FEDERAL STATUTES AND REGULATIONS

Alien Tort Statute — Extraterritoriality — Kiobel v. Royal Dutch Petroleum Co.

In 1980 the Second Circuit in *Filartiga v. Pena-Irala*[1] held that 28 U.S.C. § 1350, better known as the Alien Tort Statute (ATS), provides a federal forum for claims brought by aliens alleging violations of universal human rights norms.[2] Following *Filartiga*, the ATS, which had been passed as part of the Judiciary Act of 1789[3] and then largely forgotten, became a principal tool for foreign victims of human rights abuses seeking to vindicate their rights under international law in U.S. courts.[4] Though the Supreme Court in the 2004 case *Sosa v. Alvarez-Machain*[5] interpreted the scope of the ATS to include only clearly defined violations of international law,[6] many questions about the nature of the ATS remained unsettled.[7] Last Term, in *Kiobel v. Royal Dutch Petroleum Co.*,[8] the Supreme Court again examined the ATS and invoked the presumption against extraterritoriality to limit the ATS's extraterritorial effect.[9] The majority in *Kiobel* articulated a justification for the presumption against extraterritoriality that differs from recent cases and focuses primarily on prudential foreign policy considerations rather than traditional concerns like respect for international comity. The *Kiobel* Court's focus on freestanding foreign policy concerns may blur the line between the presumption against extraterritoriality and other doctrines that account for such concerns, and it provides insufficient guidance to lower courts.

In the early 1990s, residents of Ogoniland — an oil-rich region in Nigeria — began protesting the actions of the Europe-based Royal

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[1] 630 F.2d 876 (2d Cir. 1980).

[2] *Id.* at 887.

[3] Ch. 20, 1 Stat. 73.

[4] *See generally* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (characterizing the ATS as a principal tool of practitioners of "transnational public law litigation"). For examples of cases where plaintiffs used the ATS to challenge human rights abuses abroad, see *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

[5] 542 U.S. 692 (2004).

[6] *Id.* at 713–15.

[7] *Compare, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009) (explaining that ATS plaintiffs must establish that defendants acted with the *purpose* of facilitating international law violations), *with, e.g.*, Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011) (noting that ATS plaintiffs must establish that defendants acted with the *knowledge* that they were facilitating international law violations).

[8] 133 S. Ct. 1659 (2013).

[9] *Id.* at 1669.

Dutch Petroleum Company's local subsidiary.[10] The protestors alleged that Royal Dutch's oil extraction practices caused harmful environmental effects.[11] In response to the protests, Nigeria's military government engaged in a violent campaign against the Ogoni people, "beating, raping, killing, and arresting residents and destroying or looting property."[12] Royal Dutch allegedly facilitated the Nigerian government's campaign by providing logistical and monetary support.[13]

Following the atrocities, a group of Ogoni moved to the United States and brought suit in the U.S. District Court for the Southern District of New York against Royal Dutch Petroleum for its alleged support of the Nigerian government's anti-Ogoni campaign.[14] The plaintiffs alleged international law violations, including extrajudicial killings and crimes against humanity, and asserted federal jurisdiction under the ATS.[15] The district court dismissed some claims and certified its decision for interlocutory appeal.[16]

The Second Circuit affirmed in part and reversed in part to dismiss the plaintiffs' remaining claims.[17] Writing for a divided panel,[18] Judge Cabranes held that the plaintiffs' claims were untenable because the ATS does not apply to corporate defendants.[19] Subsequently, the Supreme Court accepted certiorari to consider corporate liability under the ATS.[20] In March 2012, after oral arguments, the Court requested new briefs on "[w]hether . . . the [ATS] 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."[21] The case was reargued in October 2012.

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[10] *Id.* at 1662.

[11] *Id.*

[12] *Id.* The campaign culminated in the internationally condemned trial and execution of nine Ogoni leaders. *See* Howard W. French, *Nigeria Executes Critic of Regime; Nations Protest*, N.Y. TIMES, Nov. 11, 1995, at 1.

[13] *Kiobel*, 133 S. Ct. at 1662–63.

[14] *Id.*; *see* Kiobel v. Royal Dutch Petrol. Co., 456 F. Supp. 2d 457, 459–60 (S.D.N.Y. 2006).

[15] *Kiobel*, 456 F. Supp. 2d at 462–67.

