

THE THREE LIVES OF THE ALIEN TORT STATUTE: THE EVOLVING ROLE OF THE JUDICIARY IN U.S. FOREIGN RELATIONS

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ABSTRACT

*This Article explains how the Alien Tort Statute (ATS) began in the late eighteenth century as a national security statute that the First Congress and early federal district judges saw as a way to afford damages remedies to British merchants, creditors, and other subjects whose persons or property were injured under circumstances in which treaties or the law of nations assigned responsibility to the United States. Torts committed within the United States by private American citizens were the most likely such circumstances. The ultimate aims of the statute were to avoid renewed war with Great Britain and the other European powers and to encourage commerce and trade with the same. Two centuries later, the ATS was reborn as an international human rights statute at a time when the United States had become a global superpower with a global human-rights agenda during the administration of President Jimmy Carter. Now that the Supreme Court's holding in *Kiobel v. Royal Dutch Petroleum Co.* has undermined the international human rights vision of the ATS, this Article suggests that the statute be used once again as a way to afford aliens money damages when they suffer torts under circumstances where the United States bears sovereign responsibility under contemporaneous international law.*

INTRODUCTION

The nineteen key words of the Alien Tort Statute have survived intact since 1789: a U.S. district court has original jurisdiction of a suit brought by an “alien . . . for a tort only . . . in violation of the law of nations or a treaty of the United States.”¹ But the statute has lived two different lives so far, and

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1 28 U.S.C. § 1350 (2006). The original version in the Judiciary Act of 1789 provided that the district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2006)).

the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*² will likely give birth to another.

This Article examines the past (1789–1795), present (1980–2013), and future (2013–) of the Alien Tort Statute (ATS) as a case study in how the role of federal judicial power in U.S. foreign relations and policymaking has evolved. The focus will be on how the statute and its implementation over time must be understood not only in terms of the traditional lawyerly tools of statutory interpretation and development through case law, but more broadly as it relates to the changing global context and the standing of the United States in the world.

The ATS was enacted in 1789 as a national security statute affording aliens access to newly created federal district courts to obtain damages for noncontract injuries to their persons or property for which the United States bore responsibility under contemporaneous international law.³ One such law of nation obligation at the time was something William Blackstone called a *general implied safe conduct*. “The general implied safe conduct [was] an extraordinarily broad protection for aliens, essentially converting any injury to their person or property within a country into an international law violation by virtue of the fact that the victim was a friendly or neutral alien. In America of 1789, this would have covered every citizen or subject of a European state since the United States was not then at war.”⁴ The underlying aims were to keep the peace with the European great powers and to encourage their merchants and bankers to do business with the people of a largely agrarian revolutionary state by promising a credibly neutral forum for dispute resolution in cases of property damage or personal injury.⁵ Even today, a high priority for developing nations, particularly those born of

2 133 S. Ct. 1659 (2013).

3 See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 900 (2006) (“The ultimate aims of the enactment were national security and commerce; the specific foreign policy of concern was injury to British creditors and merchants within the United States.”).

4 *Id.* at 837. Professors Bellia and Clark have a narrower understanding of what constitutes a safe conduct violation that seemingly does not incorporate Blackstone's general implied safe conduct. They write that “[t]hese offenses [including safe conduct violations] did not encompass acts of violence by U.S. citizens against aliens who did not enjoy the protection of a safe conduct or diplomatic status.” Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609, 1627 (2014). On Blackstone's view, however, which I believe was shared by the First Congress, all friendly and neutral aliens in the United States enjoyed a “safe conduct,” that is, the promise of protection by the United States of their persons or property. This promise, however, was an *implied* one that did not require manifestation in a particular document like a wartime safe conduct. Even today a foreigner who is lawfully in the United States holds a passport, which is the modern equivalent of the late eighteenth-century safe conduct. When one includes the general implied safe conduct within the coverage of the ATS, as I have argued in detail elsewhere, see Lee, *supra* note 3, Bellia and Clark's historical account and mine are very similar, except for their view that the tortfeasor must be a U.S. citizen for a claim to be actionable under the ATS.

5 Lee, *supra* note 3, at 892.

revolution or war (the United States was the product of both), is creating national fora for dispute resolution that appear fair to potential foreign lenders, investors, and businesses.

Two centuries later, the national security statute was reborn as an international human rights statute. The original reasons for the ATS were long forgotten as the United States had become a great power, and then a superpower and the undisputed hegemon of the world economy. In this context, progressive legal entrepreneurs seized upon the protean plain language of the ATS to recast it as a congressional license for aliens to bring lawsuits in U.S. federal courts alleging international human rights claims occurring anywhere in the world, so long as there was personal jurisdiction over the alleged tortfeasor.⁶ This included so-called “foreign-cubed suits”: suits by foreigners against other foreigners based on acts in a foreign country. This second incarnation of the ATS, baptized by the 1980 decision of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*,⁷ was still halfway faithful to the aims of the original enactment insofar as it emphasized the First Congress’s commitment to affording a private damages remedy for violations of international law.⁸ However, it importantly left out the specific concern with such violations that might subject the United States to trade sanctions or military retaliation by other more powerful states.

Notwithstanding this crucial oversight, the *Filartiga* variation of the ATS took root in fertile soil during the age of Soviet-American détente. The second life of the ATS supplemented the centrality of international human rights to President Jimmy Carter’s foreign policy agenda⁹ by deploying the judicial branch as an enabler of lawsuits against atrocities committed by the agents of Cold War allies¹⁰—allies whom the executive branch had to be far more sensitive about publicly rebuking. The new global role for the U.S. federal courts of enforcing individual rights against the state also resonated with the public rights litigation model then ascendant in the United States.¹¹ With the end of the Cold War, a modern Congress implicitly endorsed the *Filartiga* interpretation of the ATS by enacting the Torture Victim Prevention Act of 1991, a new statute affording both aliens and U.S. citizens a right to

6 See, e.g., *Daimler AG v. Bauman*, No. 11-965, slip op. at 3 (U.S. Jan. 14, 2014) (denying personal jurisdiction over German multinational corporation in California for human rights claims under the ATS arising from conduct in Argentina by its Argentine subsidiary from 1976 to 1983).

7 630 F.2d 876 (2d Cir. 1980).

8 *Id.* at 885–86.

9 See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 154–61 (2010).

10 The claim in *Filartiga*, for instance, was brought by the relatives of a teenage boy allegedly tortured to death in 1976 in Paraguay by a police official in the repressive regime of Alfredo Stroessner, a long-time U.S. ally. *Filartiga*, 630 F.2d at 878.

11 See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281–84 (1976) (describing the traditional model of litigation and the rise of the public law model).

sue foreign state actors in U.S. courts for torture or extrajudicial killings.¹² And, in 2004, in its first direct foray into ATS litigation, the U.S. Supreme Court also validated the *Filartiga* approach with a six-to-three decision in *Sosa v. Alvarez-Machain*,¹³ although the majority rejected the specific international law claim at issue and tried to formulate a historically grounded doctrinal test that curtailed overly ambitious international law claims.¹⁴

The Supreme Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.* marks an attempt to end the cosmopolitan second life of the ATS launched by *Filartiga*. The United States no longer appears to have the luxury or the appetite for championing international human rights claims, and the prevailing view is that the judicial branch should defer to the political branches in U.S. foreign relations and policymaking. Nor, for that matter, does it seem prudent to allocate scarce U.S. taxpayer-funded judicial resources to the handling of foreign-cubed suits with no discernible benefit to U.S. interests, and, indeed, high potential for damaging these interests by meddling in the internal politics of other countries, including great powers with spotty human rights records like China and Russia. The fact that all the Justices agreed on the holding in *Kiobel* indicates just how much the international setting has changed since 2004.

