

**Date :** 4/13/2021 11:54:57 AM  
**From :** "עמית אשכנזי"  
**To :** "Cedric Yehuda Sabbah"  
**Subject :** נושא: Oral argument summary

למה אני לא בין המכותבים הראשיים?

<Cedric Yehuda Sabbah <YehudaC@justice.gov.il>  
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**תאריך:** 13 באפריל 2021 בשעה 14:39:38 GMT+3  
**אל:** עמית אשכנזי <AmitAs@cyber.gov.il>  
**נושא:** FW: Oral argument summary

**From:** Vered Shpilman <VeredSh@justice.gov.il>  
**Sent:** Tuesday, April 13, 2021 1:20 PM  
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**Cc:** Roy Schondorf <RoySc@justice.gov.il>; Marlene Mazel <MarleneM@justice.gov.il>; Avital Berger <AvitalBer@justice.gov.il>; Itai Apter <ItaiA@justice.gov.il>; Cedric Yehuda Sabbah <YehudaC@justice.gov.il>  
**Subject:** FW: Oral argument summary

שלום לכולם,

ראו נא במייל מטה את הסיכום המפורט של עורכי הדין לדין בעל-פה שנערך אתמול. לנוחותכם, אנו מצרפים בנוסף את התרשומת שערכה אביטל ברגר מצוותנו – בקובץ הוורד המצורף.

אנחנו גם צפינו בדין, שהיה מרתק. לתחושתנו, השופטים יתקשו לקבל את הערעור במצב בו מחלקת המדינה האמריקאית לא נתנה את דעתה על השאלה המשפטית הרלבנטית בנושא החסינות (האם חברה פרטית מסחרית אשר מספקת שירותים לממשלות זרות יכולה להיות זכאית לחסינות תחת דוקטרינת החסינות על בסיס התנהגות). יחד עם זאת, לא היה נראה שהשופטים (לפחות לגבי שניים מהשלושה) חושבים שהטענות שהועלה מופרך, אלא ראו את ההגיון בחלק מהטענות שהעלתה NSO. כך שיהיה מעניין לראות החלטתם בסופו של דבר. אנא ראו גם את ההתייחסות של עורכי הדין להתרשומתם מהדין – המופיעה במייל מטה.

לאלה מכם שמעוניינים לצפות להנאתם בזמן הפנוי – להלן הקישור (הדין מתחיל מדק' 1:09:40):  
<https://youtu.be/OPzBaM2w4EM?t=4176>

מצ"ב בנוסף כתבה שפורסמה באתר Politico המתארת את הדין.

בברכה,

אביטל וורד

**From:** Anderson, Reeves <[Reeves.Anderson@arnoldporter.com](mailto:Reeves.Anderson@arnoldporter.com)>  
**Sent:** Tuesday, April 13, 2021 2:10 AM  
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**Cc:** Vered Shpilman <[VeredSh@justice.gov.il](mailto:VeredSh@justice.gov.il)>; Roy Schondorf <[RoySc@justice.gov.il](mailto:RoySc@justice.gov.il)>; Bellinger III, John B. <[John.Bellinger@arnoldporter.com](mailto:John.Bellinger@arnoldporter.com)>  
**Subject:** NSO: Oral argument summary

Dear Marlene,

This email summarizes our key takeaways from the oral argument today in the NSO appeal (which is available here: <https://youtu.be/OPzBaM2w4EM?t=4176>). Please feel free to share this summary with your team as appropriate.

Overall, the judges were prepared and engaged, and the advocates for both sides performed well. One judge (Hunsaker) seemed very skeptical about—even hostile to—NSO’s position. The other two judges seemed more sympathetic to points made by each side, asking probing questions to lawyers for NSO and Facebook. NSO needs to get both votes to prevail, and that seems to be a low probability (maybe 20%). Most likely, the panel will try to avoid a bright-line legal ruling and perhaps give the district court more instructions on how to consider the immunity issue further on remand. The panel also might solicit input from the US State Department, or invite the district court to do the same.

The Government of Israel played a less prominent role in the discussion than expected. One judge asked NSO if it had any customers besides “the State of Israel and other sovereigns” (paraphrasing). NSO did not highlight Israel’s regulatory role and did not mention Israel during extensive discussions about a Suggestion of Immunity. All discussion about NSO’s sovereign customers remained abstract. This was a welcome and unexpected surprise.

