

CASENOTE

***KIOBEL V. ROYAL DUTCH PETROLEUM CO.:* THE ALIEN TORT STATUTE'S PRESUMPTION AGAINST EXTRATERRITORIALITY**

I. INTRODUCTION	172
II. FACTS AND HOLDING	173
III. BACKGROUND	176
A. HISTORY SURROUNDING THE ALIEN TORT STATUTE	177
B. <i>SOSA V. ALVAREZ-MACHAIN</i>	179
C. <i>MORRISON V. NATIONAL AUSTRALIA BANK LTD.</i>	181
IV. THE COURT'S DECISION	182
A. THE MAJORITY OPINION	183
1. THE LANGUAGE OF THE ALIEN TORT STATUTE	183
2. THE HISTORICAL BACKGROUND OF THE ENACTMENT OF THE ALIEN TORT STATUTE	185
a. When the Alien Tort Statute Was Enacted, Three Principal Offenses Against the Law of Nations Were Recognized	185
b. The Historical Events Surrounding the Enactment of the Alien Tort Statute	186
3. THE LEGISLATIVE INTENT OF THE DRAFTERS OF THE ALIEN TORT STATUTE	188
B. THE THREE CONCURRING OPINIONS	189
1. JUSTICE KENNEDY'S CONCURRENCE	190
2. JUSTICE ALITO'S CONCURRENCE	190
3. JUSTICE BREYER'S CONCURRENCE	191
V. ANALYSIS	194
A. THE MAJORITY'S LEEWAY IN INTERPRETING THE ALIEN TORT STATUTE	195
1. THE ELUSIVE LANGUAGE OF THE ALIEN TORT STATUTE	195
2. THE UNCERTAIN INTENT OF THE FIRST CONGRESS	196

3. THE LACK OF INSTRUCTIVE HISTORICAL EVENTS SURROUNDING THE ENACTMENT OF THE ATS.....	197
4. THE SPARSE JURISDICTIONAL PRECEDENT	198
B. THE MAJORITY DECISION AS A REFLECTION OF CURRENT FOREIGN POLICY	198
1. AVOIDING INTERNATIONAL CONSEQUENCES	199
2. THE RECENT ADMINISTRATION’S ATTITUDE TOWARD FOREIGN POLITICS.....	200
C. THE MAJORITY’S FAILURE TO INDICATE WHEN THE PRESUMPTION AGAINST EXTRATERRITORIALITY MIGHT BE OVERCOME	201
1. THE LACK OF EXPLANATION AS TO WHEN THE PRESUMPTION AGAINST EXTRATERRITORIALITY MIGHT BE DISPLACED	201
2. JUSTICE BREYER’S CONCURRENCE AS A MORE DEVELOPED APPROACH TO FINDING EXTRATERRITORIAL APPLICATION IN SOME CIRCUMSTANCES	202
VI. CONCLUSION.....	203

I. INTRODUCTION

The Alien Tort Statute (ATS)¹ provides jurisdiction for United States courts over tort cases brought by aliens who have been injured through violations of the law of nations. On its face, the text of the ATS does not limit that jurisdiction to cases where the defendants’ misconduct occurs in the United States. In *Kiobel v. Royal Dutch Petroleum Co.*, however, the Supreme Court of the United States was confronted with a difficult question: Should a presumption against application of the ATS exist where defendants’ misconduct occurs completely outside of the United States?² The Court ultimately decided the ATS has a presumption against extraterritorial application, and as a result, it would no longer apply to violations of the law of nations and treaties of the United States that occur abroad.

A cause of action for violations of the law of nations occurring within the territory of a foreign sovereign had presumably existed since 1789, when the ATS was included in the

1. 28 U.S.C. § 1350 (2012) (“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.”).

2. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

2014]

Kiobel v. Royal Dutch Petroleum Co.

173

passage of the Judiciary Act.³ As identified by William Blackstone, offenses against the law of nations included violation of safe conducts, infringement of the rights of ambassadors, and piracy.⁴ The Supreme Court's decision in *Kiobel* removed any cause of action arising from these offenses when occurring outside the United States.⁵

To reach its decision, the *Kiobel* majority looked to the text of the ATS, the historical background surrounding its enactment, and the legislative intent of its drafters.⁶ Although the Court ultimately found that the ATS could not be used to seek remedies for violations of the law of nations occurring outside the United States in this instance, it left open the possibility to rebut the presumption against extraterritoriality without identifying how to do so.⁷

Section II of this Note discusses the facts and procedural history that gave rise to the Supreme Court's *Kiobel* decision. Next, Section III addresses the history of the ATS and identifies the precedent that the majority relied on to reach its decision in *Kiobel*. Section IV summarizes the majority and concurring opinions. Finally, Section V dissects the Supreme Court's reasoning behind its decision and critiques the largely ambiguous opinion. Specifically, the analysis in this Section contemplates the potential foreign policy motive behind the majority's decision as compared with its identifiable originalist argument. In addition, this Section evaluates the Court's failure to provide a decision that indicates when the presumption against extraterritoriality might be overcome in future cases.

II. FACTS AND HOLDING

In *Kiobel*, the plaintiffs were twelve residents of Ogoniland, an area in Nigeria that is populated by approximately 500,000 people.⁸ At the time the complaint was filed, the co-defendant,

3. Judiciary Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=199>.

4. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769).

5. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

6. *Id.* at 1665-69.

7. *Id.* at 1669.

8. *Id.* at 1662; Petitioner's Supplemental Opening Brief at 3, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2096960, at *3.

Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), was incorporated in Nigeria and engaged in the oil industry in Ogoniland.⁹ SPDC was the joint subsidiary of co-defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., holding companies incorporated in the Netherlands and England, respectively.¹⁰

The plaintiffs' complaint states that in the early 1990s, residents in Ogoniland "protest[ed] the environmental effects of SPDC's practices."¹¹ In response, the defendants bribed the Nigerian government, under the dictatorship of Sani Abacha,¹² to violently suppress the demonstrations between 1992 and 1995.¹³ The Nigerian military and police forces raided villages in Ogoniland, and residents were beaten, tortured, arbitrarily detained, raped, and executed.¹⁴ Plaintiffs allege that the defendants aided and abetted the atrocities of the Nigerian government by feeding them, providing them with transportation, and compensating them financially for their services.¹⁵ In addition, the plaintiffs alleged the defendants allowed the Nigerian military to use private property owned by the companies in Ogoniland to stage attacks on the local population.¹⁶

The plaintiffs moved to the United States after the brutalities, where they now reside as legal residents having been granted political asylum.¹⁷ In 2002, they filed suit in the United States District Court for the Southern District of New York.¹⁸

9. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013).

10. *Id.*

11. *Id.*

12. Sani Abacha, President of Nigeria from 1993 to 1998, was a dictator and politician whose regime is associated with corruption and violations of human rights. See generally U.S. DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 1999: NIGERIA (2000), available at 2000 WL 33767338; AMNESTY INT'L, NIGERIA: TIME TO END CONTEMPT FOR HUMAN RIGHTS (1996), available at <http://www.amnestyusa.org/research/reports/nigeria-time-to-end-contempt-for-human-rights>.

13. *Kiobel*, 133 S. Ct. at 1662; Petitioner's Supplemental Opening Brief, *supra* note 8, at 4.

14. *Kiobel*, 133 S. Ct. at 1662; Petitioner's Supplemental Opening Brief, *supra* note 8, at 4.

15. *Kiobel*, 133 S. Ct. at 1662-63.

16. *Id.* at 1663.

17. *Id.*; Petitioner's Supplemental Opening Brief, *supra* note 8, at 3.

18. *Kiobel*, 133 S. Ct. at 1663; Petitioner's Supplemental Opening Brief, *supra* note 8, at 3; see *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659

2014]

Kiobel v. Royal Dutch Petroleum Co.