What will happen to ATS litigation in the future? On the one hand, the *Kiobel* Court did not explicitly repudiate *Sosa*, which hesitatingly but clearly endorsed *Filartiga*.¹⁵ Accordingly, some have proposed a more modest version of the *Filartiga* approach. Justice Breyer in his *Kiobel* concurrence, for instance, suggested allowing ATS suits for extraterritorial torts in violation of international law against defendants who have taken refuge in the United States.¹⁶ On the other hand, the majority opinion in *Kiobel* was decidedly hostile to the international law claims of aliens against other aliens in foreign countries, grafting onto the *Filartiga* root a property-law transplant: actionable claims under the ATS must at minimum "touch and concern the territory of the United States."¹⁷ By so doing, the *Kiobel* Court restored something the *Filartiga* interpretation of the ATS had obscured—the fact that the statute was intended for aliens who had a grievance with a U.S. nexus.

12 Torture Victim Protection Act of 1991, Pub L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

13 542 U.S. 692 (2004).

14 *Id.* at 732.

15 *Id.*

16 See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring) ("Unlike the Court, I would not invoke the presumption against extraterritoriality. . . . I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind."). The United States-as-"safe harbor" prong of Justice Breyer's suggested test sweeps broader than all torts for which the United States bears state responsibility under international law.

17 *Id.* at 1669 (majority opinion).

The normative claim of this Article is that we should go “back to the future,” by reclaiming the most accurate original meaning of the ATS as a national security statute giving aliens access to U.S. courts to obtain money damages for injuries for which the United States plausibly bears state responsibility under international law.¹⁸ The *negative* face of this normative claim is that the post-*Kiobel* future of the ATS should shed its Filartigan pan-global gloss as a far-ranging international human rights statute. In this sense, the *Kiobel* decision was a positive step.

At the same time, *Kiobel*'s weighty reliance on *where* the relevant conduct giving rise to an ATS action took place is unduly restrictive.¹⁹ In some cases the United States may have been the prime mover behind torts committed in other countries by foreigners on its behalf, as witnessed by the facts of *Sosa* itself.²⁰ The fulcrum of the inquiry into what is actionable under the ATS should focus, accordingly, on whether the United States may be held responsible under international law for allegedly tortious conduct because, for instance, the conduct (1) violated specific U.S. treaty obligations, (2) occurred in the United States, or (3) was committed abroad by U.S. private persons acting in a public capacity or by non-U.S. agents of the U.S. government. Most of the time the relevant conduct will consist of acts within U.S. territory, but this will not be true all of the time. Of course, this proposed rule of decision is consistent with *Kiobel*'s holding which conceded that the presumption against extraterritorial application might be “displace[d]” where the tort claims “touch and concern the territory” of the United States.²¹ The holding in *Kiobel* would be fully consistent with my normative claim if those words had been “implicate the sovereign responsibility” of the United States.

18 James Crawford has recently published a comprehensive and highly informative monograph that captures the current state of the international law of state responsibility. See JAMES CRAWFORD, *STATE RESPONSIBILITY* (2013). In most cases, the defendant will be a U.S. citizen and claims will have arisen from acts within the United States, but a state may sometimes be responsible for the acts of foreign nationals abroad, for example, allegations of torture by an Afghan national against Serbian nationals working for a Polish company under contract with the U.S. government to provide security in Afghanistan. Curtis Bradley, A.J. Bellia, and Brad Clark have argued that the ATS implements constitutional alienage jurisdiction, and therefore that there must be at least one U.S. citizen defendant. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 448 (2011); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591 (2002). Bellia and Clark make their argument based on the theory that the law of nations in 1789 only recognized state responsibility for the acts of one's own nationals—a view with which I respectfully disagree. Bellia & Clark, *supra*, at 448.

19 See *Kiobel*, 133 S. Ct. at 1669 (“On these facts, all the relevant conduct took place outside the United States. And even 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.”).

20 The abduction in Mexico of the plaintiff Alvarez-Machain by Mexican nationals, including Sosa, was allegedly approved by the U.S. Drug Enforcement Agency. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

21 *Kiobel*, 133 S. Ct. at 1669.

This normative argument has not only doctrinal but also institutional implications. It seeks to preserve the sensitive foreign policy role the American Founders and the First Congress intended for the U.S. federal courts as a counterweight to state and popular resistance to the country's treaty and law of nations obligations to foreigners. Although my doctrinal prescription is consistent with the result in *Kiobel*, the facts of which did not implicate a plausible case for U.S. sovereign responsibility, my institutional point is at odds with the spirit of *Kiobel*, which strongly counseled judicial restraint in foreign affairs.²² This presumption does not fit the history of the statute: an energetic role for the federal courts in U.S. foreign policy is fully consistent with the original meaning of the ATS. On this score, the statute's *Filartiga* renaissance was not so far off the original mark when one realizes that international human rights were then perceived as a key U.S. national interest during the Carter presidency.²³ They are no longer so perceived by many Americans.

Part I, the major portion of this Article, sets forth the reasons for the First Congress's enactment of the ATS as a national security statute and the global context of its implementation during the infancy of the United States. Part II summarizes the resurrection of the ATS nearly 200 years later in *Filartiga* as an international human rights statute—a topic that, like the pre-enactment history of the ATS, has been amply discussed in the literature.²⁴ Part III briefly describes the Supreme Court's decision in *Kiobel* rejecting the *Filartiga* framing of the ATS and elaborates themes from the past trajectory of ATS litigation to chart its future. A brief conclusion follows.

I. GENESIS: THE ATS AS A NATIONAL SECURITY STATUTE (1789–1795)

A. *The ATS and the Treaty of Peace, 1789*

Lawyers and legal scholars too often focus on the words of a statute or its legislative history at the risk of missing the larger context in which the law was made. The Alien Tort Statute was passed by the First Congress in September 1789 as one very small part of the First Judiciary Act, a monumental enactment creating the U.S. federal courts and defining their jurisdiction.²⁵

²² *Id.* at 1661.

²³ Jimmy Carter, President of the United States, Inaugural Address (Jan. 20, 1977), available at <http://www.jimmycarterlibrary.gov/documents/speeches/inaugadd.phtml>.

²⁴ There has been extensive commentary by distinguished judges and scholars on the ATS, several of whom are contributors to this issue. The following are some of the early foundational works: *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries in the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47 (1988).

²⁵ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (2006)).

The 1789 Act enumerated the design and jurisdictions of not just the federal district courts, but also of the circuit courts²⁶ and of the U.S. Supreme Court. The ATS should be read in conjunction with all of these grants of jurisdiction.

