

***Kiobel* Commentary: The door remains open to “foreign squared” cases** Oona Hathaway *Guest*

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SCOTUSblog is pleased to have reactions from supporters of both sides to yesterday’s decision in [Kiobel v. Royal Dutch Petroleum](#). This post is written by Oona A. Hathaway, Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School, and Carlton Forbes, a J.D. candidate at Yale Law School. Oona is the director of the Yale Law School Center for Global Legal Challenges, which filed an amicus brief and a supplemental amicus brief in this case. Oona served as a law clerk for Justice Sandra Day O’Connor.

What, exactly, will remain of the Alien Tort Statute (ATS) after the Supreme Court’s latest decision in [Kiobel v. Royal Dutch Petroleum Co.](#)? “Foreign cubed” cases – cases in which there is a foreign plaintiff suing a foreign defendant for acts committed on foreign soil – are off the table. But there may remain significant scope for “foreign squared” cases – cases in which the plaintiff or defendant is a U.S. national or where the harm occurred on U.S. soil.

To see why this is so requires close inspection of the majority opinion, Justice Breyer’s concurrence, and – most of all – Justice Kennedy’s brief and deliberately vague concurrence.

Let’s begin with the majority opinion, penned by Chief Justice Roberts. Roberts applies the presumption against extraterritoriality set forth by the Court in [Morrison v. National Australia Bank Ltd.](#), and he concludes that it bars the case. As Roberts acknowledges, the presumption against extraterritoriality is a bit of an odd fit here, particularly because the courts have typically applied it to the *substantive* content of laws rather than jurisdictional issues like causes of action. Roberts struggles to square his strong presumption against extraterritoriality with the paradigmatic ATS claim of piracy – which is typically based on acts outside of the U.S., often involving foreign-flagged ships. He does so by arguing that applying U.S. law at sea carries fewer “direct foreign policy consequences” than applying it in foreign territory. In doing so, he ignores the more obvious rationale that piracy was a clear violation of the law of nations and therefore allowing a claim of piracy was not an imposition of “the sovereign will of the United States” but merely enforcement of international law. This more natural reading would of course raise the question of why that is true of piracy but not of genocide, torture, or crimes against humanity.

Roberts leaves the door ajar to extraterritorial ATS claims, if only narrowly. In his concluding paragraph, Roberts explains that, “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” What does he mean by “touch and concern?” It cannot be that the claim must literally “touch” U.S. soil, for then

extraterritoriality would clearly not be at issue. “[T]ouch and concern” therefore appears to leave open the possibility of ATS claims involving U.S. plaintiffs or defendants abroad. Indeed, Roberts’s assertion that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices,” might indicate that U.S. corporations could, in some cases, be subject to ATS liability for actions committed against foreigners abroad. Indeed, it may have been precisely this possibility that prompted Justices Alito and Thomas to write separately to emphasize their broader view of the bar on extraterritorial application of the ATS.

Justice Breyer’s opinion concurring in the judgment, joined by three other Justices, expressly supports extending liability to “foreign squared” cases. Relying on “principles and practices of foreign relations law,” Breyer argues jurisdiction would be proper “where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest ... includ[ing] a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.” This clearly permits “foreign squared” cases (and even some “foreign cubed” cases). The only ambiguity arises where the sole direct connection to the United States is a U.S. plaintiff. Yet it seems very likely that if an American is harmed by a violation of the law of nations abroad (tortured, for example) and has not been able to obtain recourse in the country where the abuse took place (as required by doctrines of exhaustion and forum non conveniens), the case brought by that American in U.S. courts would meet Breyer’s third test for U.S. jurisdiction.

That brings us to Justice Kennedy’s deliberately (maddeningly) vague concurrence. Kennedy, as will no doubt be blog fodder for days and weeks to come, begins by making clear that the Court “is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute.” Unfortunately, he does not specify what these open questions might be. But he does hint at them. He notes that cases may arrive that are not covered by the Torture Victim Protection Act that involve “allegations of serious violations of international law principles protecting persons.” In those disputes, he explains, “the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.” This explicitly leaves open the possibility of extraterritorial application of the ATS. Indeed, there would be no need for “further elaboration and explanation” otherwise.

Taken as a whole, the Supreme Court’s decision appears to leave the door open to “foreign squared” cases. Thus cases like that filed against U.S. corporation Exxon Mobile by fifteen Indonesian villagers that alleged the company colluded in brutal oppression in violation of the law of nations arguably survive this decision entirely intact. In fact, the Chief Justice’s acknowledgement that “mere corporate presence” does not suffice to subject that corporation to liability in U.S. courts seems to imply that corporations with

more than mere presence *can* be subject to that same liability. Those celebrating the demise of the ATS may thus find themselves surprised to discover that the end result of the Supreme Court’s decision yesterday may not be the end of the ATS after all, but instead a renewed focus of ATS litigation on U.S. corporations.

Meir Feder *Guest*

Posted Fri, April 19th, 2013 11:30 am

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Commentary: Why the Court unanimously jettisoned thirty years of lower court precedent (and what that can tell us about how to read *Kiobel*)

SCOTUSblog is pleased to have reactions from supporters of both sides to this week’s decision in [Kiobel v. Royal Dutch Petroleum](#). This post is written by Meir Feder of Jones Day. Mr. Feder served as counsel to Professors of International Law, Foreign Relations Law and Federal Jurisdiction on an [amicus brief](#) in support of the respondents in this case.

For more than thirty years, since the Second Circuit’s 1980 decision in [Filartiga v. Pena-Irala](#) (and more recently the 2004 Supreme Court decision in [Sosa v. Alvarez-Machain](#)), the lower courts have interpreted the Alien Tort Statute (“ATS”) as giving rise to a global remedy for international law violations. The Supreme Court’s [decision in *Kiobel*](#) not only rejected that seemingly entrenched understanding of the ATS as creating a global cause of action, but did so unanimously. While splitting five to four over how close a connection would be required, the Justices all agreed that claims without *some* significant connection to the United States are not actionable under the ATS, and that the *Kiobel* plaintiffs’ claims against foreign defendants based on the actions of a foreign government in its own territory should therefore be dismissed.

The unanimous rejection of a view so firmly established in the lower courts may seem surprising. And yet, at the risk of indulging in 20/20 hindsight, I think that rejection was close to inevitable – at least once the Court decided in *Sosa* that the ATS did not make all international law violations actionable, and that any cause of action would have to be created “if at all, with great caution,” in a manner akin to the creation of federal common law and implied rights of action. Once *Sosa* eliminated any assumption that all alleged international law violations were actionable (and imposed a burden of justification), it is hard to see on what basis the Court could have decided to recognize a cause of action for international law violations wholly unconnected to the United States. Certainly there is no evidence of any congressional intent to

create a global cause of action for all victims of international law violations. The purpose of the ATS, as *Sosa* explained, was parochial – it was prompted by domestic incidents and aimed at conduct that threatened foreign retaliation if left unremedied. Whatever the current merit of the policy arguments for creating a damages action for overseas human rights violations, the Congress that passed the ATS never addressed that choice, or any remotely like it. And modern courts do not view it as their role to make such policy choices when Congress has not – particularly where the choices involve foreign policy, which is viewed as especially the province of the political branches.

What, then, explains the decades of lower court cases treating the ATS as exactly the kind of global cause of action the Supreme Court has now unanimously rejected? I think at least part of the answer relates to changing views of the power of the federal courts to create causes of action, and increasing recognition that creating a right of action is a distinct act of substantive lawmaking. *Filartiga* arrived near the end of a period of permissive attitudes toward the federal courts' recognition of so-called "implied rights of action" to enforce substantive rights that were not accompanied by any express statutory private right of action. So long as the ATS provided federal jurisdiction and international law provided a substantive right, the leap to recognizing a damages action to enforce the right may not have seemed a great one. Those attitudes have changed significantly, and the federal courts are now much more restrictive about implied rights of action, and far more focused on what, if anything, might justify judicial creation or recognition of one. *Sosa* ultimately made the connection between these cases and the ATS, expressly tying the recognition of ATS-based causes of action to the creation of federal common law and implied rights of action, and focusing attention on the heavy burden of justification that must be satisfied before judges can make law in this way.

It is harder to explain how courts and litigants continued to assume the validity of a global cause of action after *Sosa*, which should have prompted them to ask whether there was a convincing basis for judicially creating such a cause of action. Many seem to have read into the *Sosa* Court's judicial minimalism – its refusal to reach questions unnecessary to dispose of the case – things that were not there. *Sosa* disposed of the claim before it on a relatively narrow basis – holding that, at a minimum, a claim must be based on an international law principle with "definite content and acceptance among civilized nations" – and expressly declined to address what other limitations might exist on the recognition of claims attendant to the ATS. Yet many somehow read this as if it were a holding that "definite content and acceptance" were the *only* limitations on an otherwise general endorsement of a global cause of action for international law violations. Similarly, some read *Sosa*'s discussion of aspects of the *Filartiga* case without disapproval as if it amounted to a holding that *Filartiga* had correctly decided issues the *Sosa* Court never addressed.

This misreading of *Sosa* returns us to *Kiobel*, because it provides some cautionary lessons for those who would read too much into what *Kiobel* refrained from deciding. Already advocates are claiming that the

Kiobel majority’s statement that a defendant’s “mere corporate presence” in the United States is not sufficient to “displace the presumption against extraterritorial application” – all that was necessary to dispose of the case before the Court – means that any corporation with more than “mere presence,” such as a U.S. corporation, will be subject to ATS suits for allegedly aiding the conduct of foreign governments. A related argument is that references like “mere corporate presence” assume that at least some ATS claims against corporations will be valid, and thereby implicitly reject the Second Circuit’s holding (which the Court did not reach) that corporations are not subject to suit under the ATS.

As the ill-fated overreadings of *Sosa* should indicate, that is not how it works. As in *Sosa*, the Court’s determination that one factual scenario (here, “mere corporate presence”) is insufficient to support an ATS claim in no way means that other scenarios are sufficient. And the purported assumption that corporations can be sued under the ATS is no more meaningful than the purported assumption in *Sosa* that *Filartiga* was correctly decided. What is meaningful – and should not be overlooked, as many courts and litigants overlooked the federal common law analysis required by *Sosa* – is the legal analysis mandated by the Court’s holding that the presumption against extraterritoriality applies to the ATS. Notably, that analysis appears to leave little room for the argument that ATS suits may be brought against U.S. corporations for overseas violations of international law. Extraterritoriality analysis turns on the location of the relevant conduct, not the citizenship of the defendant, as reflected in the *Kiobel* opinion itself, which concludes that under the presumption against extraterritoriality the plaintiffs’ “case seeking relief for violations of the law of nations occurring outside the United States is barred.” Claims against U.S. corporations for similarly extraterritorial violations are likely to fare no better.

Anton Metlitsky *Guest*

Posted Thu, April 18th, 2013 10:06 am

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Commentary: What’s left of the Alien Tort Statute?

SCOTUSblog is pleased to have reactions from supporters of both sides to yesterday’s decision in [Kiobel v. Royal Dutch Petroleum](#). This post is written by Anton Metlitsky, who is counsel to Rio Tinto, which filed an [amicus brief](#) in support of the respondents in this case.

The Alien Tort Statute (“ATS”), which grants district courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,” was enacted in 1789, but lay essentially dormant for two centuries. In 1980, however, the Second Circuit held in [Filartiga v. Pena-Irala](#), that the ATS allows aliens subjected by foreign officials to violations of modern-

day international human rights norms – in that case, torture – to bring suit for damages in U.S. courts. The Second Circuit’s position was subsequently adopted by several other courts. But ATS litigation did not proliferate broadly until the late 1990s, when plaintiffs began to sue not just individuals alleged to have directly violated human rights norms, but also deep-pocketed corporations that were usually alleged to have aided and abetted such violations. Since then, ATS defendants have contended that to the extent private actions under the ATS should be allowed at all, they should be subject to significant limitations, including the limitation that ATS suits should not be allowed when the alleged human rights violation took place within the territory of a foreign sovereign. Today’s decision in *Kiobel v. Royal Dutch Petroleum* can only be seen as a broad validation of that position. To understand the opinion and its likely implications, however, it is important to see how we got to this point.

As noted, the Second Circuit revived the ATS in 1980. But the Supreme Court had no occasion to consider the scope of that provision until 2004, in [*Sosa v. Alvarez-Machain*](#). There, the Court held that while the ATS was itself a purely jurisdictional provision, it also authorized federal courts, under federal common law, to recognize a private damages action by aliens for violations of “a very limited category” of universally recognized and clearly defined norms of international human-rights law. To that extent, *Sosa* was consistent with *Filartiga*.

But while the precondition of clear definition and universal recognition was enough to resolve *Sosa*, the Court explained that ATS actions would be subject to other limitations as well: “our demanding standard of definition,” the Court noted, “must be met to raise even the possibility of a private cause of action.” And while *Sosa* did not go into detail about what those other limitations would be, it provided a general guide to approaching that question.

In particular, the Court explained that courts must exercise “great caution” before recognizing federal-common-law actions under the ATS. A cautious approach was necessary for several reasons, including the limited nature of federal common law generally and the Court’s general reluctance to imply private causes of action from congressional silence. Most important for present purposes, the Court emphasized that “the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”

Kiobel was the Court’s second opportunity to articulate the limits that apply to federal-common-law actions authorized by the ATS. While certiorari was originally granted to determine whether corporations could be sued under the ATS, the Court after oral argument ordered supplemental briefing and argument on a new question: to what extent could courts recognize a cause of action under the ATS for conduct that occurred within the territory of a foreign sovereign?

In answering that question, the Court stayed true to *Sosa*'s admonition that courts approach questions concerning the scope of ATS actions with "great caution." Notably, the Court *unanimously* concluded that courts may not recognize an action in the circumstances of this case, *viz.*, a suit by aliens against foreign corporations for allegedly aiding and abetting the commission of human rights abuses on foreign soil. The Chief Justice's opinion for the Court and Justice Breyer's concurrence in the judgment did, however, disagree on the proper mode of analysis for reaching that conclusion. And while their debate was principally methodological, the distinction between the the Chief Justice's and Justice Breyer's approaches will have important practical consequences for ATS litigation going forward.

In answering when and under what circumstances an ATS action can be recognized for conduct occurring abroad, Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) would have relied on a multi-factor approach based in large part on international-law principles of prescriptive jurisdiction – i.e., the rules governing when a sovereign may apply its own law to conduct that occurs outside its borders. Applying that approach, Justice Breyer would have recognized an ATS action "where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest." This case did not satisfy that standard, according to Justice Breyer, because the plaintiffs and defendants are foreign nationals, the relevant conduct occurred abroad, and plaintiffs allege only that defendants aided and abetted the violation of human rights norms, not that they violate those norms themselves.

The Chief Justice's opinion, while reaching the same conclusion on the facts of this case, approached the question from a different perspective. Rather than adopting a multi-factor approach, the Chief Justice relied on the general presumption against the extension of U.S. law to conduct occurring abroad. While the ATS is a jurisdictional statute that does not itself proscribe conduct, the Court explained, "the principles underlying the [presumption against extraterritoriality] similarly constrain courts considering causes of action that may be brought under the ATS." Indeed, the principles underlying the general presumption against extraterritoriality – which is meant to avoid judicial interference with foreign relations by assuming that Congress did not mean to extend U.S. law extraterritorially absent a clear statement to the contrary – "are magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." Noting that *Sosa* emphasized the need for "caution" because of "the danger of unwarranted judicial interference in the conduct of foreign policy," the Court noted that "[t]hese concerns ... are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign." And in applying the presumption against extraterritoriality to the relevant facts, the Court held that plaintiffs' "case seeking relief for violations of the law of nations occurring outside the United States is barred."

The practical difference between the the Chief Justice’s and Justice Breyer’s methodologies is reflected in the sentence just quoted – the plaintiffs’ action “is barred” because it “seek[s] relief for *violations of the law of nations occurring outside the United States.*” As explained earlier, while all agree that *this* case cannot go forward, Justice Breyer’s approach presumably would allow suits against U.S. corporations – i.e., when “the defendant is an American national” – whether or not the alleged human rights violation occurs abroad. The majority opinion appears to squarely foreclose that result, because it focuses on where the relevant conduct occurred – i.e., whether the alleged “violation[] of the law of nations occur[red] outside the United States.” From the majority’s perspective, the identity of the defendant is irrelevant.

