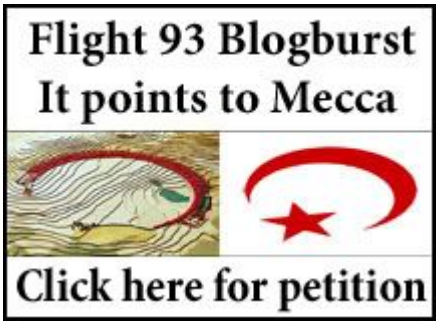
Stop The Murdoch (Flt 93) Memorial Blogburst: Obamaâ€™s filing against 9/11 families: so bad it's good

Description

Bizarre amicus brief totally demolishes the Second Circuit's dismissal of the families' suit, then replaces it with the most mendacious stupidity imaginable. Now the Supreme Court will HAVE to hear the case, just to avoid the implication that it accepted this garbage.



9/11 families were stunned this week to learn that President Obama is asking the Supreme Court NOT to review their effort to recover damages from the government of Saudia Arabia and from several Saudi princes for funding al Qaedaâ€™s 9/11 attack on America. That the defendants did funnel vast sums of money to al Qaeda was accepted as a given by the appellate court, as was the fact that al Qaeda was known to be dedicated to and engaged in violent attacks against America. So what was the Obama administrationâ€™s reason for siding with the Saudis?

Solicitor General Elena Kaganâ€™s amicus brief to the Supreme Court had to admit that the Second Circuit Court of Appeals erred in its grounds for denying the suit against the Saudi princes. No, the fact that the princes did not actually direct the al Qaeda attack on the United States does not relieve them of liability for attacks that they funded. The precedent on this is clear. As long as the defendant knew â€œthat the brunt of the injuryâ€• from his tortious act would be felt in America, then:

> … he must â€˜reasonably anticipate being haled into court thereâ€™ to answer for his actions. [*Calder v. Jones*, 465 U.S. 783, 790. Cited on Kaganâ€™s p. 18.]

Nevertheless, said Kagan, she could think of a way around the appellate courtâ€™s utter failure to get the heart of the case right. The familiesâ€™ suit falls under the 1976 FSIA law that establishes exceptions to the principle of sovereign immunity. This law does not allow jury trials. Thus while the appellate court was clearly wrong to say that the suit should not be heard, Kagan suggests that there are snippets in the ruling that can be read as the appellate court acting in its role of trier of fact, and thus ruling against the families for providing insufficient evidence.

In other words, instead of seeing the Second Circuit as rejecting the basis of the suit, we should see them as accepting the suit, and ruling against it on the substance. To make her argument that the appellate court actually did try the facts, she quotes the Second Circuitâ€™s statement that:

> Conclusory allegations that [Prince Turki] donated money to charities, without specific factual allegations that he knew they were funneling money to terrorists, do not suffice.

But of course the families DID marshal reasons why Turki could be expected to know that his donations were going to al Qaeda, as indicated by the appellate courtâ€™s further statements that there was no personal jurisdiction even if the defendants did â€œknow that their money would be diverted to al Qaeda,â€• or were â€œaware of Osama bin Ladenâ€™s public announcements of jihad against the United States.â€• (Cited in the families'reply brief, p.8, and in Kaganâ€™s brief, p. 19, respectively.)

For Kagan to pretend that the Second Circuit acted as a sufficient trier of fact, when it explicitly asserted that the facts donâ€™t matter, is just an attempt to mislead the Court. The evidence that the Saudi Princes knew they were funding al Qaeda has yet to be considered by U.S. courts, even though Kagan herself admits that if they did know, they should be held liable.

The families respond

Of course the families are angry that Obama is blocking their access to the courts, despite their legitimate claims under U.S. law:

> The Administration's filing mocks our system of justice and strikes a blow against the public's right to know the facts about who financed and supported the murder of 3,000 innocent people. It undermines our fight against terrorism and suggests a green light to terrorist sympathizers the world over that they can send money to al Qaeda without having to worry that they will be held accountable in the U.S. Courts for the atrocities that result. â€¦
>
> The Administration's filing is all the more troubling in that it expressly acknowledges that the courts below applied incorrect legal standards in dismissing the Saudi defendants, but nonetheless argues that the case — one that seeks to account for the terrorist attacks against America and the murder of our family members — does not warrant the Supreme Court's time.

This at the same time as Obama insists that al Qaeda operatives held at Guantanamo Bay must be granted access to U.S. courts. Concocted rights for terrorists, yes. Following the law for the victims of terrorism, no.

