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FOREIGN RELATIONS LAW — ALIEN TORT STATUTE — FOURTH  
CIRCUIT ALLOWS ALIEN TORT STATUTE CLAIM AGAINST ABU  
GHRAIB CONTRACTOR. — *Al Shimari v. CACI Premier Technology,  
Inc.*, 758 F.3d 516 (4th Cir. 2014).

The Alien Tort Statute<sup>1</sup> (ATS), enacted as part of the Judiciary Act of 1789,<sup>2</sup> gives the federal courts original 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.”<sup>3</sup> The Supreme Court circumscribed this broad language in 2004, limiting the statute’s applicability to a very narrow range of international law violations.<sup>4</sup> The Court’s 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>5</sup> further constricted the ATS: the *Kiobel* Court held that the presumption against extraterritorial application of statutes bars alien tort claims over conduct that does not “touch and concern the territory of the United States . . . with sufficient force.”<sup>6</sup> Lower courts have generally interpreted *Kiobel* as forbidding all suits based solely on tortious conduct that occurred overseas.<sup>7</sup>

However, this bright-line rule has not been universally accepted. Recently, in *Al Shimari v. CACI Premier Technology, Inc.*,<sup>8</sup> the Fourth Circuit held that a lawsuit by four Iraqi nationals who were imprisoned at Abu Ghraib, and who were allegedly tortured by U.S. military contractors there, satisfied the *Kiobel* “touch and concern” test.<sup>9</sup> Though the Fourth Circuit assumed that the presumption against extraterritoriality applied to occupied Iraq, *Al Shimari* presented a question that no court had previously addressed in the context of the ATS: what effect would the presumption have in territory where there was no sovereign? Because its traditional justifications do not apply in such territories, and because the *Kiobel* Court implied that it would not apply to violations of international law on the high seas, the pre-

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<sup>1</sup> 28 U.S.C. § 1350 (2012).

<sup>2</sup> Ch. 20, 1 Stat. 73.

<sup>3</sup> 28 U.S.C. § 1350.

<sup>4</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004). The Court’s nonexhaustive list of examples of such violations, drawn from customary international laws familiar to the First Congress, included assaults on ambassadors, violation of safe-conduct guarantees, and piracy. See *id.* at 715.

<sup>5</sup> 133 S. Ct. 1659 (2013).

<sup>6</sup> *Id.* at 1669.

<sup>7</sup> See, e.g., *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014); *Balintulo v. Daimler AG*, 727 F.3d 174, 188 (2d Cir. 2013). Though some courts have found jurisdiction where the *primary* tortious conduct occurred abroad, almost all such cases have involved a domestic nexus. See, e.g., *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 321–24 (D. Mass. 2013); *Mwani v. Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013).

<sup>8</sup> 758 F.3d 516 (4th Cir. 2014).

<sup>9</sup> See *id.* at 530–31.

sumption against extraterritoriality should not attach in ATS cases where there is no risk of collision with another sovereign's laws. By adopting this argument, the *Al Shimari* plaintiffs, and others similarly situated, might improve their chances of success before a Supreme Court that has increasingly pursued a formalistic approach to foreign relations law.

Suhail Najim Abdullah Al Shimari, a resident of Baghdad,<sup>10</sup> was sent to the Abu Ghraib prison complex after being arrested by the U.S. military in November 2003.<sup>11</sup> He was held in a unit known as Hard Site Tier 1A, along with other detainees who were suspected of having knowledge about insurgent forces.<sup>12</sup> Because the military lacked enough trained interrogators to fully staff Abu Ghraib, it contracted with a firm called CACI Premier Technology, Inc. (CACI) to conduct interrogations at the Hard Site.<sup>13</sup> Al Shimari alleged that CACI's civilian interrogators ordered U.S. military police to subject him to a wide variety of torture techniques, including extreme heat and cold, sleep deprivation, choking, and electric shocks.<sup>14</sup> Three fellow detainees also claimed to have been subjected to similar types of abuse.<sup>15</sup> All four were later released without being charged with any crime.<sup>16</sup>

