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U.S. Supreme Court to Review Corporate Alien Tort Act Liability

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WASHINGTON - The next *Citizens United*, in the view of some of that decision's most vigorous critics, may have nothing to do with campaign finance or the First Amendment.

Instead, corporations in a case the justices will hear this month seek not to spend their money but to avoid doing so by arguing that they have no liability under a 1789 statute for torts committed abroad in violation of international law or U.S. treaties.

The case, *Kiobel v. Royal Dutch Petroleum Co.*, 10-1491, involves the Alien Tort Statute (ATS) and is scheduled for argument on Feb. 28. *Kiobel* will be heard in tandem with *Mohamad v. Palestinian Authority*, 11-88, which raises a similar question involving claims against non-natural persons under a different statute—the Torture Victim Protection Act. *Kiobel* starkly pits the business community against human rights organizations.

"What is being asked of federal courts in these ATS cases is to create an international law not just for American corporations, which would be one thing, but international law for all foreign corporations that we could get jurisdiction over," said Michael Ramsey, an international law scholar at the University of San Diego School of Law. "I don't think that's a role for federal courts or what the ATS was intended to do."

But Katherine Gallagher of the Center for Constitutional Rights, which pioneered Alien Tort Statute litigation, countered, "*Citizens United* recognized rights of corporations. It's important in this case that we're also discussing obligations of corporations. It is particularly important as we see multinational corporations operating across borders and we see the role corporations now have globally and here at home."

Read briefs submitted in the case.

Waves of Litigation

The Alien Tort Statute, also known as the Alien Tort Claims Act, originally appeared in Section 9 of the first Judiciary Act of 1789, which created the U.S. court system. The statute provides that "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 act was largely dormant until 1980 when the U.S. Court of Appeals for the Second Circuit decided *Filartiga v. Pena-Iralam*, 630 F. 2d 876. Represented by lawyers at the Center for Constitutional Rights, Dolly Filartiga filed a civil suit under

the Alien Tort Statute against her brother's murderer, the former Inspector General of Police in Ascension, Paraguay, seeking compensatory and punitive damages. Her lawyers argued that just as piracy was a violation of the law of nations when the Alien Tort Statute was enacted, torture was a crime against the law of nations in 1979 when her brother was murdered. The Second Circuit agreed.

Since then, there have been three waves of alien tort litigation: the prototypical *Filartiga* case—torture, killing or disappearance abroad committed by one alien against another alien; suits against U.S. corporations and some foreign corporations for participating in human rights abuses abroad, and suits against U.S. government officials or those acting at their direction, a wave that included the Iraq Abu Ghraib prison litigation.

In 2004, the U.S. Supreme Court ruled in its first substantive look at the scope of the Alien Tort Statute in *Sosa v. Alvarez-Machainm*, 542 U.S. 692. The justices were asked whether Mr. Alvarez-Machain could recover damages against the United States and Mexican national Jose Sosa under the Alien Tort Statute and the Federal Tort Claims Act for his kidnapping from Mexico by Sosa and others at the instigation of the Drug Enforcement Administration. Mr. Alvarez-Machain was brought to the U.S. and acquitted in a criminal trial of charges that he had assisted in the torture and murder of a DEA agent.

The high court denied relief to Mr. Alvarez-Machain under both statutes. But the justices also rejected arguments by business and the Bush Administration that any claim for relief under the ATS, a jurisdictional statute only, requires a separate statute by Congress expressly authorizing a cause of action.

Although the case had nothing to do with corporations, it galvanized the business community, which saw a serious threat in the increasing number of Alien Tort Statute lawsuits charging corporations with human rights violations committed abroad.

Writing for the *Sosa* majority, Justice David Souter said history indicates that the Alien Tort Statute furnished jurisdiction for a relatively modest set of actions alleging violations of the law of nations, such as assaults on ambassadors, violations of safe conduct and piracy. Since Congress had done nothing in more than 200 years to preclude federal courts from recognizing a claim under the law of nations, he wrote, "Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th Century paradigms we have recognized."

In 2010, the U.S. Chamber of Commerce's Institute for Legal Reform reported that since its enactment in 1789, about 150 Alien Tort Statute cases have been brought. Of that total, about 50 are pending at any one time in federal district and circuit courts.