[16] *Id.*

[17] Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 149 (2d Cir. 2010).

[18] Judge Cabranes was joined by Chief Judge Jacobs. Judge Leval, concurring only in the judgment, vociferously critiqued the majority's analysis of corporate liability. *Id.* at 150 (Leval, J., concurring only in the judgment) ("By protecting profits earned through abuse of fundamental human rights protected by international law, the rule my colleagues have created operates in opposition to the objective of international law to protect those rights.").

[19] *Id.* at 149 (majority opinion). The questions certified by the district court did not involve corporate liability or extraterritoriality. Judge Cabranes's ruling on corporate liability was sua sponte. *See Kiobel*, 456 F. Supp. 2d 457. The Second Circuit denied rehearing en banc by a vote of five to five. Kiobel v. Royal Dutch Petrol. Co., 642 F.3d 379 (2d Cir. 2011) (mem.).

[20] *Kiobel*, 133 S. Ct. at 1663.

[21] Kiobel v. Royal Dutch Petrol. Co., 132 S. Ct. 1738 (2012) (mem.) (citation omitted) (internal quotation marks omitted).

The Supreme Court affirmed the dismissal.[22] Writing for a majority of five, Chief Justice Roberts[23] held that the principles underlying the presumption against extraterritoriality apply to the ATS, and found that the facts of the petitioners' case did not displace the presumption.[24] Chief Justice Roberts began by explaining that the ATS provides a "grant of jurisdiction" for a "modest number of international law violations."[25] The question was whether a claim under this grant "may reach conduct occurring in the territory of a foreign sovereign."[26] As Chief Justice Roberts explained, in determining whether statutes apply extraterritorially, there is a presumption that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[27] This presumption, the Chief Justice noted, prevents "unwarranted judicial interference in the conduct of foreign policy."[28]

Chief Justice Roberts concluded that the ATS falls within the ambit of the presumption against extraterritoriality.[29] The Chief Justice conceded that the presumption has traditionally been applied only to substantive statutes and that the ATS is a jurisdictional statute that does not regulate substantive conduct. But according to the Chief Justice, use of the presumption is appropriate because the judicial interference concerns that justify applying the presumption to substantive law are at least as pressing in the ATS context.[30] Chief Justice Roberts explained that *Sosa*'s holding, which limited ATS claims to clearly defined violations of international law, does not alleviate judicial interference concerns because *Sosa* does not police other elements of a cause of action.[31]

Chief Justice Roberts next explained that the structure and history of the ATS do not rebut the presumption against extraterritoriality.[32] The Chief Justice noted that the ATS's references to international law and to "any" tort under the law of nations are insufficient to rebut the presumption.[33] He found insufficient historical evidence that the ATS

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[22] *Kiobel*, 133 S. Ct. at 1669.

[23] Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito.

[24] *Kiobel*, 133 S. Ct. at 1669.

[25] *Id.* at 1663 (second quotation quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)) (internal quotation mark omitted).

[26] *Id.* at 1664.

[27] *Id.* (alteration in original) (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010)) (internal quotation marks omitted).

[28] *Id.*

[29] *See id.* at 1663–65.

[30] *Id.* at 1664.

[31] *Id.* at 1665. In addition to the substantive norm, a cause of action may include rules of exhaustion, statutes of limitation, and rules on what kinds of parties (for example, natural persons or corporations) may be held liable. *See id.*

[32] *Id.*

[33] *Id.* The petitioners had also argued that the ATS presupposes jurisdiction over "transitory torts" occurring abroad. *Id.* The Chief Justice rejected this argument because transitory torts

had been applied to foreign conduct,[34] noting that *Sosa*'s "paradigmatic" norms actionable under the ATS — violation of safe conducts, infringement of the rights of ambassadors, and piracy — need not reach conduct occurring within a foreign sovereign's territory.[35]

After holding that the presumption against extraterritoriality applies to the ATS, Chief Justice Roberts acknowledged that the presumption could be "displace[d]" if "the claims touch and concern the territory of the United States . . . with sufficient force."[36] The Chief Justice noted that "mere corporate presence" in the United States is insufficient to cause displacement, but did not explain what facts would be sufficient to displace the presumption.[37]