Many of the 1789 Act's provisions extended jurisdiction over matters involving foreign parties and accorded alien merchants and lenders certain privileges denied to U.S. citizens.²⁷ This was because the United States was a new revolutionary republic that needed European trade and credit to grow and wanted to show the rest of the world that it was a peaceful nation notwithstanding the bloody circumstances of its creation. The ATS, which specifically addressed the tort claims of aliens, was one such early American accommodation of foreigners to appease the European powers. It was, at bottom, a national security statute enacted

with an eye on a particular group of aliens, namely British subjects, and the potential that injuries suffered by them in violation of international law might disrupt renewed trade and even lead to renewed war with Great Britain. Vexed by the inability or unwillingness of the states and their courts to police [the safety of] British subjects during the first six years of peace [as promised by the 1783 Treaty of Peace], the First Congress in 1789 chose individual alien tort suits as the primary lever of national enforcement, and entrusted this vital peace-preserving and trade-promoting function to the new federal district courts.²⁸

Although today it is the "law of nations" half of the ATS that draws the most action since a treaty violation would also be actionable under the general federal question statute,²⁹ it bears remembering that the 1783 Treaty of Peace with Great Britain³⁰ was the most important international law obligation at the time of the enactment of the ATS. Accordingly, remedies for violations of the Treaty of Peace were the most likely claims the First Congress envisioned when enacting the ATS, particularly since there was no general federal question jurisdiction under the 1789 Act.

This national security gloss on the genesis of the ATS leads to two interpretations of the statute that depart from the prevailing view of the history set forth in the U.S. Supreme Court's thoughtful decision in *Sosa*, which the *Kiobel* Court accepted without question.³¹ First, the Court and most com-

26 *Id.* §§ 1–4, 1 Stat. at 73–76. The original federal circuit courts were not appellate courts but multi-judge trial courts composed of a district judge and two Supreme Court Justices "riding circuit."

27 For example, in "cases of foreign bills of exchange," the Judiciary Act accorded a special right to serve process on a defendant in a district other than where he lived or was served, and for an assignee of a promissory note to sue in federal court even if the assignor could not have. *Id.* § 11, 1 Stat. at 79. These were not available for domestic bills of exchange.

28 Lee, *supra* note 3, at 882.

29 28 U.S.C. § 1331 (2006).

30 Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

31 See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666–67 (2013).

mentators believe that “the legal norm or rule of conduct” in an ATS action “comes from international law.”³² This seems natural enough based on the plain language of the statute, which authorizes an alien to sue for “a tort only . . . in violation of the law of nations or a treaty of the United States.”³³

But the legal norms the First Congress had in mind when enacting the ATS were not protean international law norms, but rather the domestic law of tort, understood as a noncontract injury to the person or property of the plaintiff.³⁴ The words “in violation of the law of nations or a treaty of the United States” were necessary to specify which aliens could sue, not to specify the body of law that originated the claim. Put another way, the phrase was intended to narrow the set of local tort law claims actionable under the statute. If, for instance, an *enemy* alien suffered a personal injury or was deprived of property, the harm would not usually constitute an actionable tort “in violation of the law of nations or a treaty” because international law generally permitted the wounding of enemy soldiers and the taking of enemy property. Accordingly, an enemy alien could not bring a civil action in U.S. district court under the ATS. But if a *friendly* or *neutral* alien, such as a Dutch or British merchant in 1789, were to suffer such injury, he could sue under the ATS, even if the amount in controversy was below the \$500 threshold required under the 1789 Act for general alienage diversity jurisdiction.³⁵ Most alien tort claims then were likely below that threshold.

On this view, the under-examined word “only” in the statute has two important functions. First, it clarifies that *contract* claims cannot be brought under ATS, which is for “*tort* only.”³⁶ Second, the word limits the set of aliens who can sue to friendly and neutral aliens, unless a specific treaty term pro-

32 William R. Casto, *International Tort Actions Are Sui Generis*, 89 NOTRE DAME L. REV. 1545, 1549 (2014). *But see* William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577, 1577 (2014) (noting that federal courts could have applied the law of the place of the tort as the rule of decision after *Filartiga*).

33 28 U.S.C. § 1350.

34 *See* Lee, *supra* note 3, at 838 (“[T]he statute was an enactment designed not to redress substantive international law violations as *Sosa* presumed, but rather . . . to redress harm—defined by the domestic law of tort—to private aliens for which the United States had assumed responsibility.”). As Bill Dodge observes, in the event that a tort implicating U.S. responsibility occurred in a foreign country, the local law (*lex loci delicti*) might have been intended to apply. *See* Dodge, *supra* note 32, at 1578.

35 *See* Judiciary Act of 1789 ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1350 (2006)) (authorizing circuit court jurisdiction “of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars . . . and an alien is a party”); *id.* § 12, 1 Stat. at 79 (authorizing removal from state court to federal circuit court of the same).

36 *See* Letter from Edmund Pendleton to James Madison (July 3, 1789), in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789–1800, at 444, 446 (Maeva Marcus et al. eds., 1992) (asking Madison, who was then in the House, whether the word “tort” in the bill version of the ATS “intended to include suits for the Recovery of debts, or on breach of Contracts . . . or does it only embrace Personal wrongs, according to it’s [sic] usual legal meaning”). Unfortunately, we do not have Madison’s reply or know if he answered Pendleton.

vided a protection for enemy aliens.³⁷ Thus a federal district court may take cognizance of a suit brought by an alien for a tort “only . . . *in violation of international law*,” and not for a tort *authorized* by international law, such as personal injury to, or the taking of the property of, an enemy alien.

The second way in which I believe the First Congress’s understanding of the ATS differs from the view articulated in *Sosa* follows logically from the first point about the domestic law of tort, and not international law, as the source for rules of decision in ATS cases. The *Sosa* Court identified three particular violations of the law of nations as the violations that it thought the ATS was intended to address.³⁸ It directed federal courts to identify modern customary international law norms with features analogous to the paradigm’s historical norms.³⁹ These three norms were “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”⁴⁰

The *Sosa* Court was one-third right: the ATS was about safe conducts, but it was not about affording damages remedies for infringement of the rights of ambassadors or piracy at all. The Court did not examine what exactly the violation of a safe conduct entailed, a topic I have discussed in detail elsewhere.⁴¹ A couple of modern analogues of the safe conduct are: (1) passports with respect to friendly and neutral aliens, which obligate a receiving state to let the holder pass in safety; and (2) customary law of war guarantees of safety to enemy soldiers who have come to parlay under a white flag. The violation of a safe conduct meant nothing more or less than a tort (again, a noncontract injury to person or property) committed against a foreigner to whom a sovereign or its agent had promised safety.

37 For instance, Article XXIV of the 1785 Treaty with Prussia provided that neither will send the prisoners [of war] they may take from the other into the East-Indies, or any other parts of Asia or Africa . . . and . . . neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this [provision] . . . but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.

A Treaty of Amity and Commerce, U.S.-Prussia, art. XXIV, July–Sept., 1785, 8 Stat. 84. Thus, if war had broken out between the United States and Prussia in 1786, a Prussian prisoner of war taken to the East Indies against his will could presumably sue under the ATS as an “alien” pleading a tort “in violation of . . . a treaty of the United States.” *But cf.* Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 157–58 (2013) (concluding that, absent the consent of the executive or the legislature, background rules of common law and the law of nations were understood to bar undisputed foreign combatants from U.S. courts until the mid-twentieth century).

38 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

39 See *id.* at 725 (“[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”).

40 *Id.* at 724.