175

The plaintiffs argued that jurisdiction over the defendants was proper under the ATS and requested relief under long-established principles of international law.¹⁹ The plaintiffs claimed that the defendants violated the law of nations by aiding and abetting Nigerian military and police forces in committing: (I) extrajudicial killings; (II) crimes against humanity; (III) torture and cruel treatment; (IV) arbitrary arrest and detention; (V) violations of the rights to life, liberty, and association; (VI) forced exile; and (VII) property destruction.²⁰

The defendants moved to dismiss the complaint on the grounds that the plaintiffs' claims were barred by the act of state doctrine²¹ and international comity;²² additionally, they alleged that the plaintiffs had failed to state claims upon which relief could be granted.²³ The magistrate judge recommended the motion to dismiss be denied in all respects, and the defendants timely objected.²⁴ Plaintiffs then filed an amended complaint, and in response, the defendants filed a motion to strike or to dismiss.²⁵ In this second motion to dismiss, the defendants maintained arguments from their previous motion to dismiss and also argued that the amended complaint failed to state a claim, relying on the recent Supreme Court decision in *Sosa v. Alvarez-Machain*.²⁶ The district court granted the defendants' motion to dismiss on the counts for extrajudicial killings; violations of the rights to life, liberty, and association; forced exile; and property destruction, reasoning that the facts stated in the plaintiffs'

(2013).

19. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013).

20. *Id.*; *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464-67 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

21. "The [act of state] doctrine precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (discussing the act of state doctrine).

22. "[International comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 143 (1895).

23. *Kiobel*, 456 F. Supp. 2d at 459.

24. *Id.*

25. *Id.*

26. *Id.*; see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (assessing which types of offenses may be violations under the ATS).

complaint did not amount to a violation of the law of nations.²⁷ The court denied the motion on the other three counts, finding that crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention were all actionable under the ATS.²⁸ The court also certified the order for interlocutory appeal to the United States Court of Appeals for the Second Circuit.²⁹

The Second Circuit dismissed the entire complaint, stating that corporations have never “been subject to *any* form of liability . . . under the [traditional] international law of human rights.”³⁰ The Second Circuit concluded, therefore, that corporate liability could not “form the basis of a suit under the ATS.”³¹

The Supreme Court granted certiorari to consider this issue of corporate liability under the ATS.³² After oral argument, the Court directed the parties to file additional briefs to address a different issue: “Whether and under what circumstances 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.”³³ After hearing oral argument on this issue, the Supreme Court affirmed the judgment of the Second Circuit.³⁴ The Supreme Court of the United States concluded that there was no cause of action for violations of the law of nations occurring outside of the United States because the language of the ATS does not rebut the presumption against extraterritoriality.³⁵

III. BACKGROUND

Given the lack of clarity in the language of the ATS, a lack of legislative history, and a lack of precedent concerning the ATS, the Supreme Court was faced with a difficult task in interpreting

27. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 468 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

28. *Kiobel*, 456 F. Supp. 2d at 468.

29. *Id.*; see 28 U.S.C. § 1292 (2012).

30. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148-49 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

31. *Id.*

32. *Kiobel*, 133 S. Ct. at 1663.

33. *Id.* (alteration in original); *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.).

34. *Kiobel*, 133 S. Ct. at 1663.

35. *Id.* at 1669.

its jurisdictional scope in *Kiobel*.³⁶ At the time of the case, 224 years had passed since the enactment of the statute.³⁷ The ATS is now only one sentence in length and provides no information on how the first Congress intended for the statute to be applied.³⁸ Furthermore, the ATS was only invoked twice in the eighteenth century and once more over the next one hundred sixty-seven years.³⁹ Given this dearth of legislative history and legal analysis, the Supreme Court was working with a blank canvas when it interpreted the jurisdictional scope of the ATS.

This Section will detail the background of the ATS and identify the precedent that the majority referenced in its *Kiobel* decision. Specifically, Subsection A discusses the history leading to the enactment of the ATS, which the Court relied upon heavily to formulate its decision. Subsection B discusses the sparse precedent interpreting the ATS, and Subsection C discusses the development of the presumption against extraterritoriality, which directed the outcome of the instant case.

A. HISTORY SURROUNDING THE ALIEN TORT STATUTE

At the time the United States became a nation, it was “bound to receive the law of nations, in its modern state of purity and refinement.”⁴⁰ As the Republic developed, the law of nations was comprised of two principal elements.⁴¹ The first element consisted of the recognized customs governing the conduct between nation states.⁴² The second element governed the conduct of individuals that occurred outside of domestic boundaries.⁴³ Despite the dominance of these two principal elements, there was also a smaller set of violations of the law of nations in which these two elements collided.⁴⁴ Blackstone

36. See *infra* Part III(A).

37. See Judiciary Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=199>.

38. See *id.*; 28 U.S.C. § 1350 (2012); *supra* text accompanying note 3.

39. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) (citing *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795); *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908); *Khedival Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960)).

40. *Ware v. Hylton*, 3 U.S. 199, 281 (1796).

41. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-15 (2004).

42. *Id.* at 714.

43. *Id.* at 715.

44. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

referred to these violations as the “three specific offenses,” and they included violations of safe conducts, infringements of the rights of ambassadors, and piracy.⁴⁵ When enacting the statute, the drafters of the ATS were likely mindful of the potential threat these violations posed to the stability of international affairs because there was no judicial remedy available to deter such offenses.⁴⁶

Prior to enacting the ATS, the Continental Congress was constrained by its inability to enforce treaties or the laws of nations and requested that state governments intervene.⁴⁷ However, only one State complied with this request,⁴⁸ as a result, tension grew when the Continental Congress was unable to resolve a diplomatic crisis when the Secretary of the French Legion was assaulted—a crisis for which a law like the ATS would have provided a solution.⁴⁹ The state government denied yet another request from the Continental Congress for such legislation, and the tension continued.⁵⁰

To remedy this gap in the law, the first Congress passed the ATS as part of the Judiciary Act of 1789.⁵¹ This law provided that federal district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the

45. *Id.* (citing 4 BLACKSTONE, *supra* note 4, at 68).

46. *Id.* (“It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.”).

47. *Id.* at 715-16 (quoting JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (Erastus H. Scott ed., 1893) and 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1136-37 (Gaillard Hunt ed., U.S. Government Printing Office 1912) (1781) (calling on state legislatures to “provide expeditious, exemplary and adequate punishment . . . For the violation of safe conducts or passports, . . . of hostility against such as are in amity . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party”).

48. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004) (citing THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FOR THE YEAR 1782, at 82-83 (Leonard Woods Larabee ed., 1982) (1942)).

49. *See id.*; *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. 1784); *see also infra* Part IV(A)(2)(b) (discussing verbal and physical assault on the Secretary of the French Legion).

50. *Sosa*, 542 U.S. at 717 (citing 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 25 (Max Farrand ed., 1911)).

51. *See* Judiciary Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77, *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=199>.

2014]

Kiobel v. Royal Dutch Petroleum Co.

179

case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”⁵² The ATS did not grant district courts the “power to mold substantive law;” rather, it simply provided jurisdiction or “‘cognizance’ of certain causes of action.”⁵³

Unfortunately, there is no record of the legislative intent behind the enactment of the ATS to guide the actual application of the statute.⁵⁴ Although modern commentators have attempted to ascertain its jurisdictional scope by scrutinizing the language of the text, the ATS leaves many questions open to interpretation.⁵⁵

B. *SOSA V. ALVAREZ-MACHAIN*

In *Sosa*, a Mexican citizen brought a civil action in the United States against the United States government, agents of the Drug Enforcement Agency, former Mexican policemen, and Mexican civilians after he was acquitted in a criminal trial brought by the United States government.⁵⁶ Having previously been captured and brought into the United States for the trial, he alleged that the defendants violated the law of nations under the ATS.⁵⁷ After extensively discussing the history of the ATS as a jurisdictional statute that created no new causes of action,⁵⁸ the Supreme Court determined that there was a reasonable inference “that the common law would provide a cause of action for the

52. Judiciary Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=199>; see 28 U.S.C. § 1350 (providing a slight modification of the original language used in the Judiciary Act).

53. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004) (citing THE FEDERALIST NO. 81 at 447, 451 (Alexander Hamilton) (Jacob Cooke ed., 1961)); see *id.* (noting “the ATS was placed in § 9 of the Judiciary Act, a statute exclusively concerned with federal-court jurisdiction”).

54. See *id.* at 718.

55. See *id.* at 718-20 (citing Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445 (1995)) (concluding the ATS was not passed as a “jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might . . . authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners” and that “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations”).

56. *Id.* at 697-98.

57. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697-98 (2004).

58. *Id.* at 712-24.

modest number of international law violations with a potential for personal liability at the time.”⁵⁹ However, the Court cautioned against applying the statute to individual claims that could have conceivably employed its jurisdiction when it was originally drafted.⁶⁰ The Court divided its argument for cautious application into five parts.⁶¹

First, the Court contended that common law theories have changed since the enactment of the ATS.⁶² In 1789, the accepted view of the common law was that it was “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”⁶³ The Court articulated that today there is a general understanding that the law is not discovered, but created when necessary.⁶⁴

Second, the Court stated that the role of federal courts in forming the common law had changed. The general practice had become to “look for legislative guidance before exercising innovative authority over substantive law.”⁶⁵

Third, recent case law consistently held that the decision to create a private cause of action for an individual should be made by Congress.⁶⁶ The Court stated that even when Congress has enacted a statute to apply to domestic conduct, courts were “reluctant” to provide a private cause of action where one did not explicitly exist.⁶⁷ Therefore, undermining custom to make international law privately actionable warranted judicial caution.⁶⁸

Fourth, the Court stated that there may be severe

59. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

60. *Id.* at 725 (“A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.”).

61. *Id.* at 725-28.

62. *Id.* at 725.

63. *Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

64. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

65. *Id.* at 726. The Court also referred to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) as the “watershed in which [the Court] denied the existence of any federal ‘general’ common law.” *Id.*

66. *Id.* at 727 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001)).

67. *Id.* at 727.

68. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

2014]

Kiobel v. Royal Dutch Petroleum Co.

181

international friction as a result of “go[ing] so far as to claim a limit on the power of foreign governments over their own citizens, and [holding] that a foreign government or its agent has transgressed those limits.”⁶⁹ To avoid such foreign policy consequences, the Court noted that judicial caution should be exercised.⁷⁰

Fifth, the Court indicated that there was no congressional consent to whimsically define new violations of the law of nations.⁷¹ While the ATS could be adjusted as international law transformed, there was nothing to suggest that federal courts could apply the statute to individual claims of violations of international human rights.⁷²

Taken together, the Court decided that “federal courts should not recognize private claims under federal common law” for violations of the law of nations that fell outside of the limited historical offenses recognized by Blackstone—violations of safe conducts, infringements of the rights of ambassadors, and piracy.⁷³ The Court concluded that Alvarez’s detention claim did not fall under any accepted violation of international law and was not substantially similar to any of the recognized historical offenses.⁷⁴ While *Sosa* did not implicate extraterritorial concerns, the *Kiobel* majority and Justice Breyer’s concurrence relied on that decision’s reasoning for cautious application of the ATS.

C. *MORRISON V. NATIONAL AUSTRALIA BANK LTD.*

The *Kiobel* majority largely relied on the presumption against extraterritoriality laid out in *Morrison v. National Australia Bank Ltd.*⁷⁵ In *Morrison*, Australian plaintiffs sued an Australian bank in United States federal court for securities violations.⁷⁶ The defendants moved to dismiss the claim for lack of subject matter jurisdiction and for failure to state a claim upon

69. *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-32 (1964)).

70. *Id.* at 727-28.

71. *Id.* at 728.

72. *See id.*; *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

73. *See id.* at 732; *see also* 4 BLACKSTONE, *supra* note 4, at 68.

74. *Sosa*, 542 U.S. at 738.

75. *See* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

76. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2875-76 (2010). It should be noted that this case was not analyzing the application of the ATS.

which relief could be granted.⁷⁷ The district court granted the motion to dismiss for lack of subject matter jurisdiction because the security fraud occurred primarily outside of the United States.⁷⁸ The Court of Appeals for the Second Circuit affirmed this decision, and the Supreme Court granted certiorari.⁷⁹

The Supreme Court made its decision based on the canon of statutory interpretation known as the presumption against extraterritorial application.⁸⁰ Under this presumption, legislation is interpreted to apply only within the United States unless Congress explicitly states otherwise.⁸¹ This canon of interpretation is based on the idea that Congress normally legislates with domestic matters in mind.⁸² Therefore, unless Congress expresses affirmative intent to give a statute “extraterritorial effect,” it must be presumed to be concerned with domestic conditions only.⁸³

The *Morrison* majority determined that the statutes relied on by the plaintiffs did not clearly express an intent to apply extraterritorially.⁸⁴ Because the alleged securities violations occurred abroad, the plaintiffs had no cause of action.⁸⁵ Although the violations in *Morrison* are distinct from those in *Kiobel*, the *Kiobel* majority relied heavily on the presumption against extraterritorial application as discussed by the *Morrison* majority.⁸⁶

IV. THE COURT’S DECISION

In *Kiobel*, the majority relied on the history leading to the enactment of the ATS, the Court’s interpretation of the ATS in *Sosa*, and the presumption against extraterritoriality as developed in *Morrison*. In a unanimous decision, the Court held that no part of the ATS rebutted the presumption against extraterritoriality, and therefore, no cause of action exists for

77. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2876 (2010).

78. *Id.*

79. *Id.*

80. *Id.* at 2877.

81. *Id.* (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

82. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

83. *Id.*

84. *Id.* at 2883.

85. *Id.* at 2888.

86. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-69 (2013).

2014]

Kiobel v. Royal Dutch Petroleum Co.

183

violations of the law of nations occurring outside of the United States.⁸⁷ Chief Justice Roberts authored the majority opinion, and three separate concurring opinions were filed by Justices Kennedy, Alito, and Breyer.⁸⁸

This Section will detail the Court's decision in *Kiobel*. Subsection A discusses the logic underlying the majority opinion, which was shaped by the Court's perceived purpose of the ATS. Next, Subsection B will discuss the three concurring opinions.

A. THE MAJORITY OPINION

The *Kiobel* majority relied primarily on its own analysis of the ATS to reach its conclusion.⁸⁹ The Court first looked to the presumption against extraterritorial application that was laid out in the *Morrison* decision.⁹⁰ Because the Court has interpreted the ATS to be "strictly jurisdictional,"⁹¹ the Court determined that it correspondingly imposed constraints on the courts which preclude them from inferring the existence of new causes of action under the ATS.⁹² The Court then looked to the language of the ATS, the historical background surrounding its enactment, and the legislative intent of its drafters to reach its conclusion that the ATS did not overcome the presumption against extraterritoriality and thus could not be used to seek remedies for violations of international law occurring outside the United States.⁹³ This consequently barred the plaintiffs from alleging such violations.⁹⁴ However, the Court did not completely eliminate the ATS's potential to apply extraterritorially.⁹⁵

1. THE LANGUAGE OF THE ALIEN TORT STATUTE

The Court, following the logic of *Morrison*, concluded that

87. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

88. *Id.* at 1662.

89. *See id.* at 1665-69.

90. *Id.* at 1664 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)).

91. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004). The ATS "does not directly regulate conduct or afford relief." *Kiobel*, 133 S. Ct. at 1664 (noting that the ATS merely "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law").

92. *Kiobel*, 133 S. Ct. at 1664.

93. *Id.* at 1665-69.

94. *Id.* at 1669.

