial jurisdiction under the FSIA should not necessarily exculpate foreign nations (or their agents and instrumentalities) from suffering consequences as a result of supporting heinous acts. The court noted that "deterrence (or punishment) does not begin and end with civil litigation brought by individual plaintiffs. Our government has other means at its disposal — sanctions, trade embargos, diplomacy, military action — to achieve its foreign policy goals...."[63] In this way, the *In Re Terrorist Attacks* opinion appears to correspond with congressional intent in enacting the FSIA.

[63] *Id*. at 90.