The detainees filed suit against CACI in 2008, invoking jurisdiction under the ATS and charging the company with torture, war crimes, and inhumane treatment under international law.<sup>17</sup> The U.S. District Court for the Eastern District of Virginia dismissed the ATS claims,<sup>18</sup> but reinstated them after CACI's interlocutory appeal on other grounds was dismissed for lack of appellate jurisdiction.<sup>19</sup> Discovery in the case was interrupted when the Supreme Court handed down *Kiobel*.<sup>20</sup> CACI moved to dismiss the ATS claims a second time, and the court granted the motion, holding that it "lack[ed] ATS jurisdic-

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<sup>10</sup> Third Amended Complaint at 2, *Al Shimari v. CACI Int'l, Inc.*, 951 F. Supp. 2d 857 (E.D. Va. 2013) (No. 08-cv-0827), <http://ccrjustice.org/files/Al%20Shimari%20TAC%20redacted.pdf> [<http://perma.cc/RNF4-V99U>] [hereinafter Complaint].

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Al Shimari*, 758 F.3d at 521.

<sup>13</sup> *Id.* CACI is a Delaware corporation headquartered in Virginia. *Id.*

<sup>14</sup> Complaint, *supra* note 10, at 9.

<sup>15</sup> *See id.* at 9–12.

<sup>16</sup> *Id.* at 9, 11, 12.

<sup>17</sup> *Al Shimari*, 758 F.3d at 522. A former CACI employee and another government contractor were joined as defendants. *Id.* The suit was first filed in the Southern District of Ohio, then transferred to the Eastern District of Virginia, where CACI is headquartered. *Id.* at 522–23.

<sup>18</sup> *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 728 (E.D. Va. 2009). The court held that the practice of hiring private military contractors was too novel to fall within the narrow scope of the ATS: the statute was limited to causes of action analogous to those familiar to the First Congress. *Id.* at 726–28; *see also supra* note 4.

<sup>19</sup> *Al Shimari*, 758 F.3d at 523–24.

<sup>20</sup> *Id.* at 524.

tion . . . because the acts giving rise to [plaintiffs'] tort claims occurred exclusively in Iraq, a foreign sovereign."<sup>21</sup>

The Fourth Circuit vacated and remanded. Writing for a unanimous panel, Judge Keenan<sup>22</sup> characterized *Kiobel's* "touch and concern" language as mandating a "fact-based analysis" of the relationship between the plaintiffs' claims and U.S. territory.<sup>23</sup> She rejected the argument that *Kiobel* barred all ATS suits in which the alleged torts occurred abroad, pointing out that because Justice Alito advanced this proposition in his *Kiobel* concurrence, it must not have been accepted by the majority.<sup>24</sup> Judge Keenan also drew attention to the specific language the *Kiobel* Court used in articulating the "touch and concern" test.<sup>25</sup> The Court in *Kiobel* required that ATS plaintiffs' "claims" touch and concern the United States;<sup>26</sup> Judge Keenan argued that a "claim[]" covered all the facts relevant to the lawsuit, "including the parties' identities and their relationship to the causes of action," not just the particular acts that may have violated international law.<sup>27</sup>

With this framework established, Judge Keenan explained that the claim in *Al Shimari* was more strongly connected to the United States than was the claim in *Kiobel*. In *Al Shimari*, as in *Kiobel*, the alleged wrongs all occurred outside U.S. borders, but in *Al Shimari*, unlike in *Kiobel*, the defendant was both incorporated and headquartered in the United States.<sup>28</sup> Furthermore, the alleged torturers in *Al Shimari* were U.S. citizens with de facto command authority over U.S. military units, were hired by CACI under a contract with the U.S. federal government, and were (according to the complaint) encouraged in their use of torture by CACI's officers in Virginia.<sup>29</sup> *Kiobel*, by contrast, involved allegations of war crimes by the Nigerian army, aided and abetted by the defendant, a British and Dutch corporation whose only connection to the United States was a public relations office in New York and a listing on the New York Stock Exchange.<sup>30</sup> After reciting these facts, Judge Keenan concluded that *Al Shimari's* claims' "substantial ties to United States territory"<sup>31</sup> overcame the presumption

<sup>21</sup> *Al Shimari v. CACI Int'l, Inc.*, 951 F. Supp. 2d 857, 858 (E.D. Va. 2013).