95. *See infra* Part IV(A)(3).

the language of the ATS⁹⁶ did not suggest that Congress intended it to apply extraterritorially.⁹⁷ While the ATS unquestionably allowed aliens to bring causes of action for the traditional violations of international law, this did “not imply extraterritorial reach” as these violations might occur within the borders of the United States.⁹⁸ In addition, the statute’s use of the phrase “*any* civil action”⁹⁹ could not be interpreted as an indication of the ATS’s potential to apply “to torts committed abroad.”¹⁰⁰ The Court relied on precedent stating that “generic terms” such as “any” and “every” were not adequate to rebut presumptions against extraterritoriality.¹⁰¹

The Court similarly rejected the argument advanced by plaintiffs that the word “tort” is a term implying universal application.¹⁰² The plaintiffs argued that the word was intended to “provide for jurisdiction over extraterritorial transitory torts” that happen abroad.¹⁰³ In making this assertion, the plaintiffs relied on “the common-law doctrine that allowed courts to assume jurisdiction over such ‘transitory torts,’ including actions for personal injury,” which occurred extraterritorially.¹⁰⁴

The Court rejected this argument and identified that the transitory torts doctrine only justified allowing a party to bring a cause of action that arose in a foreign jurisdiction if there was “a well founded belief that it was a cause of action in that place.”¹⁰⁵ However, the standard in answering this question was not whether a United States court had the jurisdiction to hear a

96. See 28 U.S.C. § 1350 (2012).

97. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013).

98. *Id.*

99. 28 U.S.C. § 1350 (emphasis added).

100. *Kiobel*, 133 S. Ct. at 1665.

101. *Id.* (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881-82 (2010); *Small v. United States*, 544 U.S. 385, 388 (2005); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-50 (1991); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 287 (1949)).

102. *Id.* at 1665-66.

103. *Id.* at 1665 (citing Petitioner’s Supplemental Opening Brief, *supra* note 8, at 18); see also 21 C.J.S. *Courts* § 28 (2013) (defining transitory tort by explaining that if “the cause of action is necessarily local, the territorial jurisdiction is exclusive, but transitory actions may be brought in any state regardless of where the cause of action arose”).

104. *Kiobel*, 133 S. Ct. at 1665-66 (citing *Dennick v. R.R. Co.*, 103 U.S. 11, 18 (1881); *Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (P.C.) 1030); Petitioner’s Supplemental Opening Brief, *supra* note 8, at 23.

105. *Kiobel*, 133 S. Ct. at 1666 (quoting *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 478 (1912)).

2014]

Kiobel v. Royal Dutch Petroleum Co.

185

cause of action existing under foreign or international law, but whether the court had the authority to recognize an existing cause of action under United States law to enforce a foreign or international law.¹⁰⁶ The Court therefore concluded that the use of the word “tort” did not indisputably reveal that the first Congress meant for United States law to reach *all* conduct occurring abroad, as the United States may not necessarily have the authority to recognize a cause of action to enforce *every* foreign or international law.¹⁰⁷ The Court decided the text of the ATS did not reveal a clear intention of extraterritoriality, and thus, the plaintiffs could not argue that the plain language was a justification for their claim.¹⁰⁸

2. THE HISTORICAL BACKGROUND OF THE ENACTMENT OF THE ALIEN TORT STATUTE

The Court next considered the historical background of the ATS as evidence that the statute was not intended to apply extraterritorially.¹⁰⁹ The Court examined the historically recognized law of nations in addition to the events surrounding the ATS’s enactment to make this conclusion.¹¹⁰

a. When the Alien Tort Statute Was Enacted, Three Principal Offenses Against the Law of Nations Were Recognized

At the time the ATS was passed by Congress, three principal offenses against the law of nations had been identified.¹¹¹ Those offenses included violation of safe conducts, infringement of the rights of ambassadors, and piracy.¹¹² The Court indicated that violations of safe conducts and infringements on the rights of ambassadors do not require being applied extraterritorially.¹¹³ On the contrary, Blackstone actually described them in terms of conduct taking place within the forum nation.¹¹⁴ This militated

106. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1666-68.

111. See 4 BLACKSTONE, *supra* note 4, at 68; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723-24 (2004).

112. 4 BLACKSTONE, *supra* note 4, at 68.

113. *Kiobel*, 133 S. Ct. at 1666.

114. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013) (finding persuasive Blackstone’s descriptions that safe conducts were a right for those “who

strongly against ATS application in the case under consideration.

The third offense, piracy,¹¹⁵ could occur outside the forum nation, but the Court rejected the plaintiffs' contention that Congress intended the ATS to apply extraterritorially simply because it provided jurisdiction for actions against pirates.¹¹⁶ While the Court had commonly considered the high seas and foreign soil similarly in the context of the presumption against extraterritorial application,¹¹⁷ the *Kiobel* majority instead held that conduct occurring on the high seas was different from conduct occurring on foreign soil.¹¹⁸ When United States law is applied to pirates, there is typically no imposition on the jurisdiction of another sovereign, and as a result, there are "less direct foreign policy consequences."¹¹⁹ Historically, pirates could be tried in a court of the nation that found the pirates because pirates did not typically operate under a specific jurisdiction.¹²⁰ The Court decided pirates might be an exception to the presumption against extraterritoriality because the existence of a cause of action against pirates is unique and does not justify allowing other causes of action to reach conduct occurring outside of the United States under the ATS.¹²¹

b. The Historical Events Surrounding the Enactment of the Alien Tort Statute

The Court also considered historical events surrounding the enactment of the ATS to hold that it did not apply extraterritorially.¹²² The events occurring immediately before

are here" and that these conducts gave members of society "a right to intrude into another," as well as noting Blackstone's recognition of the king's right to "receiv[e] ambassadors at home" but clarifying this right to exist in the state "wherein they are appointed to reside" (quoting 4 BLACKSTONE, *supra* note 4, at 68, 251, 245-48)).

115. 4 BLACKSTONE, *supra* note 4, at 72 ("The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.").

116. *Kiobel*, 133 S. Ct. at 1667.

117. *Id.* (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 166, 173-74 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)).

118. *See id.*

119. *Id.*

120. *See id.* (citing 4 BLACKSTONE, *supra* note 4, at 71).

121. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1667 (2013) (citing *Morrison v. Nat'l Austrl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010)) (noting *Morrison*'s conclusion that "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms").

122. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666-67 (2013).

and after the enactment of the ATS involved violations of the law of nations that occurred within the United States, leading the Court to conclude that the statute was not intended for extraterritorial application.¹²³ Before the passage of the ATS, two disputes implicating the rights of ambassadors arose in the United States.¹²⁴

First, in 1784, the Secretary of the French Legion was verbally and physically assaulted in Philadelphia.¹²⁵ After the assault, the French Minister threatened the Continental Congress that he would leave the country if sufficient relief were not provided.¹²⁶ Then, in 1787, a Dutch Ambassador's servant was arrested in the Ambassador's house by a New York constable.¹²⁷ Because the legislature had not yet enacted any remedy for breach of ambassadors' privileges, both ambassadors' rights were remedied through convicting the wrongdoers of violating the law of nations, as adopted by the states' common law.¹²⁸

Shortly after the passage of the ATS,¹²⁹ two similar cases involving incidents within the United States invoked the statute's coverage.¹³⁰ The first case occurred in 1793 during the war between France and Spain, when the owners of a British ship sought a remedy under the ATS for their vessel's seizure by the French in the port in Philadelphia.¹³¹ In the second case, in 1795, a French captain captured a Spanish slave ship on the shores of the United States and sought restitution for the slaves, who were subsequently sold without his authorization, through use of the ATS.¹³² After assessing these domestic disputes, the Court

123. *Id.*

124. *Id.* at 1666.

125. *Id.* (citing *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. 1784)).

126. *Id.*

127. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 641 (2002).

128. *Kiobel*, 133 S. Ct. at 1666-67; see Bradley, *supra* note 127, at 641-42 (discussing how by adopting the law of nations under New York's common law the New York police officer was able to be convicted for the offence against the Ambassador); see also *Respublica*, 1 U.S. (1 Dall.) 111 (doing the same under Pennsylvania law).