That said, it appears that some questions under the ATS remain unanswered. Justice Kennedy, who joined the majority opinion in full, also concurred separately, stating that “the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute,” and that this is in Justice Kennedy’s view a “proper disposition.” Justice Kennedy does not say what he believes those “significant questions” to be, but based on his questions in [oral argument](#), Justice Kennedy appears concerned that actions of the sort at issue in *Filartiga* – i.e., actions by aliens against individual direct perpetrators of human rights abuses abroad – be preserved. That conclusion is reinforced by the concurrence’s statement that Congress addressed “[m]any serious concerns with respect to human rights abuses committed abroad” by enacting the Torture Victim Protection Act of 1991 (“TVPA”). That statute was enacted in large part to provide an express cause of action in cases like *Filartiga*, but only authorizes suits for torture and extrajudicial killing, subject to important limitations (e.g., [corporations may not be sued](#)). The TVPA does not, however, provide for actions based on other important human rights norms, such as genocide. And Justice Kennedy cautions that “[o]ther cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today’s opinion,” and that the application of the presumption against extraterritoriality in such cases “may require further elaboration and exploration.” Justice Kennedy’s concerns at oral argument with preserving *Filartiga*, combined with his invocation of the TVPA, suggest that he may be open in some circumstances to recognizing actions by aliens against individual direct perpetrators of human rights norms beyond those covered by the TVPA.

Thus, while *Kiobel* places significant limitations on ATS actions, this may not be the Supreme Court’s last word on the ATS’s scope.



Donald Childress *Guest*

Posted Thu, April 18th, 2013 5:03 pm

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***Kiobel* commentary: An ATS answer with many questions (and the possibility of a brave new world of transnational litigation)**

SCOTUSblog is pleased to have reactions from supporters of both sides to yesterday's decision in [Kiobel v. Royal Dutch Petroleum](#). This post is written by Trey Childress, Associate Professor of Law at the Pepperdine University School of Law and a Visiting Associate Professor of Law at the Washington & Lee University School of Law during the 2012-2013 academic year. Professor Childress teaches transnational law, civil procedure, conflict of laws, and comparative law. He has written extensively about transnational law and litigation in U.S. courts and the ways in which domestic substantive and procedural law respond to transnational parties, laws, and conduct. He is the American co-editor of [ConflictofLaws.net](#).

After two rounds of briefing, two oral arguments, and a significant wait for an opinion, what do we know about the future of Alien Tort Statute (ATS) litigation in light of the *Kiobel* decision? I think at least three things: (1) plaintiffs' ability to file ATS claims in federal court is now substantially limited; (2) plaintiffs will likely try to file such cases under U.S. state and foreign law, in some cases in U.S. state and foreign courts in the first instance; and (3) this will help usher in a brave new world of transnational litigation where federal, state, and foreign courts compete to regulate international human rights claims.

First, according to the Court in the *Kiobel* decision, ATS cases are subject to the presumption against extraterritoriality recently rearticulated in [Morrison v. National Australia Bank](#). For an ATS claim to survive a motion to dismiss, it must "touch and concern" activities occurring in the "territory of the United States." ATS claims that seek relief for violations of the law of nations occurring wholly outside of the United States are now barred. Note that *Kiobel* is an easy case for the Court to apply this rule because "all the relevant conduct took place outside of the United States." The federal courthouse doors are now shut for these cases.

However, the keys may still be in the door if plaintiffs can creatively plead around the presumption. For instance, a plaintiff might argue that a major portion of the tortious activity occurred in the United States

even though the injury was caused in a foreign country. Yet, according to the Court, “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritoriality. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.” But, what would such cases be? Much is still left unanswered by the Court when it comes to ATS litigation.

So, let’s start with what is clear. A foreign plaintiff suing a foreign defendant for acts or omissions occurring wholly *outside* of the United States that allegedly violate the law of nations (a so-called “F-cubed case” as presented in *Kiobel*) cannot bring suit under the ATS, even when there is personal jurisdiction in the United States. Conversely, a foreign plaintiff suing a defendant (foreign or domestic) for acts or omissions occurring wholly *inside* of the United States that allegedly violate the law of nations can bring suit under the ATS. Although, we know nothing from the Court’s opinion about how the ATS should be applied in such a case, except that lower courts should remain acutely sensitive to foreign policy implications. As noted by Justice Kennedy in his concurring opinion, “[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute.” Let’s take a look at some of those questions and where their answers might lead us.

Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *wholly outside* of the United State that allegedly violate the law of nations?

According to the opinion by Chief Justice Roberts, which was joined by Justices Scalia, Kennedy, Thomas, and Alito, the answer is “no.” Even though the United States would have prescriptive jurisdiction under international law, as the case involves a U.S. defendant domiciliary, this too would be an extraterritorial application of the ATS. Note that this would be a case that Justices Ginsburg, Breyer, Kagan, and Sotomayor would allow to go forward under the ATS. This could also be an example of a case where, as noted by Chief Justice Roberts, “the claims touch and concern the territory of the United States” and “do so with sufficient force to displace the presumption against extraterritoriality.” But, I doubt it, because “the claims” themselves have nothing to do with “the territory of the United States,” and “mere [] presence” is not enough. So, it appears that escaping the presumption against extraterritoriality in the ATS context is not about “who” the defendant is but about “where” the tortious conduct took place.

Can a foreign plaintiff sue a foreign defendant for acts or omissions occurring *in part in* the United States that lead to an injury in a foreign country that allegedly violates the law of nations? For instance, what if the plaintiff alleges that an officer of a foreign corporation gives directions from an office in New York that directly lead to a foreign tort that allegedly violates the law of nations?

This is a closer question, but I think the answer is “no.” I also think that reasonable judges interpreting the Court’s *Kiobel* opinion might disagree on this. To get to “no,” one has to look closely at Justice Alito’s concurrence, joined by Justice Thomas, which has the potential to serve as a model for lower court judges writing future opinions in the area, even if it could not command a majority at the Court. According to Justice Alito, the answer to this question requires one to look at the “focus” of the ATS. In light of the Court’s opinion in [Sosa](#), not just any domestic conduct will be enough to escape the presumption. In Justice Alito’s view, “unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations,” the ATS claim will fail.

Here is the multi-million dollar question: What would such a case look like where the injury occurs abroad but some of the tortious conduct occurs in the United States and that U.S. conduct itself violates the law of nations? Does Justice Alito mean to say that individuals or corporations in the United States aiding and abetting or conspiring to commit a tort in violation of the law of nations in a foreign country might still be sued under the ATS? If so, the ATS might not be dead yet. Such cases would be rare.

Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *in part in* the United States that lead to injury in a foreign country? For instance, what if the plaintiff alleges that a U.S. corporate official directed corporate agents in a foreign country to take action that allegedly violates the law of nations? I think the answer here would also be “no” for the reasons given in the prior paragraphs, unless, assuming lower courts follow Justice Alito, that conduct itself violates an international law norm. These cases would also be rare.

At bottom, foreign plaintiffs will only be able to proceed under the ATS when they are injured in the United States or when substantial activities occur in the United States that violates the law of nations, even though the injury is ultimately felt abroad. As such, the Court has substantially limited the ability of plaintiffs to file ATS cases in federal court.

Second, assuming these answers are correct, what will happen next? We should expect many ATS cases to be refiled in federal court to conform to the Court’s new rule. As discussed above, we should expect some cases to be filed alleging that the tortious activity was planned or directed from the United States. However, in light of the fact that nearly all post-*Morrison* cases that tried to escape the presumption by pleading some U.S. conduct have failed, one might similarly expect significant obstacles to federal ATS cases, especially if courts follow Justice Alito’s reasoning and in light of plausibility pleading requirements.

In light of this and as I have argued in the [Georgetown Law Journal](#), the next round of international human rights cases will be filed under state law in federal court and, in some cases, under state law in state courts. There is also every reason to believe that foreign law and foreign courts may become another battleground for such cases. Courts and commentators must now focus on the appropriate role of transnational human rights litigation in U.S. courts generally. In what circumstances should state law reach transnational human rights claims? Should preemption, due process, and related doctrines constrain the ability of plaintiffs to raise such claims under state law? Should forum non conveniens be robustly applied when cases are filed under foreign law in the United States? Should courts be concerned that forcing such cases to be filed abroad may bring these cases back to the United States in later enforcement of judgment proceedings where the U.S. court has only limited review? Should Congress step in and resolve these issues?

Finally, the *Kiobel* decision raises a significantly broader institutional and normative question: What happens when U.S. federal courts close their doors to transnational cases? As I explain in a new draft piece that will be looking for a law review home shortly, recent Supreme Court decisions regarding the Alien Tort Statute, extraterritorial application of U.S. federal law, plausibility pleading, personal jurisdiction, class action certification, and forum non conveniens pose substantial obstacles for transnational cases to be adjudicated by U.S. federal courts. As noted, the result of this is that plaintiffs are now seeking other law – U.S. state and foreign law – and other fora – including U.S. state and foreign courts – to plead transnational claims. When U.S. federal courthouse doors close, other doors open for the litigation of transnational cases.

In my view, we are at the beginning of a brave new world of transnational litigation where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases and regulate transnational activities. Maybe it is time for increased regulatory cooperation between the federal government and the states as well as between the United States and other countries to resolve these transnational legal issues.

Kristin Linsley Myles and James Rutten *Guest*

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***Kiobel* commentary: Answers ... and more questions**

SCOTUSblog is pleased to have reactions from supporters of both sides to yesterday's decision in [Kiobel v. Royal Dutch Petroleum](#). This post is written by Kristin Myles and James Rutten, who served as counsel on an [amicus brief](#) in support of the respondents in this case.

Yesterday the Court rendered its long-awaited [decision](#) in [Kiobel v. Royal Dutch Petroleum Co.](#), a case presenting the question of whether federal courts may recognize a cause of action under the Alien Tort Statute (ATS) for violations of the law of nations occurring within the territory of a foreign sovereign. The Court's five-to-four majority opinion (Roberts, C.J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.) answered that question with an all but categorical "no," with the remaining Justices concurring in the judgment on the basis that federal courts may not recognize a cause of action under the facts of the case.

Plaintiffs were a group of Nigerian nationals who alleged that the Nigerian military committed human rights violations against them in the 1990s in response to local protests concerning oil exploration and production by a subsidiary of the defendants (Royal Dutch Petroleum Company and Shell Transport and Trading Company, two holding companies incorporated in the Netherlands). After the plaintiffs obtained political asylum in the United States, they sued in federal court, alleging that the defendants had aided and abetted the atrocities by providing food, transportation, and compensation to the Nigerian military, and allowing it to use their property as a staging area for the attacks. The plaintiffs premised jurisdiction on the ATS, an obscure jurisdictional provision that was enacted by the First Congress in 1789 and that once was described by Judge Friendly as a "legal Lohengrin" in that "no one seems to know whence it came." The statute provides in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The Second Circuit, on an interlocutory appeal from a partial dismissal, dismissed the entire complaint on the ground that the law of nations does not recognize corporate liability. The Supreme Court granted certiorari to consider that question, but subsequently asked for briefing and argument on the threshold question of whether the ATS permits federal courts to entertain a cause of action at all where the conduct occurred exclusively within the territory of a foreign sovereign. The Court had not previously addressed this question, even though prior ATS cases, such as the Court's 2004 decision in [Sosa v. Alvarez-Machain](#), had involved conduct occurring largely, and in some cases entirely, within foreign nations.

The Court held that the ATS does not confer federal court jurisdiction in such circumstances. The Court grounded its decision primarily in the presumption against extraterritorial application of statutes recognized most recently in [Morrison v. National Australia Bank Ltd.](#) – a presumption that "serves to protect against unintended clashes between our laws and those of other nations which could result in

international discord.” The Court recognized that the presumption does not map neatly onto the ATS, because the presumption typically applies when there is a question about whether a federal statute affirmatively regulating conduct applies abroad, whereas the ATS does not regulate conduct at all, but simply creates jurisdiction over federal common law causes of action for violations of certain well-settled norms of international law. The Court concluded, however, that that only heightened the policy concerns from which the presumption springs: “[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.”

The Court’s decision will have immediate consequences and leaves open a number of questions. Most palpably, its decision is sure to result in the dismissal of several ATS cases now pending in the lower courts. The ATS was a largely neglected jurisdictional statute until the Second Circuit’s decision in 1980 in *Filartiga v. Peña-Irala*, but since then, increasingly has been used to target deep-pocket corporate defendants with allegations that they aided and abetted human rights violations by foreign governments. The Court’s decision is likely to put a stop to these cases, particularly where, as in *Kiobel*, neither the events at issue nor the parties to the case have any connection to the United States.

The Court’s opinion also leaves open many questions. It did not address, for example, whether corporate liability is permitted under the ATS (the question on which the Court initially granted certiorari); whether aiding-and-abetting liability is permitted; or whether, as argued by some *amici*, applying the ATS extraterritorially would *itself* violate international law because it effectively would entail United States courts regulating what happens in foreign countries.

The Court’s opinion also contains language suggesting that the categorical rule it announced is something less than that. As Justice Kennedy stated in a one-paragraph concurrence that did not expound on what he had in mind: “Other cases may arise with allegations of serious violations of international law principles protecting persons, cases [not] covered . . . by the reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”

Significantly, the Court did not address whether, *if* corporate liability is permitted, a cause of action under the ATS that otherwise would be barred by the presumption against extraterritoriality can be viable if a corporate defendant is domiciled, headquartered, or has operations in, the United States. The Court did indicate that a cause of action that otherwise would be barred is not viable merely by virtue of being brought against a multinational corporation with a presence in the United States: “Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.” Based on the Court’s use of the vague term “presence,” we can expect ATS plaintiffs to argue that corporations

that are domiciled or headquartered in the United States remain fair game in ATS suits, even if those suits challenge purely extraterritorial conduct by the corporations or their subsidiaries. Such an argument would seem to contravene the Court’s basic holding that the ATS does not apply to conduct occurring exclusively within foreign nations.

Also, the Court left open the question of whether the ATS could confer jurisdiction over a cause of action arising from events in a foreign nation where *some* degree of conduct took place in the United States, and if so, how significant the domestic conduct would have to be. The Court was careful to note that “[o]n the[] facts [presented], all the relevant conduct took place outside the United States,” and suggested that jurisdiction could exist if “claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.” What the Court meant by “displace” is not at all clear. It did not appear to mean that a connection to the United States could “rebut” the presumption; a statute either applies extraterritorially or it does not, and the Court’s decision elsewhere makes clear that “to rebut the presumption, *the ATS* would need to evince a clear indication of extraterritoriality” (emphasis added). The Court approached that question of statutory construction as such, engaging in an ordinary analysis of the “text, history, and purposes of the ATS.” Notably, neither the Court’s opinion nor any of the separate opinions endorsed the approach the United States had urged in its *amicus* brief, namely, a case-by-case, all-the-facts-and-circumstances approach to extraterritoriality that includes deference to the views of the Department of State when it comes to whether the ATS should apply extraterritorially in a given situation.

Rather, when the Court said “displace,” it seemed to mean that if conduct violating the law of nations takes place in the United States, the presumption against extraterritoriality is irrelevant because the conduct would not be extraterritorial in the first place. If that is what the Court meant, it would be consistent with Justice Alito’s concurring opinion, which articulated a test by which “a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and therefore will be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies [prior case law’s] requirements of definiteness and acceptance among civilized nations.”

Interestingly, the Court seemed to invite Congress to soften the impact of its ruling – which, as noted, will shut down numerous pending human rights cases – by enacting a statute that expressly applies extraterritorially (as Congress did in 1992 when it passed the Torture Victim Protection Act). The Court, in suggesting that mere corporate presence in the United States would not suffice, added: “If Congress were to determine otherwise, a statute more specific than the ATS would be required.” In light of yesterday’s decision, we can expect human rights advocates to urge Congress to address the issues legislatively by authorizing federal courts to project federal common law incorporating international norms onto foreign soil.

