

U.S. Supreme Court Review of Corporate Liability Under the Alien Tort Statute -- An Overview of the Oral Arguments in *Kiobel v. Royal Dutch Petroleum*

February 28, 2012 by [Sarah A. Altschuller](#)



On February 28, in proceedings that were both closely watched and anxiously anticipated, the U.S. Supreme Court heard oral arguments in [Kiobel v. Royal Dutch Petroleum](#). For the first time, the question of whether corporations are proper defendants in Alien Tort Statute ("ATS") cases is squarely before the Court. Petitioners had sought Supreme Court review of a [decision by the Second Circuit Court of Appeals](#) finding that corporations are not proper defendants under the ATS.

Corporate Liability: Defined by International Law or a Question of Domestic Enforcement?

A preliminary transcript of the oral arguments is available [here](#) (.pdf). The transcript reflects that, on several fundamental points, Petitioners' counsel, Paul Hoffman, faced a skeptical bench. The hearing had barely begun when Justice Kennedy challenged Mr. Hoffman with the argument that "international law does not explicitly recognize corporate responsibility for the alleged offenses."

Justice Kennedy's opening challenge encapsulates the fundamental question at issue in this case: *must international law explicitly provide for corporate liability in order for corporations to be proper ATS defendants, or is the question of corporate liability a question of enforcement (or remedy) that can be properly decided by domestic courts?*

The Court was clearly split on this question. At one point, Justice Kagan asserted that "the question of who can be sued is a remedial question." In contrast, Chief Justice Roberts stated that "under international law, it is critically important who's undertaking the conduct that is alleged to violate international norms."

Concerns About Extraterritoriality

Several Justices raised questions that focused on the extraterritorial nature of the ATS, despite the fact that this issue was not directly before the Court and had not been fully briefed. After noting that *Kiobel* involved Nigerian plaintiffs alleging violations of international law in Nigeria, Justice Alito bluntly challenged Mr. Hoffman with the question - "What business does a case like that have in the courts of the United States?"

The ATS Stands Alone

Also at issue was the fundamental uniqueness of the ATS. Chief Justice Roberts, Justice Kennedy, and Justice Alito each questioned whether there was any other country in the world where such a suit could be brought. In contrast, Justice Kagan seemed less uncomfortable with the singular nature of the statute, observing that "[t]he ATS is just a unique statute. It's unique against individuals, and it's unique against corporations."

U.S. Support for Petitioners' Arguments on Corporate Liability

Petitioners were supported by the United States, appearing as amicus curiae. Counsel for the United States, Edwin Kneedler, argued that "international law norms proscribe certain conduct" but enforcement "is left to each nation." He urged the Court to focus on the fact that the ATS is explicitly about tort, stating that this "directs the Court to domestic tort law, and the question of whether a corporation can be held liable under domestic tort law." Mr. Kneedler argued that a corporation "clearly can be" held liable under domestic tort law, stating that "[i]t could be at the time this statute was enacted, and it can be today."

Respondents: International Law Does Not Support Corporate Liability

In representing Respondents, Kathleen M. Sullivan was unyielding in her argument that there is no source of customary international law "throughout the world that holds corporations liable for the types of human rights offenses" at issue in *Kiobel*. She argued that "the law of nations is uniform. It rejects corporate liability." Justice Kagan directly challenged this assertion, stating that "as far as I can see, the international sources are simply silent as to this question."

Pirates, Inc. and Hypothetical Norwegians Operating with Impunity

In challenging the arguments of Respondents, several Justices seemed troubled by the potential implications of a complete rejection of corporate liability. Justice Breyer raised the hypothetical of "Pirates, Inc." Noting that an individual pirate could be held liable under the ATS for acts of piracy, Justice Breyer questioned whether the hypothetical corporation "Pirates, Inc." would nevertheless be free from liability for those same acts. Ms. Sullivan declared quite definitively that "the corporation would not be liable."

In questioning Ms. Sullivan, Justice Kagan observed that various treaties and international conventions "prohibit certain acts, [but] don't talk about the actors." Justice Kagan raised the prospect of a hypothetical defendant arguing that a specific norm of international law does not apply to Norwegians because there is no international jurisprudence specifically about the liability of Norwegians, nor is there a specific reference to Norwegians in the norm at issue. Justice Kagan concluded that "of course" an international law norm would apply to Norwegians, "because it prevents everybody from committing a certain type of act."

Kiobel in Context -- A World Away from 2004

In reviewing the hearing, and the potential implications of the Court's future decision, it is notable that [many of the recent commentaries](#) on *Kiobel* have contextualized the case with reference to [Citizens United](#) and the significant policy debates surrounding the Court's 2010 decision that corporations are legal persons with limited rights of free speech. As [one Supreme Court observer questioned after the hearing](#), "the Supreme Court says corporations have a right to free speech. But can they get away with murder?"

Justice Breyer seemed to express particular discomfort with the potential implications of arguments that corporations are not "moral persons" under international law and therefore should not bear

potential responsibility for certain offenses. Ms. Sullivan sought to allay fears of "corporate impunity," noting that "corporate officers are liable for human rights violations" and "there can also be suits under state law or the domestic laws of nations."

Nevertheless, in a post-*Citizens United* world, questions of the rights and responsibilities of companies as defined by U.S. courts have become the attention of much public debate and commentary. In addition, international developments, including the release of the [Guiding Principles on Business and Human Rights](#), have directly addressed the responsibilities, if not liabilities, of corporations to account for the adverse human rights impact of their operations.

The circumstances for this week's *Kiobel* hearing therefore seems quite different than the context for the Supreme Court's earlier review of the ATS in [Sosa v. Alvarez-Machain](#) (2004). If the Supreme Court ultimately finds that corporations are not proper defendants in ATS cases, there may be considerably more backlash against such a finding than there would have been if the Court had decided the issue eight years ago.

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