41 See, e.g., Lee, *supra* note 3, at 886.

To repeat this crucial point more tersely, a safe-conduct violation was the equivalent of an alien “tort only in violation of the law of nations or a treaty of the United States.” A safe-conduct violation was most likely to occur against a friendly or neutral alien by the hand of a native citizen within the territory of the promising sovereign. In fact, as noted earlier, the paradigmatic safe-conduct violation the First Congress likely had in mind in enacting the ATS was injury suffered by loyalists who returned to the United States and were “molested” by locals in their attempts to recover family land or property as provided for in the 1783 Treaty of Peace. In Article V of the treaty, the United States had made an explicit promise of safe conduct:

[P]ersons of any . . . description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested in their endeavours to obtain the restitution of such of their estates, rights and properties, as may have been confiscated.⁴²

But a safe-conduct violation might also occur at the hands of another alien in the United States, particularly in the more cosmopolitan port cities where most of the original federal district courts were sited. And, it might also occur extraterritorially, against an enemy alien, and by an alien tortfeasor (i.e., a late eighteenth-century foreign-cubed case). A plausible historical example of this would be if a sailor who is a British national serving in the U.S. Navy in Tripoli treacherously killed enemy alien pirates to whom he had promised safety while negotiating terms of surrender.

Assuming that *Sosa* was right that the ATS addressed safe-conduct violations, why was it wrong in concluding that the statute also addressed injuries against ambassadors and piracy,⁴³ which William Blackstone had listed with violations of safe conducts as examples of law of nations violations in his *Commentaries*?⁴⁴ Answering the question may seem pointless because *Sosa* accepted the tripartite paradigm, but getting the history right is worthwhile for its own sake, as well as for the sake of understanding the present-day implications of that history. The place to begin to formulate an answer is the point made earlier about how the ATS was merely one plank in a historic “framework legislation.”⁴⁵ Other parts of the Judiciary Act of 1789 authorized federal jurisdiction over ambassadorial infringements and piracy in ways that strongly suggest the ATS was not intended to provide redundant or overlapping coverage.

First, with respect to ambassadors, section 13 of the First Judiciary Act provided original jurisdiction in the U.S. Supreme Court itself for suits

42 Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., art. V, Sept. 3, 1783, 8 Stat. 80.

43 The following discussion of the evidence against construing the ATS to cover ambassadorial infringements and piracy draws from my prior article. See Lee, *supra* note 3, at 851–66 (ambassadorial infringements); *id.* at 866–71 (piracy).

44 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *66–73 (1769).

45 Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976) (internal quotation marks omitted).

brought by ambassadors.⁴⁶ It is almost certain that the First Congress wanted the highest court in the land to handle highly sensitive infringements of the rights of ambassadors. The norm of the time was for ambassadors to be confined to the receiving state's capital (New York in 1789), and injuring an ambassador was a more serious violation of the law of nations than torts against private aliens. Furthermore, the First Congress would not have conceived of the need to provide for backup federal jurisdiction in the district courts located in the states, to which a foreign ambassador could not travel without the permission of the U.S. President.⁴⁷ Indeed, some early American jurists, including Supreme Court Justice James Iredell, believed that it was unconstitutional for Congress to share the Supreme Court's original jurisdiction over foreign ambassadors and other agents with the lower federal courts.⁴⁸

Second, with respect to piracy, there is a persuasive case that jurisdiction over anything to do with piracy was exclusively addressed by the second clause of section 9 of the First Judiciary Act—the admiralty clause—and not by its fourth clause—the ATS. The scope of the admiralty clause was extremely broad, essentially covering any and all matters taking place on navigable waters.⁴⁹ It was also exclusive to the federal district courts, with the exception of concurrent state court jurisdiction where there was a remedy at common law by virtue of the famous “saving to suitors” clause.⁵⁰ The original formulation of the ATS, however, provided for jurisdiction “concurrent with the courts of the several States, or the circuit courts, as the case may be.”⁵¹ If the ATS did extend to piracy cases, then it would seem to operate to grant *unconditional* concurrent jurisdiction to state courts and circuit courts, in flat contradiction of the narrower concurrent grant of the admiralty clause—that is, to state courts for *in personam* actions only under the saving to suitors clause.⁵² Moreover, another clause in section 9 of the 1789 Act autho-

46 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81 (codified as amended at 28 U.S.C. § 1350 (2006)).

47 Section 13 did provide concurrent jurisdiction in state courts, which makes sense given the cosmopolitan and foreigner-friendly tendencies of the state courts in New York and Pennsylvania, the first two national capitals. See Lee, *supra* note 3, at 857 n.138.

48 See *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 299 (Iredell, Circuit Justice, C.C.D. Pa. 1793) (“[T]he context of the judiciary article of the Constitution seems fairly to justify the interpretation, that the word *original*, means *exclusive*, jurisdiction.”). See generally Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1795–1806 (2004). *Ravara* involved federal circuit court jurisdiction over a suit involving a foreign consul. *Ravara*, 2 U.S. (2 Dall.) at 297–98. Consuls were quasi-diplomatic agents of foreign states who supported the activities of their nationals located in the city in which they were located. See *id.* at 298.

49 § 9, 1 Stat. at 77.

50 *Id.*

51 *Id.*

52 The clause grants district courts “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the law is competent to give it.” *Id.* This is hardly a clear grant of

rizes jury trials “in all causes except civil causes of admiralty and maritime jurisdiction.”⁵³ Since the “cause” in an ATS suit would necessarily sound in tort, even in a piracy case, it would seem that a plaintiff suing an alleged tortfeasor for piracy could get a jury trial if he sued under the ATS but not if he sued under the admiralty and maritime jurisdiction clause. This is a bizarre result.

The focus of contemporary ATS analysis almost exclusively on piracy and ambassadorial infringements—and the virtual neglect of the safe-conduct violation—has obscured the real reasons for its enactment and skewed its modern implications. Taking the lead from the focus on piracy, commentators assume that the ATS is a primitive universal jurisdiction statute, and they reason that modern analogues of pirates, such as terrorists and genocidaires, should also be subject to suit under the ATS. Focusing on ambassadorial infringements has the deleterious effect of making one believe that the ATS is about high-profile, relatively rare incidents involving a small number of public aliens (ambassadors and ministers), not the myriad injuries suffered by private aliens throughout the country.

To summarize the discussion so far, the ATS was enacted in 1789 to empower U.S. federal district judges to award a private damages remedy to aliens who had suffered personal injury or deprivation of property under circumstances implicating U.S. state responsibility at international law. Such an injury constituted a safe-conduct violation. In 1789 the paradigmatic safe-conduct violation was of protections given to British subjects, many of them loyalists, under the 1783 Treaty of Peace. The two underlying aims of this statutory provision of judicial access were to encourage foreign merchants to do business with Americans and to placate foreign sovereigns who might otherwise seek redress by war or trade sanctions for injuries suffered by subjects whom the United States had an international law duty to protect.

The vast majority of cases in which the duty was violated involved torts within the territorial United States committed by U.S. persons. But given the diverse demographics of the U.S. port cities where the district courts were mostly located, aliens were also plausible tortfeasors, but the host sovereign remained liable nonetheless under international law since it was numinous within its territory.⁵⁴ Moreover, it was in theory possible for a state or its agents to violate safe conducts outside of its territory, especially in wartime. The ATS was *not* designed to extend jurisdiction for claims by foreign ambas-

concurrent state court jurisdiction, as it appears to grant only a “common law remedy.” *Id.* However, the provision has been construed to authorize concurrent jurisdiction in state court for *in personam* actions falling within the admiralty and maritime jurisdiction. *See* *Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303, 306 (1915); *Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 190 (1871); GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 33–36 (1957).

53 § 9, 1 Stat. at 77.