Opinion recap: Backing off of human rights cases

Analysis

Relying on the idea that the United States is not the moral custodian of the world, a splintered Supreme Court ruled on Wednesday that American courts should rarely — if ever — decide claims that foreigners have committed atrocities against foreigners in foreign lands. The Court's long-awaited decision in [*Kiobel v. Royal Dutch Petroleum*](#) (10-1491) might have left the federal courthouse door ajar, but only slightly so, for such a case in the future.

There were no outright dissents, but the actual meaning of the decision had to be drawn out of three opinions — the main one, by Chief Justice John G. Roberts, Jr., and separate opinions by Justices Anthony M. Kennedy and Samuel A. Alito, Jr. But even a fourth opinion by Justice Stephen G. Breyer, refusing to join any part of the others' opinions, might suggest ways in which a future case could yet be pursued.



For all of its importance, and that was beyond question, this was not a decision based on the Constitution. It was, instead, an interpretation of the power of U.S. courts under a broadly worded federal law that originated all the way back in the first year of the American government: 1789. It is the Alien Tort Statute, which was little used in human rights cases until the 1980s, but has been relied upon with rising frequency since then.

The law opens U.S. courts to “any civil action” filed by a foreign national and claiming wrongdoing that violated either international law or a U.S. treaty. It does not spell out what kinds of wrongdoing can be challenged, or where they must have occurred. It simply opens the courthouse door to such a claim.

In finally deciding a case that has been unfolding before the Court for nearly two full years, and was heard twice, five Justices declared that the judge-made concept that U.S. laws are presumed to apply only to the U.S. and its territory means in general that the ATS cannot be the basis for a lawsuit in which all of the conduct challenged occurred in a foreign country where there is a functioning, legitimate government.

That doctrine, spelled out most fully in the Chief Justice’s opinion, blocked the particular lawsuit at issue in the case: filed by twelve Nigerians, now living in the U.S., who claimed human rights violations by three Dutch or British oil companies that had allegedly enlisted the government of Nigeria to use its military to violently suppress resistance to oil exploration in the Ogoni region of the Niger Delta, between 1992 and 1995.

The Second Circuit Court had thrown out the lawsuit, but on the narrower basis that the ATS did not allow such lawsuits to be filed against corporations. That was the issue the Supreme Court originally took on, but then the Justices changed the thrust of the case to decide whether the ATS had any application to actions that occurred beyond U.S. shores.

On Wednesday, the Court barred the case, but on the point that the ATS did not have “extraterritorial” application. This lawsuit, the Chief Justice wrote, involved only “conduct occurring in the territory of a foreign sovereign” — here, Nigeria.

The Court explicitly avoided deciding whether any ATS case, under any circumstances, could be brought against a corporation, foreign or domestic. If the decision did leave some narrow range of options for future ATS cases in a U.S. court, and such a case targeted a corporation, the issue of whether the law can be used against such targets would be revived.

The Roberts opinion justified the result on the basis of several arguments: to avoid conflicts with other nations, to avoid judicial interference with diplomacy, to protect U.S. citizens from similarly being haled into foreign courts, and to avoid trying to set up the United States as the “*custos morum* [moral custodian] of the whole world.” That Latin quotation was borrowed from Justice Joseph Story, who made it in a court opinion in 1822.

While the whole tenor of the Roberts opinion was an argument against any ATS lawsuit based solely on atrocities on foreign soil, the final paragraph of the opinion seemed to leave an opening, however narrow. It suggested that the presumption against applying the law outside the U.S. might possibly be

overcome “where the claims touch and concern the territory of the United States.” But, it stressed, that domestic impact would have to be of “sufficient force” to displace the presumption.

The Chief Justice’s opinion was joined by Justices Alito, Kennedy, Antonin Scalia and Clarence Thomas.

Justice Kennedy’s brief separate opinion, for himself only, said the Court had left open “a number of significant questions regarding the reach and interpretation” of the 1789 law. As future cases arise, he wrote, “the presumption against extraterritorial application may require some further elaboration and explanation.”

Justice Alito, in a separate opinion joined only by Justice Thomas, argued that the Court should have gone further, and barred any ATS lawsuit unless it targeted “domestic conduct” that would definitely violate a norm of international law that had “acceptance among civilized nations.” It was not exactly clear whether that would leave any option open, because there was no further clarification.

Justice Breyer’s separate opinion was joined by Justices Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor. Those four Justices would not have used the extraterritorial bar at all. Rather, they argued that the focus should be explicitly on just what Congress meant in passing ATS, and how that should be applied in a modern world in which atrocities and other human rights abuses that are “recognized by the community of nations as of universal concern.”

That opinion argued that ATS cases should be allowed where the wrongdoing “occurs on American soil” and the target of the lawsuit is “an American national” (it did not say whether that had to be a human or a corporation), and then, in addition, a much broader potential claim — that is, where the target’s wrongdoing “substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”

It seemed at least arguable that the Breyer approach might, in time, allow lawyers bringing a future ATS lawsuit to fit their claim into the opening — however narrow — that the Chief Justice’s opinion appeared to have left.

Disclosure: Goldstein & Russell, P.C., whose attorneys work for or contribute to this blog in various capacities, represents Achmed et al. and the Center for Justice and Accountability as *amici curiae* in support of the petitioners. The author of this post operates independently from the law firm.



Lyle Denniston *Reporter*

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Piracy and the Court — Act II

A crime that is as old as the nation itself — piracy — is reaching more boating criminals around the globe, but the Supreme Court may have the last word on whether the American government will share that broader authority to punish violence at sea. Although piracy does not appear often in modern court cases, it is undergoing something of a revival in the Supreme Court, last Term and this.

The Court, in fact, opened the new Term this month by continuing a focus begun earlier on how to interpret another law that dates to the Founding era: the Alien Tort Statute of 1789. That review, in the case of *Kiobel v. Royal Dutch Petroleum*, is analyzing piracy as a classic form of legal wrongdoing for which American courts can provide a civil remedy: money damages. At the oral argument, where piracy came up often, some Justices wondered whether those who engage in human rights violations today could be sued for damages as if they were modern-day pirates.

Next up for the Court, though, could be a review of how broadly to interpret piracy when it is punished as a crime — as it had been under U.S. law since 1790. The two concepts, civil and criminal, may be more closely related in the field of piracy than at first appears. Or so the Fourth Circuit Court thought, and its rulings in two criminal piracy cases now await the Supreme Court's attention.

For all of the entertainment that actor Johnny Depp has provided for the movie-going public, piracy is a very serious crime: if one is convicted of it in a U.S. court, the sentence is automatically life in prison. And that is the sentence that has been imposed in federal courts in Virginia on two groups of convicted high-seas pirates, whose lawyers are contending in new appeals to the Supreme Court that their crimes were not piracy at all but were, at most, a form of violence at sea that carries a prison term of no more than ten years.

By coincidence, the two cases — *Dire v. United States* (docket 12-6529) and *Said v. United States* (12-6576) — were filed at the Court on October 1, the same day of the *Kiobel* oral argument. It is now clear

that a 2004 decision by the Court — [*Sosa v. Alvarez-Machain*](#) — is likely to provide the legal key for the Justices in *Kiobel* and in the new piracy cases, as well. In *Sosa*, the Court gave U.S. courts some authority to recognize new forms of civil wrongdoing, if those are recognized in international law, on the theory that such misconduct amounts to a civil tort under U.S. common law. Although that was a civil law precedent, the Fourth Circuit in the piracy cases has said that its reasoning applies, too, to criminal piracy prosecutions. The view that international law now takes of piracy, the Circuit Court decided, now provides the meaning for the crime of piracy under U.S. law.

Traditionally, and, indeed, up to the time of these two piracy cases prosecuted in Virginia, piracy as a crime in U.S. law meant robbery at sea, and usually involved pirates who either forcibly boarded a vessel at sea, or stole some of its cargo or other property. That definition of piracy, in fact, dates back to the work of the great eighteenth-century English judge and legal philosopher, Sir William Blackstone — whose work is being pondered anew by the Justices in the *Kiobel* case.

In a recent development, however, some overseas courts, and some treaties, now define piracy as encompassing almost any form of violence at sea. If the Supreme Court endorses that expansion, then life prison terms will await modern pirates prosecuted in American courts, even if their actions involved no boarding of a vessel and no theft.

The two cases, according to federal prosecutors, certainly involved violence at sea, but prosecutors conceded that the incidents did not involve piracy as previously understood under U.S. law. In the *Dire* case (docket 12-6529), which became the lead case in the Fourth Circuit, three Somalis in a small skiff, who were armed with a rocket-propelled grenade and two AK-47 rifles, approached a U.S. Navy vessel, the USS Nicholas, in April 2010 about 600 miles off the coast of Somalia. As the skiff approached the Navy frigate, there was an exchange of gunfire. As the skiff sought to flee, the Nicholas chased it, and captured the three men in the skiff as it began to sink, and the Navy crew captured two other Somalis from another boat that had been nearby.

The Somalis never went aboard the Nicholas until taken there as captives, and they stole nothing from the vessel. Still, federal prosecutors accused them of crimes under the U.S. piracy law. As that law is currently worded (with very little difference from the 1790 act except that the mandatory punishment is now life in prison rather than death), the crime of piracy is said to be “as defined by the law of nations.” The Somalis were found guilty of that crime, along with others, and received life terms for piracy plus lengthy prison terms for other crimes of which they were found guilty.

In the *Said* case (docket 12-6576), the five individuals were convicted on piracy counts alone, and received life terms. Prosecutors charged that, in April 2010, the men in a small skiff approached the USS Ashland,

a U.S. Navy craft, in the Gulf of Aden. There was an exchange of gunfire, and the Navy sank the skiff. One occupant of the skiff was killed in the gunfire, and the others were captured. They never boarded or attempted to board the Navy ship during the encounter, and did not steal anything from it.

In the *Said* case, a federal district judge ruled that the crime of piracy was restricted now as it had been traditionally, to robbery or violent boarding at sea. In the *Dire* case, a different district judge accepted the Justice Department's argument and ruled that, since the piracy law's language said it was defined according to "the law of nations," the Supreme Court's precedent in the *Sosa* case meant that the concept of piracy would change as international law norms changed. Relying on foreign court rulings and on treaty language, the judge in the *Dire* case rejected the Somalis' argument that federal courts had no authority to create common law crimes, even if they could create new common law civil torts.

The Fourth Circuit, outlining its views most fully in the *Dire* case, and then deciding the *Said* case on the same basis, agreed with the Justice Department and with the district judge who found that piracy changes with the times, as international law changes.

In both petitions in the Supreme Court, the convicted men's lawyers are arguing that the Fourth Circuit has abandoned the long-standing principle that only Congress can create new crimes, and thus the Fourth Circuit has violated that separation-of-powers principle. They also argue that piracy had a settled meaning at the time Congress made it a crime, and thus that meaning, as in the old criminal statute, remains what it was in the beginning.

That is the key issue the Justices will ponder, after the Justice Department responses — now due in early November — are filed. The *Dire* case also raises separate issues about the scope of the right of foreign nationals, captured abroad by U.S. forces, to be warned of their legal rights before they may be questioned, and about the power of the sentencing judge to add on multiple sentences for actions growing out of a single criminal incident.

Although the Fourth Circuit stands alone on its interpretation of the scope of criminal piracy, the convicted men's attorneys argue that the Justice Department is now likely to bring all of its piracy prosecutions in the courts in that circuit, so there is little chance of a split developing in the appeals courts.

Argument recap: In search of an ATS compromise

Clearly wary of turning U.S. courts into monitors of rogue governments around the world, an apparent majority of the Supreme Court opened the new Term Monday in pursuit of ways to limit the reach of a 1789 law that has had the potential to give American judges that very role. Still, a majority did not seem

inclined to narrow the Alien Tort Statute nearly into non-existence. A compromise seemed in the offing in the major new test case of [*Kiobel v. Royal Dutch Petroleum*](#).

The law, dating from the first Congress but little used until modern times, has led U.S. courts into deep explorations of human rights abuses that occur in foreign countries, in ways that make some foreign governments leery of American intrusion and the U.S. government wary of retaliation. The Court itself had previously given some encouragement to that trend, but more recently had seemed concerned that some restraints may be needed. That was what it has been pondering during two hearings by the Justices, first last Term and now this Term, on the *Kiobel* case. But the impression it gave on Monday was that new ambiguity, rather than new certainty or simplicity, could emerge in the final decision.

The simplest option open to the Court — and it was urged fervently by one lawyer — would be to rule that the ATS simply has no role to play whatsoever when a claim of atrocities abroad has no immediate connection with the United States — that is, if foreign nationals sued foreign entities in a U.S. court for human rights violations that allegedly occurred entirely overseas. But that option looked harsh, as Justices spoke of the kinds of evil that are known to occur — by, for example, the Nazi regime's Hitler — that might be regarded as the modern equivalent of lawlessness such as piracy that had prompted the founding generation to enact the ATS to do something about it.

Where to draw lines short of shutting down all but a few, U.S.-related cases, however, was quite elusive as the hour-long hearing proceeded. Each of the three lawyers met, in turn, a barrage of skepticism from across the bench.

Paul L. Hoffman, a California lawyer representing Nigerian nationals claiming killing and torture in their homeland, faced claims that his approach would mean no limits on a worldwide pursuit of human rights justice, potentially disrupting diplomatic relations generally. Kathleen M. Sullivan, a New York lawyer for the big foreign oil companies sued in the case and seeking to head off almost all ATS claims, encountered suggestions that her view would cut back even on ATS claims that the Court has already allowed. And U.S. Solicitor General Donald B. Verrilli, Jr., arguing against the *Kiobel* claim but pleading to keep the courts open to at least some ATS cases, ran up against arguments that he was switching away unpersuasively from the more clear-cut position taken by the government in the past.

The case was before the Court last Term, focusing on the question of whether corporations could be sued under ATS. Rather than decide that question, though, the Justices told lawyers to come back this Term with arguments on whether the ATS was meant to have any application to claims by foreigners against foreigners for foreign conduct. Justice Samuel A. Alito, Jr., who began pressing that more basic issue at the prior hearing, was again wondering on Monday why the *Kiobel* case had any justification for its

presence on an American court's docket. Aside from Justice Stephen G. Breyer, who appeared to be making some efforts to salvage this case from dismissal, no other member of the Court appeared to be its champion. Beyond that, though, there was no apparent consensus.

One task that most of the Justices seemed to agree they faced, as they now move toward a decision on *Kiobel*, is how to interpret the Court's most important precedent up to now on the ATS's scope: the 2004 decision in [*Sosa v. Alvarez-Machain*](#). That decision barred an ATS lawsuit by a Mexican national against other Mexicans for incidents that occurred in Mexico, but it also was a dispute that had a U.S. connection. The *Sosa* precedent, though, did indicate that some other ATS claims might fare better, without giving any specific guidance on which ones might.

The *Sosa* ruling came up repeatedly in Monday's discussion, and the Justices pressed the oil companies' lawyer on whether the Court would have to overrule that decision in order to rule for those companies. Their lawyer said no, but she also left the impression that, unless Congress had authorized any such lawsuits that reached outside the borders of the U.S., any such case should be blocked from U.S. courts.

An idea floated by Justice Alito, and also pursued by Justice Breyer, was whether the courts on encountering an ATA case could get guidance from the State Department on whether the case threatened U.S. relationships with other countries if the case were allowed to go forward, with that guidance getting at least some solid respect from the courts. Attorney Hoffman appeared to embrace the idea, but some Justices wondered whether the courts would actually accept the State Department's advice. Hoffman also tried to save some significant ATS discretion in the courts by arguing that judges have the tools to keep those cases from reaching too far. There also was some discussion of whether an ATS case should be barred if the suing party had not first tried to get some remedy in the country where the alleged international law violations had occurred.

Justice Sonia Sotomayor seemed to gain some traction by embracing an idea put forth in a brief from the European Commission, which would limit ATS cases to those in which a judicial forum was really the only one in which some remedy for human rights violations might be obtained — what Sotomayor called “a forum by necessity” whose powers would be clearly defined and limited.

Justice Alito spoke what appeared to be the sentiment of several members of the Court in defending the fairness of foreign courts to handle claims of atrocities that occurred within their borders.



