# SAUDI ARABIA *v.* NELSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 23, 1993]

Justice Souter delivered the opinion of the Court.

Because this case comes to us on a motion to dismiss the complaint, we assume that we have truthful factual allegations before us, see *United States* v. *Gaubert*, 499 U. S. ___, ___ (1991), though many of those allegations are subject to dispute. See Brief for Petitioners 3, n. 3; see also n. 1, *infra*. Petitioner Kingdom of Saudi Arabia owns and operates petitioner King Faisal Specialist Hospital in Riyadh, as well as petitioner Royspec Purchasing Services, the Hospital's corporate purchasing agent in the United States. App. 91. The Hospital Corporation of America, Ltd. (HCA), an independent corporation existing under the laws of the Cayman Islands, recruits Americans for employment at the Hospital under an agreement signed with Saudi Arabia in 1973. *Id.*, at 73.

In its recruitment effort, HCA placed an advertisement in a trade periodical seeking applications for a position as a monitoring systems engineer at the Hospital. The advertisement drew the attention of respondent Scott Nelson in September 1983, while Nelson was in the United States. After interviewing for the position in Saudi Arabia, Nelson returned to the United States, where he signed an employment contract with the Hospital, *id.*, at 4, satisfied personnel processing requirements, and attended an orientation session that HCA conducted for Hospital employees. In the course of that program, HCA identified Royspec as the point of contact in the United States for family members who might wish to reach Nelson in an emergency. *Id.*, at 33.

In December 1983, Nelson went to Saudi Arabia and began work at the Hospital, monitoring all "facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others." *Id.*, at 4. He did his job without significant incident until March 1984, when he discovered safety defects in the Hospital's oxygen and nitrous oxide lines that posed fire hazards and otherwise endangered patients' lives. *Id.*, at 57-58. Over a period of several months, Nelson repeatedly advised Hospital officials of the safety defects and reported the defects to a Saudi Government commission as well. *Id.*, at 4-5. Hospital officials instructed Nelson to ignore the problems. *Id.*, at 58.

The Hospital's response to Nelson's reports changed, however, on September 27, 1984, when certain Hospital employees summoned him to the Hospital's security officewhere agents of the Saudi Government arrested him. [n.1] The agents transported Nelson to a jail cell, in which they "shackled, tortured and bea[t]" him, *id.*, at 5, and kept him four days without food. *Id.*, at 59. Although Nelson did not understand Arabic, Government agents forced him to sign a statement written in that language, the content of which he did not know; a Hospital employee who was supposed to act as Nelson's interpreter advised him to sign "anything" the agents gave him to avoid further beatings. *Ibid.* Two days later, Government agents transferred Nelson to the Al Sijan Prison "to await trial on unknown charges." *Ibid.*

At the Prison, Nelson was confined in an overcrowded cell area infested with rats, where he had to fight other prisoners for food and from which he was taken only once a week for fresh air and exercise. *Ibid.* Although police interrogators repeatedly questioned him in Arabic, *id.*, at 5, Nelson did not learn the nature of the charges, if any, against him. *Ibid.* For several days, the

Saudi Government failed to advise Nelson's family of his whereabouts, though a Saudi official eventually told Nelson's wife, respondent Vivian Nelson, that he could arrange for her husband's release if she provided sexual favors. *Ibid.*

Although officials from the United States Embassy visited Nelson twice during his detention, they concluded that his allegations of Saudi mistreatment were "not credible" and made no protest to Saudi authorities. *Id.*, at 64. It was only at the personal request of a United States Senator that the Saudi Government released Nelson, 39 days after his arrest, on November 5, 1984. *Id.*, at 60. Seven days later, after failing to convince him to return to work at the Hospital, the Saudi Government allowed Nelson to leave the country. *Id.*, at 60-61.