54 *See* Lee, *supra* note 3, at 883.

sadors or the victims of piracy; other provisions of the First Judiciary Act took care of those violations of the law of nations.⁵⁵

B. The ATS in the Neutrality Controversy, 1793–1795

Relatively soon after its enactment, the ATS came to be invoked as a means to deploy the federal district courts as safety valves in a new foreign policy crisis. Its identity as a national security statute endured, but the ATS was effectively redeployed from its original function of affording damages to injured merchants and loyalist claimants under the 1783 Treaty of Peace, to the function of affording a forum for aliens injured by private Americans under circumstances suggesting that the United States, by negligent inaction or tacit support, had compromised its neutrality in the European war between France and Britain.

In 1789 when the ATS was enacted, the biggest foreign policy challenges for the United States were maintaining the peace treaty with Great Britain and reviving transatlantic trade. The situation changed dramatically over the next few years. The French Revolution, which the First Congress had witnessed from a distance, had moved into a new phase. French revolutionary armies took the offensive against the European monarchies in 1792. In early 1793, France declared war on Bourbon Spain, Great Britain, and the Dutch Republic.

The United States was caught in the middle of the warring European great powers. On the one hand, there was the 1783 Treaty of Peace with Great Britain, which was still the preeminent power in the Americas and master of the oceans. On the other hand, there was the longer-lived 1778 Treaty of Alliance with France. This treaty was the legal manifestation of compelling moral, emotional, and ideological reasons to fight side-by-side against kings (mostly) with a brother republican state who had shed much blood and treasure as midwife to American independence. Under the circumstances, President George Washington famously proclaimed a policy of neutrality seeking to navigate between the Scylla of Britain and the Charybdis of France. Washington's words foreshadowed the key role the federal district courts would play in safeguarding this neutrality, in important part via the ATS:

[W]hosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said Powers . . . will not receive the protection of the United States, against such punishment or forfeiture; and further, . . . I have given instructions . . . to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of

55 § 13, 1 Stat. at 80 (original jurisdiction in Supreme Court for cases brought by ambassadors); *id.* § 9, 1 Stat. at 77 (admiralty and maritime jurisdiction).

the United States, violate the law of nations, with respect to the Powers at war⁵⁶

Maintaining neutrality in the face of European world war meant gold and riches for America's planters and merchants and a path to solvency for the national government. Its crops (food and tobacco for soldiers and sailors) and timber (for ships, wagons, and weapons parts) were more in demand than ever, and, accordingly, fetched higher prices on European markets. Moreover, these goods were carried onboard American ships that bore essential imports on their journeys home. The reality was that European war meant booming business for Americans, and neutrality meant that American businesses could ply their goods in good conscience with both sides in the wars.

The greatest practical challenge to maintaining neutrality arose from the actions of private U.S. persons who, motivated by cause, revenge, and/or profit, sought to aid the French war effort despite the U.S. government's declared policy of neutrality. The most pressing problem on this front was the use of American ports as supply bases and safe harbors by enterprising privateers who raided British shipping along the western Atlantic sea lanes.⁵⁷ Some Americans also joined French military expeditions against other parts of the British Empire as far away as Africa. There was a plausible argument that the United States had violated its neutrality and bore responsibility at international law for allowing these acts by private Americans or by condoning them. If so, then the British had the right under international law to launch military reprisals or sanctions.

The U.S. district courts and the ATS played a very useful role in navigating this sensitive foreign policy issue. Between 1793 and 1795, the ATS was referenced in the published reports of three district court cases⁵⁸ and one opinion by U.S. Attorney General William Bradford.⁵⁹ All four cases implicated maritime seizures or attacks in possible violation of American neutrality, whether by breach of the Treaty of Peace with Great Britain by not doing enough to restrain French sympathizers on the one hand, or, conversely, by breach of the Treaty of Alliance with France by not living up to their alliance commitments against France's enemies. Bradford's opinion has been dis-

56 George Washington, *By the President of the United States of America: A Proclamation* (April 22, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON 308-09 n.1 (Harold C. Syrett ed., 1969).

57 The French Republic's navy did not have the resources to project power far enough to disrupt British Caribbean sea lanes, and so American bases and privateers were particularly vital to threatening the British Atlantic trade. See 1 A.T. MAHAN, *THE INFLUENCE OF SEA POWER UPON THE FRENCH REVOLUTION AND EMPIRE, 1793-1812*, at 35-41, 110-11 (1892).

58 See *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); *M'Grath v. Candalero*, 16 F. Cas. 128 (D.S.C. 1794) (No. 8810); *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895).

59 *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795).

sected thoroughly by commentators,⁶⁰ but there has not been much analysis of the three district court opinions, the most notable of which is South Carolina District Judge Thomas Bee's 1795 opinion in *Bolchos v. Darrel*.⁶¹ That case was the only instance in which a federal district court upheld ATS jurisdiction before the second half of the twentieth century.

The earliest of the three cases, *Moxon v. The Fanny*,⁶² involved a suit in admiralty brought by the British owners of a ship and cargo seized by a French ship in U.S. territorial waters and sailed into Philadelphia. Judge Richard Peters, Jr. declined jurisdiction on the view that it was for the executive branch to decide how to deal with a friend (France) capturing the ship of its enemy (Britain) within the territorial waters of a neutral country (the United States). Peters gratuitously reasoned that the ATS could not provide an alternative basis for jurisdiction because the libellants were seeking return of their property in addition to damages. "It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for."⁶³ Thus, the district judge used a narrow reading of the remedy available under the ATS to help avoid judicial intervention into a matter he felt was better left to the President. The practical effect favored the French captor in possession of the British prize.

In *M'Grath v. Candalero*,⁶⁴ Judge Bee allowed a U.S. citizen to file an attachment *in rem* on a French privateer's ship alleged to have unlawfully seized the American's ship and cargo, and sailed them into Charleston. The court's jurisdiction in the case was based on the exclusive admiralty grant, but Bee reasoned by analogy to the ATS:

If an alien sue here for a tort under the law of nations or a treaty of the United States, against a citizen of the United States, the suit will be sustained. Shall it be otherwise, where the alien is the offender, and one of our citizens the party complaining?⁶⁵

This time the federal district judge intervened on behalf of a U.S. party against a French captor deriving a reciprocal right for a U.S. citizen to access a U.S. district court by analogy from the alien's right to do so under the ATS.

The next year, in *Bolchos v. Darrel*,⁶⁶ the same Judge Bee invoked the ATS as an alternative basis for jurisdiction in a case involving slaves aboard a Spanish ship seized as prize by Bolchos, a French privateer. The Spanish owner of the slaves had mortgaged them to a British subject. The British

60 In particular, Curtis Bradley and Ishai Mooreville have recently written exceptional accounts of the history and context surrounding the Bradford opinion. See Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 509 (2012); Ishai Mooreville, *A Question of Sovereignty: The History Behind Attorney General Bradford's 1795 Opinion on the Alien Tort Statute*, 40 SYRACUSE J. INT'L L. & COM. 217 (2013).

61 3 F. Cas. at 810.

62 17 F. Cas. at 942.

63 *Id.* at 948.

64 *M'Grath v. Candalero*, 16 F. Cas. 128 (D.S.C. 1794).

65 *Id.* at 128.

66 3 F. Cas. at 810.

mortgagee's agent in Charleston—Edward Darrel (presumably an American)—seized and sold the slaves when they made landfall in Charleston.⁶⁷ Bolchos thereupon sued Darrel in South Carolina federal district court for the proceeds from the sale, claiming that the slaves had been cargo onboard his lawfully seized prize and therefore his property entitled to protection under the 1778 Treaty of Alliance.