<sup>22</sup> Judge Keenan was joined by Judge Floyd and District Judge Cogburn, sitting by designation.

<sup>23</sup> *Al Shimari*, 758 F.3d at 527.

<sup>24</sup> *Id.*; see also *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring).

<sup>25</sup> See *Al Shimari*, 758 F.3d at 527.

<sup>26</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>27</sup> *Al Shimari*, 758 F.3d at 527.

<sup>28</sup> *Id.* at 528.

<sup>29</sup> *Id.* at 528–29.

<sup>30</sup> *Kiobel*, 133 S. Ct. at 1662–63; *Al Shimari*, 758 F.3d at 528.

<sup>31</sup> *Al Shimari*, 758 F.3d at 529.

against extraterritoriality, enabling the district court to exercise subject matter jurisdiction.<sup>32</sup>

Judge Keenan then turned to the defendants' second argument against jurisdiction: because *Al Shimari* threatened to impose liability for military decisions made in the theater of war, the case presented a nonjusticiable political question.<sup>33</sup> The Fourth Circuit had already identified the two scenarios in which the political question doctrine would shield private military contractors.<sup>34</sup> The first was where the "contractor was under the 'plenary' or 'direct' control of the military"<sup>35</sup> and the second was where hearing the case "would require the judiciary to question actual, sensitive judgments made by the military."<sup>36</sup> Judge Keenan determined that the factual record was insufficiently developed for the Fourth Circuit to pass on either test; the panel remanded the case to the district court for further discovery on the political question issue.<sup>37</sup>

One of the primary justifications for the presumption against extraterritoriality is that it prevents conflict between U.S. law and the laws of other countries.<sup>38</sup> This notion raises the question: does it make sense for the presumption to apply to a case arising in territory where there is no foreign sovereign and no municipal law? No court has yet addressed this question in an ATS suit, but *Al Shimari* involved the necessary combination of facts: an alleged violation of the law of nations occurring in a territory that lacked a formal sovereign due to military occupation. In such a case, where a key rationale for the presumption is absent, courts should not apply it and should accept subject matter jurisdiction when a recognized violation of international law has been pled. ATS litigants should consider emphasizing this approach alongside arguments based on the more subjective "touch and concern" paradigm, because the former employs the type of bright-line rule that appeals to the Supreme Court in the foreign relations context.

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<sup>32</sup> *Id.* at 529–31.

<sup>33</sup> *See id.* at 531.

<sup>34</sup> *Id.* at 533–34; *see also* *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011).

<sup>35</sup> *Al Shimari*, 758 F.3d at 533 (quoting *Taylor*, 658 F.3d at 411). Plenary control existed if the military gave the contractor specific instructions or procedures for performing its duties, but not if the contract "merely provides . . . general guidelines that can be satisfied at the contractor's discretion." *Id.* at 535 (quoting *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 467 (3d Cir. 2013)) (internal quotation marks omitted).

<sup>36</sup> *Id.* at 533–34 (quoting *Taylor*, 658 F.3d at 411 (internal quotation marks omitted)) (internal quotation marks omitted). This factor examined the merits defenses the contractor might employ — if they would assign blame to the armed forces, political questions could be implicated. *See id.* at 535.

<sup>37</sup> *See id.* at 537.

