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Legal Sidebar

The Rise and Decline of the Alien Tort Statute

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A narrowly divided Supreme Court held in *Jesner v. Arab Bank, PLC* that foreign corporations may not be defendants in suits brought under the Alien Tort Statute (ATS). In its current form, the ATS provides that "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." This single-sentence statute has been the subject of intense interest in recent decades, as it has evolved from a little-known jurisdictional provision to a prominent vehicle for foreign nationals to seek redress in U.S. courts for injuries caused by human rights offenses and acts of terrorism. In a series of decisions, however, the Supreme Court has placed significant limitations on the ability to pursue claims under the ATS, and the High Court has never ruled in a plaintiff's favor in an ATS case. *Jesner*'s holding barring foreign corporate liability marks a continuation of this trend, causing some to debate whether the ATS remains a viable mechanism to provide redress for human rights abuses.

The Original Purpose of the Alien Tort Statute

As described in this CRS Report and seminar, the ATS provides federal district courts with jurisdiction to hear cases with four elements: (1) a civil action; (2) by an alien; (3) for a tort; (4) committed in violation of the law of nations or a treaty of the United States. The First Congress enacted the statute against the backdrop of the United States' struggles as a young nation operating under the Articles of Confederation. During the early years of the Republic, the national government was dependent on state governments to ensure compliance with the nation's commitments under international law. In some cases, the states ignored the United States' obligations. For example, states refused to remove legal impediments on British citizens' efforts to collect pre-Revolutionary War debts as required by the 1783 Treaty of Peace with Great Britain. And when a French diplomat was assaulted on a public street in Philadelphia, the national government was forced to apologize to the French Ambassador and explain that only Pennsylvania officials had authority to prosecute the offender.

At the same time, international law during the Founding era was understood to place an affirmative obligation on the United States to redress certain violations of international legal rights. The Framers expressed concern that the state governments did not understand the legal duties that arose by virtue of

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the United States' new position as a sovereign nation. These concerns led the First Congress to provide jurisdiction to federal courts in a number of circumstances that may implicate U.S. foreign relations—such as admiralty and maritime cases and suits involving ambassadors. The ATS was included among this class of foreign-affairs-related provisions in the Judiciary Act of 1789. The "principal objective" of the ATS, according to the Supreme Court, was to "promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a remedy might prove foreign nations to hold the United States accountable."

The Long Dormancy, Rebirth, and Supreme Court Restrictions on the ATS

Although the ATS has deep historical roots, it was rarely used for the first 190 years of its existence. Between 1789 and 1980, litigants successfully invoked the ATS in only two reported decisions. But after nearly 200 years of dormancy, the statute was "reborn" as a result of the decision by the U.S. Court of Appeals for the Second Circuit (Second Circuit) in *Filártiga v. Peña-Irala*. There, the Second Circuit concluded the ATS authorizes aliens to bring claims in U.S. courts for violations of modern international law, including human rights abuses.

*Filártiga "*revitalized" the ATS and gave rise to an "abundance of litigation" in U.S. courts. But the expansion of claims grounded in the ATS was not long lived. Beginning with a 2004 decision, *Sosa v. Alvarez-Machain*, the Supreme Court began to place outer limits on the statute's application. *Sosa* held that not all violations of international norms are actionable under the ATS—only those that "rest on a norm of international character accepted by the civilized world" and are defined with sufficient clarity and particularity. And even when a claim meets these standards, *Sosa* explained that federal courts must exercise "great caution" before deeming a claim actionable.

Nine years later, in *Kiobel v. Royal Dutch Petroleum Co*., the Supreme Court further limited the statute's reach by holding that the presumption against extraterritoriality (discussed here) applies to the ATS. Under *Kiobel,* foreign plaintiffs cannot sue foreign defendants in ATS suits when the relevant conduct occurred overseas. Although courts are still grappling with the contours of *Kiobel*, many commentators view the decision as having significantly limited the ATS as a vehicle to provide redress for human rights abuses in U.S. courts

***Jesner*: A Further Limit on the ATS's Application**

Jesner marks the third time that the Supreme Court has cabined the scope of the ATS. The case involved claims by approximately 6,000 foreign nationals (or their families or estate representatives) who were injured, killed, or captured by terrorist groups in Israel, the West Bank, and Gaza between 1995 and 2005. The plaintiffs alleged that Arab Bank aided and abetted four terrorist organizations allegedly responsible for the attacks by, among other things maintaining accounts for the organizations knowing that they would be used for terrorist actions and identifying the families of victims of suicide bombing so that they could be compensated in so-called "martyrdom payments."

In an opinion authored by Justice Kennedy (and joined, in relevant part by Justices Thomas, Alito, Gorsuch, and Chief Justice Roberts), *Jesner* held that the claims against Arab Bank must be dismissed because "foreign corporations may not be defendants in suits brought under the ATS." The Court's decision arose out of separation of powers and foreign affairs concerns. Congress is in a better position to decide if the public interest would be served by imposing ATS liability on foreign corporations, the majority in *Jesner* reasoned. And ATS claims against foreign corporations often impact the United States' foreign relations, the Court explained. Because the "political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign policy concerns[,]"*Jesner* concluded that the "judicial caution" described in *Sosa* warranted a bright line rule prohibiting foreign corporate liability.

Although the Supreme Court granted certiorari to hear *Jesner* on the question of whether *any* corporation is subject to ATS liability, the Court limited its holding to a decision regarding foreign corporations. Thus,

Jesner preserves the possibility that U.S. corporations can still face ATS claims (although such cases still must satisfy *Sosa*'s framework and survive *Kiobel*'s presumption against extraterritoriality.)

Only portions of Justice Kennedy's opinion garnered a majority of the Court. As discussed in more detail here, three Justices would have gone further than the Court in restricting ATS jurisdiction. In a concurring opinion, Justice Alito advanced the view that courts should decline to recognize ATS claims "whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife." Justice Gorsuch also wrote separately to assert that courts should *never* recognize new causes of action under the ATS, and that the statute should only apply in suits against U.S. defendants—regardless of whether the defendants are corporations or natural persons. Justice Thomas also wrote a one-paragraph concurring opinion in which he explained that, although he joined Justice Kennedy's opinion because he believed it "correctly applies" the Court's precedents, he also agreed with the views of Justices Alito and Gorsuch.

Justice Sotomayor, writing the dissent and joined by Justices Ginsburg, Breyer and Kagan, argued that nothing in the "corporate form in itself raises" foreign policy concerns that require the Court to "immunize all foreign corporations from liability under ATS," regardless of the specific claim alleged. The "text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort," the dissenters contended, "confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS."

Congress and the ATS After *Jesner*

The Supreme Court's steady narrowing of the cognizable causes of action that may be raised under the ATS has caused some commentators to question whether the statute remains a viable avenue to seek judicial redress for human rights offenses. Some argue in favor of establishing a new legislative paradigm that is not reliant on the ATS to advance corporate compliance with human rights norms. Others assert that the ATS still retains some significance because *Jesner* does not categorically prohibit cases against U.S. corporations or the individual employees of foreign companies. Another group of commentators contends that *Filártiga* caused an overextension of ATS jurisdiction, which the Supreme Court correctly narrowed in *Jesner*. Ultimately, the *Jesner* Court emphasized the need for "further action from Congress" before construing ATS jurisdiction to extend beyond its 18th century roots, and therefore the future of ATS litigation may be dictated by the legislative branch rather than the courts.