### **NSO’s Argument**

- Judge Murguia asked why no one had requested an SOI from the State Department. NSO sidestepped the issue by replying that there was nothing in the record about communications with the State Department, and that when the State Department does not weigh in (for whatever reason), the court should apply well-established immunity principles.
- Judge Murguia and Judge Hunsaker both asked how NSO could argue that the State Department has a “policy” of recognizing immunity for private foreign corporations, given that the State Department has never actually recognized immunity in that context. NSO replied that the *framework* for common-law immunity is well-established, and Facebook is seeking an “end-run” around that framework by suing a private corporation working for a sovereign rather than the sovereign itself. NSO analogized the situation to a party suing a corporation that manufactures bullets for the US military instead of suing the US military itself.
- Judge Hunsaker called NSO’s position “remarkable” and unprecedented. She found it hard to believe that if foreign corporate agent immunity existed, it would not have arisen before now. NSO replied that the *Butters* case from the Fourth Circuit is a relevant precedent, as is *Moriah* (the BOC case).
- Judge Murguia noted that the United States had issued an SOI in *Dogan v. Barak*, which would seem to make *Dogan* distinguishable. NSO responded that the court in *Dogan* implied that it would have reached the same conclusion on immunity even absent an SOI. (Notably, Judge Murguia was on the panel in *Dogan*, so her interpretation of the decision will carry significant weight with her other panelists.)
- Judge Murguia then asked what role, if any, Restatement section 66(f) should play in the court’s analysis. (Recall that section 66 is the source for some courts requiring a judgment to “run against the state” in order to invoke official-acts immunity.) NSO dodged on this question a little, simply asking the court to apply section 66 “as you did in *Dogan*” -- which is a nice way of saying “not at all.”
- Judge Nelson asked whether NSO had clients other than foreign sovereigns and what role, if any, NSO’s own activities give rise to Facebook’s claims. NSO explained that all of its clients are sovereigns. NSO emphasized that its CEO had submitted a declaration making clear that NSO does not operate Pegasus itself. NSO merely sets up the software and provides ongoing support for updates and bug fixes. Facebook’s alleged injury comes solely from foreign states’ “use” of Pegasus. That’s why, even if NSO acted independently in some respects, the conduct at issue in this lawsuit (the “use” of Pegasus) was all sovereign conduct.

### **Facebook’s Argument**

- Facebook’s lawyer started aggressively, emphasizing that no court has ever recognized the exact form of immunity NSO seeks. He characterized NSO’s position as a “radical” expansion of existing immunity doctrine. Despite Facebook leaning heavily on the distinction between natural persons and corporate actors, the Court didn’t seem terribly interested in that difference.
- Judge Nelson asked whether the panel could look to cases where courts held that US contractors enjoyed derivative sovereign immunity. Facebook responded that domestic sovereign immunity is different than foreign

sovereign immunity: foreign sovereign immunity rests on comity, whereas domestic immunity involves separation of powers and a statutory framework. Facebook highlighted that NSO has been “entirely opaque” on the identity of its foreign clients, and no foreign sovereign has made an SOI request. (The implicit point here is that it would be unclear “whose immunity” is even at stake. Without knowing the countries, the court couldn’t possibly decide whether comity is advanced by granting immunity.) Indeed, Facebook stated that NSO was not, in fact, claiming immunity belonging to the State of Israel.

- When Judge Nelson pushed on the exclusively sovereign nature of NSO’s clients, Facebook responded that there’s been no discovery, and that point is not undisputed.
- Judge Murguia asked Facebook to clarify when, exactly, it believes that its servers were unlawfully accessed. Facebook responded that the unlawful access occurred *both* while NSO was testing Pegasus *and* while foreign sovereigns were using Pegasus. Facebook used this opportunity to reiterate that Facebook disputes that NSO was, at all relevant times, acting in an official capacity. Facebook stated that it requested jurisdictional discovery on this point.
- Judge Murguia repeated her question about the role of Restatement section 66, expanding that the US Government has recently criticized courts’ reliance on that provision. Facebook likewise backed away from Section 66, arguing instead that NSO bears the burden to establish its entitlement to immunity, and NSO has failed to do so based on any established principle.
- Judge Hunsaker weighed in at the end only to repeat Facebook’s argument that the Court might lack jurisdiction over NSO’s interlocutory appeal. It was a softball, but no other judges seemed interested.

### **NSO’s Rebuttal**

- Judge Nelson asked whether NSO could be held liable for actions that it undertook independently of its clients, and whether this issue should be developed through discovery. NSO responded that Facebook’s alleged injury arises solely from the actions of foreign sovereigns. NSO also noted that Facebook has yet to ask for discovery (apart from a single throwaway line in a brief), and that it is well-established that foreign sovereign immunity is effectively lost if a case is allowed to proceed to discovery.
- In his summation, NSO’s lawyer played the reciprocity card. He emphasized that if this case is allowed to proceed, “the shoe could [eventually] be on the other foot.” The United States works with many technology companies to conduct national security operations, and if a plaintiff could sue the technology company instead of the US government for acts arising out of official operations, then there would be an obvious end-run around the United States’ sovereign immunity. Judge Hunsaker said that she appreciated the point, but shouldn’t the court solicit input from the State Department before deciding such weighty issues with reciprocal implications? That question, which seemed to sum up the sentiment of the panel, lingered as the presiding judge thanked the parties for their presentations in this “significant matter.”

We would be happy to discuss if you have any questions.

Best,  
Reeves

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