In 1988, Nelson and his wife filed this action against petitioners in the United States District Court for the Southern District of Florida seeking damages for personal injury. The Nelsons' complaint sets out 16 causes of action, which fall into three categories. Counts II through VII and counts X, XI, XIV, and XV allege that petitioners committed various intentional torts, including battery, unlawful detainment, wrongful arrest and imprisonment, false imprisonment, inhuman torture, disruption of normal family life, and infliction of mental anguish. *Id.*, at 6-11, 15, 19-20. Counts I, IX, and XIII charge petitioners with negligently failing to warn Nelson of otherwise undisclosed dangers of his employment, namely, that if he attempted to report safety hazards the Hospital would likely retaliate against him and the Saudi Government might detain and physically abuse him without legal cause. *Id.*, at 5-6, 14, 18-19. Finally, counts VIII, XII, and XVI allege that Vivian Nelson sustained derivative injury resulting from petitioners' actions. *Id.*, at 11-12, 16, 20. Presumably because the employment contract provided that Saudi courts would have exclusive jurisdiction over claims for breach of contract, *id.*, at 47, the Nelsons raised no such matters.

The District Court dismissed for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330 1602 *et seq*. It rejected the Nelsons' argument that jurisdiction existed, under the first clause of §1605(a)(2), because the action was one "based upon a commercial activity" that petitioners had "carried on in the United States." Although HCA's recruitment of Nelson in the United States might properly be attributed to Saudi Arabia and the Hospital, the District Court reasoned, it did not amount to commercial activity "carried on the United States" for purposes of the Act. *Id.*, at94-95. The court explained that there was no sufficient "nexus" between Nelson's recruitment and the injuries alleged. "Although [the Nelsons] argu[e] that but for [Scott Nelson's] recruitment in the United States, he would not have taken the job, been arrested, and suffered the personal injuries," the court said, "this `connection' [is] far too tenuous to support jurisdiction" under the Act. *Id.*, at 97. Likewise, the court concluded that Royspec's commercial activity in the United States, purchasing supplies and equipment for the Hospital, *id.*, at 93-94, had no nexus with the personal injuries alleged in the complaint; Royspec had simply provided a way for Nelson's family to reach him in an emergency. *Id.*, at 96.

The Court of Appeals reversed. 923 F. 2d 1528 (CA11 1991). It concluded that Nelson's recruitment and hiring were commercial activities of Saudi Arabia and the Hospital, carried on in the United States for purposes of the Act, *id.*, at 1533, and that the Nelsons' action was "based upon" these activities within the meaning of the statute. *Id.*, at 1533-1536. There was, the court reasoned, a sufficient nexus between those commercial activities and the wrongful acts that had allegedly injured the Nelsons: "the detention and torture of Nelson are so intertwined with his employment at the Hospital," the court explained, "that they are `based upon' his recruitment and hiring" in the United States. *Id.*, at 1535. The court also found jurisdiction to hear the claims

against Royspec. *Id.*, at 1536. [n.2] After the Court of Appeals denied petitioners' suggestion for rehearing en banc, App. 133, we granted certiorari, 504 U. S. ___ (1992). We now reverse.

The Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488-489 (1983); see 28 U.S.C. § 1604; J. Dellapenna, Suing Foreign Governments and Their Corporations 11, and n. 64 (1988).

Only one such exception is said to apply here. The first clause of §1605(a)(2) of the Act provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." [n.3] The Act defines such activity as "commercial activity carried on by such state and having substantial contact with the United States," §1603(e), and provides that a commercial activity may be "either a regular course of commercial conduct or a particular commercial transaction or act," the "commercial character of [which] shall be determined by reference to" its "nature," rather than its "purpose." §1603(d).

There is no dispute here that Saudi Arabia, the Hospital, and Royspec all qualify as "foreign state[s]" within the meaning of the Act. Brief for Respondents 3; see 28 U.S.C. §§ 1603(a), (b) (term "foreign state" includes "an agency or instrumentality of a foreign state"). For there to be jurisdiction in this case, therefore, the Nelsons' action must be "based upon" some "commercial activity" by petitioners that had "substantial contact" with the United States within the meaning of the Act. Because we conclude that the suit is not based upon any commercial activity by petitioners, we need not reach the issue of substantial contact with the United States.