Justice Kennedy concurred. Justice Kennedy noted that "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]."[38] According to Justice Kennedy, some cases involving international law violations might arise that would not be covered "by [*Kiobel*'s] reasoning and holding."[39] Thus, "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."[40]

Justice Alito, joined by Justice Thomas, authored a concurring opinion outlining a broader standard for when an ATS cause of action falls within the presumption's scope and is barred. According to Justice Alito, a cause of action falls outside the scope of the presumption when the event or relationship that was the "'focus' of congressional

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doctrine only permits a cause of action when there is "a well founded belief" that the cause of action was viable where the alleged tort took place. *Id.* at 1666 (quoting Cuba R.R. Co. v. Crosby, 222 U.S. 473, 479 (1912)).

[34] The petitioners had pointed to a 1795 opinion by Attorney General William Bradford indicating that the ATS granted jurisdiction over a group of U.S. citizens who had participated in an attack on the British colony of Sierra Leone, *id.* at 1667–68, and historical evidence indicated that Bradford knew the alleged attack took place on land, *see* Supplemental Brief of *Amici Curiae* Professors of Legal History William R. Casto et al. in Support of the Petitioners at 21–25, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). Chief Justice Roberts explained, however, that this historical evidence "defies a definitive reading and . . . hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1668.

[35] *Kiobel*, 133 S. Ct. at 1666–69.

[36] *Id.* at 1669.

[37] *Id.* Some international law scholars have suggested that the final paragraph of Chief Justice Roberts's opinion leaves room for future ATS cases in which the plaintiff or the defendant is a U.S. citizen or where a portion of the alleged tortious conduct occurs on U.S. territory. *See, e.g.*, Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/?p=162617. Others have expressed skepticism that this paragraph permits cases where the alleged conduct occurred outside the United States. *See, e.g.*, Anton Metlitsky, *Commentary: What's Left of the Alien Tort Statute?*, SCOTUSBLOG (Apr. 18, 2013, 10:06 AM), http://www.scotusblog.com/?p=162581.

[38] *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

[39] *Id.*

[40] *Id.*

concern" under the statute occurs inside the United States.[41] Thus, in Justice Alito's view, an ATS case would be viable only when conduct occurring inside the United States violated an international law norm actionable under *Sosa*.[42]

Justice Breyer concurred in the judgment.[43] Justice Breyer criticized the majority's application of the presumption against extraterritoriality because the ATS was "enacted with 'foreign matters' in mind," and at least one of *Sosa*'s paradigmatic ATS norms — piracy — is extraterritorial.[44] Justice Breyer argued that the Court should have limited the ATS by looking at the statute's "substantive grasp" as defined in *Sosa* and at jurisdictional norms in international law.[45] Using these principles, Justice Breyer explained that the ATS ought to provide jurisdiction "only where distinct American interests are at issue."[46] Thus, the ATS should apply extraterritorially when "(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, [including] a distinct interest in preventing the United States from becoming a safe harbor for . . . [an] enemy of mankind."[47]

The Supreme Court's use of the presumption against extraterritoriality in *Kiobel* was inconsistent with recent extraterritoriality jurisprudence. The presumption against extraterritoriality has traditionally been based largely on an assumption that Congress would not want to cause international discord by applying U.S. law in ways that would create conflict with foreign laws. In justifying its application of the presumption, however, the *Kiobel* Court emphasized foreign policy consequences without an explicit connection to conflicts of law. Though *Kiobel*'s logic could be unique to the ATS context, lower courts applying the presumption against extraterritoriality to other statutes may interpret *Kiobel* to require a fact-based analysis of policy concerns, rather than a primarily legal analysis of potential clashes with foreign law. The result may be an increasingly muddled, less administrable extraterritoriality doctrine.

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[41] *Id.* at 1670 (Alito, J., concurring) (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 (2010)) (internal quotation mark omitted).

[42] *Id.*

[43] Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

[44] *See Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring in the judgment).

[45] *Id.* at 1673.

[46] *Id.* at 1674.