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Kiobel v. Royal Dutch Petroleum: What’s at stake, and for whom?

Last February, early in the first oral argument in [*Kiobel v. Royal Dutch Petroleum*](#), Justice Alito asked Paul Hoffman – the lawyer representing twelve Nigerian nationals who filed a lawsuit against three European oil companies for aiding the Nigerian military in killing and torturing civilians who protested oil exploration in Nigeria – a simple but potentially far-reaching question: “What business does a case like this have in the courts of the United States?” Just a few days later, the Court ordered a second round of briefing and oral argument, on a question that at bottom mirrors the one posed by Justice Alito – whether a case like *Kiobel* can be brought in U.S. courts at all. Lyle has reported on this case [extensively](#), and over the summer this blog hosted an [online symposium](#) on the case as well. In preparation for the second oral argument in the case on Monday morning, this post focuses on the players in the case and their views of what is at stake.

Background

At issue in the *Kiobel* case is the proper interpretation of the Alien Tort Statute (ATS), which provides, in relevant part, that foreign citizens may bring civil suits in U.S. district courts for actions “committed in violation of the law of nations or a treaty of the United States.” Enacted as part of the Judiciary Act of 1789, the ATS lay almost forgotten

for nearly two hundred years. But in 1980, in [*Filartiga v. Pena-Irala*](#), the U.S. Court of Appeals for the Second Circuit breathed life into the statute, holding that the ATS conferred jurisdiction over a lawsuit brought by one Paraguayan national against another Paraguayan national (residing in the United States) for torture that occurred in Paraguay. Since then, victims of human rights violations that occurred overseas have sought to rely on the ATS to press their own claims in U.S. courts.

Until *Kiobel*, the Supreme Court had considered only one other case brought under the ATS: [Sosa v. Alvarez-Machain](#), a case brought by a Mexican national against other Mexican nationals who – at the behest of the U.S. Drug Enforcement Administration – abducted the plaintiff from Mexico to the United States to stand trial in this country. In *Sosa*, the Court held that lawsuits could be brought under the ATS only for a limited set of serious violations of international law. It did not, however, discuss the question now before it in *Kiobel*: whether the ATS applies at all if those violations occurred in another country.

The *Kiobel* plaintiffs and other victims of human rights violations

For the *Kiobel* plaintiffs and other foreign nationals who allege that they have been the victims of human rights abuses overseas, the stakes are significant. In the view of Peter Weiss, who served as the lead lawyer for Filartiga in the Second Circuit, “[w]hat’s riding [on *Kiobel*] is the whole Filartiga line of jurisprudence” – that is, the ability to seek redress in U.S. courts under the ATS at all.

A ruling against the *Kiobel* plaintiffs would be disastrous, contends Katie Redford, the co-founder of EarthRights International, which filed an [amicus brief](#) supporting the *Kiobel* plaintiffs. In 1996, Redford filed an ATS case against the Union Oil Company of California (Unocal) on behalf of Burmese peasants who alleged that a company in which Unocal was a minority shareholder had been complicit in forced labor, rape, and murder by security forces dispatched by the Burmese government to protect an oil pipeline. Redford characterizes the ATS as a tool for providing people for whom the odds of seeing justice for the abuses they have suffered is next to null. She explains that “[i]n these human rights cases, it is so hard for victims to actually get their case into court. Forget about who are they – they are living in jungles most of the time – or how they are going to find a lawyer, it’s also the language differences, the logistical challenges, the travel.”

“What’s at stake for us,” Redford said of the prospect that the Court could close the door to ATS lawsuits alleging human rights violations in other countries, “is just a chance for those very few cases that you can actually get together.” Indeed, she emphasized, only a handful of ATS cases are even filed in U.S. courts each year, and most of them are dismissed under other doctrines, precisely because a forum is available in other countries.

Royal Dutch Petroleum and other businesses

The strong conviction of human rights activists that the ATS provides a necessary avenue for victims of human rights abuses to seek justice are met with equally strong opposition from businesses – like the defendant in this case, Royal Dutch Petroleum – with operations in foreign countries. The defendants object not only to the large litigation bills that may accompany ATS suits, but also to the difficulties of both predicting when they will be filed and defending them when they are. In [remarks](#) made earlier this

year at Georgetown Law, Kristin Myles, who represented Unocal and filed an [amicus brief](#) on behalf of several companies in support of Royal Dutch Petroleum in *Kiobel*, explained that the *Unocal* case started with several different defendants, all of whom were dismissed from the case except Unocal. That left the company to litigate not only issues of its own conduct, but also the conduct of the dismissed parties, which it had allegedly aided and abetted. Unocal eventually settled.

Myles draws parallels between that case and *Kiobel*, and she cautions that reading the ATS to potentially hold corporations liable in cases like these can threaten the sovereignty of their foreign hosts. She reasons that when a country cooperates with a foreign company for the sole purpose of enjoying economic benefits from the foreign company, holding the company responsible for the actions of the host country's military can look like a threat to the nation's sovereignty. Such countries, Myles says, "don't want a doctrine of law that says that 'visitors in our borders get to tell us how to run our country.'"

Foreign countries

As the remarks by Myles suggest, foreign countries are also watching the *Kiobel* case closely. Some countries oppose what some commentators have derisively called the "legal colonialism" that ensues when U.S. courts rely on U.S. laws to try international law cases. Thus, the United Kingdom and the Netherlands, where Royal Dutch Petroleum is incorporated and the other most likely fora for the case, argue in an [amicus brief](#) submitted in support of neither party that the ATS creates "special litigation advantages" for plaintiffs. To avoid this, their brief suggests strict observance of the "requirement of a sufficiently close nexus" of the parties and events to the U.S. "to minimize conflicts between States and to prevent forum shopping by plaintiffs and defendants rushing to obtain judgments in a forum that favors their own interests."

But not all countries would regard a holding in favor of the *Kiobel* plaintiffs as a U.S. endorsement of "forum shopping," or as purely an opportunity for the U.S. to project its laws abroad. Argentina filed an [amicus brief](#) in support of the *Kiobel* plaintiffs, because it believes that the advancement of the international human rights agenda is something for which all countries in the international community are responsible. Jonathan Miller, who served as counsel to Argentina in the case, explains that, however frustrating the ATS may be for plaintiffs and defendants alike, the law has "done a lot of good in specific contexts" – including Argentina, where the ATS was among the tools used to respond to human rights violations which occurred during that country's military dictatorship.

The federal government, including the State Department

The ongoing debate over whether the ATS applies to events that occurred in other countries can be seen in the different positions that the federal government has taken over time in ATS lawsuits, as well as the conflict within the federal government over those positions.

The Bush Administration opposed the broad application of the ATS to events that occurred abroad on the grounds that [ATS decisions are in effect foreign policy decisions](#) and should be left to Congress, and further that allowing cases against foreign officials, whom are generally [assumed to have immunity](#), could expose U.S. officials to legal action abroad.

The Obama Administration has been more sympathetic to human rights cases brought under the ATS: in its [initial amicus brief](#), filed last Term, the government argued that corporations could be held liable under the ATS, and it urged the Court to allow the case to proceed in U.S. courts. It reasoned that U.S. courts can and should serve as a forum to resolve cases alleging a limited group of violations of international law. Moreover, it noted, Congress has never challenged “the view that some extraterritorial causes of action may be recognized under the ATS”; to the contrary, in the wake of the Second Circuit’s decision in *Filartiga*, Congress passed the Torture Victim Protection Act, which provides that individuals can be held civilly liable in U.S. court for acts of torture or extrajudicial killing that occur in other countries.

However, the government’s position shifted in its [new amicus brief](#). In that brief, the government told the Court that cases like *Kiobel* – involving foreign plaintiffs, the conduct of a foreign country, and the role of a foreign corporation from a third country in that conduct – have no place in U.S. courts. The government’s brief notes that foreign governments are typically immune from suit, and that although the *Kiobel* plaintiffs are suing private corporations, “adjudication of the suit would necessarily entail a determination about whether the Nigerian Government or its agents have transgressed limits imposed by international law.” Such a determination by a U.S. court rather than by the executive or legislative branches could create unwanted friction between the U.S. and Nigerian governments.

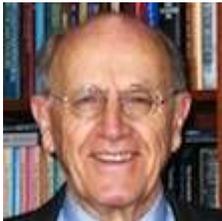
Notably, lawyers from the State Department appeared on the government’s first *amicus* brief in *Kiobel*, but not on the second. Former State Department lawyers and diplomats are themselves divided over whether the ATS should be available for cases like this one. Several former legal advisors to the State Department filed an [amicus brief](#) supporting Royal Dutch Petroleum, and in 2008 John Bellinger – who served as the State Department legal advisor during the George W. Bush Administration – [told an audience](#) at Vanderbilt Law School that ATS suits can cause friction in U.S. foreign relations because “foreign governments do not see the Alien Tort Statute as an instance of the United States instructively engaging in international law. In fact quite the opposite, we are regarded as something of a rogue actor by allowing these suits.” Moreover, Bellinger [argued earlier this year](#), the United States

“should be concerned about reciprocity: It would certainly object if foreign governments were to encourage lawsuits in their courts against U.S. companies for perceived violations of international law, such as against the manufacturers of drone aircraft.”

But not all State Department officials and diplomats share Bellinger’s views. J.D. Bindenagel, one of several former Foreign Service officers who signed onto an [amicus brief](#) in support of the petitioners and who also served as Ambassador and Special Envoy for Holocaust issues and U.S. Special Negotiator for Conflict Diamonds, counters that the ATS plays an important role as a complement to the International Criminal Court in cases of post-conflict justice. In his experience, the ATS was useful beyond simply getting parties to court, as it provided opportunities for the parties to negotiate alternative remedies and – in the case of the relationship between Germany and Poland – even a basis for reconciliation. Although the International Criminal Court may eventually be able to take over the role that the ATS currently serves in the international community, he concludes that, until then, the ATS can help secure forums for plaintiffs in their lifetimes.

In sum

However the Court decides *Kiobel*, the era of “plaintiff’s diplomacy” ushered in by *Filartiga* has at a minimum raised questions of individual, governmental, and corporate responsibility in a globalized world, questions that are unlikely to go away no matter who wins the case. An opinion on whether the ATS is the proper tool for addressing those questions is expected sometime next year.



Lyle Denniston *Reporter*

Posted Thu, September 27th, 2012 12:07 am

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Argument preview: Will an old law shrink?

The Supreme Court opens its new Term at 10 a.m. on Monday, and starts with one hour of oral argument on the reach of a 1789 law that seeks to impose liability in U.S. courts on those who commit human rights violations in foreign countries. The case is [Kiobel v. Royal Dutch Petroleum](#) (docket 10-1491). Arguing for a group of Nigerians who claim violations of the Alien Tort Statute of 1789 will be

Paul L. Hoffman, a Venice, Calif., attorney, with thirty minutes of time. He will be followed by Kathleen M. Sullivan, a New York attorney, arguing against applying the ATS to conduct that occurs entirely outside the U.S. The remaining ten minutes will be used by U.S. Solicitor General Donald B. Verrilli, Jr., for the U.S. government as an amicus taking something of a middle position.

Background

A case that has been unfolding in American courts over the past decade puts before the Supreme Court one of the most important and historic issues affecting international law and U.S. foreign policy. It is a test of whether judges in the U.S., applying both American legal theory and international law norms, will have a role in holding to account those accused of carrying out atrocities in foreign lands. Foreign governments and international business firms have weighed in against allowing U.S. judges wide-ranging authority to carry out that role, when there is no real connection to the U.S., while human rights advocates have joined in to support that role so that there is some potential remedy for such abuses beyond any remedies in international crimes tribunals. The U.S. government is straddling a bit between the two opposing factions.

While the case of *Kiobel v. Royal Dutch Petroleum* was filed in 2002 in a federal court in New York, it seeks to apply a law passed by the very first U.S. Congress, in 1789 — the Alien Tort Statute. That law does not spell out just what kinds of lawsuits can be filed in U.S. courts; it is simply a grant by Congress of authority to U.S. District Courts to hear ATS claims. The law says that those trial courts may consider a lawsuit filed by “an alien” — that is, not a U.S. citizen — who claims to have been harmed by a “violation of the law of nations” or of a U.S. treaty. In essence, Congress left it to the courts to fill in the blanks of what claims could be made.

The law went almost entirely unused until a federal appeals court in New York City in 1980 allowed an “all-Paraguayan” lawsuit — that is, filed by one Paraguayan national against another, claiming to have been tortured in Paraguay. The only connection to the U.S. in that case was that the alleged torturer was then living in this country, and the lawsuit was based on a U.S. law — the ATS. One reason that the case was allowed to proceed was that, otherwise, it might appear that the U.S. would be protecting the torturer. The decision in that case ([*Filartiga v. Pena-Irala*](#)) set off a wave of ATS lawsuits that has continued in growing numbers, and the Supreme Court from time to time has had a role in defining the scope of such claims. (The ATS lawsuits that have been filed are civil in nature, and thus provide an alternative to the criminal cases that now go before international human rights tribunals dealing with controversies such as alleged war crimes or “crimes against humanity.”)

Up to now, the Justices' most important interpretation of the ATS came in 2004 in the case of [Sosa v. Alvarez-Machain](#). While the decision allowed U.S. judges to permit some ATS lawsuits to proceed, the Court stressed that they should proceed cautiously, making sure that the international law they were applying was clear and definite and that it reflected legal norms accepted by "civilized nations." But it left it to later cases to provide more specifics.

The *Kiobel* case now before the Justices arrived at the Court in June of last year. At that point, it raised the basic question of whether a business corporation operating in another country could be sued in a U.S. court for allegedly committing, or helping others to commit, human rights violations overseas. A group of Nigerian nationals, led by Esther Kiobel, contended in the lawsuit that a Netherlands firm, Royal Dutch Shell Petroleum Co., along with one of its subsidiaries and a British firm, had aided military forces of the Nigerian dictatorship in the killing or torture of, or other atrocities against, Nigerian civilians in a plot to suppress resistance to oil exploration in the Ogoni region of the Niger Delta between 1992 and 1995. The oil companies had aided and abetted those human rights violations, the lawsuit claimed. The lawsuit was thrown out by the Second Circuit Court, which concluded that an ATS claim could be made only against human beings, not a corporation.

The first round in the Court

Last October, the Supreme Court agreed to hear the *Kiobel* petition, on the sole question of whether corporations could be sued under the ATS. The Justice Department, supporting some forms of corporate liability under the law, urged the Court to decide that issue and not be side-tracked by any other issues. The foreign oil companies, however, urged the Court to consider whether the ATS should be available at all when all of the circumstances in a case had occurred entirely outside the U.S. The companies contended that, if any U.S. law is to be applied to conduct beyond the limits of the U.S., Congress has to say that explicitly, and it had not done so in the ATS.

The Court, though, proceeded to hold an oral argument on the case on February 28, and much of the exchange between the Court and the lawyers focused on the corporate liability issue.

The second round in the Court

The Court, as matters turned out, did not decide whether ATS applies to corporate conduct abroad. Instead, six days after the oral argument, the Court issued an order putting off the case until the following Term, and ordering all sides in the case to file new written briefs on the so-called "extraterritoriality" question. The order called for written briefs on "whether and under what circumstances" an ATS lawsuit could be filed in U.S. courts "for violations of the law of nations occurring within the territory of a sovereign other than the United States." The supplemental briefs were filed over

the summer, by the parties and by scores of *amici*, and the case was then scheduled for oral argument as the first case to be heard in the new Term starting October 1. If the Court were to rule that the ATS does not reach entirely foreign actions, the Nigerians' case will be over. If it were to rule for a broader reach for ATS, presumably it would then turn to the issue of whether the law applies at all to corporations, or only to human beings.

Arguments for a broader ATS reach

The Nigerians who filed the human rights case against the three foreign oil companies contended in their supplemental brief that no court has ever imposed a territorial limit on such claims, and argued that the Supreme Court should not be the first to do so. Any such limitation, they asserted, would have no support in precedents or in the history of the old law, would restrain such lawsuits in a way that Congress would have the power to do but has never done, and would contradict long-standing U.S. foreign policy in favor of global compliance with human rights protection and accountability for "gross violations" of international law.

