The Alien Tort Statute and the Presumption Against Extraterritoriality

By R. Ethan Hargraves

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Much controversy surrounds the modern trend of human rights litigation, particularly with respect to the use of the Alien Tort Statute (ATS). Some of the more recent controversy stems from the statute's extraterritorial application—that is the extension of its jurisdictional grant to conduct that occurred entirely within a foreign nation. The extraterritorial application of the ATS has largely been assumed since the statute's resurrection in the case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). But despite being passed over for more than three decades, the Supreme Court has finally taken up the issue in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 132 S. Ct. 472 (2011). In deciding the issue of whether the ATS applies extraterritorially, the Supreme Court should look to the longstanding presumption against the extraterritorial application of federal statutes. When properly analyzed according to this important rule of statutory construction, it becomes clear that the ATS should apply only to conduct that occurs within the sovereignty of the United States.

Morrison v. Nat'l Australia Bank Ltd. held that "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions." __ U.S. __, 130 S. Ct. 2869, 2877 (2010) (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (internal quotation marks omitted). Where a statute lacks a clear and affirmative congressional intention to give the statute extraterritorial effect, the statute has no such extraterritorial effect. *Morrison*, __ U.S. __, 130 S. Ct. 2869, 2877-883 (2010). *See also, Aramco.*, 499 U.S. 244, 248 (1991) ("It is a

longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'").

The presumption against the extraterritorial application of federal legislation, as revived by *Morrison*, is by no means a recent development in American law. The Supreme Court in *U.S. v. Palmer* held that in the absence of a statutory provision to the contrary, United States courts could not exercise jurisdiction over acts committed within the territorial boundaries of a foreign nation. *United States v. Palmer*, 16 U.S. 610 (1818). Later, the Supreme Court again ruled on the issue, holding that "in [a] case of doubt" courts should apply a "construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. **All legislation is prima facie territorial**." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-57 (1909) (emphasis added) (internal quotation marks omitted) (overturned on other grounds). Finally, in *U.S. v. Bowman* the Supreme Court again applied the presumption against extraterritorial application, saying, "We cannot suppose that when Congress enacted the statute … it did not have in mind that a wide field for such [violations] was … beyond the land jurisdiction of the United States, and therefore intended to include them in the section." *United States v. Bowman*, 260 U.S. 94, 102 (1922).

A. The Supreme Court Should Apply the Presumption Against Extraterritorial Application of Federal Statutes to the ATS by Examining the Text, Context, Structure, and Legislative History of 28 U.S.C. § 1350.

In *Carnero v. Boston Scientific Corp.* the First Circuit adopted the standard of *Morrison* to determine whether a federal statute applied extraterritorially. In that case the court held that "the presumption can be overcome **only** if there is an **affirmative** intention of the Congress **clearly** expressed." *Id.* (quoting *Aramco*, 499 U.S. 244, 248d (1991)) (internal quotation marks

omitted) (emphasis added). The court there posited that such necessary evidence of Congressional intent can be found, if at all, in the particular statute's "text, context, structure, and legislative history." *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7 (1st Cir. 2006) (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993)). These four factors applied to the ATS demonstrate the lack of a clear and affirmative expression of Congress' intent for the ATS to apply extraterritorially.

i. Text of the ATS

Nothing in the text of the Alien Tort Statute itself lends even a scintilla to the argument that it was intended by Congress to apply extraterritorially; the statute currently provides: "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." 28 U.S.C.A. § 1350 (West). One might argue that the use of the inclusive term "**any** civil action by an alien" (emphasis added) would impliedly include claims founded on extraterritorial conduct; however, the Supreme Court has held that even such seemingly inclusive terms are not sufficient to overcome the presumption. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (holding that federal labor statute requiring an eight-hour day provision in "[e]very contract made to which the United States ... is a party" did not apply to contracts for work performed in foreign countries). *See also*, *United States v. Palmer*, 16 U.S. 610, 631 (1818) (holding that "general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them," and thus even language applying a statute to "any person or persons" did not overcome the presumption against extraterritorial application); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (holding that "[w]ords having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be

taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch"); *See also*, *Union Underwear Co., Inc. v. Barnhart*, 50 S.W.3d 188, 191 (Ky. 2001) ("Under the presumption against extraterritorial application, the use of the terms 'any' or 'all' to persons covered by the legislation does not imply that the enacting legislature intended that the legislation be applied extraterritorially") (citing 73 Am.Jur.2d, Statutes, § 359 (1974)).

Furthermore, contrary to what some may argue, the inclusion of the word "alien" in the statute does not overcome the presumption against extraterritorial application. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 76 (D.C. Cir. 2011) ("Nor does the ATS's specific reference to alien plaintiffs establish that the statute applies extraterritorially. That language merely ensures that alien plaintiffs can sue under customary international law for injuries suffered *within the United States*") (Kavanaugh, J., dissenting in part) (italics in original). This is consistent with the Supreme Court's holding in *Aramco,* wherein the court found that even though Title VII protected people working in the United States who were "aliens," the use of that word alone did not constitute clear evidence of congressional intent to apply Title VII extraterritorially. *Aramco,* 499 U.S. at 255 (1991).

Finally, the mere possibility, and even plausibility, that the language of a statute could be read to include extraterritorial application does not overcome the presumption against it. *Aramco*, 499 U.S. 244, 253 (1991) (holding that to allow for even "plausible" interpretations in favor of extraterritorial application would negate the presumption against extraterritoriality to the point that there would be little left of it). The text of the ATS offers nothing to the argument that the statute is meant to have extraterritorial application.

ii. Context of the ATS

The context in which the Alien Tort Statute was drafted and enacted indicates even more affirmatively than the text that it was never meant to have extraterritorial application. The ATS was enacted "on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time: offenses against ambassadors, violation of safe conducts, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004). Indeed, the very conduct that inspired the creation of the ATS was the mistreatment of foreign officials **on U.S. soil**. Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 Pepp. L. Rev. 671, 678 (2003).