[47] *Id.*

Though the Supreme Court's extraterritoriality jurisprudence has been inconsistent,[48] two themes are prominent. First, the presumption against extraterritoriality is a canon of statutory interpretation through which "unexpressed congressional intent may be ascertained."[49] More recently, in *Morrison v. National Australia Bank Ltd.*[50] — the Court's most recent pre-*Kiobel* case to extensively discuss the presumption — the Court made clear that the canon does not "resolv[e] matters of policy"[51] and that it is intended to preserve "a stable background against which Congress can legislate with predictable effects."[52] Though the presumption has evolved from a focus on effects inside the United States to more of a clear statement rule,[53] the goal has always been to effectuate Congress's likely intent.[54]

Second, the presumption reflects a belief that Congress would want to promote comity and avoid clashes between U.S. and foreign law.[55] As Justice Holmes explained in *American Banana Co. v. United Fruit Co.*,[56] an early examination of extraterritoriality, "if [a foreign jurisdiction] should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would [that] be unjust, but [it] would be an interference with the authority of another sovereign, contrary to the comity of nations."[57] The Court reemphasized this rationale beginning in the early 1990s, when it explained in *EEOC v. Arabian American Oil Co.* (*Aramco*)[58] that the

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48 *See* George T. Conway III, *Extraterritoriality's Watchdog after* Morrison v. National Australia Bank, 105 AM. SOC'Y INT'L L. PROC. 394, 395 (2011) (discussing "the Court's . . . inconsistent approach to the presumption [against extraterritoriality]").

49 Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); *see also* Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 N.Y.U. ANN. SURV. AM. L. 137, 148–49 (2011) ("The presumption against extraterritoriality is a stand-alone tool of statutory interpretation, designed by courts to create a stable rule against which congressional intent may be evaluated without inquiring into legislative jurisdiction.").

50 130 S. Ct. 2869 (2010).

51 *Id.* at 2880.

52 *Id.* at 2881; *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 277 (1994) (analogizing courts' approach to canons of construction, such as the presumption against extraterritoriality, to "driving a car on the right-hand side of the road" in that both provide a clear background rule).

53 *Compare* United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945) (applying the Sherman Act to extraterritorial conduct because of the effects such conduct could have in the United States), *with Morrison*, 130 S. Ct. at 2881 (emphasizing the facial meaning of a statute as critical to determining its extraterritorial effect).

54 The Court in *Kiobel* did not deviate from this theme. *See Kiobel*, 133 S. Ct. at 1664.

55 *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798–99 (1993) (explaining that in determining the extraterritorial reach of a statute, the only relevant question is whether a true conflict of laws exists, and analyzing the structure of the relevant foreign law to check for such a conflict); EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

56 213 U.S. 347 (1909).

57 *Id.* at 356.

58 499 U.S. 244.

presumption was intended "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[59] In that case, the Court declined to give extraterritorial effect to Title VII of the Civil Rights Act in part because doing so would "raise difficult issues of international law."[60] The Court in *Morrison* cited the *Aramco* formulation approvingly and explicitly denied that the presumption resolves "matters of policy."[61] Though a few mid-twentieth-century cases suggest that foreign policy concerns factor into the extraterritoriality analysis,[62] the Court's recent jurisprudence has largely rejected those cases,[63] and scholars have expressed skepticism that foreign policy concerns are relevant to extraterritoriality.[64]

The *Kiobel* Court's justifications for its use of the presumption differed from those offered in recent extraterritoriality cases. Though the

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[59] *Id.* at 248; *see also* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 352 (2010) ("For most of U.S. history, the Supreme Court determined the reach of federal statutes in the light of international law — specifically, the international law of legislative jurisdiction. In effect, it applied a presumption against extrajurisdictionality: that is, a presumption that federal law does not extend beyond the jurisdictional limits set by international law." (emphasis omitted) (footnote omitted)).

[60] *Aramco*, 499 U.S. at 255. Similarly, in *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007), the Court concluded that section 271(f) of the Patent Act did not have extraterritorial effect because foreign law "may embody different policy judgments about the relative rights of inventors, competitors, and the public." *Id.* at 455 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 28, *Microsoft*, 550 U.S. 437 (No. 05-1056)) (internal quotation mark omitted).

[61] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2880 (2010); *see id.* at 2880–81, 2883. Rather than focusing on potential policy effects, the *Morrison* Court expressed concern that extraterritorial application of part of the Securities Exchange Act would create "incompatibility with the applicable laws of other countries." *Id.* at 2885.

[62] *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19 (1963); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).