129. See *supra* note 3 and accompanying text.

130. *Kiobel*, 133 S. Ct. at 1667 (citing *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795); *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793)).

131. *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793).

132. *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795).

concluded that the historical events surrounding the implementation of the ATS “provide[d] no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.”¹³³ The ATS was applicable to both of these cases because the conduct occurred domestically.¹³⁴ Unlike these cases, however, are the facts of *Kiobel*, where the relevant conduct took place abroad in Nigeria.¹³⁵ Because the conduct in *Kiobel* occurred abroad and no domestic dispute was in debate, the plaintiffs’ claims did not fall within the scope of the ATS.¹³⁶

3. THE LEGISLATIVE INTENT OF THE DRAFTERS OF THE ALIEN TORT STATUTE

The Court also examined the intent of the first Congress to determine that the ATS did not have extraterritorial reach.¹³⁷ The Court, noting that no other nation at that time had ever attempted to create an international forum,¹³⁸ found that it was extremely unlikely that the first Congress intended the nascent Republic to have such a role.¹³⁹

The Court reasoned that it was more likely that the first Congress implemented the ATS to prevent future embarrassment should it have found itself unable to provide judicial remedies to foreign officials injured in the United States, much like those injured in the incidents surrounding the enactment of the ATS.¹⁴⁰ Failure to provide such relief could have resulted in grave consequences if the offended nation retaliated.¹⁴¹ The ATS

133. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1667 (2013).

134. *See id.*; *see also supra* notes 130–32 and accompanying text.

135. *Kiobel*, 133 S. Ct. at 1669 (“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.”); *see also supra* notes 8–16 and accompanying text.

136. *Kiobel*, 133 S. Ct. at 1669.

137. *Id.* at 1668–69.

138. *Id.* at 1668 (“As Justice Story put it, ‘No nation has ever yet pretended to be the *custos morum* of the whole world. . . .’” (quoting *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822))).

139. *See id.*

140. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013).

141. *Id.* (stating that “offenses against ambassadors . . . if not adequately redressed could rise to an issue of war” (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004))).

2014]

Kiobel v. Royal Dutch Petroleum Co.

189

guaranteed that the United States would not lack a forum to adjudicate such incidents.¹⁴² The Court decided that there was “[n]othing about this historical context [to] suggest[] that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.”¹⁴³

Similar to *Sosa*, the Court cautioned that extraterritorial application of the ATS would open the floodgates to other nations recognizing similar causes of actions.¹⁴⁴ If extraterritorial application were presumed, other nations could bring United States citizens into their courts for violations of the law of nations occurring domestically or abroad.¹⁴⁵ Thus, the presumption against extraterritoriality advanced by the Court in *Kiobel* prevents United States courts from precipitating a dangerous trend in international relations.¹⁴⁶ Allowing the *Kiobel* plaintiffs to bring a claim under the ATS would likely have the opposite effect and create international tension.

The Court did not, however, completely remove the possibility for extraterritorial application of the ATS.¹⁴⁷ Instead, the Court implied that extraterritoriality may be possible “where the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.”¹⁴⁸ However, and to the consternation of the concurring Justices, the majority failed to give any explanation as to when this might occur.¹⁴⁹

B. THE THREE CONCURRING OPINIONS

All three concurring opinions scrutinized the *Kiobel* majority’s failure to indicate under what circumstances the presumption against extraterritorial application might be

142. *Id.* (citing *Sosa*, 542 U.S. at 715-18 & n.11).

143. *Id.* at 1668-69.

144. *Id.* at 1669; *see also supra* Part III(B) (discussing the *Sosa* majority’s fourth reason for cautious application of the ATS).

145. *Kiobel*, 133 S. Ct. at 1669.

146. *See id.*

147. *See id.*

148. *Id.* (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883-84 (2010)) (addressing why corporate presence of defendants in the United States could not overcome the presumption against extraterritoriality).

149. *See id.* (providing no insight into when extraterritoriality may be appropriate).

overcome.¹⁵⁰ Given this lack of clarity, Justice Kennedy indicated that a new analysis might be required in the future to supplement the deficiencies in the majority's opinion, while Justices Alito and Breyer provided their own methods for more straightforwardly defining the scope of the ATS.¹⁵¹

1. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy agreed with the Court's decision to avoid an overreaching opinion and focus narrowly on the case at hand.¹⁵² Justice Kennedy stated that many extraterritorial human rights concerns similar to those in *Kiobel* have already been adopted by specific legislation and are better addressed under those statutes.¹⁵³ As an example, he mentioned that many potentially extraterritorial human rights offenses are actionable under the Torture Victim Protection Act of 1991 (TVPA),¹⁵⁴ so that application of the ATS is not necessary.¹⁵⁵ Justice Kennedy did not deny, however, that other cases regarding violations of international law may arise where neither the *Kiobel* majority opinion nor the TVPA are applicable, and "in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."¹⁵⁶ However, Justice Kennedy determined this was not that time.¹⁵⁷

2. JUSTICE ALITO'S CONCURRENCE

Justice Alito specifically agreed with the majority's ambiguous statement that when ATS "claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."¹⁵⁸ However, he applied a broader approach to reach

150. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669-78 (2013).

151. *Id.*

152. *Id.* at 1669 (Kennedy, J., concurring).

153. *Id.* at 1669 (Kennedy, J., concurring).

154. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

155. *See Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

156. *Id.*

157. *See id.*

158. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669-70 (2013) (Alito, J., concurring) (stating there may be "wisdom" in the Court's decision to leave so much unanswered).

the same conclusion.¹⁵⁹ Justice Alito stated that only conduct which satisfied precedential requirements of definiteness and international acceptance could be subject to the ATS.¹⁶⁰ Because there were only three principal offenses against the law of nations at the time the ATS was enacted,¹⁶¹ the ATS is not applicable to conduct that falls outside of these categories.¹⁶² Justice Alito concluded that the facts of *Kiobel* fell “within the scope of the presumption against extraterritoriality” because there was no violation of an established international law.¹⁶³

3. JUSTICE BREYER’S CONCURRENCE

Justice Breyer concurred in the result but did not join the Court’s reasoning that the ATS had a presumption against extraterritoriality.¹⁶⁴ Justice Breyer stated that the issue presented in *Kiobel* was the extent to which the ATS applied to conduct that took place abroad when that conduct was similar to piracy in character and specificity.¹⁶⁵ To answer this narrow issue, which he believed the majority avoided, he referred to *Sosa* and to principles and norms of international law.¹⁶⁶ Justice Breyer ultimately concluded that jurisdiction under the ATS should be found where (1) the “tort occurs on American soil,” (2) the defendant is an American citizen, or (3) the “defendant’s conduct substantially and adversely affects an important American national interest.”¹⁶⁷ The alleged violations in *Kiobel*

159. *Id.* at 1670.

160. *Id.* (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)). In *Sosa*, the Court stated that “federal courts should not recognize” claims for violations of the law of nations “with less definite content and acceptance” than the historical offenses recognized by Blackstone. 542 U.S. at 732.

161. *See supra* Part IV(A)(2)(a).

162. *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

163. *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring) (“[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.”).

164. *Id.* at 1670-71 (Breyer, J., concurring).

165. *Id.* at 1671 (recognizing that the task was determining “[w]ho are today’s pirates” as influenced by the majority opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004)).

166. *Id.* at 1671-72.

167. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013) (noting that there is a national interest “in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind”).

would not be actionable under this application of the ATS.¹⁶⁸

Justice Breyer first addressed the majority's presumption against extraterritoriality, which "rests on the perception that Congress ordinarily legislates with respect to the domestic, not foreign matters."¹⁶⁹ He rebutted this presumption and stated that the ATS was obviously "enacted with 'foreign matters' in mind" as it referred to "alien[s]," "treat[ies]," and "the law of nations."¹⁷⁰ He further pointed out that one of the three violations of the law of nations is piracy, which almost exclusively takes place abroad.¹⁷¹ While the majority attempted to "wish this piracy example away by emphasizing that piracy takes place on the high seas," Justice Breyer argued that a ship was still comparable to land as "it falls within the jurisdiction of the nation whose flag it flies."¹⁷²

Given that the ATS was intended to apply to pirates in 1789, Justice Breyer concluded that it should also apply to torturers and those who commit genocide, the equivalent of pirates today.¹⁷³ Nonetheless, the majority's presumption against extraterritoriality failed to indicate under what circumstances the ATS might permit a court to recognize a cause of action for a violation of the law of nations that occurred abroad.¹⁷⁴ Justice Breyer criticized the *Kiobel* majority's statement that a statutory claim might suffice to overcome the presumption against extraterritoriality if it sufficiently concerned the United States, asserting that the majority simply left unanswered the question of when this might actually occur.¹⁷⁵

To develop the applicable standard,¹⁷⁶ Justice Breyer

168. *Id.* at 1678 (Breyer, J., concurring).

169. *Id.* at 1672 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010)).

170. *Id.* (alteration in original) (citing 28 U.S.C. § 1350 (2012)).

171. *Id.*

172. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1672 (2013) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963)).

173. *Id.* (Breyer, J., concurring).

174. *Id.* at 1673.

175. *Id.* (Breyer, J., concurring); *see id.* at 1666, 1669 (Roberts, J., majority opinion).

176. *See supra* text accompanying note 167 (laying out Justice Breyer's three principles for determining when ATS recognizes a cause of action for violations of the law of nations occurring extraterritorially).

2014]

Kiobel v. Royal Dutch Petroleum Co.

193

evaluated the ATS's purpose and the risks of applying the Statute, both of which were addressed in *Sosa*.¹⁷⁷ He stated that the Statute's purpose was to compensate persons "injured by piracy and its modern-day equivalents."¹⁷⁸ This purpose was to be balanced with caution so as not to create "international friction."¹⁷⁹

Breyer also assessed the United States' principles of foreign relations to determine when the ATS should recognize a cause of action under the ATS for violations of the law of nations occurring outside of the United States.¹⁸⁰ He cited to the *Restatement (Third) of Foreign Relations Law*, which allows the United States to apply its law, subject to a "reasonableness" requirement,¹⁸¹ to: (1) conduct within its boundaries, (2) conduct of citizens outside the United States, (3) conduct abroad that has an effect within the United States, and (4) extraterritorial conduct that is directed against the United States or a limited class of its interests.¹⁸² In addition, it grants jurisdiction to the United States to punish offenses such as piracy or slave trading that are recognized internationally as a collective concern.¹⁸³

Lastly, Justice Breyer concluded that application of the ATS to conduct occurring outside of the United States was not inconsistent with international law or foreign practice when the defendant was an American citizen or the defendant's conduct adversely affected a national interest.¹⁸⁴ In making this assertion, he referenced case law in which countries permitted foreign plaintiffs to bring suits against their own nationals for conduct occurring abroad.¹⁸⁵ Justice Breyer similarly cited to cases in which countries permitted some type of lawsuit brought by a foreign citizen against another foreign citizen for conduct outside of the nation.¹⁸⁶ He also pointed out that United States

177. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1673 (2013) (Breyer, J., concurring).

178. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004)).

179. *See id.* at 1673-74 (citing *Sosa*, 542 U.S. at 715).

180. *Id.* at 1673 (Breyer, J., concurring).

181. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

182. *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987)).

183. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987)).

184. *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

185. *Id.* at 1675-76.

186. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1676 (2013).

courts have previously found jurisdiction over foreigners under the ATS when the conduct affected a national interest.¹⁸⁷ Furthermore, Congress has approved treaties obligating the United States to search for and punish foreigners who commit serious crimes against other foreigners abroad and at times authorized civil damages in these cases.¹⁸⁸

Justice Breyer concluded that his jurisdictional approach was consistent with *Sosa*, principles on foreign relations, and international law norms.¹⁸⁹ He then contended that the facts of the *Kiobel* case did not fall within the scope of the jurisdictional approach as neither the plaintiffs nor the defendants were United States citizens, the conduct occurred abroad, and the defendants did not directly engage in the acts.¹⁹⁰

V. ANALYSIS

In deciding that the ATS could not be applied extraterritorially, the *Kiobel* majority interpreted the ATS in accordance with current foreign policy preferences due to the lack of information on the Statute and the existence of only one prior case interpreting it. Instead, the *Kiobel* majority failed to issue a comprehensive decision with the capacity to decide future incidents implicating the scope of the ATS. The majority merely determined that there was a presumption against extraterritoriality in the instant case, leaving open the question of when such a presumption might be overcome in the future.¹⁹¹

The Court's ambiguous language¹⁹² could be interpreted as a

187. *Id.* at 1675 (Breyer, J., concurring) (citing *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) as examples of cases in which defendants used the United States as a safe harbor).

188. *Id.* at 1676-77.

189. *Id.* at 1675, 1677; *see also supra* text accompanying note 167.

190. *Kiobel*, 133 S. Ct. at 1678 (Breyer, J., concurring).

191. *See id.* at 1669. It should be noted that narrower holdings are common in foreign relations cases. *See* *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 770 (1972) (stating that "it is both faithful to the principle of separation of powers and consistent with earlier cases applying the act of state doctrine" to limit courts to adjudicating only the case before them, and allowing the Executive Branch to handle foreign relations). *Kiobel* presents a different challenge, however, as it is really an analysis of jurisdictional scope under statute with an inferred theme in foreign relations.

192. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883-88 (2010)) ("And even

2014]

Kiobel v. Royal Dutch Petroleum Co.

195

purposeful statement to leave open the question of extraterritorial application to future interpretation. On the other hand, the language could be viewed as an accidental statement to clarify that Royal Dutch Petroleum Company's corporate presence in the United States was not sufficient to find that there were no extraterritorial concerns implicated by the case.¹⁹³ With such a vague decision, it is difficult to determine how the ATS will be construed in the future. Instead, the majority should have adopted Justice Breyer's approach, which offered a more fully developed and succinct method for applying the ATS.

This Section will analyze and critique the majority's decision in *Kiobel*. Section V(A) will discuss the majority's leeway in interpreting the ATS; Section V(B) will explain how the majority decision is a reflection of current foreign policy; finally, Section V(C) will analyze the majority's failure to indicate when the presumption against extraterritoriality might be overcome.

A. THE MAJORITY'S LEEWAY IN INTERPRETING THE ALIEN TORT STATUTE

The *Kiobel* majority had a large amount of leeway in interpreting the ATS, where many decisions could have been easily justifiable. This is due to the elusive language of the statute, the similarly unclear legislative intent of the drafters, the lack of historical events surrounding the enactment of the ATS, and the sparse jurisdictional precedent on the subject.

1. THE ELUSIVE LANGUAGE OF THE ALIEN TORT STATUTE

The ATS is only one sentence long and employs ambiguous terms¹⁹⁴ making it susceptible to varying interpretations. For instance, the majority determined that the district courts' jurisdiction over "any" civil action did not apply to torts committed abroad.¹⁹⁵ Although a variety of Supreme Court cases justify this decision by stating that generic terms such as "any" do not rebut the presumption against extraterritoriality,¹⁹⁶ the

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.").

193. *Id.* ("Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.").

194. *See* 28 U.S.C § 1350 (2012).

195. *See supra* Part IV(A)(1).

196. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881-82 (2010);

majority easily could have concluded that the word “any” actually did apply to any civil action, regardless of location. Courts have consistently held that for purposes of statutory interpretation, “words and people are known by their companions” under the familiar canon of *noscitur a sociis*.¹⁹⁷ Because the words surrounding “any” have an international connotation, it would be reasonable to assume that the statute intended jurisdiction over any civil action, even if it occurred extraterritorially.

