



Can Corporations be Held Liable under the Alien Tort Statute?

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Update: In a 5-4 [opinion](#) written by Justice Kennedy, the Supreme Court held that foreign corporations (including Arab Bank) may not be defendants in suits brought under the Alien Tort Statute. A Sidebar discussing the ruling and an update to this broader [report](#) on the Alien Tort Statute are forthcoming.

The original post from November 3, 2017, follows below.

Recently, the Supreme Court heard [oral argument](#) in *Jesner v. Arab Bank PLC*—a case filed under the [Alien Tort Statute](#) against one of the largest financial institutions in the Middle East. Originally passed by the First Congress as part of the [Judiciary Act of 1789](#), the Alien Tort Statute provides federal district courts with “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 [described](#) as “unlike any other in American law” and “unknown to any other legal system in the world.” Despite its brevity, questions about jurisdiction under the statute have been the subject of debate for several decades (as discussed in this [CRS primer](#).) In *Jesner*, the Supreme Court is [set to address](#) an issue that has caused a recent split among U.S. circuit courts of appeals: can corporations be liable for torts in violation of the law of nations under the Alien Tort Statute?

***Jesner* and the Corporate Liability Circuit Split**

Jesner involves 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. The plaintiffs allege Arab Bank aided and abetted the terrorist organizations allegedly responsible for the attacks by maintaining bank accounts that Arab Bank knew would be used to fund terrorism and by identifying the relatives of suicide bombers so that they could be compensated with so-called “martyrdom payments.” As [one court](#) described the allegations, Arab Bank allegedly served as a “paymaster” for terrorist groups through the institution’s branch offices in the West Bank and Gaza.

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The U.S. Court of Appeals for the Second Circuit (Second Circuit) [dismissed the case](#) on the sole ground that the Alien Tort Statute does not permit liability against corporations. However, the Second Circuit is the only U.S. court of appeals to reach this conclusion. [All other circuits that considered](#) the issue determined that corporate liability is available under the Alien Tort Statute. The Second Circuit acknowledged the “growing consensus among [its] sister circuits” allowing corporate liability, but it declined to overrule its [prior circuit precedent](#) on the issue.

Although the Supreme Court [will review](#) the Second Circuit’s decision, this is not the first time the Court has taken a case involving corporate liability under the Alien Tort Statute. In 2011, the Supreme Court granted certiorari in *Kiobel v. Royal Dutch Petroleum* on the same topic. But the Court [ultimately resolved](#) *Kiobel* on the ground that the case did not displace the “[presumption against extraterritoriality](#)”—meaning the case was not connected sufficiently to the United States to overcome the presumption that claims arising overseas cannot be brought in U.S. courts. In *Jesner*, the Second Circuit purposefully declined to address the presumption against extraterritoriality and all other arguments for dismissal *except* corporate liability, creating another opportunity for the Supreme Court to resolve the circuit split.

A Possible Two-Step Approach for Resolving Alien Tort Statute Questions

[Some commentators](#) have differed in their interpretation of the October 11 [oral argument](#) in *Jesner* and whether the Supreme Court may definitively resolve whether corporations may be liable under the Alien Tort Statute. But several members of the Court—Justices Alito, Kagan, and Kennedy—intimated that the Court may use a two-step approach for resolving the dispute. This two-step framework is informed by an earlier Supreme Court decision interpreting the contours of the Alien Tort Statute, *Sosa v. Alvarez Machain*.

***Sosa* Step One**

In *Sosa* (discussed in more detail [here](#)), the Court concluded that the Alien Tort Statute does not provide jurisdiction for all claims asserting violations of the standards of conduct (often called “norms”) required by international law. Rather, under *Sosa*, only those norms that are “accepted by the civilized world” and defined with a high degree of specificity are actionable under the Alien Tort Statute. During oral argument in *Jesner*, Justice Kennedy harkened back to this holding, and stated that in “*Sosa* step 1” the Supreme Court “ask[s] if there’s a specific universal norm” that is implicated in the case. Applied to *Jesner*, this inquiry could implicate a complex and currently unresolved question of whether domestic law or international law governs corporate liability under the Alien Tort Statute.

Under long-standing American domestic jurisprudence, corporations generally are “[deemed persons](#)” that may “[sue and be sued](#)” for torts. But the Alien Tort Statute creates jurisdiction only for torts that violate treaties or the law of nations, and the issue of corporate liability in international law is far less clearly defined than domestic law. [Proponents](#) of corporate liability contend that, although international law defines substantive standards of conduct that cannot be violated, international law delegates to each individual nation the responsibility of selecting the means of enforcing international norms. In other words, [proponents argue](#), international law simply returns the question of how to remedy a violation of an international norm to the domestic law of the United States, which has a long-standing history of recognizing corporate liability. [Opponents](#) of corporate liability [respond](#) that U.S. law does not permit corporate tort liability in all cases, including some potentially analogous [circumstances](#), such as [implied constitutional causes of action](#) and [claims](#) under the [Torture Victim Protection Act](#).

Ultimately, this choice-of-law question is not easily resolved, but could be a decisive feature in *Jesner*.

***Sosa* Step Two**

The Supreme Court’s holding in *Sosa* had a second facet. In addition to limiting jurisdiction under the Alien Tort Statute to widely accepted and well-defined international norms, *Sosa* explained that, because claims under the statute could lead to adverse foreign policy consequences, courts should act as “vigilant

doorkeepers” and exercise “great caution” before deciding that a norm is actionable. Discussing this concept during oral argument in *Jesner*, Justice Alito described *Sosa* step two as raising the question of whether courts “*should* recognize” a particular norm is actionable based on a balancing of the “international repercussions” that could result from the decision.

At the step two level, there would appear to be at least some adverse foreign policy consequences if the Supreme Court were to allow the claims against Arab Bank to go forward: the Kingdom of Jordan (where Arab Bank is headquartered) filed an [amicus brief](#) calling the exercise of jurisdiction in *Jesner* a “grave affront” to its sovereignty.

Congressional and Other Interest in *Jesner*

Jesner has generated attention in a number of interested communities, including [legal scholars](#) and [historians](#), [human rights groups](#), [national security specialists](#), and [business interest groups](#). Senators Sheldon Whitehouse and Lindsey Graham filed an [amici brief](#) in support of the *Jesner* plaintiffs’ efforts to recognize corporate liability. The Senators argue that the Alien Tort Statute serves as part of a larger legislative scheme to address terrorism, and that a limitation on corporate liability in the statute would leave “gaps in the United States’ counterterrorism framework.” Citing existing criminal prohibitions on [material support to terrorism](#) and [financial regulations](#) administered by the Office of Foreign Asset Control, Arab Bank [counters](#) that the Alien Tort Statute is not an essential element of U.S. anti-terrorism efforts.

In its [brief for the United States](#), the Solicitor General takes a middle approach in support of neither party. The Solicitor General asserts there is no categorical prohibition on corporate liability in the Alien Tort Statute, and that the Second Circuit’s decision should be vacated. But the Solicitor General also argues that *Jesner* should be remanded to consider whether the case should be dismissed on the alternative ground that the claims are not sufficiently connected to the United States to satisfy the presumption against extraterritoriality.