[63] *Compare Aramco*, 499 U.S. at 248 (citing *McCulloch* for the proposition that the presumption protects against unintended clashes of law), *with id.* at 265 (Marshall, J., dissenting) (criticizing the majority for ignoring *McCulloch*'s foreign policy analysis).

[64] When articulating the underlying purposes of the presumption against extraterritoriality, scholars frequently have emphasized the primacy of the potential for clashes of international law. For example, Professor Curtis Bradley identified five justifications for the presumption against extraterritoriality: (1) an unwillingness to "ascribe to [Congress] a policy which would raise difficult issues of international law," Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 514 (1997), (2) protecting against discord that would result from "unintended clashes between our laws and those of other nations," *id.* at 515, (3) consistency with choice of law principles, *id.*, (4) assisting courts in "implementing likely congressional intent," *id.* at 516, and (5) separation of powers concerns, *id.* The first three of these five justifications plainly relate to concerns over conflicts of law. Freestanding foreign policy consequences are not mentioned as a possible justification. It is possible that the separation of powers justification for the presumption could encompass foreign policy concerns (the idea being that sensitive foreign policy issues, such as those implicated by extraterritorial application of a statute, should not be left with the judiciary, *see* Bradley, *supra*, at 550–61). However, the separation of powers justification for the presumption against extraterritoriality has never been discussed by courts and has been criticized for furthering "highly questionable assumption[s] about congressional intent." William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 120 (1998).

Court began, as it did in *Morrison* and *Aramco*, by emphasizing the need to guard against "unintended clashes" of U.S. and foreign law,[65] the Court suggested that "[t]he presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[66] Note the shift from *Morrison* to *Kiobel*. Where *Morrison* expressed concern over possible international discord resulting from the statute's "incompatibility with the applicable laws of other countries,"[67] *Kiobel* focused on "foreign policy consequences"[68] without any reference to actual legal conflicts.[69]

The Court first invoked the possibility of foreign policy consequences when justifying application of the presumption to the ATS as a wholly jurisdictional statute. The Supreme Court has never applied the presumption against extraterritoriality to a jurisdictional statute, and some lower courts have declined to invoke it in such circumstances because the presumption does not govern "statutes that, by their nature, implicate the legitimate interests of the United States abroad,"[70] and because "[w]hen Congress is considering the scope of federal jurisdiction, its attention is focused precisely on how far U.S. law should reach."[71] Yet after conceding that the ATS is "strictly jurisdictional,"[72] the Court invoked the presumption, explaining that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS."[73] It is possible that extraterritorial application of the ATS could have foreign policy consequences,[74]

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[65] *Kiobel*, 133 S. Ct. at 1664 (quoting *Aramco*, 499 U.S. at 248).

[66] *Id.*

[67] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2885 (2010).

[68] *Kiobel*, 133 S. Ct. at 1664.

[69] Admittedly, the Court in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), noted that the presumption "has special force when . . . construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Id.* at 188. This proposition does have weight. However, the *Kiobel* Court did not discuss it, and most of the cases in which it has been mentioned involved urgent foreign-affairs concerns relating to national security, none of which were present in *Kiobel*. *See id.* at 158, 188 (examining the extraterritorial application of a provision of the Immigration and Naturalization Act to prevent forced repatriation of Haitian refugees); Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 45 (D.D.C. 2006) (examining the extraterritorial application of U.S. law to Guantanamo detainees), *aff'd in part, rev'd in part sub nom.* Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009).

[70] United States v. Corey, 232 F.3d 1166, 1170 (9th Cir. 2000).

[71] *Id.* at 1171.

[72] *Kiobel*, 133 S. Ct. at 1664 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)) (internal quotation marks omitted).

[73] *Id.*

[74] *See* John B. Bellinger III, Speech, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 2, 8–10 (2009) (explaining that "many recent ATS suits have tended to implicate important aspects of U.S. foreign policy," *id.* at 2, and asserting that ATS litigation imposes "diplomatic" and "democratic" costs, *id.* at 8 (internal quotation marks omitted)). *But see* Robert Knowles, *A Realist Defense of the Alien*

and whether the ATS violates non-U.S. law is a contentious question,[75] but the Court's explanation did not discuss potential clashes of laws. The focus was instead on "judicial interference" in foreign policy. Thus, the *Kiobel* majority's reframing of the policy concerns undergirding the presumption — from negative consequences arising from a clash of laws to freestanding foreign policy consequences — helped it avoid the complex and disputed issue of the ATS's legality under non-U.S. law.