Similarly, the majority could have interpreted the use of the word “tort” to imply universal application as suggested by the plaintiffs.¹⁹⁸ The plaintiffs offered a well-formed argument on “the common-law doctrine that allow[s] courts to assume jurisdiction over such ‘transitory torts,’ including actions for personal injury” which occurred extraterritorially.¹⁹⁹ Instead, the *Kiobel* majority concluded that the common law doctrine only allowed courts to assume jurisdiction over causes of action expressly recognized under United States law.²⁰⁰ While the majority determined the statute had a presumption against extraterritoriality, the opposing viewpoint could have been adopted just as easily. For this reason, it cannot be said that the majority’s decision was necessarily justified by the language of the ATS alone.

2. THE UNCERTAIN INTENT OF THE FIRST CONGRESS

The *Kiobel* majority had the freedom to interpret the first Congress’s intent in drafting the ATS in the absence of any actual drafting history available for evaluation.²⁰¹ The majority used an originalist approach to conclude that the first Congress could not

Small v. United States, 544 U.S. 385, 388 (2005); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248-50 (1991); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 287 (1949).

197. See Gutierrez v. Ada, 528 U.S. 250, 254-55 (2000) (holding that the phrase “any election” used in 48 U.S.C. § 1422 (2000) could only refer to an election for Governor and Lieutenant Governor in Guam, given the context of the statute); see also Maracich v. Spears, 133 S. Ct. 2191, 2201 (2013) (applying canon of *noscitur a sociis*); Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 287-88 (2010) (same).

198. See Petitioner’s Supplemental Opening Brief, *supra* note 8, at 18, 23; see also *supra* Part IV(A)(1).

199. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665-66 (2013) (citing *Dennick v. R.R. Co.*, 103 U.S. 11, 18 (1881); *Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (P.C.) 1030); see also Petitioner’s Supplemental Opening Brief, *supra* note 8, at 23.

200. *Kiobel*, 133 S. Ct. at 1666.

201. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004).

2014] *Kiobel v. Royal Dutch Petroleum Co.* 197

have intended “their fledgling Republic” to be the world’s courtroom.²⁰² Given the immense change in the global dynamic since the ATS was drafted in 1789, and the unlikelihood that the first Congress could have foreseen the changing role of the United States in international politics, an originalist construction of the ATS seems misguided.

It is not uncommon for cases to arise which present questions that could not have been foreseen by the Framers.²⁰³ “In such cases, the Constitution has been treated as a living document adaptable to new situations.”²⁰⁴ In *Kiobel*, this should have allowed the Court to take a more “aspirational” approach, interpreting the ATS as the Framers would have intended it to be applied had they been able to foresee the future global dynamic.²⁰⁵ Under such an interpretation, extraterritorial application of the ATS should have been determined by assessing the current state of international relations, rather than the intent of the Framers in 1789. Justice Breyer’s concurrence most accurately takes this approach, using United States principles of foreign relations, international law, and foreign practice to conclude that the ATS could be applied extraterritorially in certain circumstances.²⁰⁶

3. THE LACK OF INSTRUCTIVE HISTORICAL EVENTS SURROUNDING THE ENACTMENT OF THE ATS

Four events involving application of the ATS surround its enactment.²⁰⁷ The *Kiobel* majority implies that because all of

202. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013); see also *supra* Part IV(A)(3).

203. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682-83 (1952).

204. *Id.* at 682 (citing *United States v. Classic*, 313 U.S. 299, 315-16 (1941); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442-43 (1934)).

205. “Aspirationalism” has been defined as:

[V]iewing the Constitution as a signal of the kind of government under which [United States citizens] would like to live, and interpreting that Constitution over time to reach better approximations of that aspiration. This vision treats as essential to constitutional understanding the broad normative purposes that the Constitution invokes: “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.

Peter M. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531, 550 (1988) (footnote omitted) (quoting U.S. CONST. pmb.).

206. See *Kiobel*, 133 S. Ct. at 1673-77 (Breyer, J., concurring); see also *infra* Part V(C)(2).

207. See *supra* Part IV(A)(2)(b); see also *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795); *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Republica v. De*

these events occurred within the boundaries of the United States, they do not undermine the presumption against extraterritoriality.²⁰⁸ The majority fails to address the diminutive sample size, which detracts from its value as persuasive authority.²⁰⁹ While the majority was careful to assess the implication of these four events, interpreting them to strongly support a presumption against extraterritoriality is unsubstantiated.

4. THE SPARSE JURISDICTIONAL PRECEDENT

Prior to *Kiobel*, only *Sosa* had assessed the jurisdictional questions of the ATS.²¹⁰ *Sosa* effectively identified which causes of action existed in the federal courts under the scope of the ATS,²¹¹ but it did not address the main issue presented in *Kiobel*—extraterritoriality. Because *Sosa* addressed a distinct and separate issue, the Court's heavy reliance on that case was misplaced. In addition, it could be argued that *Sosa* supports different conclusions about the scope of the federal courts' jurisdiction under the ATS without application of the doctrine of extraterritoriality.²¹² This is because, despite being the only precedential Supreme Court case available to the majority, it really does not provide conclusive support for either viewpoint.

B. THE MAJORITY DECISION AS A REFLECTION OF CURRENT FOREIGN POLICY

Because the Supreme Court ultimately had the flexibility to make any decision given the lack of binding precedent, the resolution was largely a reflection of the majority's own sentiments on foreign policy. When crafting its opinion, the *Kiobel* majority was influenced by both the fear of an overly bold

Longchamps, 1 U.S. (1 Dall.) 111 (Pa. 1784); Bradley, *supra* note 127, at 641 (discussing the incident with the Dutch Ambassador which occurred in 1787).

208. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666-67 (2013).

209. *Cf. Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 621 (1974) (holding that smallness of sample size made evidence proving racial discrimination less persuasive).

210. See Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 118 & n.32 (2004); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *supra* Part III(B) (discussing *Sosa*).

211. *Sosa*, 542 U.S. at 724-25; see also *supra* note 161.

212. See *Kiobel*, 133 S. Ct. at 1670-78 (Breyer, J., concurring) (citing to *Sosa* as authority in developing a different approach to interpreting the ATS).

2014]

Kiobel v. Royal Dutch Petroleum Co.

199

decision that might result in international friction and the current administration's attitude toward foreign affairs. In light of the various directions the Court could have conceivably taken, this policy-based decision seems relatively reasonable as a response to the current circumstances in the United States.

1. AVOIDING INTERNATIONAL CONSEQUENCES

Had the *Kiobel* majority chosen to allow extraterritorial application of the ATS, other nations might have similarly decided to exercise the same jurisdictional power over citizens and corporations of the United States. The majority briefly addressed this argument in support of a presumption against extraterritoriality and stated that applying the ATS extraterritorially “would imply that other nations, also applying the law of nations, could hale [United States'] citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.”²¹³ The foreign policy consequences of allowing extraterritorial application could thus have been tremendous.²¹⁴

The fear of international friction from applying the ATS extraterritorially is not unfounded; on the contrary, other nations have already voiced their objection to the extraterritorial application of the statute.²¹⁵ For instance, “[t]he Government of South Africa complained for six years” that a lawsuit litigated in the United States interfered with the policy embedded in “its post-apartheid Truth and Reconciliation Commission.”²¹⁶ In

213. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); *see also* Transcript of Oral Argument at 7, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 4486095, at *7 (statement of Justice Scalia) (“Sure, national courts have been the deciders when—when the violation occurs within the nation. But to give national courts elsewhere the power to determine whether a United States corporation in the United States has violated a norm of international law is something else, it seems to me.”).

214. *See Kiobel*, 133 S. Ct. at 1669 (noting the potential “serious foreign policy consequences” if applied).

215. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of the ATS by seven countries), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (mem.).

