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Legal Sidebar

High Court to Determine Proper Method to Serve Process on a Foreign Government

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Update: On March 26, the Supreme Court held 8-1 in favor of Sudan, finding that the most natural reading of the statute requires the mailing of service of process directly and expeditiously to the Minister of Foreign Affairs of a foreign country at his ordinary place of business in the foreign state rather than the country's embassy in the United States. This reading, the Court noted, avoids tension with the Vienna Convention on Diplomatic Relations and the anomalous situation that would arise under the opposing interpretation, which would seemingly make it easier to serve a foreign government than any foreign individual abroad. The Court reversed the judgment below, leaving the plaintiffs to file their complaint anew with proper service of process on Sudan.

The original post from October 26, 2018, appears below:

In its October 2018 term, the Supreme Court is to hear *Republic of Sudan v. Harrison*, a case concerning the interpretation of the Foreign Sovereign Immunities Act (FSIA) as it relates to the permissible methods of serving process on a foreign government in order to gain jurisdiction to pursue a civil lawsuit. Specifically, Sudan urges the Court to toss out a $315 million default judgment against it for its support to terrorists responsible for the U.S.S. Cole bombing in Yemen in October 2000. Sudan claims it was improperly notified of the lawsuit because the plaintiffs addressed the complaint to its foreign minister via its embassy in the United States. The judgment creditors urge the Court to uphold that particular means of serving process as compatible with the relevant provision of the FSIA.

The FSIA provides four hierarchical methods to serve process on a foreign government:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
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> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

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> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit… by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or
>
> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit…by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia….

Paragraph (3) is at issue in this case. The plaintiffs addressed the summons and complaint to the head of the foreign ministry of Sudan, but sent the package to the embassy in Washington, D.C. rather than to the foreign ministry in Khartoum. The plaintiffs note that paragraph (3) does not require that the complaint be sent to any particular *place*; it is to be addressed to a *person*. In their view, the text suggests the complaint may be sent to the embassy as an extension of the country's foreign ministry.

Sudan reads paragraph (3) differently. It believes the most natural reading of the text is that the summons and complaint must be sent to the foreign minister at his ordinary place of business in the foreign nation's capital. Sudan argues that the phrase "addressed and dispatched to" the foreign minister forecloses sending the service package to some agent or other intermediary at another address, including a diplomatic mission. Moreover, Sudan argues that delivery of a summons by mail to its embassy violates the Vienna Convention on Diplomatic Relations (VCDR). Article 22 of the VCDR provides that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." The plaintiffs dispute that mail delivery of a summons to an embassy constitutes an infringement of that embassy's inviolability.

The U.S. Court of Appeals for the Second Circuit (Second Circuit), in the opinion below, distinguished between serving process *on* an embassy, which it held impermissible under the FSIA and the VCDR, and serving process on a foreign minister *via* his country's embassy, which it held to be consistent with the FSIA. The Second Circuit rejected the United States' argument in its submission that effecting service of process in the latter manner treats the ambassador as an agent of the foreign minister.

The Solicitor General has submitted an amicus brief in support of Sudan. While expressing sympathy for the respondents as victims of a terrorist act, the United States agrees with Sudan that service of process through its embassy in the United States was defective under the FSIA. It argues that the Second Circuit's opinion contravenes the most natural reading of the statute, places the United States in breach of its treaty obligations, and "threatens harm to the United States' foreign relations and reciprocal treatment in courts abroad."

Like the petitioner and respondents, the government bases its argument mainly on its reading of the plain text of the statute in context. If Congress had meant to permit service of process via a foreign government's embassy, the government argues, it would have written the statute expressly to permit service of process on an agent or on the ambassador. The government also points to legislative history that demonstrates how Congress rejected a provision that would have permitted service of process on an embassy. The government disagrees with the Second Circuit's contention that there is a significant distinction between service *on* and service *via* an embassy. It recommends the Court adopt the reading of the statute given it by the U.S. Court of Appeals for the Fourth Circuit and remand the case to give the plaintiffs an opportunity to effect service of process by sending the summons and complaint to Sudan's foreign minister in Khartoum.

A number of groups filed briefs of amici curiae for the Court's consideration. Libya and Saudi Arabia have filed briefs in essence arguing that the VCDR does not permit service of process via or in care of an embassy, and that service by that method causes delay and confusion. A group of international law professors also urges the Court to reverse the decision below, arguing that the FSIA should be interpreted

consistently with the VCDR's principle of inviolability. A group of former U.S. counterterrorism officials supports the respondent judgment creditors, arguing that service of process on an embassy does not violate international law, is often the most effective way to notify a foreign state of a lawsuit, and is especially necessary to assist victims of terrorism in cases such as this one. Finally, the Veterans of Foreign Wars of the United States also urges the Court to affirm, arguing that a reversal would undermine Congress's efforts to hold terrorist states responsible for injuries and deaths caused by terrorist acts undertaken with a terrorist state's support.

The Supreme Court's decision will likely rest on its interpretation of the FSIA's text and Congress's intent. In previous cases, the Court has declined to read new language into the FSIA and has relied on a natural reading of the text. For example, in *Republic of Argentina v. NML Capital, Ltd.* the Court stated that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA] text. Or it must fall." But in *Harrison*, both sides believe that the omission of certain text favors their interpretation. Sudan argues that Congress could have provided expressly for mailing service of process to a nation's embassy in the United States, if it intended to permit such a method. The respondents believe Congress would have referenced sending the service package to the foreign minister in the state's seat of government, if that is what it intended.

The Court has scheduled oral argument for November 7, 2018. The Solicitor General is to participate.