Since Darrel's actual seizure of the slaves had occurred on land, Judge Bee was "doubtful" of his jurisdiction in admiralty.⁶⁸ But there was a strong case for admiralty jurisdiction given the capacious understanding of its scope at the time: "as the original cause arose at sea, every thing dependent on it is triable in the admiralty."⁶⁹ And if he were to dismiss the case for want of jurisdiction, "there would be a failure of justice, for the court of common law of the state has already dismissed the cause as belonging to my jurisdiction in the admiralty."⁷⁰ Just to be safe, Bee turned to the ATS, reasoning that because it "gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point."⁷¹

So what was Bolchos's claim of a "tort only in violation of the law of nations or a treaty of the United States" under the ATS? Bee suggested that if the case were decided strictly under the law of nations, Bolchos would have no claim at all. Bolchos, as a friendly alien, was certainly entitled to protection of his property. But the British mortgagee of the slaves and the Spanish mortgagor, who jointly held the pre-existing property interest in the chattel, were also entitled to protection of their property as *neutral* aliens vis-à-vis the United States.⁷² Accordingly, the taking of their property within the United States would be a violation of the implicit safe conduct that the United States had granted. Since their interest preceded Bolchos's, it ought to have prevailed in a U.S. court, all else being equal.

Of course, not all else was equal because a provision of the 1778 Treaty of Alliance with France "alter[ed] that law [of nations rule], by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited."⁷³ Since Bolchos was an ally, he was a "friend," and the slaves were his property "found on board the vessel[] of an enemy" to France—a British ship. This treaty term trumped the law of nations rule, and so Bolchos could plead a "tort only" (the conversion of his property) "in violation of . . . a treaty of the United States" (the alliance treaty with France). Bee ordered the slaves "or the money arising from the sale" to be returned to Bolchos, but "as there was colourable ground for the defendant's seizing them on behalf

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 811.

73 *Id.*

of his principal the mortgagee, let the costs be paid by each party for himself, and the expenses of the suit be divided.”⁷⁴

Juxtaposing *M’Grath* and *Bolchos* illuminates the way one federal district judge used the ATS in its infancy to grapple with the most sensitive foreign policy issue of the day. In both cases, Judge Bee used creative interpretations of the ATS as a basis for upholding his judicial power to hear the matter at issue, in contrast to Judge Peters in *Moxon*, who punted on his case involving a French captor and a British prize by taking a narrow interpretation of the ATS. Both of the South Carolina cases involved a French captor, but *M’Grath* concerned an American libellant, and *Bolchos* a British libellant (with a Spanish party also interested). The court upheld a prior decision in favor of the American party in *M’Grath* and decided against the British party in *Bolchos*—but split costs. What we can see, in summary, is the remarkably robust and independent role district judges played as front-line managers of the crucial U.S. national foreign policy of neutrality.

One feature of the cases that seems to contradict the original meaning of the ATS in 1789 was the overlap with admiralty jurisdiction. I explained above my reasons for concluding that the ATS was not intended to encompass piracy, which the First Congress intended to fall exclusively within the federal court’s admiralty and maritime jurisdiction.⁷⁵ Of course, the three early judicial opinions in which the ATS was mentioned were maritime prize cases, not piracy cases, but they do demonstrate that contemporary judges were open to the possibility that the ATS could walk on water—at least U.S. territorial waters. As a formal matter, Judge Peters in *Moxon* and Judge Bee in *M’Grath* only reasoned in passing or by analogy to the ATS in their respective discussions of the jurisdictional issues. And in *Bolchos*, the seizure of the slaves occurred on land after they had been taken off the prize ship, which was why admiralty jurisdiction was shaky and the judge made reference to the ATS in the first place. Finally, there were many maritime prize cases in the federal courts during those years. Almost all of those invoked the district court’s admiralty and maritime jurisdiction; these three opinions were the only ones where the ATS was discussed.

But putting those lawyerly arguments aside, at the end of the day, what the references to the ATS in the maritime prize cases may reveal is the statute’s importance and flexibility as a national security statute designed for judges to intervene (or not, as Judge Peters chose) in the most sensitive foreign policy disputes of the day. Flexibility inhered in the protean phrasing of the statute’s key words: “a tort only . . . in violation of the law of nations or a treaty of the United States.” At the time of the ATS’s enactment in 1789, the paradigmatic problems were loyalists with claims under the Treaty of Peace and remedying personal injury and property damage to foreign merchants. By 1793, the crucial issue was maintaining American neutrality in a war of the European great powers, and the courts were an important instrument of this

74 *Id.*

75 *See supra* Part I.

policy.⁷⁶ The ATS was a resilient, all-purpose national security statute that was handy for both crises.

Although the district court cases in which the ATS was referenced involved incidents in U.S. ports or territorial waters, it was conceivable that the United States might bear state responsibility under international law for torts committed by U.S. persons against aliens *outside* of the United States. This was the factual predicate presented to U.S. Attorney General William Bradford when he wrote an opinion letter in July 1795.⁷⁷ He was addressing an inquiry from the British government and British subjects about what the United States intended to do with respect to private Americans who had participated in a French fleet raid against the British settlement of former slaves at Sierra Leone and the nearby privately owned slaving enterprise at Bance Island. Although it is an opinion letter, Bradford's opinion has assumed a great importance in present ATS litigation and commentary because it directly addresses the applicability of the ATS to extraterritorial acts. It is the only piece of evidence from the late eighteenth century on what would become the crucial question in *Kiobel*.

Bradford divides his analysis into torts committed by U.S. citizens in U.S. territory, in foreign sovereign territory, and on the high seas. The "high seas" was a law of nations term of art used to refer to waters beyond the sovereignty of any state. First, attacks by American citizens, according to Bradford are "punishable by indictment" in U.S. courts as "offences against the United States, so far as they were committed within the territory or jurisdiction thereof."⁷⁸ Second, "[s]o far, therefore, as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States."⁷⁹ In this sentence, Bradford appears to have ruled out the possibility of criminal or civil jurisdiction in U.S. courts for any part of the harm caused by Americans within British sovereign territory. Third, Bradford continued that

crimes *committed on the high seas* are within the jurisdiction of the district and circuit courts of the United States; and, so far as the offence was *committed thereon*, I am inclined to think that it may be legally prosecuted in either of those courts, in any district wherein the offenders may be found.⁸⁰

A later sentence in Bradford's opinion has been the subject of great controversy:

⁷⁶ Cf. Letter from Thomas Jefferson, Sec'y of State, to Chief Justice John Jay and Associate Justices (July 18, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 486-87 (Henry P. Johnston ed., 1891) (asking for their advance opinion on how to deal with the involvement and support of American citizens in the French war effort, especially at sea).

⁷⁷ Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795).

⁷⁸ *Id.* at 58.

⁷⁹ *Id.*

⁸⁰ *Id.* (emphasis added).

But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only⁸¹

This is a clear reference to the ATS; the controversy about the sentence revolves around whether Bradford intended the reference to apply to the acts of Americans on the “high seas” which he discussed in the preceding sentence, or whether he meant it with respect to such acts both on the high seas and in a “foreign country.” Judges and commenters have been divided on the question. The *Kiobel* Court dodged the issue by concluding that regardless of where the tortious acts happened, there was a treaty on point: “Whatever its precise meaning, it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain.”⁸²

In my view, the *Kiobel* Court correctly focused on the most important kernel of Bradford’s opinion. What was involved were private U.S. citizens who had voluntarily participated in a French expedition against British subjects in Africa. ATS liability was implicated if and only if there was an international law obligation requiring the United States to have prevented such U.S. citizen involvement. Under the background law of nations, a nation did not have any responsibility for the acts of its private citizens abroad. But, as Bradford pointed out, a treaty of the United States did create such an obligation even if the customary law of nations did not.⁸³

There were two possible treaties to which Bradford may have been referring. The 1783 Treaty of Peace committed signatories to a “firm and perpetual peace . . . between the subjects of the one and the citizens of the other . . . wherefore all hostilities both by sea and land shall henceforth cease.”⁸⁴ Although generally relevant, this treaty term did not address the

81 *Id.* at 59.

