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Litigating against human rights abuses

Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine School of Law. Erwin served as co-counsel, in the case discussed, Kiobel v. Royal Dutch Petroleum.



The Supreme Court has restricted the ability of victim of human rights violations occurring in foreign countries to sue in federal courts, but it has not completely closed the door on such litigation. In *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (April 17, 2013), the court limited the ability of federal

courts to hear suits under the Alien Tort Statute (ATS). But quite importantly, Chief Justice John Roberts' majority opinion expressly recognized that there still can be suits for human rights violations so long as there are significant connections between the litigation and the U.S.

The ATS was adopted as part of the Judiciary Act of 1789. It provides "[t]he 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." For the last several decades, it has been the primary vehicle for litigation in the U.S. for human rights violations occurring elsewhere in the world.

Esther Kiobel and the other plaintiffs were residents of Ogoniland, an area of 250 square miles located in the Niger delta area of Nigeria and occupied by roughly half a million people. Shell Petroleum Development Company of Nigeria is a subsidiary of Royal Dutch Petroleum Company and Shell Transport and Trading Company, companies incorporated in the Netherlands and England. The complaint alleges that after concerned residents of Ogoniland began protesting the environmental effects of Shell Petroleum's practices, the company enlisted the Nigerian Government to violently suppress the burgeoning demonstrations.

Throughout the early 1990s, the complaint alleges, Nigerian military and police forces attacked Ogoni villages, beating, raping, killing and arresting residents, and destroying or looting property. It is alleged that Royal Dutch Petroleum, through its subsidiary, was part of human rights violations, including killings and torture.

Chief Justice Roberts, writing for a five person majority, said that there is a presumption against the extraterritorial application of federal statutes. He said that there was not a sufficiently clear indication from Congress that it meant for the ATS to apply to actions in foreign countries such as were alleged to occur here. The court declared: "The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS." The court thus affirmed the dismissal of the lawsuit.

SPECIAL REPORT

Top Women Lawyers



Tuesday, May 14, 2013

U.S. Supreme Court

Technology company lawyers praise limited Supreme Court patent ruling

Lawyers representing Silicon Valley technology companies applauded the U.S. Supreme Court's narrowly-tailored decision in a patent suit on the replication of soybean seeds which avoided a sweeping ruling that might have affected them.

Corporate

Skadden, Gunderson help seal \$1B biopharmaceutical royalty pact

The firms represented South San Francisco-based biopharmaceutical company Theravance Inc. in its \$1 billion royalty agreement with Elan Corp. PLC, a deal announced Monday.

Education

Stanford Law names new innovation, IP clinic director

Stanford Law School appointed Phillip Malone as the new director and professor of law at the soon to launch Juelsgaard Intellectual Property and Innovation Clinic, the school announced Monday.

U.S. Court of Appeals for the 9th Circuit

Lawyers for offshore company accused of infringing porn tries to reverse injunction

The future looked foggy for an offshore cloud storage company accused of copyright infringement as it struggled to reverse a total asset freeze at oral argument Monday before the 9th U.S. Circuit Court of Appeals.

Judges and Judiciary

Obama administration considering San Mateo County judge for judicial vacancy

The Obama administration is considering San Mateo Superior Court Judge Beth Freeman to fill a longstanding federal court vacancy in San Jose, according to two sources in the Bay Area legal community.

Government

Northern District cancels court furlough days

There must be a remedy for egregious violations of human rights - including killing, torture and rape. Often the country where this occurs fails to provide any remedy.

The problem with the court's analysis is that the ATS clearly was adopted to deal with harms occurring outside the U.S. There already was a cause of action for torts occurring within the U.S.; there would have been no need for Congress to include a separate jurisdictional provision for these to be heard in federal court. The ATS is obviously about creating jurisdiction in the federal courts for torts that occur elsewhere in the world that violate treaties and the law of nations. Piracy was the paradigm example of what the ATS was meant to reach.

This was exactly the point Justice Stephen Breyer made in disagreeing with Chief Justice Roberts' reasoning. Justice Breyer explained: "The ATS, however, was enacted with 'foreign matters' in mind. The statute's text refers explicitly to 'alien[s],' 'treat[ies],' and 'the law of nations.' The statute's purpose was to address 'violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs.'"