<sup>38</sup> *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

Normally, once the Court has applied the presumption to a statute, that statute can no longer have extraterritorial effect.<sup>39</sup> But the *Kiobel* Court did not follow this principle — the “touch and concern” language in the opinion’s final paragraph contemplated case-by-case analysis,<sup>40</sup> and the Court explicitly identified one valid extraterritorial ATS claim: piracy.<sup>41</sup> Because piracy, which by definition occurs outside the United States, was a recognized violation of international law in 1789, the *Kiobel* petitioners had argued that Congress must have intended the ATS (as a whole) to apply extraterritorially.<sup>42</sup> Not so, the Chief Justice wrote: “Applying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of *another sovereign*.”<sup>43</sup> In other words, the Court agreed that a valid ATS cause of action *can* reach conduct occurring abroad where there is no risk of offending another sovereign’s laws<sup>44</sup> — as is the case in international waters, the paradigmatic example of a territory without a sovereign.<sup>45</sup>

Though occupied Iraq’s status is less clear than that of the high seas, it still falls within the definition of sovereignless territory. Traditionally, in the event of a military occupation or governmental overthrow, sovereignty immediately passed to the new power without any sovereignless interim period.<sup>46</sup> The Supreme Court recently endorsed a less formalistic approach in *Boumediene v. Bush*,<sup>47</sup> by recognizing

<sup>39</sup> See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010).

<sup>40</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). Justice Kennedy, the *Kiobel* majority’s fifth vote, wrote separately to emphasize that in future ATS cases “the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.” *Id.* (Kennedy, J., concurring).

<sup>41</sup> See *id.* at 1667 (majority opinion).

<sup>42</sup> See *id.*

<sup>43</sup> *Id.* (emphasis added). Some might argue that piracy is a sui generis category, which the ATS covers only because the First Congress recognized it as one of the principal concerns of the law of nations. But this strict limitation conflicts with the logic of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which is still good law post-*Kiobel*, see *Kiobel*, 133 S. Ct. at 1663, and which allowed federal courts to recognize international norms that are as specific and universal as the condemnation of piracy was when the ATS was enacted, see *Sosa*, 542 U.S. at 731–32. In particular, *Sosa* endorsed the Second Circuit’s opinion that torturers, as “enem[ies] of all mankind,” are the modern-day equivalent of pirates. See *id.* at 732 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)). Justice Breyer’s *Kiobel* concurrence reiterated that *Sosa*’s key question was: “Who are today’s pirates?” *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).

<sup>44</sup> The *Kiobel* Court’s consistent use of the language of sovereignty, not the language of territory, supports the idea that *Kiobel* was predicated on fear of intersovereign conflicts. See, e.g., *Kiobel*, 133 S. Ct. at 1664 (majority opinion) (framing the question presented as “whether a[n] [ATS] claim may reach conduct occurring in the territory of a *foreign sovereign*” (emphasis added)).

<sup>45</sup> See, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355–56 (1909); see also United Nations Convention on the Law of the Sea art. 89, Dec. 10, 1982, 1833 U.N.T.S. 397, 433.

<sup>46</sup> See *Fleming v. Page*, 50 U.S. (9 How.) 603, 608 (1850); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1936).

<sup>47</sup> 553 U.S. 723 (2008).

the possibility of de facto sovereignty.<sup>48</sup> But applying either rule is more difficult when the occupying power is a multinational coalition. Under the *Boumediene* approach, there are two possible classifications of Iraqi sovereignty during the occupation. The United States might be seen as the de facto sovereign due to its predominant role in the coalition governing Iraq.<sup>49</sup> The alternative, which takes into account the diffusion of authority among coalition partners and the fact that the occupation was always intended to be temporary,<sup>50</sup> is that Iraq had no formal sovereign between 2003 and 2004. International law recognizes the concept of suspended sovereignty, a status most commonly created by foreign military occupation, whereby a country temporarily has no sovereign at all.<sup>51</sup> Thus, under either understanding, there is substantial reason to believe that Iraq's sovereignty was suspended as soon as coalition forces took control of the country.<sup>52</sup>

While the presumption against extraterritoriality is often justified on the basis that it prevents conflict between U.S. and foreign law,<sup>53</sup> there is no risk of conflict when there is no foreign sovereign. Another rationale for the presumption is derived from separation of powers principles: the courts should not interfere with the sensitive foreign policy judgments of the executive branch, because the executive has better information about foreign governments and greater expertise in dealing with them.<sup>54</sup> Though these concerns are still present in a suspended-sovereignty situation, they are substantially diminished since there is a much smaller chance of a court's action having adverse diplomatic effects. For example, when applying the ATS to actions that took place in an area without a functioning government or military of its own, there are no foreign political or military officials to threaten with suit in a U.S. court; when applying the ATS in an area

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<sup>48</sup> See *id.* at 754–55.