The cases against corporations, according to the Institute, have involved 60 different countries and 21 different industries, mainly the extractive industry, financial services, food and beverage, manufacturing and communications/media. The allegations cover acts by security agents, labor related issues, environmental claims, and suits against companies for providing support to allegedly repressive political regimes and foreign combatants. In recent years, settlements and judgments reportedly ranged from $1.5 million to $80 million.

A Shift in the Second Circuit

About 30 percent of all corporate Alien Tort Statute cases to date reportedly have been brought in the Second Circuit—more than any other circuit—which generally was viewed as one of the circuit courts more sympathetic to Alien Tort Statute plaintiffs. But the ground shifted with the *Kiobel* decision.

In *Kiobel*, a three-judge panel addressed head-on the question of corporate liability under the ATS in a case brought by Nigerian residents against Dutch, British and Nigerian oil companies for allegedly aiding and abetting the torture and killing of residents who protested the environmental effects of the companies' drilling in their region. Two of the judges concluded that "although customary international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has never extended the scope of liability to a corporation." 621 F. 3d 111 (NYLJ, Sept. 20, 2010).

The Second Circuit declined to re-hear the case en banc, in that included some notably fierce dissents (NYLJ, Feb. 7, 2011).

Soon after the *Kiobel* ruling, the District of Columbia, the Eleventh and Seventh circuits disagreed with the Second Circuit's conclusion.

In the Supreme Court, human rights litigator Paul Hoffman of Schonbrun DeSimone Seplow Harris Hoffman & Harrison in Venice, Calif., will face former Stanford Law Dean Kathleen Sullivan of Quinn Emanuel Urquhart & Sullivan. Mr. Hoffman argued on behalf of Alvarez-Machain eight years ago.

Mr. Hoffman argues in his brief that: "The concept that corporations may be civilly liable for the torts committed by their agents is neither new nor exotic. Such liability is a function of loss allocation principles that have been a feature of all legal

systems in the world for as long as corporations have existed." There is nothing in the Alien Tort Statute's text, history or purpose to suggest that the drafters meant to exclude entities from its tort liability, he argues. And, international law norms, he writes, require accountability for international law violations whether committed by states, state officials or private actors.

Ms. Sullivan counters that the *Kiobel* plaintiffs fail to follow the analysis set out by the Supreme Court in its *Sosa* decision. They cannot show that international law, she contends, recognizes corporate liability for each of the alleged violations in this case: arbitrary arrest and detention, torture and crimes against humanity. International law sources, she argues, recognizes liability for violations of those norms only against states and natural persons.

And, she adds, even if they satisfied that first step, they cannot show that a private cause of action should be recognized as a matter of federal common law—the second step in the analysis. The Court, she notes, has refused to recognize corporate liability for federal constitutional torts. "Petitioners provide no reason why federal common law should extend more broadly when it comes to alleged violations of the law of nations, recognition of which raises risks of adverse consequences to foreign policy and U.S. trade and investment abroad."

If the Court rejects her arguments, Ms. Sullivan offers two alternative grounds for affirming the Second Circuit: there is no aiding and abetting liability in Alien Tort Statute actions and the Alien Tort Statute does not apply to conduct within a foreign nation's borders.

Even if the Court decides there is no corporate liability, Richard Samp of the Washington Legal Foundation said, the number of Alien Tort Statute suits may not decrease. "Suits will be brought against individual officers," he predicted. "The response to that is it would be a lot harder to win those cases, but these lawsuits have never been about winning but about getting a lot of bad publicity about corporations and building sympathy for the cause plaintiffs are involved in."

"The idea that Congress ever intended the law to apply to actions in a foreign country has no historical support," he said.

Alien Tort Statute cases are complex, hard to bring and take a long time to litigate, said Ms. Gallagher of the Center for Constitutional Rights. "We've never seen the floodgates open on ATS cases and even if we get a positive decision, there will be no floodgate opening."

The Second Circuit ruling is the outlier, she said. "The question of whether the ATS somehow in that short language gives some kind of safe harbor or immunity to corporations is at play here. Why is it that they would possibly be immune when *Sosa* clearly set out that the Alien Tort Statute grants jurisdiction over this small class of egregious conduct?"

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