



# Supreme Court Permits Retroactive Punitive Damages Against Sudan in Terrorism Cases

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More than two decades after the [U.S. embassies bombings in Tanzania and Kenya](#), some plaintiffs who alleged that Sudanese support of Al Qaeda contributed to the attacks have won the opportunity to obtain punitive damages against the government of Sudan. The Supreme Court decided 8-0 (with no participation by Justice Kavanaugh) in *Opati v. Republic of Sudan* that Congress intended to make punitive damages available on a retroactive basis when it [updated](#) the [terrorism exception](#) to the [Foreign Sovereign Immunities Act](#) (FSIA) in 2008. The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) had [decided](#) otherwise, invalidating \$4.3 billion in punitive damages and halving the *Opati* plaintiffs' award for the embassy bombings. Under *Opati*, the D.C. Circuit is to reinstate some or all of those punitive damages.

## State-Sponsored Terrorism Exception to the FSIA

Under the [FSIA](#), foreign states are immune from jurisdiction in U.S. courts unless an exception exists. Congress [amended](#) the FSIA in 1996 to provide jurisdiction in any case in which an eligible plaintiff seeks money damages against a [designated state sponsor of terrorism](#) “for 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.” The current terrorism exception, codified at [28 U.S.C. § 1605A](#), provides U.S. courts jurisdiction to hear claims against designated state sponsors of terrorism for similar conduct if the claimant or victim was, at the time the terrorist act occurred: (1) a U.S. national; (2) a member of the Armed Forces; or (3) “otherwise an employee or contractor of the United States.” The previous terrorism exception did not permit foreign national employees or contractors to bring claims, although foreign national family members of U.S. victims could bring claims, as could U.S. family members of foreign victims.

Section [1605A\(c\)](#) also created a new federal cause of action for injuries caused by acts of state-sponsored terrorism. Before enactment of section 1605A in 2008, the terrorism exception in the FSIA did not provide a separate cause of action and did not specify the types of damages available. Instead, plaintiffs [had to assert](#) causes of action based on some other source of law, primarily state or foreign law. The [1605A\(c\)](#) cause of action is available for U.S. nationals, members of the U.S. Armed Forces, and contractors or employees of the U.S. government. Because the cause of action does not apply to foreign

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nationals who were not employees or contractors of the United States when the claim arose, foreign national family members of covered persons [must look to state or foreign law](#) for a cause of action. Most plaintiffs in *Opati* fall into the latter category and must use state or foreign law for a cause of action.

The cause of action in section 1605A(c) provides that damages “may include” punitive damages, as well as economic damages, solatium, and pain and suffering. Under other exceptions to the FSIA (and under the previous terrorism exception), [punitive damages](#) are not available against a foreign state, although they are available against [agencies or instrumentalities](#) of foreign states.

Upon enacting section 1605A, Congress permitted plaintiffs to refile cases filed under the previous terrorism exception or convert pending claims to the new cause of action, [directing](#) that such cases be treated as if they had been filed under the new cause of action. Congress also permitted plaintiffs, within a specified time, to file new cases related to claims that had already resulted in judgments, even if the time for filing had expired. In these ways, Congress permitted the new cause of action to apply to terrorist acts that occurred before section 1605A was enacted in 2008.

## The Question in *Opati*

In *Opati*, the Supreme Court agreed to decide the following [question](#) plaintiffs presented to the Court:

Whether, consistent with this Court’s decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Foreign Sovereign Immunities Act applies retroactively; thereby permitting recovery of punitive damages under 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring prior to the passage of the current version of the statute.

*Altmann* held that the FSIA as a whole, which became law in 1976, applied retroactively to cover conduct that occurred prior to its enactment. Plaintiffs in *Opati* [sought](#) to extend that rule to cover not only general questions of foreign sovereign immunity but also to cover a new claim for punitive damages. Sudan [argued](#) that the general presumption against retroactivity the Supreme Court set forth in *Landgraf v. USI Film Products* suggests that Congress must expressly state that punitive measures (including punitive damages) should apply retroactively. (For more discussion of *Landgraf* and retroactive legislation, see this [CRS InFocus](#).) Sudan [conceded](#) that the new cause of action in section 1605A(c) applies retroactively, but argued that Congress had not clearly stated that the portion of that statute that provides for punitive damages also applies to past conduct.

The Court, however, [saw](#) “no need to resolve the parties’ debate over interpretive presumptions.” Assuming without deciding that Sudan could benefit from *Landgraf*’s presumption of prospectivity, the Court [held](#) that Congress was “as clear as it could have been” that it meant for the newly enacted cause of action to apply to pre-enactment conduct. The Court [saw](#) no logical reason to apply that interpretation to “every jot and tittle” of the provision *except* for punitive damages.

The Court [was not persuaded](#) that the language “may include” introduced any ambiguity—“may” simply denotes discretion on the part of the judge deciding the claim, the Court reasoned. [Noting](#) that Sudan did not challenge the constitutional validity of the retroactive application of punitive damages, the Court [declined](#) to accept Sudan’s proposal that would require Congress to provide a “super-clear” statement when it intends to authorize punitive damages for past conduct.

## The Question on Remand

The Supreme Court resolved the question about the retroactive availability of punitive damages under the federal law cause of action in section 1605A, but most of the *Opati* plaintiffs are foreign nationals that proceeded under state law rather than the federal cause of action. The D.C. Circuit previously [ruled](#) that retroactive punitive damages are not available to the plaintiffs using state law causes of action “for the same

reason” it had concluded plaintiffs using section 1605A(c)’s federal cause of action cannot obtain them. *Opati* overturned the D.C. Circuit on the issue of retroactive punitive damages and federal causes of action, but the Supreme Court declined to decide whether those damages are available to plaintiffs asserting state law claims against Sudan. Instead, the Court [remanded](#) that question back to the D.C. Circuit. *Opati* may [suggest](#) that the D.C. Circuit’s earlier reasoning does not necessarily apply with respect to different causes of action.

## Interest for Congress

*Opati* may be of interest to Members of Congress concerned with Sudan’s efforts to conclude an international claims [settlement agreement](#) with the United States. Sudan is in the midst of a transition of power (discussed in this [CRS Report](#)) after nationwide protests against the Islamist regime of long-ruling President Omar al Bashir led to his ouster in April 2019. Sudan’s new transitional government is currently seeking to negotiate a settlement agreement with the United States and remove itself from the U.S. list of state sponsors of terrorism. It is possible that such a settlement agreement might moot the remaining questions in *Opati* about retroactive punitive damages for state law causes of action because a claims settlement agreement or implementing legislation would likely call for dismissal of all terrorism claims against Sudan. (Plaintiffs could still obtain punitive damages against co-defendant Iran, who has not participated in the litigation).

A congressional memorandum discussing Sudan’s proposed settlement and its implications for U.S.-Sudan relations is available upon request from the author.

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