On Saudi state liability, Kagan again misleads to the point of outright dishonesty

Here too, Kagan is forced to start out by noting that the grounds on which the Second Circuit Court of Appeals dismissed the familiesâ€™ claims is not valid. The circuit court held that damages for terrorist acts have to be brought under the FSIA lawâ€™s special exception for terrorist acts, which requires

that the state defendant be designated by the State Department as a terror supporting state. Since Saudi Arabia has not been so designated, suit cannot be brought under this provision, end of case.

Wrong, as Kagan herself explains:

> Congressâ€™s concern was not to impose new limits on the domestic tort exception, but instead to expand jurisdiction to cover a narrow class of claims based on conduct abroad. See, *e.g.*
>
> , H.R. Rep. No. 702, 103d Cong., 2d Sess. 3, 5 (1994) (explaining that the bill would â€œexpandâ€• jurisdiction to include claims by an American who is grievously mistreated abroad by a foreign governmentâ€•).

This was necessary because the domestic tort exception only applies to injuries that occur on U.S. territory. Specifically, the domestic exception allows suit when:

> 1605(a)(5) – money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state.

In the wake of the Iranian hostage taking in Tehran, Congress wanted designated terror-supporting states to be liable for harms that they inflict on Americans even on their own territory, but this in no way was supposed to limit suit over harms that occur within the United States, such as the 9/11 murders.

Confronted with this obviously wrong ruling by the Second Circuit, Kagan again tries to cobble together an alternative grounds for granting Saudi immunity. To fullfill this improbable command from above, she decides to flat-out *lie* about precedent, big bald astounding lies.

Torturing “tortious”

Notice that the language of the domestic tort exception is perfectly clear that what has to occur inside the United States is the personal injury or death, not the decision that leads to the personal injury or death. Suppose that the home office of a state owned shipping company decides to scrimp on safety equipment for its cargo vessels, leading to loss of American lives when cargo is offloaded in an American port. This is exactly the kind of thing that FSIA was intended to cover, but Kagan pretends otherwise, arguing that not only the tort (the harm), but also the â€œtortious act or omissionâ€• that creates the harm, have to take place inside the United States.

In many cases there is no separation between the harm and the act that creates it. They both occupy the same time and place. Neither does the language of torts typically distinguish between the tort and the tortious act. Instead, the tortious act is seen as being realized when the tort (the harm) actually occurs. Kagan’s ploy is to try to make a distinction between the tort and the “tortious act” that leads to it, and she is able to come up with some out-of-context references to make it sound as if precedent demands that both the harm and the decision-making that leads to the harm have to occur here in America.

She claims, for instance, that:

> In *Amerada Hess*, the Court considered and rejected the argument that domestic effects of a foreign stateâ€™s conduct abroad satisfy the exception. 488 U.S. at 441.

Applied to the current case, she is clearly suggesting that the â€œdomestic effectâ€• corresponds to the 9/11 attacks, and that the â€œconduct abroadâ€• corresponds to the statutorily required â€œtortuous act or omissionâ€• that in both cases took place outside of U.S. territory. A look at the actual Supreme Court ruling, however, shows this to be a gross misrepresentation of *Ameranda Hess*.

Looking up *Argentine Republic v. Amerada Hess Shipping Corp.* and turning to p. 441 we find what the case was actually about:

> In this case, the injury to respondents' ship occurred on the high seas some 5,000 miles off the nearest shores of the United States. Despite these telling facts, respondents nonetheless claim that the tortious attack on the Hercules occurred "in the United States."

In other words, it was the harm itself that in this case did not occur within U.S. territory. Contrary to Kaganâ€™s representation, the Court was NOT making a distinction between the harm and decision that led to it and claiming that both had to occur within the United States.

This kind of blatant misrepresentation of precedent is lawlessness! Is this how the Obama administration treats precedent? As fodder for utterly dishonest word games? YES.

To preserve its own reputation, SCOTUS will *have* to hear the familiesâ€™ case

The Supreme Court asked the Obama administration to submit this brief. It cannot be ignored. If SCOTUS accepts guidance from this contemptuous document, then it is implicated in the Obama administrationâ€™s contempt for the law.

If the sheer perversity of Kaganâ€™s filing does force the Court to hear the familiesâ€™ case, that would be a great outcome, but the downside risk is equally amplified. If the Court DOES accept Kaganâ€™s guidance, it is a black black day for America.

Meretricious cites and arguments dominate every paragraph of Kaganâ€™s brief, except in two place: where she shoots down the Second Circuitâ€™s patently errant grounds for dismissal. It almost seems like she started with a brief in support of the familiesâ€™ suit before getting the order from Obama to side with the Saudis. Apparently she decided that it was fruitless to try to support the Second Circuitâ€™s reasoning, so she let the demolition of the Second Circuitâ€™s ruling stand, then supplied her own just as bad case for Saudi immunity.