We begin our analysis by identifying the particular conduct on which the Nelsons' action is "based" for purposes of the Act. See *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F. 2d 300, 308 (CA2 1981), cert. denied, 454 U.S. 1148 (1982); Donoghue, Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception, 17 Yale J. Int'l L. 489, 500 (1992). Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, see Black's Law Dictionary 151 (6th ed. 1990) (defining "base"); Random House Dictionary 172 (2d ed. 1987) (same); Webster's Third New International Dictionary 180, 181 (1976) (defining "base" and "based"), the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. See *Callejo* v. *Bancomer, S. A.*, 764 F. 2d 1101, 1109 (CA5 1985) (focus should be on the "gravamen of the complaint"); accord, *Santos* v. *Compagnie Nationale Air France*, 934 F. 2d 890, 893 (CA7 1991) ("An action is based upon the elements that prove the claim, no more and no less"); *Millen Industries, Inc.* v. *Coordination Council for North American Affairs*, 272 U. S. App. D. C. 240, 246, 855 F. 2d 879, 885 (1988).

What the natural meaning of the phrase "based upon" suggests, the context confirms. Earlier, see n. 3, *supra*, we noted that §1605(a)(2) contains two clauses following the one at issue here. The second allows for jurisdiction where a suit "is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," and the third speaks in like terms, allowing for jurisdiction where an action "is based . . . upon an act outside

the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Distinctions among descriptions juxtaposed against each other are naturally understood to be significant, see *Melkonyan* v. *Sullivan*, 501 U. S. ___, ___ (1991), and Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity. [n.4]

In this case, the Nelsons have alleged that petitioners recruited Scott Nelson for work at the Hospital, signed an employment contract with him, and subsequently employed him. While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons tonothing under their theory of the case. The Nelsons have not, after all, alleged breach of contract, see *supra*, at 4, but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.

Petitioners' tortious conduct itself fails to qualify as "commercial activity" within the meaning of the Act, although the Act is too " `obtuse' " to be of much help in reaching that conclusion. *Callejo*, *supra*, at 1107 (citation omitted). We have seen already that the Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). If this is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it "leaves the critical term `commercial' largely undefined." *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. ___, ___ (1992); see Donoghue, *supra*, at 499; Lowenfeld, Litigating a Sovereign Immunity Claim--The *Haiti* Case, 49 N. Y. U. L. Rev. 377, 435, n. 244 (1974) (commenting on then draft Act) ("Start with `activity,' proceed via `conduct' or `transaction' to `character,' then refer to `nature,' and then go back to `commercial,' the term you started out to define in the first place"); G. Born & D. Westin, International Civil Litigation in United States Courts 479-480 (2d ed. 1992). We do not, however, have the option to throw up our hands. The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a "commercial activity" is for purposes of the Act.

We took up the task just last Term in *Weltover*, *supra*, which involved Argentina's unilateral refinancing of bonds it had issued under a plan to stabilize its currency. Bondholders sued Argentina in federal court, asserting jurisdiction under the third clause of §1605(a)(2). In the course of holding the refinancing to be a commercial activity for purposes of the Act, we observed that the statute "largely codifies the so called `restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952." 504 U. S., at ___. We accordingly held that the meaning of "commercial" for purposes of the Act must be the meaning Congress understood the restrictive theory to require at the time it passed the statute. See *Weltover*, *supra*, at ___.