Treating the Court's call for further briefing as embracing two questions — does the ATS ever reach actions occurring on foreign soil, and, if it does, what circumstances would define or limit U.S. courts' power — the Nigerians argued that the Court has already answered the first question, with its decision in the *Sosa* case eight years ago. The Court, the brief said, approved the move in the courts beginning in 1980 to hear ATS claims involving human rights violations occurring on foreign territory, so unless *Sosa* is cast aside as precedent, there is no categorical bar to such claims.

And, the brief went on, the *Sosa* decision has already put distinct limitations on ATS claims: the Court made clear there that "ATS jurisdiction is not available for all law of nations violations, but only for universally-recognized, specifically-defined norms" of international law. Lower federal courts already use caution in dealing with "transnational" cases, and can be trusted to continue to do so when claims arise under the ATS, the Nigerians said. One such limitation the brief noted was the doctrine that a case cannot proceed if it is an inconvenient forum for one side or the other, requiring it to go far beyond its own homeland to defend itself legally.

For those members of the Court who prefer to read the language of federal statutes literally, the Nigerians noted that the ATS itself applies explicitly to claims by aliens, contains no territorial limitations, and was enacted to enforce international law — law that is not limited in its application to U.S. territory. Although courts generally follow the principle that a U.S. law does not apply outside the U.S. unless Congress explicitly says it does, the Nigerians' brief added, that does not apply to a law that only assigns jurisdiction to a court and does not seek to enforce "American norms of conduct." But, even if the Court were to find

that the presumption against extraterritoriality would apply in the ATS context, the brief said, that presumption could easily be overcome by the fact that the ATS was written explicitly to enforce international laws, which extend beyond any one nation's territory.

Finally, the brief said, the accusations leveled in this case — torture, killing, prolonged detention, crimes against humanity — “are so fundamental that every nation may assert universal jurisdiction over the perpetrators. Any restriction upon such jurisdiction would protect modern perpetrators of genocide, slavery, torture, or other egregious violations” who were present in the United States from accountability.

The Nigerians are supported by nearly three dozen *amicus* briefs, from civil liberties and human rights advocacy organizations, to scholars in international law, to individuals who have filed lawsuits over the September 11, 2001, terrorist attacks on the U.S., to individuals who claim that they or their families were subjected to the kind of atrocities that the Nigerians confronted, to former diplomats and former counter-terrorism officials in government, and even to one foreign government — Argentina — and to some members of the German parliament.

Arguments against ATS cases for acts on foreign soil

The foreign oil companies relied heavily upon the long-standing notion — traced back to opinions of Chief Justice John Marshall as early as 1804 and reiterated by the Court as recently as two years ago — that American law does not extend outside U.S. territory unless Congress explicitly says that it does. This is both a traditional, history-based argument, and one keyed to separation-of-powers concepts. Congress, the companies' supplemental brief said, knows very well how to make a U.S. law reach beyond the nation's shores — and, in fact, it has done so for some forms of terrorism — and so the Court should not itself conclude that the ATS reaches actions that occurred entirely on foreign soil.

There is a second notion about how to read statutes that supports limiting ATS cases, the brief said. The Court has long followed the practice of refusing to interpret U.S. law in a way that would make it violate international law. It would be a violation of the law of nations, the brief asserted, for the Court to interpret the ATS as conferring universal civil jurisdiction in U.S. courts over foreign entities sued in such cases. It is for foreign governments to deal with violations that occur within their own territories, and U.S. law has long acknowledged that, the companies said.

Going back to the origins of the ATS, the companies argue that the first Congress passed this law to deal with violations of international law that had occurred on U.S. soil, because such incidents “might prompt international conflict and even war if left without a remedy” in the newly created federal courts.

In discussing potential foreign policy complications of applying ATS extraterritorially, the companies' new brief noted that the Nigerian government has formally protested this very lawsuit, and had argued that allowing the case to proceed would jeopardize a process already ongoing in Nigeria to deal with the suppression of the Ogoni people. In addition, the brief noted, Nigeria's government had said that an ATS case could compromise government efforts in Nigeria to "guarantee the safety of foreign investments, including those of the United States," and harm the bilateral relations of the Nigerian and U.S. governments.

Although U.S. judges may retain the power to put some limits on ATS litigation, the companies asserted, that does not deal with the core question of whether Congress intended for the ATS to reach beyond America's shores.

But the companies' brief has a fallback position: if the Court does find that the ATS can reach conduct that occurred entirely overseas, it should then conclude that, in any event, the ATS cannot be used against a business corporation.

The governments of Great Britain and the Netherlands filed briefs that are nominally not in support of either party in the *Kiobel* case, but amount to strong contentions against giving the ATS an extraterritorial sweep. It is up for each sovereign government, that brief contended, to deal with the human rights abuses that involve their own territories and their own nationals. The European Commission, representing the multi-national European Union, also filed a nominally neutral brief, but it argued against extending ATS in the international context only to those situations in which the sued party is a United States national or when the conduct involved "threatens United States' fundamental security interests." Otherwise, only laws that deal with criminal conduct should have an extraterritorial reach, the Commission argued.

Some fourteen *amicus* briefs have been filed in support of the oil companies' challenge. Many of those are from business firms, including major multi-national companies, and from business advocacy organizations. Others are from former State Department legal advisers, groups of law professors, and libertarian or conservative legal advocacy groups.

The U.S. government's separate argument

The Obama Administration has switched what had been the government's position against extending the ATS to conduct occurring on foreign soil. That was a categorical position. In its place, the Solicitor General's office, reflecting the result of new consultations with the State Department, no longer wants to shut U.S. courts completely out of hearing ATS cases that have extraterritorial reach. The government would leave that to the courts to decide, on a case-by-case basis. The government, though, does take the explicit stance that the *Kiobel* lawsuit itself should not be allowed to proceed.

Spelling out specifically the kind of case that should not be allowed to go forward in a U.S. court, the Administration said it would be one involving the actions of a foreign government on its own territory, where the lawsuit specifically targeted a foreign corporation that was claimed to have aided and abetted actions of the foreign government. That position has provoked a strong objection from the oil companies, who argue that it would shut Congress completely out of the picture in deciding whether ATS should reach outside America.

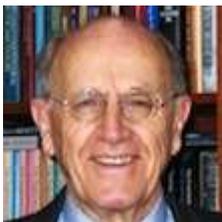
(A post discussing more fully the Administration's new brief can be found [here](#).)

Analysis

The decision in this case may come down to whether the Court shows more respect for Congress or for the Executive Branch. If the Justices conclude that Congress should have the power to decide the reach of a federal law, that could doom the attempt to extend U.S. judges' ATS authority beyond the nation's territory. If the Justices, however, see the core issue as the management of foreign policy, that could work in favor of the Obama Administration's new position that moved away from a flat rejection of a foreign reach for ATS lawsuits.

There is one undeniable fact, though, that works in favor of the oil companies' challenge to foreign-based ATS claims: the Court's decision, on its own, that the core question of extraterritoriality had to be addressed explicitly, once and for all. In the first round, the Court was proceeding — as the Solicitor General had suggested — on the premise that the only issue was whether the ATS reached the conduct of corporations. But it did not take the Justices long, after the oral argument had concluded, to skip that issue and move to the more basic question of whether the ATS applied at all in circumstances like those in the *Kiobel* case. The likelihood is that at least a majority of the Justices thought that had to be addressed explicitly, and that would seem to imply considerable skepticism about it.

The Court's own precedents, including fresh ones, reinforcing the presumption against extraterritoriality of American law generally, and the institutional pedigree of that long-standing doctrine, seem likely to work in favor of shrinking the ATS's scope. If that is the outcome, it would not be surprising if the Court were to add some commentary to its opinion making it very clear that it was not denigrating the seriousness of human rights violations in today's troubled global climate.



Lyle Denniston *Reporter*

Posted Fri, July 6th, 2012 6:22 am

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***Kiobel*: Made simple**

Editor's note: During the Supreme Court's summer recess, the blog will be publishing a series of posts that explain, in non-legal terms, some of the most important cases that will be decided in the new Term that starts October 1. This is the first of those posts. It explains the case of [Kiobel v. Royal Dutch Petroleum](#). Beginning on Monday, the blog will also be hosting a symposium on Kiobel.

America's very first Congress, which started meeting in 1789, passed a law that has been given a new life in the Nation's courts since the 1980s as the world searched for legal ways to deal with human rights abuses such as torture and killing that occurred around the world. At its next Term, the Supreme Court is expected to decide whether that law gives federal courts in the U.S. the authority — in essence — to reach across the seas and judge violations of international law that occur entirely in another country. If the Justices find that the law goes that far, they are then likely to decide whether corporations can be sued for such human rights violations.

The law is called the Alien Tort Statute. The word "alien" means a person who is not a U.S. citizen. Those individuals are the only ones who have a right to file a lawsuit under that law. The word "tort" means misconduct or wrongdoing for which the law provides a remedy. Under this old law, foreign nationals may sue in federal courts in the U.S. for "torts" that violate either international law or a treaty that the U.S. has signed.

Although first passed in 1789, the law was hardly used for nearly two centuries. Then, in 1980, a federal appeals court in New York City became the first to uphold a claim under the law, in a case involving alleged torture of an individual in Paraguay; the lawsuit was filed by his father. Most lawyers and professors now refer to that case as the birth of the modern series of lawsuits dealing with torture, killing or other atrocities in foreign lands. One of the more famous cases since then has been a lawsuit by South Africans against a multitude of international companies over the abuses carried out under the apartheid policy in that country.

Up to this point, the most important Supreme Court ruling on such lawsuits came in 2004, when the Justices refused to permit a case in which a Mexican citizen had sued other Mexicans who supposedly had

arranged with law enforcement officials in the U.S. to abduct him and transport him to the U.S. to be tried on criminal charges. In that decision, which had the title [*Sosa v. Alvarez Machain*](#), the Supreme Court included a footnote that has given rise to the most important issue still unsettled about the Alien Tort Statute.

In that footnote, the Justices raised a question of whether a private corporation could be sued for violating the law. The Court did not decide that issue, merely noting that lower federal courts had been issuing conflicting decisions on it.

In October 2011, the Supreme Court stepped into the controversy, with the aim of settling whether corporations could be the targets of ATS claims. They agreed to hear the case of Esther Kiobel, a Nigerian national, who filed the lawsuit for herself, for her late husband, Dr. Barinem Kiobel, and other Nigerians. They claimed that three international oil companies had arranged for the Nigerian government to use its military forces to put down resistance to the companies' drilling for oil in the Ogoni region of the Niger Delta in Nigeria.

In that case, which is titled *Kiobel v. Royal Dutch Petroleum*, the Justices have been reviewing a decision issued in September 2010 by a federal appeals court sitting in New York City. The appeals court — the same one that had started the modern string of rulings on the 1789 law — had issued a split decision. Its majority declared that international law had not made it clear that corporations could be sued for human rights violations, even if they were serious atrocities. The Nigerians took the case on to the Supreme Court.

The Supreme Court held a hearing on it on February 28. During that hearing, some of the Justices raised a more basic legal question than the one about who could be sued: they wondered if the Alien Tort Statute actually did allow U.S. courts to hear lawsuits that were aimed at violations of international law, when those occurred entirely on foreign soil. Six days after that, the Court announced that it was postponing its review of the *Kiobel* case until its next Term. It told the lawyers on both sides of the case to file new written legal arguments on the issue of whether, and in what situations, the 1789 law allowed a U.S. court to permit a lawsuit for violations of international law that had occurred on the territory of a foreign nation.

This summer, the lawyers are filing those new arguments. The federal government, for example, has sent in a brief that urged the Court to rule that U.S. courts should not be entirely closed to such lawsuits, but that the *Kiobel* lawsuit itself should not be allowed to go ahead. Briefs will be filed opposing that view and in favor of permitting the Nigerians' claims, and briefs will be filed contending that U.S. courts should have no role to play in monitoring such violations that occur entirely outside of the U.S.

When the Court comes back into session in October, it will schedule a new hearing, and the case will go from there. A final decision is expected some time in 2013.

There is another U.S. law — passed by Congress in 1992 — that does allow U.S. citizens to file lawsuits claiming that they or their relatives were tortured overseas. However, in [a decision](#) last April, the Justices concluded that such lawsuits could not be filed under that law against corporations, but only against human beings.



Lyle Denniston *Reporter*

Posted Wed, June 13th, 2012 10:05 pm

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U.S. urges narrowing human rights claims

The Obama Administration urged the Supreme Court on Thursday to close the U.S. courts to most lawsuits involving claims that a foreign corporation helped a foreign government engage in human rights abuses in that country. While arguing that the door to American courts should be left somewhat ajar to allow some abuse claims, the options that would remain would appear to be quite narrow, with a variety of legal hurdles to overcome. The government’s new reaction to lawsuits under the Alien Tort Statute, first enacted in 1789, was [expressed in a brief](#) filed in [Kiobel v. Royal Dutch Petroleum](#) (docket 10-1491). That specific lawsuit, the brief argued, should not be permitted.

That case, heard by the Justices in February, is due to be reheard in the new Term starting October 1. The new issue to be explored then — a question raised by the Court itself in March— is whether and under what circumstances an ATS lawsuit should be allowed based on international law violations that had occurred in a foreign land. Technically, that is the issue of “extraterritorial application” of the ATS. Previously, the *Kiobel* case had focused only on whether corporations could be sued in U.S. courts under the ATS for foreign violations of global law.

The supplemental government brief offered a complex argument, attempting to move between a sharply negative view of lawsuits by private individuals that focus on foreign conduct, and an unwillingness to say that no ATS lawsuit should ever be allowed in a U.S. court for overseas breaches of international law. The

views appeared to have been strongly influenced by State Department concerns that opening U.S. courts for many claims that involved foreign government actions would disrupt foreign policy and complicate diplomatic relations, and perhaps expose the U.S. to reprisals abroad. The ultimate conclusion was that the Court need not resolve all issues surrounding ATS claims in this one lawsuit, but that the Justices should embrace some controlling principles that generally would work against U.S. courts' fashioning new ATS claims for breaches of international law.

However, there was no mistaking the clarity of this statement: American courts "should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the [sued party] is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct." Beyond that, the brief added, the Court should not go, leaving open the questions of whether an ATS lawsuit could proceed against a U.S. national or U.S. corporation, whether such a suit could be brought where the alleged misconduct of a foreign government had occurred outside its own territory, or where the lawsuit targeted the conduct of others within the U.S. or on the high seas.

The brief did claim that the Obama Administration had softened the federal government's past opposition to ATS lawsuits. It noted that the government "in recent years has advanced a more categorical rule against extraterritoriality before this Court and the courts of appeals," referring to one brief in 2004 in which the Justice Department had argued that no lawsuit should be recognized under the ATS for the conduct of foreign individuals in foreign countries, and another brief in 2009 arguing against an ATS lawsuit aimed at conduct occurring in a foreign country. The new brief added: "As explained in this brief, the government urges the Court not to adopt such a categorical rule here."

Even so, the opening that the new brief would leave for ATS claims was tightly circumscribed. It was focused, as is the *Kiobel* case in particular, on when the courts should create, on their own initiative, a right to sue for violations of international law. Accepting that Congress has wider power to create a right to sue for foreign abuses, as the lawmakers did in 1991 in the Torture Victim Protection Act, the brief suggested that there should be a "general assumption" that creating a right to sue for private individuals under ATS was "better left to legislative judgment."

The filing did accept (and noted that the State Department, too, had accepted) that a right to sue had been properly recognized by the Second Circuit Court in 1980, in the case of [*Filartiga v. Pena-Irala*](#). That was the decision that is generally credited with launching a wave of new lawsuits under the ATS after that law had languished for decades. But note the key features of the *Filartiga* ruling that the Justice and State Departments now endorse as valid claims: while that case involved a claim by Paraguayan individuals against a Paraguayan individual for abuses committed in that Latin American country, the claim was for torture, and the sued individual had actually been found living in the U.S., and that suggested that maybe

the U.S. government could be accused of harboring him. And, the brief added, those Paraguayan individuals if suing now would be able to sue under the anti-torture law, the TVPA.

