

Does the Supreme Court of the United States Protect Terrorists?

In *Jesner v. Arab Bank*, 2018 U.S. LEXIS 2631 (April 24, 2018), Justice Kennedy, writing for the Court on most of the issues, ruled that the Alien Tort Statute would not aid victims of terrorism in a case against a bank which allowed for laundered money for terrorist organizations.

Petitioners in this case, or the persons on whose behalf petitioners assert claims, allegedly were injured or killed by terrorist acts committed abroad. Those terrorist acts, it is contended, were in part caused or facilitated by a foreign corporation. Petitioners sought to impose liability on the foreign corporation for the conduct of its human agents, including its then-chairman and other high-ranking management officials. The suits were filed in a United States District Court under the Alien Tort Statute, commonly referred to as the ATS. See 28 U. S. C. §1350.

The foreign corporation charged with liability in these ATS suits is Arab Bank, PLC. Some of Arab Bank's officials, it is claimed, allowed the Bank to be used to transfer funds to terrorist groups in the Middle East, which in turn enabled or facilitated criminal acts of terrorism, causing the deaths or injuries for which petitioners sought compensation. Petitioners attempted to prove that Arab Bank helped the terrorists receive the moneys in part by means of currency clearances and bank transactions passing through its New York City offices, all by means of electronic transfers.

It was assumed by the Justices that those individuals who inflicted death or injury by terrorism committed crimes in violation of well-settled, fundamental precepts of international law, precepts essential for basic human-rights protections. It was also assumed that the individuals who knowingly and purposefully facilitated banking transactions to aid, enable, or facilitate the terrorist acts would themselves be committing crimes under the same international-law prohibitions.

Petitioners contended that international and domestic laws impose responsibility and liability on a corporation if its human agents use the corporation to commit crimes in violation of international laws that protect human rights. The question presented to the Court was whether the Judiciary had the authority, in an ATS action, to enforce liability in ATS suits, without any explicit authorization from Congress to do so.

The answer turns upon the proper interpretation and implementation of the ATS. The statute 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." §1350. The Supreme Court reasoned that a court must first ask whether the Law of Nations imposes on corporations human-rights violations committed by its employees. It was said that the Court must also ask whether it has the authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so.

A significant majority of the Plaintiffs in the lawsuits, about 6,000 of them, were foreign nationals whose claims arose under the ATS. They alleged that they or their family members were injured by terrorist attacks in the Middle East over a 10-year period. Two of the five lawsuits also included claims brought by American nationals under the Anti-Terrorism Act, 18 U. S. C. §2333(a), but those claims are not at issue.

According to the brief for Hashemite Kingdom of Jordan, Arab Bank is a major Jordanian financial institution with branches throughout the world, including in New York. According to the Kingdom of Jordan, Arab Bank “accounts for between one-fifth and one-third of the total market capitalization of the Amman Stock Exchange.” Petitioners alleged that Arab Bank helped finance attacks by Hamas and other terrorist groups. Among other claims, Petitioners alleged that Arab Bank maintained bank accounts for terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers.

Most of Petitioners’ allegations involve conduct that occurred in the Middle East. Yet Petitioners alleged as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists.

According to the Alien Tort Act, “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. § 1350.

The Court reasoned that there was a “relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States.” This, according to the policymakers on the Court, illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. The Court, as foreign relations experts, also claimed that for 13 years, the litigation has “caused significant diplomatic tensions” with Jordan, “a critical ally in one of the world’s most sensitive regions.”

This case is about the limits of the courts to grant relief where foreign powers are concerned. The United States Supreme Court, in its infinite wisdom, simply could not abide mostly foreign nationals utilizing the United States court system to shut down money laundering where it took place in connection with a “friendly” regime. Such logic was behind the refusal of the United States Supreme Court to accept *certiorari* in the case of *Sokolow v. Palestine Liberation Organization*. In *Sokolow*, the plaintiffs had prevailed before the District Court as a result of terrorist acts committed by the defendants. The Second Circuit threw out the verdict, claiming that under the Fifth Amendment it was fundamentally unfair to exercise jurisdiction over actions that occurred abroad, notwithstanding that in *Sokolow* Plaintiffs held American citizenship. When the United States Supreme Court had the opportunity to right the wrong, it unfortunately refrained from so doing.

Sokolow and cases like it have completely denuded protections overwhelmingly passed by Congress for Americans and non-Americans who were killed or injured by terrorism abroad. The terrorist organizations which were defendants in these cases, as well as

those that aid and abet them, have assets and do business in the United States. The Palestinian Authority, named as a Defendant in *Sokolow*, has a major presence in the United States and yet is guilty of paying terrorists stipends who commit the most heinous acts. Much of the funding for the Palestinian Authority even comes from the United States!

The war on terrorism cannot simply be fought with cruise missiles and “stand-off” weapons. The legal system must also be utilized where proof of terrorism or money laundering can be proven to strip those who kill and maim of their economic weaponry. The actions and omissions of the United States Supreme Court unwittingly contribute to the scourge of terrorism worldwide.

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