216. *Id.* at 77 (Kavanaugh, J., dissenting) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)). Also, the Government of Indonesia has repeatedly protested the lawsuit for violations of the ATS brought by Indonesian plaintiffs against a United States corporation and its subsidiaries, because the violations were committed by Indonesian military hired by the defendants and occurred in Indonesia. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15, 77 (D.C. Cir. 2011), *vacated*,

addition, the Government of Papua New Guinea objected to an ATS claim against a mining corporation in Papua New Guinea, stating that the litigation had “potentially very serious, social, economic, legal, political and security implications” and could impair its international relations, particularly with the United States.²¹⁷ Similarly, the United Kingdom, supported by Germany, objected that the ATS “infringes the sovereign rights of States to regulate their citizens and matters within their territory.”²¹⁸ Given the foregoing, the *Kiobel* majority was justified in its concerns about international friction as a result of extraterritorial application of the ATS.

2. THE RECENT ADMINISTRATION’S ATTITUDE TOWARD FOREIGN POLITICS

The majority’s decision was likely a reflection of the Obama Administration’s attitude toward international politics. The Supreme Court has a “customary policy of deference to the President in matters of foreign affairs.”²¹⁹ Consequently, the Supreme Court may have attempted to mirror the sentiment of the Obama Administration, which has emphasized the importance of improving democracy within the United States in order to promote global relationships.²²⁰

527 F. App’x 7 (D.C. Cir. 2013) (mem.).

217. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1199 (9th Cir. 2007) (quoting statement of interest filed by the United States Department of State), *on reh’g en banc*, 550 F.3d 822 (9th Cir. 2008); *see also* *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2005 WL 2082846, at *1–2 (S.D.N.Y. Aug. 30, 2005) (involving an ATS suit where plaintiffs from Sudan brought a claim against a Canadian corporation for conduct that occurred in Sudan, and the Canadian government objected to the extraterritorial reach of the ATS on the grounds that it interfered with Canada’s foreign relations).

218. *Developments in the Law – Extraterritoriality*, 124 HARV. L. REV. 1226, 1283 (2011) (citing Brief for the United States as Amicus Curiae in Support of Petitioners at app. B at 4a, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389); *see also id.* (citing Brief for the United States as Amicus Curiae in Support of Petitioners at app. C at 7a-8a, *Am. Isuzu Motors, Inc.*, 553 U.S. 1028 (No. 07-919)) (stating that Switzerland also “complained that the ATS was inconsistent with established principles of international law, which do[] not recognize the principle of universal civil jurisdiction over the foreign conduct of foreign defendants not affecting the forum”).

219. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005).

220. *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY *9i (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (stating that United States citizens’ “efforts to live [their] own values, and uphold the principles of democracy in [their] own society, underpin [their] support for the aspirations of the oppressed abroad, who know they can turn to America for

President Obama has repeated that the United States should lead, not force, other nations to adopt our systems.²²¹ Similarly, the Obama Administration has addressed the danger of an overextension of United States influence in foreign affairs.²²² The decision of the *Kiobel* majority mirrors this foreign policy approach. By limiting jurisdiction over foreign individuals and corporations, the *Kiobel* majority prevented such an overextension of United States influence. These policy reasons underlying the majority's decision provide better support for requiring a presumption against extraterritoriality than the text of the ATS itself, notwithstanding the majority's textual analysis.

C. THE MAJORITY'S FAILURE TO INDICATE WHEN THE PRESUMPTION AGAINST EXTRATERRITORIALITY MIGHT BE OVERCOME

The majority undermined its own reasoning when it established support for a presumption against extraterritoriality, only to immediately announce its fallibility. At the conclusion of the majority opinion, the Court stated that if "claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."²²³ The *Kiobel* majority dedicated a large portion of its decision and reasoning to advancing a presumption against extraterritoriality, but failed to identify how that presumption might be rebutted.²²⁴ The Court's lack of explanation on when the presumption could be overcome makes it unclear how the ATS will be interpreted in the future. In contrast to the ambiguous conclusion of the *Kiobel* majority, Justice Breyer's concurrence offered a more persuasive interpretation of the ATS.²²⁵

1. THE LACK OF EXPLANATION AS TO WHEN THE

leadership based on justice and hope").

221. THE WHITE HOUSE, *supra* note 220 ("[M]oral leadership is grounded principally in the power of [the United States'] example—not through an effort to impose [the United States'] system on other peoples.").

222. President Barack Obama, *Introduction to NATIONAL SECURITY STRATEGY*, *supra* note 220 ("The burdens of a young century cannot fall on American shoulders alone—indeed, our adversaries would like to see America sap our strength by overextending our power.").

223. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883-88 (2010)).

224. *See id.* at 1664-69.

225. *See id.* at 1670-78 (Breyer, J., concurring); *see also supra* Part IV(B)(3).

PRESUMPTION AGAINST EXTRATERRITORIALITY MIGHT BE DISPLACED

The majority relied on weak reasoning to avoid creating a clear rule applicable to future situations. In fact, the majority's reason for doing so is not specified. One possibility is that the majority meant to completely eliminate extraterritorial application of the ATS, but wanted to leave open the possibility for future exceptions to this "all-encompassing" rule.²²⁶ Another potential explanation is that the majority meant only to emphasize that the facts before it could not overcome the presumption against extraterritoriality, but future cases might hold different results. Finally, it is possible that the majority's closing statement was merely imperfect language used to rebut Royal Dutch Petroleum Company's presence in the United States as a means of getting rid of extraterritorial concerns. The majority's intentions are unclear and amount to a decision based on a poorly constructed analysis.

2. JUSTICE BREYER'S CONCURRENCE AS A MORE DEVELOPED APPROACH TO FINDING EXTRATERRITORIAL APPLICATION IN SOME CIRCUMSTANCES

Justice Breyer's approach to finding jurisdiction under the ATS is a much more comprehensive method than that provided by the *Kiobel* majority.²²⁷ Justice Breyer determined that jurisdiction under the ATS should be found "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 American national interest."²²⁸ While the third scenario for finding jurisdiction under the ATS may be criticized for its ambiguity, Justice Breyer's other two criteria are extremely specific. Furthermore, Justice Breyer attempted to reduce the potential uncertainty by giving an example of such a national interest.²²⁹

Unlike the majority decision that left many questions

226. If this is the case, the majority did not indicate what those exceptions might be.

227. *See supra* Part IV(B)(3).

228. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013).

229. *Id.* (stating that the American national interest includes an "interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind").

2014]

Kiobel v. Royal Dutch Petroleum Co.

203

unanswered,²³⁰ Justice Breyer's opinion recognized that the purpose of the ATS was to compensate persons "injured by piracy and its modern-day equivalents," while simultaneously exercising caution so as not to create "international friction."²³¹ Instead of using the limited language and history of the ATS to justify a decision, he looked to United States principles of foreign relations, international law, and foreign practice to conclude that the ATS could be applied extraterritorially in certain circumstances.²³² In this way, Justice Breyer's concurrence provided a response that was more consistent with—and based on—existing patterns of international law.

VI. CONCLUSION

In short, the *Kiobel* majority determined that the ATS had a presumption against extraterritorial application, and the plaintiffs therefore had no actionable claim.²³³ The majority attempted to justify this decision by assessing the language of the ATS, the historical background of its enactment, and the legislative intent of the founders; however, the opinion was likely driven by policy.²³⁴

Because the majority also indicated that the presumption against extraterritoriality might be overcome if "claims touch[ed] and concern[ed] the territory of the United States" with "sufficient force,"²³⁵ this decision failed to fully address how the scope of the ATS might be interpreted in the future. Justice Breyer's concurrence is a more reasoned approach for determining the scope of the ATS.²³⁶

Kaki J. Johnson

230. *See supra* Part V(C)(1).

231. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1673-74 (2013) (Breyer, J., concurring) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004)).

232. *Id.* at 1673-77.

233. *See supra* Part IV(A).

234. *See supra* Part V(A)-(B).

235. *Kiobel*, 133 S. Ct. at 1669.

236. *See supra* Part V(C)(2).