Turning to the *Kiobel* case itself, the new filing flatly urged that it be rejected. It involved, the brief noted, Nigerian nationals suing Dutch and British corporations for allegedly helping the Nigerian military and police forces to commit torture, killings, “crimes against humanity,” and arbitrary arrest and detention — all of which had occurred inside Nigeria. In those circumstances, the brief said, “the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company’s actions, while the nations directly concerned could.”

Even when circumstances might arise that would justify bringing an ATS lawsuit in the U.S. courts for abuses that occurred in foreign lands, the brief said, there should be strict requirements that those who sued should first have to have tried to get some legal relief in the courts or the government of that country, and, if there is an international claims agency available, to try for a remedy there. Such lawsuits, it added, also should be limited by the notion that a U.S. court might well be an inconvenient forum, in which it was more difficult or costly for a foreign government or foreign corporation to mount a defense many miles from its own shores.

Those two limiting requirements should be imposed “at the outset of the litigation,” and should be applied “with special force,” the brief argued. In particular, when the link to the U.S. “is slight,” the filing contended, “a U.S. court applying U.S. law should be a forum of last resort, if available at all.”

The *Kiobel* plaintiffs have already filed their supplemental brief on the overseas reach of ATS, urging that the Justices allow such an application of that law in their case. The two oil companies sued in the case are due to file their briefs on that issue in August. After that, the *Kiobel* parties will have a chance to file a reply brief.

The Justice Department has been taking part in the *Kiobel* case since briefing began. In an earlier brief filed in December, it supported the *Kiobel* plaintiffs and urged the Court to rule that corporations could be sued under the ATS for overseas human rights abuses, saying there was nothing in the history of that old law that provided a basis for applying it only to natural persons. Its new position against the *Kiobel* claims is bound to draw criticism of the government from human rights activists, who had been hoping that the Justice Department would not file a brief against the claims in this case. **Lyle Denniston**

Reporter

Posted Mon, March 5th, 2012 2:01 pm

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***Kiobel* to be expanded and reargued**

The Supreme Court on Monday put over to its next Term a major case on lawsuits against corporations for human rights abuses in foreign countries, and ordered lawyers to come back with an expanded argument on the scope of a 1789 law giving aliens a right to sue in U.S. courts. The case of [*Kiobel v. Royal Dutch Petroleum*](#) (docket 10-1491) was heard just last Tuesday, and some of the Justices at that time questioned whether the Alien Tort Statute allowed U.S. courts to hear lawsuits for violations of international law on foreign soil. That is the issue lawyers are to address in new legal briefs due on a schedule that runs through June 29. The order is [here](#).

The Court gave no reason for its action, but at its private Conference last week, it had examined a new case involving that 223-year-old law that raised directly the question of whether it applied to overseas conduct — that is, the issue of “extraterritoriality.” That other case was [*Rio Tinto PLC v. Sarei*](#) (11-649). When the orders from Friday’s Conference were released Monday morning, there was no mention of that case. Four hours later, the new order emerged. The Justices faced the option of granting the *Rio Tinto* case and essentially starting over in interpreting the ATS, or expanding the review of the *Kiobel* case. They chose the second option, with the effect of putting the case over to the Term starting October 1.

Here is the added question to be argued in new briefs: “Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” The *Kiobel* parties are to file their brief by May 3, with the oil companies involved due to file their response by June 4. A reply brief is due by June 29. *Amici* also may file added briefs as dictated by Court rules.

It would have been legally possible for the Justices to have gone ahead, this Term, and decided whether corporations could be sued under the ATS for alleged roles in atrocities or other human rights abuses in foreign lands. A decision against corporate liability would have made it unnecessary to decide the extraterritoriality issue. But that would have left open whether others could be sued for such foreign wrongdoing under the ATS, and that is a broader question. The Court has now promised to consider answering that question.

In addition to the extraterritoriality question, the Court also seemed to be promising a ruling on another issue under ATS: can a party that is being sued be challenged not for directly engaging in human rights abuses, but for “aiding and abetting” someone else who did so. That question appears to be within the part of Monday’s order that called for briefs to address “what circumstances” can be alleged under ATS. That was another of the questions that had been posed in the *Rio Tinto* case, and it was a question posed by Justice Antonin Scalia at last week’s oral argument. A ruling on the “circumstances” that may be

the target of an ATS case would also potentially include whether corporations may be targeted, it would appear.

While the question the Court raised for lawyers appeared to focus explicitly on the meaning of the law, it is at least conceivable — if not very likely — that the Court might go so far as to question in the new round whether Congress has the constitutional authority to pass a law authorizing a lawsuit in which both sides are non-citizens and the misconduct occurred entirely overseas. At last week’s argument, Justice Samuel A. Alito, Jr., asked: “Is there an Article III source of jurisdiction for a lawsuit like this?...What’s the constitutional basis for a lawsuit like this, where an alien is suing an alien?” The Court, of course, has a long tradition of not deciding constitutional issues if it can decide a case on other grounds, and it may well follow that tradition in this instance.

The new order was another, vivid illustration of the tendency of the “Roberts Court” to take on the broadest kind of controversy in cases brought to it. The current Term of the Court is quite literally filled with cases of a broad sweep, including the constitutionality of the new federal health care law and the power of states to restrict the activities within their borders of undocumented immigrants. And, for next Term, the Court had already taken on the abiding question of whether it is unconstitutional for public colleges and universities to use race in selecting their entering classes of students. In addition, there is a strong chance that the Court next Term could be reexamining its controversial ruling in [*Citizens United v. Federal Election Commission*](#) in a new case from Montana — that is, if it does not dispose of that case by a summary ruling this Term, which is a possibility.

The Court’s order in the *Kiobel* case made no mention of another case on corporate liability for human rights violations that also was argued last Tuesday — [*Mohamad v. Palestinian Authority*](#) (docket 11-88). That case, however, involves an entirely different law — the Torture Victim Protection Act of 1992 — and the issue is whether a U.S. citizen can sue a foreign political organization for such atrocities. The *Mohamad* case asks the Court whether the word “individual” as the target of a TVPA lawsuit includes a political organization or another non-human entity, including a corporation. Presumably, the Court can go ahead and decide that issue without waiting for its review of the scope of the Alien Tort Statute. In fact, at last Tuesday’s argument, there were strong indications that the Court was unmoved by the notion that “individuals” means anything other than human beings.

It is quite unusual for the Court, after briefing and argument on a case, to put it over until its next Term. But it is not unprecedented: in fact, the Court’s *Citizens United* ruling on campaign finance was put off to a following Term, and expanded in scope. The result was a much more sweeping case than the one that reached the Court initially.

Monday's order almost certainly have the support of at least five Justices, although this is not spelled out in the formal rules of the Court. The Court does not reveal how its members vote on such an issue. It takes the votes of four Justices to hear a case in the first instance, but disposition after that very likely depends upon majority support; the reasoning, if not spelled out in the order, may vary among the Justices in such a majority, however.

Lyle Denniston *Reporter*

Posted Tue, February 28th, 2012 3:05 pm

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Argument recap: Downhill, from the start

Analysis

When Justice Anthony M. Kennedy, in the opening minute of a Supreme Court argument, tells a lawyer that his entire case is in jeopardy, it is extremely difficult for even an experienced counsel to recover. And, though he tried, Venice, Calif., attorney Paul L. Hoffman did not appear on Tuesday to have resuscitated his argument that foreign corporations should be held to account in U.S. courts for human rights abuses in foreign lands. At least a majority of the Justices looked notably unconvinced.

Hoffman, of course, had a core argument of considerable merit, in [Kiobel v. Royal Dutch Petroleum](#) (docket 10-1491). But it required the Court to draw a distinction that most of the Justices seemed unwilling to draw. He readily accepted that international law is where to look to define the kinds of atrocities that violate the norms of a civilized world, but he was not ready to accept that international law also defined who could be sued for such wrongdoing; for that, he wanted domestic law to govern.

“The principal issue before this Court,” Hoffman began, “is the narrow issue of whether a corporation can ever be held liable for violating fundamental human rights norms under the Alien Tort Statute.” He had barely uttered a second sentence, when Kennedy said that, for himself, “the case turns in large part” on an assertion by the global oil companies in the case that “international law does not recognize corporate responsibility for the alleged offenses here.”

Another big oil company, Chevron, had asserted in a brief, Kennedy added, that “no other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights

abuses to which the nation has no connection.” Kennedy said he could find no answers to that in the briefs, and then added: “It involves your whole argument, of course.”

Although Kennedy referred to both of those thoughts as if they were a single “proposition,” they actually involved two quite different notions: first, that international law in defining who can be sued for human rights abuses leaves out corporations, and, second, that other countries do not permit their courts to reach such abuses beyond their territories. The first directly refuted the core of Hoffman’s claim about domestic law prevailing on who might be held liable, but the second only served to show that, perhaps, the United States’ Alien Tort Statute was unique, without proving to whom Congress had meant it to apply.

Even so, the Kennedy thrust was devastating for the concept that corporations may be sued under the ATS. It seemed to clear the way for other Justices to raise grave doubts about whether Congress really intended to go against the weight of world opinion, and about whether even the Constitution might forbid a grant of authority to U.S. courts that would have global reach when no part of a lawsuit had any direct connection to the U.S.

After that, Hoffman was never able to make much of a case for the idea that domestic law should control the identification of who could be sued under ATS. And his cause surely suffered, perhaps grievously, from a polished, deeply researched and highly confident argument against him by New York lawyer (and former Harvard and Stanford constitutional expert) Kathleen M. Sullivan, who gave a stellar performance even by the high standards that have come to be expected of her.

An underlying theme in the case, and this, too, went against Hoffman, is that the current Court is deeply conflicted over whether the interpretation of U.S. law should be influenced in any way by the legal concepts that are developed in other countries. But both Justices who favor taking some guidance from abroad, like Justice Kennedy, and those who regard such guidance as offensively alien, like Justice Antonin Scalia, used the perceived international consensus against Hoffman.

Although the counsel for the Nigerian plaintiffs in the case, suing foreign-based oil companies, repeatedly insisted that the kinds of crimes against humanity being alleged were focused upon their dastardly character, and not whether they were committed by an individual or a corporation, that separation never caught on with most of the Justices. They seemed to see international law as controlling across the spectrum — identifying the violations of international law, and limiting remedies to those against individual perpetrators.

But that perception was reinforced by Kennedy’s second point: the ATS seemed to give U.S. courts a sweeping authority to reach globally that no other country would allow its courts to have. For example, Justice Samuel A. Alito, Jr., commented: “I think the question is whether there’s any other country in the

world where these plaintiffs could have brought these claims against the respondents.” Hoffman could only answer that their claims could be brought in countries where domestic law does impose liability on corporations — but that was not what Alito and others were talking about: they were focused on an issue that is not supposed to be at stake in the *Kiobel* case at this stage: did Congress really intend ATS to embrace suits by aliens against aliens for overseas acts.

Alito also pointed to Hoffman’s description in the brief of the specifics of this lawsuit, and then added: “What business does a case like that have in the courts of the United States?...There’s no connection to the United States whatsoever.” Such a lawsuit, the Justice remarked, only creates international tension.” (Later, Alito would pose a question of whether the Constitution conferred any such authority on the U.S. courts.)

Chief Justice John G. Roberts, Jr., also commented on that point, saying: “If there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn’t it a legitimate concern that allowing the suit itself contravenes international law?”

Hoffman tried, unsuccessfully, to head off questions along that line by noting that the extraterritorial scope of ATS had not been briefed by the parties, and should not be confronted until it had been fully briefed and argued.

The U.S. government has come to Hoffman’s aid in the case, arguing that corporations should not be categorically immunized from lawsuits under ATS. But Deputy Solicitor General Edwin S. Kneidler kept his focus, as Hoffman had tried to do, on the claim that domestic common law would fill in the blank in ATS over who could be sued for human rights violations. Kneidler added, though, that international law does not independently bar corporate liability for a foreign company, in the same way that international law immunizes a foreign government from liability for its official misdeeds.

And, before Kneidler finished, Justice Kennedy had chastised him for making a sweeping argument. Kennedy said: “Suppose an American corporation commits human trafficking with U.S. citizens in the United States. Under your view, the U.S. corporation could be sued in any country in the world, and it would have no international consequences. We don’t look to the international consequences at all.”

When attorney Sullivan rose to make the oil companies’ side of the argument, she already seemed to be operating at an advantage, given how the argument had proceeded up to that point. But she proceeded as if the issue had to be won all over again, and moved energetically — conceding nothing along the way — to make international law the whole of the case against the Nigerians’ lawsuit. With apparently full command of the modern history of world litigation, human rights conventions and treaties, and

international war crimes tribunals, Sullivan sought to demolish every hint that the world community recognized corporate liability for the wrongdoing perpetrated by individuals. Corporate officers, of course, could be held liable, but that, she argued, was wholly different from liability for the corporation itself.

When the Court turned from the *Kiobel* case and the Alien Tort Statute to a parallel question of liability for political organizations and entities under a different U.S. human rights law, the Torture Victim Protection Act, the entire hour was consumed with Justices and lawyers intensely focused upon how many meanings could be seen in the single word “individual.” (The second case was [Mohamad, et al., v. Palestinian Authority, et al.](#), 11-88.)

The Justices were far more engaged with Stanford law professor Jeffrey Fisher, arguing that “individuals” under the torture act clearly had a “secondary meaning” that could include organizations, not just human beings. Fisher did perhaps as much as could be done with that argument, but it was not obvious that he had persuaded a deeply skeptical bench. The Court did not similarly press the other two counsel arguing against organizational liability under that act, Washington attorney Laura G. Ferguson and Justice Department lawyer Curtis E. Gannon, siding with the argument that the Palestinian Authority and the Palestine Liberation Organization were not subject to such lawsuits.



Stephen Wermiel *Law Students*

Posted Mon, February 27th, 2012 2:43 pm

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SCOTUS for law students (sponsored by Bloomberg Law): Torture and jurisdiction

For many law students, the only connection between torture and jurisdiction is having to sit through first-year civil procedure. But two Supreme Court cases may soon change all that.

Tomorrow, the Justices will hear arguments in two cases that raise difficult and important questions about whether corporations and organizations may be sued in U.S. courts for damages for their involvement in torture and human rights abuses in other countries.

The outcome in the two appeals will be of great interest to students in federal courts, civil procedure, and international human rights and other international law classes, and the decisions may also have implications for the study of business and organizational liability.

In one case, [*Kiobel v. Royal Dutch Petroleum Co.*](#), the issue is the meaning of the Alien Tort Statute (ATS). The statute was passed by the very first Congress in 1789, but it was never really interpreted by a federal court until 1980. The other case, [*Mohamad v. Palestinian Authority*](#), involves the Torture Victim Protection Act, which was enacted in 1992. Both are cases in which the factual background is much more dramatic and compelling than the important but technical legal question on which a decision may turn.

In *Kiobel*, the plaintiffs-petitioners are Nigerians whose suit under the ATS alleges that the defendant oil companies (the respondents before the Court) helped the Nigerian government stop resistance to oil exploration among the people of the country's Ogoni region. The lawsuit alleges that company-backed government troops murdered, raped, and detained Nigerian residents, all in violation of international human rights norms. A federal district court in New York dismissed about half of the claims but allowed others to go forward, and both sides appealed to the Second Circuit.

The Second Circuit [ruled](#) that the ATS does not give federal courts subject matter jurisdiction over lawsuits against corporations. By a two-to-one vote, the Second Circuit said that the scope of the ATS is determined not by U.S. law, which does impose liability on corporations for wrongdoing, but instead by standards of international law, which does not. Judge Pierre Leval agreed that the lawsuit should be dismissed, but he rejected the majority's view that international law does not impose penalties on corporations.

The heart of the Second Circuit's ruling was that "customary" international law has not established liability for corporations for committing or aiding and abetting human rights violations. A practice becomes "customary international law" when it is engaged in repeatedly by a significant number of countries based on the belief that their actions are legally required and are not rejected by a large number of other countries.

If the Supreme Court agrees with the Second Circuit, then the ATS will be largely closed for claims of corporate liability. If the Supreme Court rules that corporate liability is not a question of subject matter jurisdiction for ATS purposes, then the Justices face the heart of the matter: whether federal common law or international law is the proper way to determine whether corporate liability exists under the ATS. Because that issue has not been fully developed in the lower courts in this case, it is also possible the Justices might look for a way around a decision on this important issue and might try to await a case in which the arguments are more fully developed in the trial and appellate courts.

