

# CHINA DESERVES A DAY IN COURT

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As Donald Trump and Joe Biden debate how to deal with malign Chinese behavior, Beijing's National Bureau of Statistics reports its economy has largely recovered from the Covid-19 pandemic, growing 4.9% year-on-year in the third quarter. Meanwhile American class-action lawyers and the attorneys general of Mississippi and Missouri are **suing the Chinese government over the novel coronavirus**. Plaintiffs accuse Beijing of various forms of misconduct, ranging from negligence in handling the original infections in Wuhan to the reckless operation of biolabs and even perpetrating bioterrorism against the U.S.

Some of these claims are more plausible than others, but all face an insurmountable obstacle in court: the Foreign Sovereign Immunities Act of 1976, which prevents most lawsuits against foreign countries in U.S. courts. Litigation could be a way of holding China accountable, but only if Congress changes the law.

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**FSIA makes a few limited exceptions to immunity**. Although lawyers in these cases have cited them, all seem clearly inapplicable. One permits suits against foreign governments based on their commercial activities in the U.S., or elsewhere if there is a direct effect in America. But these complaints allege governmental, not commercial, negligence or duplicity in handling the epidemic.

The **tort exception** allows foreign governments to be sued for wrongful actions, whether negligent or intentional. But Supreme Court precedent limits the exception to torts that take

place entirely within the U.S. It would cover, for instance, an auto accident in Washington but not in Beijing.

There's also an **exception for terrorism**, but that requires either that the defendant be designated a "state sponsor of terrorism" by the U.S.—currently only Iran, North Korea, Sudan and Syria are—or a specific act of international terrorism within the U.S. A biological attack would surely qualify, but there's no evidence of that here.

**FSIA gives federal courts jurisdiction over all lawsuits against foreign governments, and it's almost certain judges will dismiss these actions even if Beijing refuses to participate in the proceedings. Reinterpreting any of the FSIA exceptions to cover suits involving the pandemic would open the door to further attacks on sovereign immunity.** The U.S., a sovereign state itself, should be careful about creating broad new exceptions, and judges should be especially cautious, since they have neither the authority nor the expertise to conduct foreign policy.

**That said, Congress has the power to limit or withdraw a foreign state's sovereign immunity,** and it should consider doing so in response to Covid-19. Such changes to deal with novel problems are legitimate and well-recognized. In May the Supreme Court held unanimously in *Optai v. Republic of Sudan* that plaintiffs in a lawsuit over al Qaeda's 1998 attacks on U.S. embassies in Africa could recover punitive damages under an amendment to FSIA enacted in 2008.

Congress could enact a new exception to FSIA for cases in which a foreign state has failed to inform, or deliberately misinformed, the global community of the nature and scope of a local epidemic that becomes a global pandemic. Beijing's failure in December to comply with the 24-hour notification requirement of the 2005 International Health Regulations would be an important factor to consider.

Such a statute could either create a new federal tort or give federal courts jurisdiction over suits alleging injuries under state law. As with the Justice Against Sponsors of Terrorism Act of 2016, Congress should authorize the federal government to intervene in litigation to secure a diplomatic resolution that compensates plaintiffs and mitigates future harms.

The U.S. judiciary is respected around the world and would be a better venue than any governmental or international investigation for getting at the truth of Covid-19. Beijing has accused the U.S. military of creating the virus and introducing it during the 2019 Military World Games in Wuhan, in which a U.S. team participated. Chinese nationals have filed several lawsuits in China against the U.S. military, the Centers for Disease Control and Prevention and other American government entities. In [these pages](#) in May, a senior Chinese official, Xie Feng, suggested that the virus might have originated outside China. If Chinese officials have evidence to support any of these assertions, they could introduce them in court. In any case, their claims underscore the need for an impartial inquiry.

**Congress could also withdraw immunity from international organizations that allegedly aided and abetted China's efforts to play down the virus's transmission** and the health risks. Western intelligence services have suggested that Beijing gave detailed instructions to World Health Organization on what it should say. Plaintiffs could use the discovery process to identify other governmental and private-sector collaborators and hold them accountable for their Covid-related activities and other likely offenses, such as garden-variety corruption, committed while collaborating with Beijing.

They could also explore evidence that Covid-19 stemmed from an accidental release from a Wuhan biolab.

Beijing wouldn't be able to ignore U.S. lawsuits. If it refused to participate, U.S. courts would enter enforceable default judgments. If it did participate, it would have to submit to discovery. It may be tempted to cheat in this process, but modern discovery techniques make that exceedingly difficult, and cheating would entail further liability and judicial punishments.

The Chinese government could try to avoid complying with any court-ordered damages and injunctions. But that wouldn't be easy. Successful plaintiffs could collect judgments against Beijing by seizing Chinese government-owned commercial property around the world and the proceeds of sales of government goods and services. Ignoring injunctions would lead to monetary fines and other punishments.

Several bills featuring some of these provisions have been introduced by Sens. Tom Cotton, Josh Hawley, Martha McSally and Marsha Blackburn. Congress should proceed with caution. The law is usually a blunt and inflexible policy tool, wielded by an unelected judiciary rather than the president and Congress, where the Constitution vests the power to run foreign affairs. The political branches are accountable for their decisions in a way that the judiciary is not.

Yet Covid-19 has taken a tremendous human and economic toll world-wide. Lawsuits may become a powerful instrument for changing China's behavior and can aid U.S. diplomatic and economic efforts to accomplish the same goal. Deterring China from future aberrant behavior requires holding it accountable for its Covid-19-related misconduct.

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