However it came about, Kaganâ€™s destruction of the Second Circuit ruling is so competent, and her substitute arguments for immunity so *in*

competent, that the whole almost seems designed to force a Supreme Court hearing. Could she have

intentionally sabotaged her own brief? Doubtful, given that the Obama DOJ just overruled its own career lawyers in order to drop an already won case against three New Black Panthers who were caught on tape using weapons to intimidate voters. Apparently the Obama administration just really is this stupid and malicious.

In any case, it seems unlikely that Kaganâ€™s shenanigans will get past the justices. Antonin Scalia is unlikely to forget the FISA case opinion he wrote in 1992, addressing the very question of harms resulting in the United States from decisions made by foreign entities in their home countries. His conclusion? In a breach of contract case where the only tie to the United States was the option of receiving payment in dollars in New York City, the Court denied immunity. Only the harm itself had to take place on U.S. territory, not the decisions that led to the harm, and the opinion was *unanimous*

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Obamaâ€™s imperial presidency: he does not want to be bound by the 1976 Foreign Sovereign Immunity Act, and says so

The family group states directly that:

> The filing was political in nature and stands as a betrayal of everyone who lost a loved one or was injured on September 11, 2001.

Indeed, the entire first section of Kaganâ€™s brief is replete with claims that exceptions to sovereign immunity *should* be determined politically.

That is the way it used to be, before Congress passed the FSIA act specifically in order to take these determinations out of the political realm. The United States only started granting any exceptions to the legal tradition of sovereign immunity in the 1950's, after some nation-states started getting heavily involved in commerce. If state enterprises could not be held liable in U.S. courts, they would have a competitive advantage over private industry. Not smart policy during the cold-war contest between capitalism and communism.

Exceptions were at first made on a case by case basis by the executive, but such arbitrariness does not suit the needs of commerce, so Congress made an explicit decision to take this power away from the executive. Even so, Kaganâ€™s brief hints over and over (p. 4-10) that executive prerogative should still hold sway, but without ever making an explicit case that FSIA intrudes on the inherent powers of the presidency, and without ever stating what the president would want to do with those powers in the present case if the court were to recognize them as pre-eminent.

The reason Kagan doesnâ€™t make these things explicit is because they are damning. Obama knows that the Saudiâ€™s are liable under U.S. law, but for his own political reasons he does not want them to be held liable, but neither does want the nation to understand that he considers currying favor with the people who attacked us on 9/11 to be more important than justice for his own murdered countrymen.

The president does indeed have some inherent power here, just as President Bush had inherent power to wiretap conversations with al Qaeda operatives both at home and abroad, regardless of what

Congress put in the FISA wiretapping law. Bush *did* abide by FISA, but he didnâ€™t *have* to.*

Obama is going further. He does not want to abide by FSIA, but is unwilling to make the case that the particular exemption from FSIA that he is asking for is a legitimate exercise of his inherent powers, or even assert what he would do with that power. He just wants the courts to do his dirty work for him, asking them to grant immunity to the Saudis based on bogus claims about FSIA law and precedent.

Conservative justices might be tempted to recognize the presidentâ€™s inherent powers in the area of foreign policy, but they should not let him exercise this power on false pretenses. If he wants to claim that he has the inherent power to grant immunity to the Saudis and that this is how he wants to exercise that power, he can do it publicly, but he should not be allowed to overrule Congress on the pretense that he is doing the will of Congress.

To allow this subterfuge would destroy fundamental FSIA precedents while failing to attain the virtue of the pre-FSIA regime, where the president had to stand or fall by his explicitly political decision-making. If Obama wants to invoke the inherent power of the presidency here, he at the very least has to be willing to admit it.

*** FISA court precedent on inherent powers**

The powers of Congress to regulate in an area where the president has his own inherent authority was addressed by the FISA court in September 2002:

> The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. It was incumbent upon the court, therefore, to determine the boundaries of that constitutional authority in the case before it. We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the Presidentâ€™s constitutional power.

The contrast to the present case is instructive. Bushâ€™s Solicitor General Ted Olson did not hide the fact that President Bush wanted the court to recognize his inherent authority to conduct signals intelligence. With that power duly recognized, Bush still went the last mile to conform to the law as enacted by Congress. That is what it means to â€œuphold our fundamental principles and values,â€• while Obama, who keeps accusing President Bush of failing to uphold our values, engages in legal subterfuge, showing as much contempt for the law as for our 9/11 families.

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