
A Very Sad Man

In my view, Dan's helpful post the other day about the Supreme Court's environmental cases neglected one very important case decided just a few days ago: *Kiobel v. Royal Dutch Petroleum*, about which I have blogged earlier. The "in my view" in the last sentence is more than throat-clearing, for *Kiobel* raises the question, also flagged by Dan, about what an environmental case is.

Kiobel concerned the grotesque human rights violations that occurred against the Ogoni people in Nigeria, and whether liability could attach to Royal Dutch Petroleum under the Alien Tort Claims Act for its actions there. In keeping with the Roberts Court's activism to protect powerful interests, the decision not only held in the negative, but also moved to cut off as much liability as possible under the statute, originally enacted in 1789. The standard 5-member right-wing majority invoked (for the first time with ATCA) a "presumption against extraterritoriality" in reading the statute and thus shielded Royal Dutch Petroleum. You can find excellent analysis at the always-valuable Opinio Juris blog.

One might think that a case involving construction of the Alien Tort Claims Act would not be germane for environmental lawyers. In recent years, however, we have seen that many of the most egregious human rights abuses have arisen in the context of natural resource disputes, whether in mining (*Sarei v. Rio Tinto*) or oil exploration (*Doe v. Unocal*, and *Kiobel* itself). That's not an accicdent: how resources are developed or extracted in the Global South is a highly contentious political issue, often pitting indigenous peoples against central governments, and many of those central governments are not particularly solicitous of human rights — especially when so much money is at stake. These things will continue to happen. So what happens to this statute should be of interest to anyone involved with

environmental law or policy.

Even though the Court invoked the "presumption against extraterritoriality," it isn't clear what this presumption actually means. It's comparatively easy in the case of Royal Dutch Petroleum, which isn't even an American company (although as I have suggested beforehand, the connections of the case with American are pretty deep and wide). What if the company is American, such as Unocal or ExxonMobil? If, say, Saudi security officials brutalize workers in their oil fields, which are operated by Unocal or ExxonMobil, does that abuse occur "in" the United States or not? Obviously, the injuries occurred outside the United States; but to the extent that they were done at the behest, with the acquiescence of, or even in connection with, decisions to drill made in the United States, what does the "presumption against extraterritoriality" mean? The ATCA suit is against the company, not the Saudi thugs.

It is for this reason that Justice Kennedy, whose vote gave Chief Justice Roberts his majority, stated in his concurrence that

> Other cases may arise with allegations of serious violations of international law principles protecting persons, cases [not] covered . . . by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

Very true. Chief Justice Roberts sought to foreclose the scenario suggested earlier in the coda to his opinion:

> [E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application…Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.

His solicitude for multinational corporations is touching. I wish he had the same sort of consideration for the victims of torture and oppression.