<sup>49</sup> In that case, Al Shimari's injuries occurred under U.S. sovereignty, and he could invoke the ATS without any extraterritoriality concerns. See *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (holding the presumption inapplicable where the United States exercises de facto sovereignty).

<sup>50</sup> See Brief of Appellees CACI International Inc. & CACI Premier Technology, Inc. at 30, *Al Shimari*, 758 F.3d 516 (No. 13-1937), [http://ccrjustice.org/files/2013-12-02\\_AlShimari\\_CACIOpeningBrief.pdf](http://ccrjustice.org/files/2013-12-02_AlShimari_CACIOpeningBrief.pdf) [<http://perma.cc/N2ZT-45TU>].

<sup>51</sup> See Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics*, 13 EUR. J. INT'L L. 1037, 1038 (2002) (explaining that "in such situations sovereignty is no longer an applicable legal concept").

<sup>52</sup> See *id.* The American-led Coalition Provisional Authority (CPA) also took affirmative steps to place Iraqi sovereignty in a suspended state by dissolving the national legislature and most of the executive branch. See Coal. Provisional Auth. Order 2, CPA/ORD/2003/02 (May 23, 2003). The CPA, consistent with the claim that Iraq's sovereignty was suspended, characterized itself as wielding full governmental power but on a purely temporary basis. See Coal. Provisional Auth. Regulation 1, CPA/REG/2003/01 (May 16, 2003).

<sup>53</sup> See, e.g., William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 112 (1998).

<sup>54</sup> See *id.* at 113.

without municipal laws, there is little risk that the other party will retaliate by applying its own laws to conduct occurring in the United States; when there is no interaction between two sovereigns, there are no bilateral trade or human rights negotiations for a poorly timed ATS action to damage; and when the foreign territory has no native corporations, there is a reduced likelihood of unforeseeable effects on the world economy.<sup>55</sup> Overall, since a presumption is an assumption that Congress legislates with certain concerns in mind,<sup>56</sup> it makes little sense to apply one when its foundational rationales are barely implicated.<sup>57</sup>

The facts in *Al Shimari* present an uncommon opportunity for parties seeking to maximize the ATS's scope by qualifying *Kiobel*'s sweeping ruling: the Supreme Court might be more accepting of the suspended-sovereignty theory than of arguments applying the "touch and concern" test.<sup>58</sup> After all, whether *Kiobel*'s "touch and concern" language paves the way for a totality-of-the-circumstances test is an open question: the Court may have meant that the tortious *conduct*

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<sup>55</sup> Cf. Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 107–09 (2003) (expressing concern that an overbroad reading of U.S. securities regulations could "catalyze international discord and injury to U.S. markets," *id.* at 109); cf. also *Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2880 (2010) (citing Chang, *supra*). Recognizing sovereignless areas would not raise the concern that a geographically unlimited ATS would transform American courts into a forum for worldwide human rights enforcement, overburdening the federal judiciary and inflating the United States's role in policing the world. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013). The Court has recently heightened personal jurisdiction barriers to suits against foreign companies for actions outside the United States, see *Daimler AG v. Bauman*, 134 S. Ct. 746, 758–63 (2014), which will help keep suits against foreign entities arising in internationally administered states — such as East Timor — out of federal courts.

<sup>56</sup> See James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1205–06 (2010).