The majority invoked the new justification again when refuting arguments that the ATS rebuts the presumption against extraterritoriality. In response to the petitioners' historical claim that the ATS was intended to permit the application of international law to "enemies of all mankind,"[76] thereby reducing diplomatic tensions, the majority noted that "accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world" and that "[t]he presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences."[77] Although a foreign court's asserting jurisdiction over a U.S. citizen might trigger a clash of laws, a conflict is not certain, and the Court did not consider whether one existed. Instead, potential foreign policy consequences themselves justified rejection of the plaintiffs' argument and use of the presumption.

It is possible that lower courts will not extend the *Kiobel* Court's approach to extraterritoriality outside the ATS context because of unique concerns associated with international human rights litigation. But read literally, *Kiobel*'s emphasis on freestanding foreign policy consequences blurs the distinction between the presumption against extraterritoriality and the doctrines courts have traditionally used to address foreign policy concerns. Courts have previously invoked the political question doctrine to dismiss cases implicating foreign affairs issues,[78]

Tort Statute, 88 WASH. U. L. REV. 1117, 1122–23 (2011) (arguing that ATS litigation is advantageous to U.S. foreign policy interests from a realist perspective).

[75] It has been argued that the application of U.S. legal standards for issues such as secondary liability and corporate liability to claims brought under the ATS contravenes international legal standards. *See* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 377–89 (2011). Whether U.S. law or international law standards should govern issues like corporate liability is disputed. *Compare* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011) (using U.S. standards), *with* Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 145 (2d Cir. 2010) (using international standards).

[76] Petitioners' Supplemental Opening Brief at 27, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) (internal quotation marks omitted).

[77] *Kiobel*, 133 S. Ct. at 1669.

[78] *See, e.g.*, Bancoult v. McNamara, 445 F.3d 427, 430, 433–38 (D.C. Cir. 2006) (barring a claim that implicated "topics that serve as the quintessential sources of political questions: nation-

including ATS claims.[79] Courts may decline cases on forum non conveniens grounds when issues of public interest favor dismissal,[80] and other doctrines, such as sovereign immunity and act of state, "cabin judicial involvement in the management of foreign affairs."[81] *Sosa*'s demand that courts exercise "vigilant doorkeeping" when recognizing norms actionable under the ATS[82] was explicitly motivated by an understanding that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences."[83] The relationship between each of these doctrines and the presumption against extraterritoriality as applied in *Kiobel* is unclear.

If lower courts do read *Kiobel* to modify the presumption against extraterritoriality, the shift will make it significantly more difficult to predict statutes' extraterritorial reach. Prior to *Kiobel*, the likelihood of whether the presumption against extraterritoriality applied, and whether it was rebutted, could be assessed with the usual tools of statutory interpretation; extraterritoriality after *Kiobel* may depend in part on prudential foreign policy concerns, which are by nature indefinite and constantly in flux. For example, would a statute become less likely to reach extraterritorial conduct if the underlying conduct became a source of international controversy? Such questions can be answered only through rigorous fact-based inquiry. This is the irony of *Kiobel*. In applying a canon of interpretation ostensibly designed to provide Congress with a "stable background" against which to legislate,[84] the *Kiobel* court may have changed the canon in a way that will make it more difficult for Congress to reliably predict the extraterritorial effects of future statutes.

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al security and foreign relations," *id.* at 433); *see also Developments in the Law — Access to Courts*, 122 HARV. L. REV. 1151, 1196–201 (2009).

[79] *See* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) (finding that the political question doctrine barred a claim brought against a bulldozer manufacturer who sold bulldozers to Israel because "preclud[ing] sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government"); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

[80] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). Though the Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, did not conceive of factors of public interest as encompassing foreign policy concerns, subsequent courts have brought foreign affairs concerns within the ambit of *Gilbert*'s public interest prong. *See* Turedi v. Coca Cola Co., 460 F. Supp. 2d 507, 519 (S.D.N.Y. 2006).

[81] Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 471 (2007). These doctrines have been applied in the context of the ATS. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989); *Corrie*, 403 F. Supp. 2d at 1032.

[82] *Sosa*, 542 U.S. at 729.

[83] *Id.* at 727–28.

[84] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881 (2010).