Moreover, never before had the court applied the presumption against extraterritoriality to a jurisdictional statute, like the ATS. Always before the court's concern was with applying American substantive law to activities occurring outside the U.S.

Some commentators immediately proclaimed that the court's decision in *Kiobel* was the end for ATS litigation in federal courts. This seems clearly wrong, though it is uncertain as to what litigation will be permitted. At the end of his majority opinion, Chief Justice Roberts declared: "On these facts, all the relevant conduct took place outside the United States. And 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. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."

In other words, the court says that there can be claims under the ATS for conduct in other countries if the effect on the U.S. has "sufficient force" to displace the presumption against extraterritoriality. Justice Anthony Kennedy, the fifth justice for the majority, wrote a short, enigmatic concurring opinion, declared: "The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition."

It is unclear as to what will be enough of a connection to the U.S. to overcome the presumption against extraterritoriality. In *Kiobel*, it was a suit for human rights violations occurring in a foreign country, by a non-U.S. company, and with the victims being non-U.S. residents. The court thus says nothing about other situations, such as where it is a U.S. company engaged in human rights violations in a foreign country. In that circumstance, the connections to the U.S. seem strong enough to overcome the presumption against extraterritoriality.

Justice Breyer, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan would allow suits "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, 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." Interestingly, none of these situations for using the ATS is foreclosed by Chief Justice Roberts majority opinion. In this way, Justice Breyer's opinion can provide guidance for lower courts as to situations in

The Northern District of California has canceled the remaining four furlough days planned through the end of this fiscal year.

Corporate Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Government

Pomona may consider eminent domain to seize underwater mortgages

In an attempt to help homeowners facing foreclosure, city officials in Pomona may look at eminent domain as a way to help struggling debtors refinance their loans.

Law Practice

Fenwick plans move into China with Covington partner

Fenwick & West LLP announced Monday it has landed a partner to anchor its efforts to launch an office in China.

Bankruptcy

Howrey estate sues more successor firms

The estate of Howrey LLP recently filed four new adversary cases against law firms, seeking to recover profits from unfinished business claims.

Heller estate wins round against successor firms

The estate of Heller Ehrman LLP achieved a victory Monday when a district judge denied several motions made by firms seeking leave to file interlocutory appeals of a summary judgment ruling that they are liable for fraudulent transfers.

Government

State to appeal prison population reduction order to Supreme Court

On Monday, the state of California notified opposing counsel that it will petition the U.S. Supreme Court for review of a federal three-judge panel's order that the state must continue to reduce its prison population.

U.S. Supreme Court

Litigating against human rights abuses

By Erwin Chemerinsky.

Appellate Practice

Statutorily imposed review standard would be a state first

Assembly Bill 715 would establish that evidentiary decisions made at summary judgment would be subject to de novo review on appeal. By David J. Wilson

Large Firms

Efficiency is not *the* competitive advantage

which the ATS still remains viable.

Perhaps what is most missing from the Supreme Court's decision in *Kiobel* is an explicit recognition of the need for such litigation in American courts. There must be a remedy for egregious violations of human rights - including killing, torture and rape. Often the country where this occurs fails to provide any remedy. It thus often is a suit under the ATS in a federal court or no remedy at all. The tragedy of the court's decision in *Kiobel* is that it often will leave victims of horrific abuses with no remedy at all.

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Far too many firms only seem to be investing in efficiency - at the expense of being *effective*. By Patrick J. McKenna and Edwin B. Reesr

Bankruptcy

9th Circuit rules bankruptcy courts can recharacterize transactions

The court rejected the long-accepted holding of *In re Pacific Express* that bankruptcy courts in the 9th Circuit do not have the authority to recharacterize transactions. By Larry Gabriel and Robyn Sokol

Judicial Profile

Daniel P. Maguire

Superior Court Judge Yolo County (Woodland)

Law Practice

Robots v. Humans: A legal industry faceoff

The idea that computers can replace humans for certain types of work has threatened many industries for years, but only recently have attorneys had to face the fact that computers can outperform them for specific types of legal work.