82 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013).

83 *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 58 (1795).

84 “There shall be a firm and perpetual peace between His Britannic Majesty and the said States, and between the Subjects of the one and the Citizens of the other, wherefore all Hostilities, both by Sea and Land, shall from henceforth cease” *Definitive Treaty of Peace Between the United States of America and His Britannic Majesty*, U.S.-Gr. Brit., art. VII, Sept. 3, 1783, 8 Stat. 80. Or he may have been thinking about the 1794 Jay Treaty, which had not yet been ratified but to which the Senate had given advice and consent on June 24, 1795, less than two weeks before the date of Bradford’s opinion, July 6, 1795. Article XXI of the Jay Treaty provided:

It is likewise agreed, that the subjects and citizens of the two nations, shall not do any acts of hostility or violence against each other, nor accept commissions or instructions so to act from any foreign prince or state, enemies to the other party; nor shall the enemies of one of the parties be permitted to invite, or endeavour to enlist in their military service, any of the subjects or citizens of the other party; and the laws against all such offences and aggressions shall be punctually executed.

Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. XXI, Nov. 19, 1794, 8 Stat. 116.

specific question of whether the United States was thereby bound to stop or provide a judicial remedy for damages when private U.S. citizens went off on their own and joined a foreign state's military expedition against the British in a war thousands of miles away.

The other possible treaty was the Jay Treaty of 1794, which had not yet been ratified but which dominated the news cycle at the time that Bradford drafted his opinion. Bradford's opinion was dated July 6, 1795. Jay had negotiated the treaty in 1794, and the Senate had given its advice and consent to it on June 24, 1795. Jay himself had resigned as Chief Justice to become Governor of New York on June 28; his successor by recess appointment, John Rutledge, would give an incendiary speech against the Jay Treaty on July 16 which would come back to haunt him when the Senate later turned down his permanent appointment. Article XXI of the Jay Treaty addressed the precise issue that Bradford was facing with respect to the participation of U.S. citizens in the French military raid on Sierra Leone and Bance Island:

[T]he subjects and citizens of the two nations, shall not do any acts of hostility or violence against each other, nor accept commissions or instructions so to act from any foreign prince or state, enemies to the other party; nor shall the enemies of one of the parties be permitted to invite, or endeavour to enlist in their military service, any of the subjects or citizens of the other party; and the laws against all such offences and aggressions shall be punctually executed.⁸⁵

Once we look at the two possible treaty violations that Bradford believed were actionable under the ATS, we can see the commonality in his understanding of the statute as compared to his contemporaries in the judiciary branch, Judges Peters and Bee. To all of them, the ATS was Congress's authorization of district courts to hear claims for damages by aliens who suffered injuries to person or property under circumstances where there appeared to have been an international law duty on the part of the United States to have prevented the injury. In all of the instances, there were treaties in the background that generated the obligations—the 1778 Treaty of Alliance with France, the 1783 Peace Treaty, and 1794 Jay Treaty with Great Britain.

To sum up, commentary on the ATS has focused most of its attention on the prehistory of the 1789 statute and on ambassadorial infringements and piracy. The safe-conduct violation and the early implementation of the ATS have been largely ignored with the exception of Attorney General Bradford's 1795 opinion letter. Understanding these ignored aspects of the ATS's early history helps us to see more clearly how the ATS operated as a national security statute. The executive branch counted on the ATS as a judicial escape hatch in the sensitive foreign policy issue of neutrality. Federal district judges themselves displayed ingenuity or reserve in invoking the ATS to enforce neutrality on the ground and in the water. As we talk briefly about

85 1794 Treaty of Amity, *supra* note 84, art. XXI, 8 Stat. 116.

the subsequent history of the ATS, it is worth remembering these illuminating—but forgotten—antecedents.

II. RESURRECTION: THE ATS AS AN INTERNATIONAL HUMAN RIGHTS STATUTE (1980–2013)

Nearly 200 years after its enactment, the original reasons for the ATS were forgotten, and the statute took on an altogether different life. It became a means to vindicate the claims of victims of international human rights violations around the world in the national courts of the most powerful country in the world. This vision of the ATS was informed both by the public law litigation model then-embraced by progressive U.S. lawyers, and by President Jimmy Carter’s retreat from Cold War *realpolitik* and related support for international human rights even as against staunch anti-Communist allies. U.S. federal district judges became roving international human rights commissioners—the foreign legion of a federal judiciary tasked as U.S. public rights commissioners in the aftermath of the Warren Court’s decisions expanding constitutional rights for U.S. persons. Under this incarnation of the ATS, an alien harmed by international law violations anywhere in the world could sue his or her tormentor in U.S. federal district court if he or she could obtain territorial jurisdiction over the proposed defendant.

The early targets of twentieth-century ATS litigation were mostly former state officials of repressive regimes like the Paraguayan police official in *Filartiga*, but plaintiffs soon began targeting deep-pocketed multinational corporations involved in projects with such regimes.⁸⁶ The crucial step in this evolution was the Second Circuit’s decision in *Kadic v. Karad_ic*,⁸⁷ which suggested that a non-state actor could commit a tort in violation of international law actionable under the ATS. In this way, ATS suits became a useful tool for enforcing global corporate social responsibility initiatives, supplementing calls for regulatory reform and corporate self-enforcement.

In a typical case, a developing state with valuable natural resources needs help from foreign companies (usually U.S. or European) to extract, refine, and deliver the local treasures to global markets. Villages are razed, residents

86 See, e.g., *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003).

87 70 F.3d 232, 241–42 (2d Cir. 1995). The defendant in *Kadic* was Radovan Karad_ic, the leader of Republika Srpska, a Bosnian-Serb breakaway state. The Second Circuit reasoned that some international law violations like genocide do not require state action, and that, even if state action were required and the Republika Srpska were not a state, Karad_ic might still be liable under the ATS because he “acted in concert” with the Yugoslav government. *Id.* at 244–45. This theory of liability was logically extended to corporations “acting in concert” with repressive regimes in developing countries. *Id.* at 237.

The Second Circuit has played a prominent role in every stage of the second life cycle of the ATS: *Filartiga* launched it as an international human rights statute; *Kadic* brought corporations under its coverage; and *Kiobel* was the beginning of the end. Moreover, it was one of the Second Circuit’s greatest judges, Henry Friendly, who sounded the overture to the ATS’s rebirth when, in 1975, he called it “a kind of legal Lohengrin.” *IIT v. Vencap, Ltd.* 519 F.2d 1001, 1015 (2d Cir. 1975).

relocated or enlisted to work for low wages, and protesters imprisoned or even killed. Government soldiers or officials usually do the dirty work, but often according to plans and schedules which are drawn up by the foreign corporations. These companies ultimately operate the enterprises through local subsidiaries, sharing profits with the leaders of the host state in return for security and infrastructure support. Owing to their multinational scope, the corporations or their subsidiaries or affiliates almost always conduct operations within the United States, supplying a plausible basis for personal jurisdiction.

