SUPREME COURT OF THE UNITED STATES

No. 91–522

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL AND ROYSPEC, PETITIONERS *v.*
SCOTT NELSON ET UX.

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

[March 23, 1993]

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

According to respondents' complaint, Nelson's employer retaliated against him for reporting safety problems by "summon[ing him] . . . to the hospital's security office from which he was transported to a jail cell." App. 5. Once there, he allegedly was "shackled, tortured and beaten by persons acting at the direction, instigation, provocation, instruction or request of" petitioners—Saudi Arabia, King Faisal Specialist Hospital, and Royspec. *Id*., at 5, 14, 18. The majority concludes that petitioners enjoy sovereign immunity because respondents' action is not "based upon a commercial activity." I disagree. I nonetheless concur in the judgment because in my view the commercial conduct upon which respondents base their complaint was not "carried on in the United States."

As the majority notes, the first step in the analysis is to identify the conduct on which the action is based. Respondents have pointed to two distinct possibilities. The first, seemingly pressed at trial and on appeal,

consists of the recruiting and hiring activity in the United States. See Brief for Appellant 12–15. Although this conduct would undoubtedly qualify as "commercial," I agree with the majority that it is "not the basis for the Nelsons' suit," *ante*, at 8, for it is unrelated to the elements of respondents' complaint.

In a partial change of course, respondents suggest to this Court both in their brief and at oral argument that we focus on the hospital's commercial activity in Saudi Arabia, its employment practices and disciplinary procedures. Under this view, the Court would then work its way back to the recruiting and hiring activity in order to establish that the commercial conduct in fact had "substantial contact" with the United States. See Brief for Respondents 22, 24–25, 31; Tr. of Oral Arg. 44–45. The majority never reaches this second stage, finding instead that petitioners' conduct is not commercial because it "is not the sort of action by which private parties can engage in commerce." *Ante*, at 13. If by that the majority means that it is not the manner in which private parties *ought* to engage in commerce, I wholeheartedly agree. That, however, is not the relevant inquiry. Rather, the question we must ask is whether it is the manner in which private parties at times *do* engage in commerce.

To run and operate a hospital, even a public hospital, is to engage in a commercial enterprise. The majority never concedes this point, but it does not deny it either, and to my mind the matter is self-evident. By the same token, warning an employee when he blows the whistle and taking retaliatory action, such as harassment, involuntary transfer, discharge, or other tortious behavior, although not prototypical commercial acts, are certainly well within the bounds of commercial activity. The House and Senate Reports accompanying the legislation virtually

compel this conclusion, explaining as they do that "a foreign government's . . . employment or engagement of laborers, clerical staff or marketing agents . . . would be among those included within" the definition of commercial activity. H. R. Rep. No. 94–1487, p. 16 (1976) (House Report); S. R. Rep. No. 94–1310, p. 16 (1976) (Senate Report). Nelson alleges that petitioners harmed him in the course of engaging in their commercial enterprise, as a direct result of their commercial acts. His claim, in other words, is "based upon commercial activity."

Indeed, I am somewhat at a loss as to what exactly the majority believes petitioners have done that a private employer could not. As countless cases attest, retaliation for whistleblowing is not a practice foreign to the marketplace.[1] Congress passed a statute in response to such behavior, see Whistleblower Protection Act of 1989, 5 U. S. C. §1213 *et seq.* (1988 ed., Supp. III), as have numerous States. On occasion, private employers also have been known to retaliate by enlisting the help of police officers to falsely arrest employees. See, *e.g.*, *Rosario* v. *Amalgamated Ladies Garment Cutters' Union*, 605 F. 2d 1228, 1233, 1247–1248 (CA2 1979), cert. denied, 446 U. S. 919 (1980). More generally, private parties have been held liable for conspiring with public authorities to effectuate an arrest, see, *e.g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), and for using private security personnel for the same purposes. See *Albright* v. *Longview Police*

[1]See, *e.g.*, *English* v. *General Electric Co.*, 496 U. S. 72, 75–76 (1990); *Belline* v. *K-Mart Corp.*, 940 F. 2d 184, 186–189 (CA7 1991); *White* v. *General Motors Corp.*, 908 F. 2d 669, 671 (CA10 1990), cert. denied, 498 U. S. 1069 (1991); *Sanchez* v. *Unemployment Ins. Appeals Bd.*, 36 Cal. 3d 575, 685 P. 2d 61 (1984); *Collier* v. *Superior Court of Los Angeles County*, 228 Cal. App. 3d 1117, 279 Cal. Rptr. 453 (1991).

Dept., 884 F. 2d 835, 841–842 (CA5 1989).

Therefore, had the hospital retaliated against Nelson by hiring thugs to do the job, I assume the majority—no longer able to describe this conduct as "a foreign state's exercise of the power of its police," *ante*, at 12—would consent to calling it "commercial." For, in such circumstances, the state-run hospital would be operating as any private participant in the marketplace and respondents' action would be based on the operation by Saudi Arabia's agents of a commercial business.[2]

At the heart of the majority's conclusion, in other words, is the fact that the hospital in this case chose to call in government security forces. See *ante*, at 12–13. I find this fixation on the intervention of police officers, and the ensuing characterization of the conduct as "peculiarly sovereign in nature," *ante*, at 12, to be misguided. To begin, it fails to capture respondents' complaint in full. Far from being directed solely at the activities of the Saudi police, it alleges that agents of the *hospital* summoned Nelson to its security office because he reported safety concerns and that the *hospital* played a part in the subsequent beating and imprisonment. App. 5, 14. Without more, that type of behavior hardly qualifies