Underlying this dispute is an important narrative about the modern evolution of international law. Since the Nuremberg trials after World War II, there has been an increasing focus on the use of criminal tribunals to try individuals for violation of international norms. But the federal government, supporting the position of the *Kiobel* plaintiffs, argues in a friend-of-the-court brief that this reliance on criminal tribunals does not in any way suggest that corporate wrongdoing may not lead to civil liability. Instead, the government argues, whether there is corporate liability for violation of international norms should be determined on the basis of federal common law, under which corporations may be held liable.

The corporate defendants in *Kiobel* counter that the Second Circuit was correct when it held that the central issue is one of subject matter jurisdiction and that the claims should be barred under the Alien Tort Statute.

The second case involves a lawsuit filed by the sons and widow of a U.S. citizen who was born in the Palestinian West Bank. The lawsuit alleges that Palestinian officials detained, tortured, and killed the man during a visit to the West Bank in 1995. The family sued several individuals, but it also named the Palestinian Authority and the Palestinian Liberation Organization as defendants.

The lawsuit was filed under the Torture Victim Protection Act (TVPA), a law passed by Congress in 1992 at a time when it was unclear what types of lawsuits might be valid under the Alien Tort Statute. The law established that U.S. citizens have the right to sue for civil damages in federal court for torture or killing that was ostensibly under the authority of law or of a foreign country. The dispute before the Supreme Court arises because the TVPA says the lawsuits may be brought against an “individual.” The U.S. Court of Appeals for the District of Columbia Circuit dismissed the lawsuit against the Palestinian organizations on the ground that “individual” means a natural person, and the Supreme Court agreed to hear the family’s appeal.

The family argues that Congress did not intend to alter a presumption in U.S. law that organizations are responsible for the actions of their members. (Disclosure: The law firm of Goldstein & Russell, P.C., whose attorneys contribute to this blog, serves as co-counsel to the petitioners.) The family argues that the term “individual” should include liability for organizations that are not sovereign states.

In this case, the United States is on the other side. The government’s friend-of-the-court brief argues that the literal meaning of what Congress intended is clear – that the term “individual” means just that, and does not refer to entities. Lawyers for the Palestinian organizations maintain the same position: the statute is clear.

Both cases in one sense present narrow questions of procedure, statutory interpretation, and jurisdiction for federal courts. But both cases will be closely watched because they fall right on the edge of increasingly

important questions of how one may use the courts of the United States to enforce international law against human rights violations around the world.



Lyle Denniston *Reporter*

Posted Sat, February 25th, 2012 12:09 am

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Argument preview: Human rights abuses and the law

Next Tuesday, starting at 10 a.m., the Supreme Court will hear two hours of argument — in back-to-back cases — on the scope of the right to sue in U.S. courts for human rights abuses — including torture — carried out in other countries. Both cases have implications for corporations, including multi-national firms, as well as for political organizations, that are accused of violating the rights of individuals under international or U.S. law In the first case, [Kiobel, et al., v. Royal Dutch Petroleum Co., et al.](#)(10-1491), the suing individuals will be represented by Paul L. Hoffman of the Venice, Calif., law firm of Schonbrun DeSimone Seplow Harris Hoffman and Harrison, and that side of the case will be supported by the U.S. government, with Deputy Solicitor General Edwin S. Kneedler arguing. The sued oil companies will be represented by Kathleen L. Sullivan of the New York law firm of Quinn Emanuel Urquhart & Sullivan. In the second case, [Mohamad, et al., v. Palestinian Authority, et al.](#), the suing individuals will be represented by Jeffrey L. Fisher, a law professor at Stanford. Arguing on the other side will be Laura G. Ferguson of the Washington law firm of Miller & Chevalier, representing the political organizations sued in the case, with their legal position supported by the U.S. government, represented by Curtis E. Gannon, an Assistant to the Solicitor General.

Background

The global community has always rallied around to find new legal ways of dealing with the horrors perpetrated by totalitarian regimes, and often the chosen method has been some form of international criminal trial, as at Nuremberg following World War II. While that trend continues today for the most grievous atrocities, the legal community in recent years has turned increasingly also to civil lawsuits, reflecting a rising sense that human rights abuses still occur around the globe, and that someone should be held liable — and made to pay money damages or reparations.

That is the trend, getting a mixed reaction in lower courts, that comes in for intense new examination this week by the Supreme Court, in two cases with potentially worldwide impact. One of the cases lines up the U.S. government on the opposite side of some of its closest allies — the governments of Germany, Britain, and the Netherlands. The business community, from the U.S. and abroad, while fiercely condemning the abuses that are claimed, has mounted an energetic legal effort to head off a new wave of liability for corporations.

The Supreme Court has given some support to the civil lawsuit trend, but has told federal courts to be cautious in recognizing new forms of civil liability, thus putting some restraint on lawyers' inventive instincts. The legal basis of civil lawsuits given at least modest encouragement by the Court is the Alien Tort Statute, a law that dates all the way back to 1789, and that had lain largely unused for nearly two centuries, until the Second Circuit Court in the 1980 case, [*Filartiga v. Pena-Irala*](#), launched what the Supreme Court has since described as a whole new generation of ATS litigation.

Congress has also joined in encouraging that trend, to some degree, apparently in response to the view that torture is becoming too common a feature in the violent repression of political minorities or hated adversaries. Congress, in passing a 1991 law, indicated it wanted to ensure that terrorists could not come to the U.S. and find a safe haven. The law, the Torture Victim Protection Act, taking effect in 1992, was passed to give U.S. citizens — for the first time — the right to sue if they have been victims of torture or other human rights abuses in foreign lands. The Alien Tort Statute, by contrast, has always been restricted to lawsuits by non-citizens of the U.S.

As the two new cases reached the Supreme Court last year, they both centered on a simple core issue: do either of the two laws allow lawsuits in U.S. courts against corporations, or are both restricted to imposing potential liability only on individual human beings. (Foreign governments usually have immunity as sovereign states.) Lurking in one of the cases are a variety of what might be considered side issues — such as the authority of Congress to give U.S. courts the authority to reach beyond the nation's borders to judge foreigners' conduct, and the specific kinds of human rights abuses that might give rise to a lawsuit in an American court — but the Justice Department has urged the Justices to stay focused on the basic issue of corporate (or political organization) liability.

Joining in both cases, the Department sides with the argument that the Alien Tort Statute does allow lawsuits by aliens against corporations, but it takes the view that the Torture Victim Protection Act is confined to lawsuits against natural persons, and thus would not reach corporations or political entities. A government lawyer will advance those views in each of the cases on Tuesday, going from one side in the first to the opposite in the second.

The first case — involving ATS claims against corporations — does have a side issue that the government argues should not deter the Court from reaching the issue of corporate liability. That is whether the coverage of the ATS is a matter of jurisdiction, as the Second Circuit Court said it was (thus shutting down any lawsuit against a corporation from the outset), or whether it is a matter of the merits, as to whether a given corporation can be sued for alleged specific acts. The government contends it is a merits question, within the power of courts to resolve, but business groups and their legal allies claim that it goes to the basic authority of courts even to hear an ATS claim against a business firm.

The Court, in recent years, has been increasingly resistant to the idea that a law that does not say flatly that courts have no authority to decide a given issue should be interpreted to impose just such a jurisdictional barrier. If the Court follows that line of reasoning in the ATS case, it seems very likely it will feel free to decide the corporate liability question.

The ATS law at issue in the first case says simply that U.S. District Courts have the authority to decide “any civil action by an alien” claiming any wrongdoing that violated “the law of nations” or a U.S. treaty. The most important Supreme Court ruling so far interpreting that law was the 2004 decision in [*Sosa v. Alvarez-Machain*](#). It barred an ATS lawsuit by a Mexican against Mexican nationals who supposedly had been recruited by U.S. narcotics agents to abduct him and transport him to the U.S. for a criminal trial. In the course of that decision, urging caution by federal judges in implementing it, the Court seemed to say that an ATS claim must involve conduct that would violate norms of conduct accepted by the civilized world, but did not say who might be sued for such violations.

The first case to be heard Tuesday is initially titled in the name of Esther Kiobel, for herself and on behalf of her late husband, Dr. Barinem Kiobel, but also representing the interests of 10 other Nigerians, too. Their lawsuit, a class action claim, targeted a Netherlands firm, Royal Dutch Shell Petroleum Co., along with one of its subsidiaries, and a British firm, Shell Transport and Trading Co. It claimed that Nigerians or their relatives were killed, tortured, or subjected to cruel, inhuman and degrading treatment, as part of a plot of the military dictatorship in that country, using the Nigerian armed forces to suppress resistance to oil exploration in the Ogoni region of the Niger Delta between 1992 and 1995.

The lawsuit claimed that the three oil companies had aided and abetted the armed forces in the alleged atrocities. A District Court judge ruled that some of the ATS claims could go forward against the corporations. The case then was sent to the Second Circuit Court. Reaching the issue not even discussed in the District Court, the Circuit Court, in a [bitterly divided ruling](#), said that the ATS only applied to individual persons, so the claims were barred as a matter of jurisdiction. The Circuit Court majority said it could find no custom in international law of corporate liability. The *en banc* Circuit Court split 5-5 in refusing further review.

The second case on Tuesday turns on the meaning of the Torture Victim Protection Act, which allows U.S. citizens to file two specific types of claims: acts of torture or wrongful killing, and is limited to such abuses that were done by an individual under the authority of a foreign government. As the measure went through Congress, it at one time had referred to any “person” who committed such wrongs, but that was later changed to “individual.” The Supreme Court has said that this law supplemented, rather than replaced, the ATS.

The torture act case was filed by the family survivors of a U.S. citizen, Azzam Rahim, who allegedly was tortured to death in Jericho, a city near the Jordan River in the West Bank of the Palestinian territories. Rahim had been born in the West Bank, but moved to the U.S. and became a citizen in the 1970s. In the fall of 1995, he went to the West Bank for a visit. While sitting at a coffee shop in his boyhood village of Ein Yabroud, near Ramallah, he allegedly was captured by men identifying themselves as security police, and was whisked away to a Jericho prison. His family would later claim that he had been tortured there, and had died on September 29, 1996. A later autopsy showed injuries, but could not determine the actual cause of his death.

Rahim’s son, Asid Mohamad, on behalf of Rahim’s widow and his six sons as representatives of the estate, sued in September 2005, against intelligence officers of the Palestinian Authority, the Authority itself, and the Palestinian Liberation Organization. The individuals sued in the case were later dismissed. The family had tried to sue also under the ATS, but that was dismissed because they were citizens, so the case proceeded under the 1992 torture law. A District Court judge dismissed the case against the Authority and the PLO, concluding that the law only applied to natural persons. That was upheld by the D.C. Circuit Court in [Mohamad, et al., v. Rajoub, et al.](#)

(The Palestinian Authority was created by international agreement between Israel and the PLO [the Oslo Accords] in 1993 to function as a sort of local government in areas of the West Bank and the Gaza Strip. Its role was to be a transitional one, until a permanent agreement could be reached; none ever has been.)

Petitions for Certiorari

After the Supreme Court’s *Sosa* decision in 2004, the pace of ATS litigation picked up considerably, and cases began reaching the Supreme Court. In the fall of 2010, the Justices passed up two of those cases, originating in the Second Circuit, but others followed. In June 2011, the *Kiobel* petition was filed, followed in July by the *Mohamad* case. By that time, it appeared that the key issue that had developed in the lower courts was whether corporations could be sued under ATS.

Attorneys for *Kiobel* raised two issues in their petition: whether the question of whether corporations could be sued under the 1789 law was a matter of jurisdiction, and if not, whether ATS did allow such lawsuits. The petition accused the Second Circuit of engaging in “a radical overhaul of all existing ATS jurisprudence by transforming virtually every significant ATS issue into an issue of subject matter jurisdiction and by creating a blanket immunity for corporations engaged or complicit in universally condemned human rights violations.”

In an era of globalization, the petition asserted, ATS cases often provide the only opportunity for victims of human rights abuses “to obtain any remedy for their suffering and to deter future unlawful conduct.” On the question of corporate liability, the petition noted that the Second Circuit ruling against such liability conflicted directly with a ruling by the Eleventh Circuit Court.

The oil companies responded that the Supreme Court itself, in the *Sosa* decision, had treated the ATS as a jurisdictional statute. And, noting that the Court in *Sosa* had told federal courts to proceed with caution in finding new causes to sue under international law. What the Second Circuit did in this case, the opposition brief contended, was “a straightforward application” of the *Sosa* decision. Even though the Second Circuit judges had significant disagreements among them in the case, the brief commented, all three of them agreed that this lawsuit should be dismissed, so it said this case would be “a poor vehicle” for addressing the corporate liability question.

The case drew a smattering of *amici* support for the *Kiobel* parties.

The oil companies in the case had also filed a conditional petition for review, but the Court denied that routinely when the *Kiobel* parties declined to respond to it.

In the *Mohamad* case, the petition to the Court raised a single issue: whether the Torture Victim Protection Act allows lawsuits against any entity that was not a natural person. A spare 14 pages, the petition primarily relied upon a direct conflict between the D.C. and Eleventh Circuit Courts. It also relied upon the Circuit split over the “closely related question” of whether the ATS allowed a lawsuit against an entity other than a natural person. It anticipated that the Court would review the *Kiobel* case.

The Palestinian Authority and the PLO urged the Justices to bypass the *Mohamad* case. They contended that the Eleventh Circuit Court ruling not involve a significant exploration of the torture act’s scope, and, on the facts, they argued that the claims of the Rahim relatives had not been proven.

But the opposition brief placed particular emphasis on the point that the Authority and the PLO do not take any of their actions by using authority given to them by any foreign government. The torture act, it

noted, requires that the wrongdoing had to have occurred under the authority of a foreign nation. They do not so function, it asserted.

Last October 17, the Court agreed to rule on both the *Kiobel* and *Mohamad* cases, and ordered that they be argued back to back rather than together — obviously because different laws, with different wording and background, were at issue.

Briefs on the Merits

The *Kiobel* brief on the merits spent little effort challenging the Second Circuit ruling that the question of the Alien Tort Statute's coverage was a jurisdictional issue. The Circuit Court majority reached out to make that declaration, the brief said, and that must be reversed, since it will complicate how courts process ATS cases in the future.

On the issue of corporate liability, the suing individuals' brief went back to the nation's Founding era, arguing that the first generation under the new Constitution understood from the English heritage that entities could be sued for violating international law, beginning with the maritime tradition of allowing lawsuits against the physical being of a ship itself, not its owners or crew. Moreover, lawsuits against non-human entities also were being filed at the time in state courts, the brief said.

That document went on to find support for a right to sue corporations for human rights abuses in the *Sosa* decision itself, in the rulings of every other Circuit Court to address the question, in international law, and in the history of the ATS itself over its long stretch on the statute books.

In a rhetorical thrust, the *Kiobel* brief recalled the infamous Nazi corporation, I.G. Farben, noting that such German corporations showed that they were "as capable as natural persons of committing or abetting genocide and other human rights violations, and thus violating international law."

Substantially aiding the *Kiobel* plea, the Justice Department has entered the case to join in calling for corporate liability under ATS. It strongly disputed the Second Circuit's finding that it simply had no jurisdiction to hear a case against a corporation under that old law, arguing that the scope of a law's coverage is a merits issue, not a question that relates to the court's fundamental power to rule.

After counseling the Court not to let any side issues get in the way of ruling upon the corporate liability question, the Department's brief contended that the *Sosa* decision did not limit lawsuits under ATS to those in which there was already a generally accepted and well-defined principle of international law that corporations could be held liable for misconduct. When the Court suggested in that case's now-famous footnote 20 that any ATS claim had to rest upon an international norm, the government brief asserted, it

did not mean to bar courts from interpreting their own common-law traditions to determine who could be liable for violation of international law. The Court was only describing there what constituted such an international norm, not using that as a barrier to specific kinds of lawsuits, according to the brief. In any event, it added, there is no current international law norm that distinguishes between natural and artificial persons, so corporations are deemed as capable as natural persons of violating international law.