<sup>57</sup> In a suspended-sovereignty area administered by a multinational coalition, the ATS may still create diplomatic friction between the United States and one of its coalition partners. But this worry should not defeat the statute's application. First, personal jurisdiction would still operate as a limiting principle, see *supra* note 55, with the added safeguard of forum non conveniens where the defendant's home country has a functioning court system, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). Second, it is unrealistic to set zero probability of international dispute as the prerequisite for ATS application; after all, a suit for piracy might offend the nation(s) of which the pirates are citizens.

<sup>58</sup> The Court has previously declined to extend other federal laws to sovereignless territory, but only when the statutory language evinced a specific congressional intent to limit the statute's reach. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173, 177 (1993) (refusing to extend refugee protections to Haitians seized on the high seas by the Coast Guard because the applicable statute only limits the action of the Attorney General, and mentioning the presumption in dicta); *Smith v. United States*, 507 U.S. 197, 201–03 (1993) (rejecting a Federal Tort Claims Act (FTCA) suit arising from an accident in Antarctica on the grounds that the FTCA explicitly excludes torts occurring in a foreign country, and citing the presumption only to clear up "any lingering doubt," *id.* at 203). The presumption has not been invoked on its own to block invocation of a federal law in the absence of any conflicting law.

must occur in the United States.<sup>59</sup> The suspended-sovereignty theory would also be easier to formulate as the sort of bright-line test the Roberts Court prefers to use in the foreign policy arena.<sup>60</sup> As a bright-line rule, the suspended-sovereignty theory could be more predictable in application and easier for courts to administer than the “touch and concern” test. It would also diminish worries about judicial disruption of foreign policy planning, since the executive could anticipate the situations in which courts will intervene.

Using *Al Shimari* to establish a suspended-sovereignty exception to *Kiobel* would also set a valuable precedent: contractors and other private corporations involved in military occupation and reconstruction would be liable for harm they cause. This precedent would likely apply only to a violation of the law of nations, committed on the high seas or in a country with suspended sovereignty, by a non-state actor<sup>61</sup> subject to personal jurisdiction in the United States — facts like *Al Shimari*’s. Recognizing this exception would fill a gap in the law that leaves many contractors free from civil liability.<sup>62</sup> Further, the United States arguably has a duty to exercise greater control over for-profit corporations it employs to serve our national interests. Eliminating these “legal black holes where no law applies at all”<sup>63</sup> would thus serve the interests of justice while continuing to respect the purposes of the presumption against extraterritoriality.

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<sup>59</sup> The Court implied that the requirement that a claim “touch and concern the territory of the United States” excludes a situation where “all the relevant conduct took place outside the United States.” *Kiobel*, 133 S. Ct. at 1669. Justices Alito and Thomas explicitly advocated this position. *See id.* at 1670 (Alito, J., joined by Thomas, J., concurring).

<sup>60</sup> *See* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. (forthcoming 2015) (manuscript at 6), <http://ssrn.com/abstract=2412103> [<http://perma.cc/Z3T3-453W>]. All that would be needed to create a bright-line rule would be a definition of suspended sovereignty: for example, it could be defined as any case where a state’s previous government has been dissolved and the state’s territory is under temporary administration by a multinational entity.

<sup>61</sup> *See* 28 U.S.C. § 1604 (2012) (establishing immunity for foreign states, with some exceptions).

<sup>62</sup> Contractors who commit torture are not covered by the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), because they do not act under authority of a foreign nation. *See id.* § 2(a), 106 Stat. at 73. If they commit common law torts, they are likely to be protected by choice-of-law rules that apply the law of the place where the injury occurred. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); *see also* *Al Shimari v. CACI Int’l, Inc.*, 951 F. Supp. 2d 857, 870–74 (E.D. Va. 2013) (dismissing *Al Shimari*’s common law claims pursuant to what the court identified as “Iraqi law,” namely CPA orders immunizing U.S. personnel against civil liability, *id.* at 871). Congress has already recognized the need for accountability by applying the federal criminal code to *individual* contractors acting outside the United States. *See* 18 U.S.C. § 3261 (2012).

<sup>63</sup> John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 381 (2010).