

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SUNDUS SHAKER SALEH, on
behalf of herself and those
similarly situated,
Plaintiff-Appellant,

v.

GEORGE W. BUSH; RICHARD B.
CHENEY; DONALD RUMSFELD;
CONDOLEEZZA RICE; COLIN
POWELL; PAUL WOLFOWITZ;
DOES 1–10, inclusive; and the
UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 15-15098

D.C. No.
3:13-cv-01124-JST

OPINION

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted December 12, 2016
San Francisco, California

Filed February 10, 2017

Before: Susan P. Graber and Andrew D. Hurwitz, Circuit Judges, and Richard F. Boulware,* District Judge.

Opinion by Judge Graber

SUMMARY**

Westfall Act / Immunity

The panel affirmed the district court's dismissal, due to plaintiff's failure to exhaust her administrative remedies, of her action after the district court, pursuant to the Westfall Act, substituted former officials of the President George W. Bush administration for the United States as the sole defendant.

Plaintiff alleged that former officials of the President George W. Bush administration engaged in the war against Iraq in violation of the Alien Tort Statute. The district court held that plaintiff had not exhausted her administrative remedies as required by the Federal Tort Claims Act.

The panel held that the individual defendants were entitled to official immunity under the Westfall Act, which accords federal employees immunity from common-law tort claims for acts undertaken in the course of their official

* The Honorable Richard F. Boulware, United States District Judge for the District of Nevada, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

duties. Applying the plain language of the Westfall Act and District of Columbia's *respondeat superior* law to the facts alleged in the operative complaint, the panel held that the individual defendants' alleged actions fell within the scope of their employment. The panel further held that the treaties and charters cited by plaintiff did not alter its conclusion that the Westfall Act, by its plain terms, immunized defendants from suit. Finally, the panel held that the district court did not abuse its discretion in denying plaintiff an evidentiary hearing to challenge the Attorney General's scope certification (wherein the Attorney General determined that the employees were acting within the scope of their employment and transformed the action into one against the United States).

The panel rejected plaintiff's argument that defendants could not be immune under the Westfall Act because plaintiff alleged violations of a *jus cogens* norm of international law. A *jus cogens* norm is recognized by the international community as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law. The panel held that Congress can also provide immunity for federal officers for *jus cogens* violations pursuant to the reasoning in *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992) (holding that Congress can provide immunity to a foreign government for its *jus cogens* violations, even when such immunity is inconsistent with principles of international law).

COUNSEL

Dave Inder Comar (argued), Comar Law, San Francisco, California, for Plaintiff-Appellant.

Patrick G. Nemeroff (argued) and Matthew M. Collette, Attorneys, Appellate Staff; Melinda Haag, United States Attorney; Benjamin C. Mizer, Principal Deputy Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

Jerome Paul Wallingford, San Diego, California, for Amicus Curiae Lawyers for International Law.

Rajeev E. Ananda, New York, New York, for Amicus Curiae Planethood Foundation.

OPINION

GRABER, Circuit Judge:

Plaintiff Sundus Shaker Saleh sues several individuals who served as high-ranking officials in the administration of President George W. Bush. Plaintiff claims that the former officials conspired to engage in, and did engage in, a war of aggression against Iraq and that, in doing so, they violated the “law of nations” within the meaning of the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350. The district court substituted the United States for the officials as the sole defendant pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(1), and then dismissed the case because Plaintiff had not exhausted her administrative remedies as required by the Federal Tort Claims Act (“FTCA”). Plaintiff argues that substitution of

the United States was improper because the former officials are not entitled to official immunity. Because we conclude that the individual defendants are entitled to official immunity under the Westfall Act and that the United States properly was substituted as the sole defendant, we affirm.

FACTUAL AND PROCEDURAL HISTORY¹

In 2003, Kurdish Army troops forced Plaintiff and her family to leave their home in Jalawla, Iraq, and flee to Baghdad. The troops, who were aligned with the United States, were taking part in what has become known as the Iraq War, a military action that officially began on March 19, 2003, but that, Plaintiff claims, Defendants² had been planning for years. Plaintiff endured many hardships in Baghdad. Eventually she was forced to leave Iraq and move to Jordan. In this case, she seeks to represent “a class of persons consisting of all innocent Iraqi civilians who, through no fault of their own, suffered damage” from the Iraq War.

¹ We recount the facts as alleged in Plaintiff’s second amended complaint. *See McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001) (holding that, when reviewing a dismissal in the absence of an evidentiary hearing, “we accept as true the factual allegations in the complaint”).

² The defendants are former President George W. Bush, former Vice President Richard B. Cheney, former Secretary of Defense Donald Rumsfeld, former National Security Advisor and Secretary of State Condoleezza Rice, former Secretary of State Colin Powell, former Deputy Secretary of Defense Paul Wolfowitz, 10 other former high-ranking officials in the Bush Administration, and the United States. In this opinion, we use “Defendants” to refer only to the individual defendants, who were the named defendants below. We refer to the United States, which was substituted as the sole defendant, as the United States

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