And though some may point to the inclusion of piracy in the list of early ATS torts as evidence of extraterritorial application, such an argument ignores the fact that "jurisdiction over ships and persons on the high seas was considered domestic jurisdiction by early United States courts." *Id.* (citing State v. Carter, 27 N.J.L. 499 (N.J. 1859)) ("When [a crime is committed] upon our vessels, in whatever solitary corner of the ocean … the vessel and all it contains is still within our jurisdiction … But we have never treated acts done upon the vessels of other governments as within our jurisdiction, nor has such ever been done by any civilized government"). Furthermore, the crime of piracy as a violation of the law of nations had the effect of causing a "vessel [to lose] her national character" *United States v. Furlong*, 18 U.S. 184, 185 (1820). In other words, pirates were considered subjects of no sovereign, therefore any jurisdiction exercised over them was not extraterritorial because it did not encroach into the jurisdiction of a foreign nation.

iii. Structure of the ATS

The structure of the Alien Tort Statute is relatively simple. It was enacted as part of the Judiciary Act of 1789 which among other things established the federal judiciary and defined the bounds if its jurisdiction. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 45 (D.C. Cir. 2011). ("The Judiciary Act of 1789 ensured that there would be no gap in federal subject matter jurisdiction with regard to torts in violation of treaties or the law of nations"). *See also*, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 Hastings Int'l & Comp. L. Rev. 221, 222 (1996) ("the Alien Tort Statute was enacted as the Alien Tort Clause -- a provision in Section 9 of the Judiciary Act of 1789"). And "[w]hile the whole of the Judiciary Act served to confer broad jurisdiction over aliens upon the federal courts, the ATS conferred a unique type of jurisdiction: the power of an alien to sue another alien." Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 Pepp. L. Rev. 671, 676 (2003). As the structure of the Judiciary Act was primarily devoted to defining the bounds of the judiciary, and particularly the bounds of federal subject matter jurisdiction, its silence with respect to any extraterritorial application of the Alien Tort Clause is even more telling—no such application was ever intended.

iv. Legislative History of the ATS

The Alien Tort Statute was enacted by the First Congress "as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789), and its content has not been materially amended since its enactment." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20 (D.C. Cir. 2011). As an act of the First Congress, it is no surprise that there is no actual legislative history on the Alien Tort Statute itself. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 Hastings Int'l & Comp. L. Rev. 221, 222 (1996). In the absence of any clear

legislative intent, some courts have looked to the nature of the particular offense prescribed and the extent to which "other legislative efforts" had attempted to eliminate that same conduct. *United States v. Bredimus*, 234 F. Supp. 2d 639, 649 (N.D. Tex. 2002) *aff'd*, 352 F.3d 200 (5th Cir. 2003). The Alien Tort Statute as part of the Judiciary Act was in fact the culmination of a series of legislative efforts designed to remedy the federal government's inability to deal with **domestic** infractions against the law of nations, specifically harms committed against ambassadors. Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 Pepp. L. Rev. 671, 677-79 (2003).

The first and major event that prompted the need for such federal power involved the assault of a French official by a French citizen named Chevalier De Longchamps. *Id.* at 677). In response to this event and "[b]eing bereft of power to succor the enraged international community, Congress merely offered a reward for the miscreant's apprehension and encouraged state authorities to prosecute him." *Id.* This, albeit limited effort by Congress to remedy this particular type of harm, is strong evidence that the final culmination of the efforts, the ATS, was created primarily for the purpose of assuming federal subject matter jurisdiction over domestic claims by aliens.

B. The Supreme Court Should not be Persuaded by Prior Cases that have Assumed Extraterritorial Jurisdiction *Sub Silentio*.

The Supreme Court in *Morrison* held that the presumption against extraterritorial application applies in **all** cases of federal legislation. *Morrison v. Nat'l Australia Bank Ltd.*, __ U.S. __, 130 S. Ct. 2869, 2873 (2010). The *Morrison* Court also clearly dictated that no deference should be given to any case that has wrongly "ignored or discarded the presumption against extraterritoriality." *Morrison.*, __ U.S. __, 130 S. Ct. 2869, 2887-88 (2010); *See also*,

Aramco., 499 U.S. 244, 260 (1991). And to the extent that courts have allowed for extraterritorial application of the Alien Tort Statute without ever raising the jurisdictional issue, the Supreme Court has held that those "sub silentio" decisions are not binding on a court that finally decides to take up the issue. *Arizona Christian Sch. Tuition Org. v. Winn*, __ U.S. __, 131 S. Ct. 1436, 1448 (2011). The Supreme Court also recently held, in *Milner v. Department of Navy*, that the time period for which courts have misapplied or failed to apply a canon of statutory construction is "immaterial." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1268, 179 L. Ed. 2d 268 (2011).

Some may attempt to confuse the issues and mischaracterize this argument as being contrary to the power afforded to Congress; however, it is beyond dispute that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." *Aramco.*, 499 U.S. 244, 248 (1991). The question before the Court now however is not whether Congress has such power, but "[w]hether Congress has in fact exercised that authority," and that "is a matter of statutory construction." *Id.* The Supreme Court has specifically adopted the statutory construction of federal statutes in presumption against extraterritorial application, but it has not specifically ruled on the issue of extraterritorial application of the ATS. Therefore, the presumption against extraterritorial application is binding, and should apply with full force in the absence of a clear and affirmative expression of congressional intent to the contrary.