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[2]"[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of . . . the accidents which it may cause. . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." Testimony of Monroe Leigh, Legal Adviser, Department of State, Hearings on H. R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess., 27 (1976).

as sovereign. Thus, even assuming for the sake of argument that the role of the official police somehow affected the nature of petitioners' conduct, the claim cannot be said to "rest[] entirely upon activities sovereign in character." See *ante*, at 8, n. 4. At the very least it "consists of both commercial and sovereign elements," thereby presenting the specific question the majority chooses to elude. See *ibid*. The majority's single-minded focus on the exercise of police power, while certainly simplifying the case, thus hardly does it justice.[3]

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[3]In contrast, the cases cited by the majority involve action that did not take place in a commercial context and that could be considered purely sovereign. For instance, in *Arango* v. *Guzman Travel Advisors Corp.,* 621 F. 2d 1371 (CA5 1980), plaintiffs were expelled from the Dominican Republic pursuant to a decision by immigration officials that they were "`undesirable aliens.'" *Id*., at 1373. As the Court of Appeals reasoned, the airline's actions "were not commercial. [It] was impressed into service to perform these functions . . . by Dominican immigration officials pursuant to that country's laws." *Id*., at 1379. Nor was there a hint of commercial activity in *Herbage* v. *Meese*, 747 F. Supp. 60 (DC 1990), affirmance order, 292 U. S. App. D. C. 84, 946 F. 2d 1564, cert. denied, 502 U. S. ___ (1991), an extradition case that did not so much as mention the commercial activity exception.

Absence of a commercial context also distinguishes those incidents relied on by the majority that pre-date passage of the Foreign Sovereign Immunities Act. See *ante,* at 12, n. 5. Yet the majority gives short shrift to an occurrence that most closely resembles the instant case and that suggests strongly that the hospital's enlistment of, and cooperation with, the police should not entitle it to immunity. The incident involved allegations that an agency of the Jamaican

Reliance on the fact that Nelson's employer enlisted the help of public rather than private security personnel is also at odds with Congress' intent. The purpose of the commercial exception being to prevent foreign states from taking refuge behind their sovereignty when they act as market participants, it seems to me that this is precisely the type of distinction we should seek to avoid. Because both

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government conspired to have Jamaican nationals working in the United States "falsely arrested, imprisoned and blacklisted, and to deprive them of wages and other employee rights." Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau, eds.), in 1977 Digest of United States Practice in International Law 1062. Significantly, the State Department did not take refuge behind the words "arres[t]" and "impriso[n]" and decide that the actions were sovereign in nature. Rather, it declined to recognize immunity, focusing on the fact that private parties acting in an employment context could do exactly what the Jamaican agency was alleged to have done: "[T]he activities under consideration are of a private nature . . . . The Department of State is impressed by the fact that the activities of the British West Indies Cental Labour Organization . . . are very much akin to those that might be conducted by a labor union or by a private employment agency— arranging and servicing an agreement between private employers and employees. Although it may be argued that some of the acts performed by the British West Indies Central Labour Organization in this case are consular in nature, the Department believes that they arise from the involvement of the British West Indies Central Labour Organization in the private employer-employee contractual relationship rather than from a consular responsibility, and cannot be separated

the hospital and the police are agents of the state, the case in my mind turns on whether the sovereign is acting in a commercial capacity, not on whether it resorts to thugs or government officers to carry on its business. That, when the hospital calls in security to get even with a whistleblower, it comes clothed in police apparel says more about the state-owned nature of the commercial enterprise than about the noncommercial nature of its tortious conduct. I had thought the issue put to rest some time ago when, in a slightly different context, Chief Justice Marshall observed:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." *Bank of United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1824).

See also *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U. S. 682, 695–696 (1976) (plurality opinion).

Contrary to the majority's suggestion, *ante*, at 13, this conclusion does not involve inquiring into the purpose of the conduct. Matters would be different, I suppose, if Nelson had been recruited to work in the Saudi police force and, having reported safety violations, suffered retributive punishment, for there the Saudi authorities would be engaged in distinctly sovereign activities. Cf. House Report, at 16 ("Also

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therefrom." *Id*., at 1063.

public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel"); Senate Report, at 16. The same would be true if Nelson was a mere tourist in Saudi Arabia and had been summarily expelled by order of immigration officials. See *Arango* v. *Guzman Travel Advisors Corp.,* 621 F. 2d 1371 (CA5 1980). In this instance, however, the state-owned hospital was engaged in ordinary commercial business and "[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens." *Alfred Dunhill*, *supra*, at 704 (plurality opinion). As we recently stated, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are `commercial' within the meaning of the FSIA." *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. ___, ___ (1992) (slip op., at 6). That, I believe, is the case here.

Nevertheless, I reach the same conclusion as the majority because petitioners' commercial activity was not "carried on in the United States." The Act defines such conduct as "commercial activity . . . having substantial contact with the United States." 28 U. S. C. §1603(e). Respondents point to the hospital's recruitment efforts in the United States, including advertising in the American media, and the signing of the employment contract in Miami. See Brief for Respondents 43–45. As I earlier noted, while these may very well qualify as commercial activity in the United States, they do not constitute the commercial activity upon which respondents' action is based. Conversely, petitioners' commercial conduct in Saudi Arabia, though constituting the basis of the Nelsons' suit, lacks a sufficient nexus to the United States. Neither the hospital's employment practices, nor its

disciplinary procedures, has any apparent connection to this country. On that basis, I agree that the Act does not grant the Nelsons access to our courts.