Under the restrictive, as opposed to the "absolute," theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts *(jure imperii)*, but not as to those that are private or commercial in character *(jure gestionis)*. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S., at 487; *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*,

425 U.S. 682, 698 (1976) (plurality opinion); see 28 U.S.C. § 1602; see also *Dunhill*, *supra*, at 711 (Appendix 2 to the Opinion of the Court) (Letter to the Attorney General from Jack B. Tate, Acting Legal Adviser, Dept. of State, May 19, 1952); Hill, A Policy Analysis of the American Law of Foreign State Immunity, 50 Ford. L. Rev. 155, 168 (1981). We explained in *Weltover*, *supra*, at ___ (quoting *Dunhill*, *supra*, at 704), that a state engages in commercial activity under the restrictive theory where it exercises " `only those powers that can also be exercised by private citizens,' " as distinct from those " `powers peculiar to sovereigns.' " Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts "in the manner of a private player within" the market. 504 U. S., at ___; see Restatement (Third) of the Foreign Relations Law ofthe United States §451 (1987) ("Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons").

We emphasized in *Weltover* that whether a state acts "in the manner of" a private party is a question of behavior, not motivation:

"[B]ecause the Act provides that the commercial character of an act is to be determined by reference to its `nature' rather than its `purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in `trade and traffic or commerce.' " *Weltover*, *supra*, at ___ (citations omitted) (emphasis in original).

We did not ignore the difficulty of distinguishing " `purpose' (*i. e.*, the *reason* why the foreign state engages in the activity) from `nature' (*i. e.*, the outward form of the conduct that the foreign state performs or agrees to perform)," but recognized that the Act "unmistakably commands" us to observe the distinction. 504 U. S., at ___ (emphasis in original). Because Argentina had merely dealt in the bond market in the manner of a private player, we held, its refinancing of the bonds qualified as a commercial activity for purposes of the Act despite the apparent governmental motivation. *Id.*, at ___.

Unlike Argentina's activities that we considered in *Weltover*, the intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and howevermonstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. See *Arango* v. *Guzman Travel Advisors Corp.*, 621 F. 2d 1371, 1379 (CA5 1980); *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360 (CA2 1964) (restrictive theory does not extend immunity to a foreign state's "internal administrative acts"), cert. denied, 381 U.S. 934 (1965); *Herbage* v. *Meese*, 747 F. Supp. 60, 67 (DC 1990), affirmance order, 292 U. S. App. D. C. 84, 946 F. 2d 1564, cert. denied, 502 U. S. ___ (1991); K. Randall, Federal Courts and the International Human Rights Paradigm 93 (1990) (the Act's commercial activity exception is irrelevant to cases alleging that a foreign state has violated human rights). [n.5] Exercise of the powers of police and penal officers is not the sort of action by whichprivate parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y. B. Int'l L. 220, 225 (1952); see also *id.*, at 237.

The Nelsons and their *amici* urge us to give significance to their assertion that the Saudi Government subjected Nelson to the abuse alleged as retaliation for his persistence in reporting Hospital safety violations, and argue that the character of the mistreatment was consequently commercial. One *amicus*, indeed, goes so far as to suggest that the Saudi Government "often uses detention and torture to resolve commercial disputes." Brief for Human Rights Watch as *Amicus Curiae* 6. But this argument does not alter the fact that the powers allegedly abused were those of police and penal officers. In any event, the argument is off the point, for it goes to purpose, the very fact the Act renders irrelevant to the question of an activity's commercial character. Whatever may have been the Saudi Government's motivation for its allegedly abusive treatment of Nelson, it remains the case that the Nelsons' action is based upon a sovereign activity immune from the subject matter jurisdiction of United States courts under the Act.

In addition to the intentionally tortious conduct, the Nelsons claim a separate basis for recovery in petitioners' failure to warn Scott Nelson of the hidden dangers associated with his employment. The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. See *supra*, at 4. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. But this is merely a semantic ploy. For aught we can see, a plaintiff couldrecast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity. Cf. *United States* v. *Shearer*, 473 U.S. 52, 54-55 (1985) (opinion of Burger, C. J.).

The Nelsons' action is not "based upon a commercial activity" within the meaning of the first clause of §1605(a)(2) of the Act, and the judgment of the Court of Appeals is accordingly reversed.

*It is so ordered.*