While international criminal tribunals have limited their cases to prosecutions of natural persons, the brief said, that is because those cases involve matters that are unique to criminal punishment, not finding liability for misconduct not treated as criminal in nature.

Royal Dutch Shell and its trading subsidiary, in their brief on the merits, not surprisingly argued that the *Sosa* decision does, indeed, limit proper claims under the ATS to misconduct that violates a defined international law norm. Any claim under the statute, it argued, must identify a specific international norm, and then show explicitly how it would violate that standard. The *Kiobel* parties and the Justice Department are simply wrong in trying to read that out of the *Sosa* opinion, the Shell brief contended.

Turning to international law concepts, the Shell filing contended that there is a recognition of human rights violations, but those are recognized “only against states and natural persons, not against corporations.” And, turning to domestic constitutional law, the brief noted that the Supreme Court has declined to create a right to sue corporations directly under the Constitution, even when no other law provides a remedy against such business entities.

Shell’s brief also sought to keep in the case two of the issues that the Justice Department had argued need not be addressed: whether an ATS lawsuit can be filed when it focused on misconduct that occurred entirely within a foreign country, rather than within the U.S. or on the high seas (the “extraterritoriality” issue), and whether ATS encompasses claims that a defendant “aided and abetted” misconduct by someone else.

On the first point, the brief for the oil companies argued that, for a U.S. law to have application beyond the nation’s borders, that must be stated explicitly by Congress, and there is no such clear statement in ATS. That statute, it suggested, must be interpreted to avoid clashing with international law, and to avoid “adverse consequences to U.S. trade and foreign policy.” On the second point, the brief contended that international law recognizes such liability only when the secondary actor had a specific purpose in facilitating what the primary actor was alleged to have done.

Both sides in the case drew significant *amici* support, but most of it was quite predictable: civil liberties and human rights organizations favoring the *Kiobel* side, business organizations and conservative advocacy groups on the side of the oil companies, and with dueling briefs from law professors each

choosing a side. On the *Kiobel* side, there is a distinct tendency to try to push the Court's attention to how domestic law, in the U.S. and abroad, creates substantial liability for corporations, and on the Shell side, there is an opposing tendency to lead the Court to focus on the evidence indicating that there is no international norm of corporate liability. How the Justices may react to either of those forensic thrusts may depend upon how they interpret the *Sosa* decision, and whether or not they conclude that it demands an international law foundation for any ATS claim.

The *amicus* briefs on Shell's side by the governments of Germany, Britain, and the Netherlands energetically support the argument that international law — whether civil or criminal — simply does not impose liability on corporations. But the briefs go on to argue that, if the Court should find liability based upon U.S. domestic law (on which those governments say they have no opinion), then the foreign state briefs argue that there could be serious international implications in making such liability extend overseas to foreign companies — and some foreign governments, perhaps — involving only foreign conduct. It is an argument that relied heavily upon the notion that a U.S. law does not reach beyond the nation's shores unless Congress says so very clearly. The German brief, in particular, argued that a ruling extending liability under U.S. laws would put great stress on the sovereignty of foreign governments.

The briefs on the merits in the Torture Victim Protection Act case are, by comparison with those in the *Kiobel* case on ATS, models of simplicity. They depend very heavily upon what kinds of meanings can be teased out of a single word in the Act — “individual” — and they are not burdened by the seriously complicating influence of the *Sosa* precedent.

The Rahim family's brief urged the Court not to look only at the word “individual,” but to see it in the context of collective liability for the acts of individuals. It thus depended quite heavily upon the concept that corporations are liable because corporations act through their agents — that is, they act through individuals and are liable for their agents' misconduct. There is no indication, that document contended, that Congress intended in any way to deviate from normal concepts of organizational liability.

Every other federal law, and all treaties dealing with torture or “extrajudicial killing,” that brief argued, apply to corporations and individuals alike. The torture act should not be made an exception to that approach, it contended.

The family brief put some emphasis on a policy argument: assuming that the Court finds in *Kiobel* that corporations can be sued under ATS, it would be strange indeed if, under the torture act, U.S. citizens were given fewer legal rights than those accorded to aliens.

The Palestinian Authority/PLO brief on the merits, aside from trying to fend off the rhetoric in its challengers' briefs about what those say were the past excesses of misconduct by the PLO, strove to keep

the Court's attention on what it argued was a "purely legal question" — that is, what Congress meant when it used "individual" to establish potential liability for torture or extra-judicial killing. If Congress had wanted to make political organizations and other non-human entities the targets of claims under the Act, it could have used the word "persons," the Palestinian brief asserted. The meaning of the word "individual," that document said, is "so obvious" that in passing laws using that particular word, Congress seldom feels the need to define it. State laws are the same, it noted.

Although there are few *amici* filings in the *Mohamad* case, those supporting the Rahim family interpretation are the more numerous, but the other side far more significantly has the support of the Justice Department. The Department makes a down-the-line defense of the idea that Congress simply meant what it said when it deliberately chose the word "individual," not "persons."

Analysis

One issue in the *Kiobel* case is likely to be quite easy for the Court — that is, whether the reach of the Alien Tort Statute is a matter of federal court jurisdiction, as the Second Circuit found it to be. Given the Court's repeated habit of reading jurisdictional limits on federal courts very narrowly, the Justices are not likely to be longer deterred from reaching the merits of the corporate liability issue in that case.

And, although that case as it has developed on the liability issue is notably complex, that complexity could be gotten around quite easily, if the Court were to look back at its *Sosa* decision in 2004 and find in it a clear declaration of what a lawsuit filed under the Alien Tort Statute must claim in order to be allowed to go forward — in short, what it meant in footnote 20 and the accompanying text. Both sides in the case have labored strenuously to read into *Sosa* very clear support for what each believes an ATS complaint must embrace, and their perceptions clearly conflict, but the mere fact that both can do so without making frivolous arguments suggests that *Sosa* is anything but a clear guidepost.

If the Court were to read *Sosa* as imposing a firm requirement that there must be solid proof that international law allows corporations to be sued for human rights violations, corporations might well win that argument; at least there are many briefs that seek to refute that notion. But if the Court were to read *Sosa* as saying that the place to look for who is liable for such violations, and the extent of such liability, is domestic law, corporations might well lose; it is commonplace for corporations, in domestic law here and abroad, to be held legally to blame for clear misconduct.

The choice of arguments, it would seem, is clear-cut, and the Justices may simply need to choose one.

There is, though, a complicating factor here: will the Court find itself free to ignore the two issues that the Justice Department has told it to leave aside. First is whether the Alien Tort Statute was intended by

Congress to reach across the seas to foreign countries to deal with misconduct by foreign corporations entirely within their own countries, and, if so, whether Congress made that very clear in the ATS. The second is whether, if corporations might potentially be liable under ATS, must they have been engaged in promoting atrocities before they may be held liable. Those are not easy issues, but the answers might well favor those who are resisting corporate liability under the ATS.

At least on the surface of things, the *Mohamad* case seems very likely to be an easy one for the Court, because the choices available to the Justices seem so starkly in conflict. For the Rahim family to win, “individual” has to be read to mean considerably more than it commonly does, and for the Palestinian entities to win, “individual” has to be read in the customary way. For the family, policy preferences have to be more persuasive than the mere interpretation of language. For the Palestinian entities, a single word seems enough.



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Plain English: Recent grants

October was a busy month at the Court for merits cases: it heard twelve oral arguments during its October sitting, and then kicked off its November sitting with two more arguments on October 31, the first day of that sitting. However, this frenzy of activity apparently did not extend to adding new cases to its docket to be argued later this Term, an arena in which the Court continued to be parsimonious; its three October Conferences yielded only six new grants to add to [the eight cases](#) it granted in late September, after its long summer recess. Let’s take a look at these new cases, in Plain English.

On October 11, following its Conference on October 7, the Court granted review in just two new cases. The first was [Freeman v. Quicken Loans, Inc.](#), which has its origins in the mortgages that a group of homeowners obtained from Quicken. [Disclosure: My firm represents Tammy Freeman and the other homeowners in the case.] The homeowners filed this lawsuit because they believe that Quicken charged them various fees for which they did not receive any services. Such charges, they contended, violate

Section 2607(b) of the Real Estate Settlement Procedures Act, which prohibits the “giv[ing]” and “accept[ing]” of “any portion, split, or percentage” of unearned fees for mortgage settlement services.

Both the trial court and the court of appeals ruled in favor of Quicken. They held that Section 2607(b) only prohibits kickbacks – that is, when a provider of settlement services *shares* the unearned fees with a third party. The law does not apply, they ruled, when the provider simply keeps all of the unearned fees for itself. Freeman then filed a petition seeking review of the lower court’s decision in the Supreme Court, which initially [asked the federal government](#) to weigh in on the dispute. In August, the government filed a brief urging the Court to grant review – which it did a little over a month later – and to rule in Freeman’s favor on the merits. The case may be important for people who buy homes and pay various fees to the mortgage company.

The other grant that week was [Blueford v. Arkansas](#), a case involving the Double Jeopardy Clause of the Constitution. Most people are at least vaguely familiar with the clause, which prohibits “any person” from being “subject for the same offense to twice be put in jeopardy of life or limb”: it means, for example, that if a defendant is tried for a crime and the jury returns a verdict of “not guilty,” prosecutors can’t try him again for the same crime. If all cases were this straightforward, the Supreme Court wouldn’t need to get involved. But, as you can imagine, they rarely are.

In this case, petitioner Alex Blueford was charged with murdering his girlfriend’s young son. The jury at his trial was instructed to consider four charges, beginning with the most serious charge of capital murder and moving on to the three less serious crimes for killing – first-degree murder, manslaughter, and negligent homicide – in order of seriousness. In other words, the jury was to consider a charge only if they had “reasonable doubt” on the more serious offenses. After deliberating for several hours, the jury informed the judge that it was deadlocked. When questioned by the judge, the jury’s forewoman indicated that the jurors had voted unanimously against the capital and first-degree murder charges; they were divided on the manslaughter charge and did not vote on the negligent homicide charge. After further deliberations, the jury was still unable to return a verdict, and the court declared a mistrial.

The state attempted to re-try Blueford on all four charges. He asked the court to dismiss the capital and first-degree murder charges. He argued that a new trial on those charges would violate the Double Jeopardy Clause because the forewoman had told the court that the jury had voted unanimously against them. The trial court rejected Blueford’s request, reasoning that the jury had not made any “findings” or reached any “verdicts,” and the Arkansas Supreme Court affirmed. In its opinion, the state supreme court acknowledged that some other states would reach the opposite result, but it declined to follow those states’ holdings. Blueford then asked the U.S. Supreme Court to step in, which it did after considering the

case at two conferences in a row. The case will help to make clear the government’s power to hold retrials after a mistrial.

The Court granted four more cases on October 17. In two, the Court will consider whether corporations and organizations can be sued in U.S. courts for human rights violations that occur abroad. The first case, [*Mohamad v. Rajoub*](#), was brought by the family of a U.S. citizen of Palestinian descent, who was allegedly tortured to death in a Palestinian prison in 1995. The family then sued the Palestinian Authority and the PLO (as well as several Palestinian officials) under the Torture Victim Protection Act (TVPA), a 1991 law that allows victims of torture to bring civil lawsuits for damages against the “individual” who – while acting on behalf of a foreign government – is responsible for the torture. The district court dismissed the case, and the court of appeals affirmed. The lower courts agreed with the defendants that the PLO and the Palestinian Authority could not be sued under the TVPA because it only allows lawsuits against an “individual” (that is, an actual person) who perpetrates the torture, rather than against an organization or corporation. [Disclosure: Our firm works with the Stanford Supreme Court Litigation Clinic, which is representing the plaintiffs.]

In the second case, [*Kiobel v. Royal Dutch Petroleum Co.*](#), the Court will have to interpret a different law: the Alien Tort Statute (ATS), which allows foreigners to bring lawsuits in U.S. federal courts for serious violations of international human rights laws. Unlike the TVPA, the ATS doesn’t say anything about who can be sued. Instead, it simply gives the trial court authority to decide “any civil action by” a foreigner for substantial violations of international law. So when a group of Nigerians filed a lawsuit in the U.S. against three oil companies, seeking to hold them liable for human rights abuses allegedly committed on their behalf by Nigerian soldiers, the U.S. Court of Appeals for the Second Circuit explained that it was not enough that corporations could be held liable under U.S. domestic law. Instead, it looked to whether corporations could be sued under established principles of international law – and concluded that they could not. The court reasoned that only individuals have traditionally been held liable for violations of international law, because the kinds of violations that international law is intended to address are so serious that the blame for them can only rest with the individuals who are responsible for the violations. The Nigerian plaintiffs then asked the Supreme Court to take up the question, which – after considering the case at [three straight Conferences](#) – it finally agreed to do.

Although important in their own right, these question may take on even more significance (or depending on how the Court ultimately rules, irony) in the context of the Court’s recent decision in the [*Citizens United*](#) campaign finance case, in which the Court held that corporations have First Amendment rights.

In the last case granted on October 17, [*Elgin v. Department of the Treasury*](#), the Court will consider whether and where federal employees can challenge negative employment decisions. In 1978, Congress

enacted the Civil Service Reform Act (CSRA) to set up a comprehensive system to deal with claims by federal employees that they had been wrongly fired. As a general rule, an employee who believes that he should not have been terminated must go to the Merit Systems Protection Board (MSPB), an independent government agency. From there, an employee would normally appeal to the United States Court of Appeals for the Federal Circuit – a specialized appellate court that deals with certain kinds of cases (including patent and international trade) from all over the country, no matter where they originate.

The petitioners in this case are four federal employees who, as required by a 1985 law, were fired because they had failed to register for the draft. They then filed a lawsuit in a federal district court in Massachusetts, arguing that the federal law prohibiting them from holding government employment was unconstitutional because (among other things) it discriminated on the basis of gender (because women aren't required to register for the draft). They asked the court to hold the 1985 law unconstitutional and issue an order barring the government from enforcing the statute. The district court declined to do so, rejecting the employees' constitutional arguments.

On appeal, the U.S. Court of Appeals for the First Circuit (which would normally hear appeals from federal district courts in Massachusetts) did not decide the merits of the employees' claims. Instead, it held that the CSRA prohibited the employees from going to the district court to challenge their firings at all. This is true, the First Circuit explained, even if they are only challenging the law requiring their dismissal as unconstitutional and even if the MSPB – where the employees would have to bring their challenge first – can't rule on whether the law is constitutional. In doing so, the First Circuit acknowledged that other courts of appeals have reached different results on the same question – a split that was no doubt very helpful in convincing the Supreme Court to review of the case.

In the last granted case, the Court will consider the constitutionality of the statute that wins the award for best name of the month: the Stolen Valor Act, which makes it a crime to lie about having received military honors. The respondent in this case, Xavier Alvarez, was elected to the board of his local water district in southern California. He was charged with violating the Act after he falsely told the audience at a meeting that he had been awarded the Congressional Medal of Honor. To defend himself, Alvarez sought to have the charges dismissed on the ground that the Act was unconstitutional because it violated his right to free speech. When the district court rejected that argument, Alvarez pleaded guilty but reserved the right to challenge the constitutionality of the Act on appeal. Alvarez found a friendlier audience in the Ninth Circuit, which reversed his conviction. After the full court of appeals declined to re-hear the case, the United States sought Supreme Court review.

In its petition for certiorari, the government began by emphasizing that the Act plays an important role in protecting the integrity of the military honors system: if people can lie about receiving awards without

any penalty, it will cheapen the value of the awards for the soldiers who actually did earn them. Moreover, the government argued, the Act is constitutional: it is exactly the kind of false factual statement that, under the Supreme Court's precedents, should receive only limited First Amendment protection. Although the government conceded that the Ninth Circuit's decision was the first one to weigh in on the constitutionality of the Act (so that the case lacked the kind of circuit split that the Supreme Court would normally look for in deciding whether to grant review), the Court's decision to review the case was not at all surprising given the federal government's [high batting average](#) in seeking review generally but also because the Supreme Court will almost always agree to review a lower court's decision striking down a federal statute as unconstitutional.