The deep pockets of these corporations not only attracted human rights plaintiffs (and plaintiff's lawyers) and corporate social responsibility activists, they also funded ATS defense lawyering of higher quality than in prior ATS suits against ex-officials (where defaults were not uncommon, producing large damage awards that often went uncollected). More spirited and sophisticated defenses in turn raised the profile of ATS litigation and inspired a backlash in U.S. appellate courts sympathetic to business interests, including, ultimately, the U.S. Supreme Court.

The ATS corporate defense bar and its clients had been disappointed with what they viewed as the modest restrictions on *Filartiga* ATS claims the Supreme Court had articulated in its 2004 *Sosa* decision. Opponents turned first to a legislative fix: the Alien Tort Statute Reform Act, which Senator Dianne Feinstein (Democrat) of California introduced on October 17, 2005.⁸⁸ The bill, which would have limited ATS liability strictly to "a direct participant acting with specific intent to commit" one of six of the most heinous international law claims such as torture, genocide, or slavery, inspired a vociferous backlash from human rights groups and was ultimately withdrawn.⁸⁹

The corporations were thus forced to continue the battle in the courts, where they won some major victories in ATS lawsuits.⁹⁰ A particularly fruitful line of argument was that customary international law did not recognize corporate liability for aiding and abetting with respect to corporate actors collaborating with repressive regimes in development projects. A particularly

88 The bill provided that:

The district courts shall have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort. The district courts shall not have jurisdiction over such civil suits brought by an alien if a foreign state is responsible for committing the tort in question within its sovereign territory.

Alien Tort Statute Reform Act, S. 1874, 109th Cong. § 1350(a) (2005).

89 *Id.*

90 In 2012, the Supreme Court also unanimously held that the ATS's modern counterpart, the Torture Victim Protection Act of 1991, *see supra* note 12, "does not impose liability against organizations." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012). Although the decision did not involve a corporation as defendant, the reasoning of the Court—"that the term 'individual' in the Act encompasses only natural persons"—would appear to apply to corporate defendants as well. *Id.*

important win was the decision by the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*,⁹¹ holding that customary international law did not recognize aiding and abetting liability as against foreign corporate defendants (Dutch, British, Nigerian) for human rights violations allegedly committed by the Nigerian government in a joint oil-development venture in the country.⁹² The U.S. Supreme Court had initially granted certiorari on the question of aiding and abetting liability, but it ordered new briefing and argument on the threshold question: “Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”⁹³

III. RETRENCHMENT AND BACK TO THE FUTURE (2013–)

Unsurprisingly,⁹⁴ the Supreme Court in *Kiobel* affirmed the Second Circuit on the different ground that the ATS did not apply extraterritorially on the facts of the case.⁹⁵ In so doing, the majority reasoned that the “principles underlying the presumption against extraterritoriality . . . constrain courts exercising their power under the ATS.”⁹⁶ In other words, the ATS was to be treated like an ordinary statute for purposes of the conventional presumption against extraterritoriality notwithstanding its expansive plain language permitting an alien to sue for a “tort only, committed in violation of the law of nations.”⁹⁷ Justice Breyer, speaking for three other Justices, concurred in the result in *Kiobel* but did not agree with this seemingly routine application of the presumption against extraterritoriality⁹⁸ to a statute that appeared anything but routine in its geographical reach and which had in fact been construed to reach globally during the *Filartiga* interlude.

The Court then gave some guidance on what it would take to rebut the presumption against extraterritoriality. At minimum, the ATS claims must “touch and concern the territory of the United States . . . with sufficient force to displace the presumption.”⁹⁹ Specifically with respect to multinational

91 621 F.3d 111 (2d Cir. 2010).

92 *Id.* at 145, 149–50.

93 *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012).

94 Professor Kontorovich writes that “the ruling in *Kiobel* . . . blind-sided the academy.” Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1672 (2014). What was surprising, in my view, was when the Court ordered reargument on the question of extraterritoriality. Once that occurred, I think that very few ATS scholars were surprised at the result.

95 *Kiobel*, 133 S. Ct. at 1669.

96 *Id.* at 1665. “We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.” *Id.* at 1669.

97 *Id.* at 1663 (citing the Alien Tort Statute, 28 U.S.C. § 1350 (2006)).

98 *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring) (“Unlike the Court, I would not invoke the presumption against extraterritoriality.”).

99 *Id.* at 1669 (majority opinion).

corporations, they “are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”¹⁰⁰

The Supreme Court in *Kiobel*, while professing fealty to *Sosa*, has dramatically curtailed the scope of the ATS as construed in *Sosa* by injecting the presumption against extraterritoriality into ATS jurisprudence. By contrast to its prior two incarnations, however, *Kiobel* presents no affirmative vision of what the ATS is or should be. The *Kiobel* Court saw the ATS neither as a critical Founding-era national security statute nor as a modern international human rights statute. *Kiobel*, rather, has the style and tone of a defensive opinion articulating the U.S. territorial nexus test to minimize the damage of the *Filartiga* interlude as much as possible without explicitly overruling its prior holding in *Sosa*. The lawyerly tool for doing so was the presumption against extraterritoriality.

Visions or designs for ATS litigation after *Kiobel* fall loosely into two camps. First, human rights advocates are attempting to save as much of the international human rights statute as possible. Strategies for this include preserving the statute for claims against aliens who committed torts in foreign countries but have taken refuge in the United States or, analogizing to piracy, asserting that even after *Kiobel*, the ATS might be available for the most heinous sorts of international law violations like genocide or torture, which is separately actionable under the Torture Victim Protection Act. Others, such as Professor Doug Cassel, want to preserve corporate liability vis-à-vis U.S. corporate tortfeasors¹⁰¹ who would presumably stand at least a greater chance of passing *Kiobel*'s “touch and concern” test for torts committed by their overseas subsidiaries.

A second camp favors the bright-line rule of limiting ATS suits to U.S. citizen defendants.¹⁰² This approach overlaps with human rights advocates—like Professor Cassel—who share the same view as to corporate defendants, albeit without an anchor in original public meaning. This position has the additional appeal of bringing a law of nations claim brought by an alien under the ATS within the Article III alienage jurisdiction, dissolving any doubt about the constitutionality of such ATS suits.

Both camps, I think, are not focusing enough on the fact that the ATS began as a national security statute in the late eighteenth century and that it became an international human rights statute when human rights were a part of U.S. national security policy. Once we realize this, we should ask what it might mean to use the words of the statute as a twenty-first century national security statute.

If, as I have argued, the ATS opens U.S. courts for alien torts for which the United States bears state responsibility, most such torts will in fact occur on U.S. territory. And so *Kiobel*'s U.S. territorial nexus test will work in most cases. Furthermore, even if an alien tort for which the United States bears

100 *Id.*

101 *See, e.g.,* Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1811–12 (2014).

102 *See, e.g.,* Bellia & Clark, *supra* note 18, at 446.

sovereign responsibility occurs on foreign territory, it will usually be committed by a U.S. person or by an alien under U.S. governmental direction emanating from Washington D.C. In that case, the tort would presumably pass even *Kiobel*'s "touch and concern" test. For instance, the tort in *Sosa* was the arrest and arbitrary detention of Alvarez-Machain in Mexico by Mexican nationals including *Sosa*, at the request of the U.S. Drug Enforcement Agency. The *Kiobel* Court did not say as much but, presumably, these facts of *Sosa* would suffice to rebut the presumption against extraterritoriality.

By the same token, a U.S. corporation that commits a tort abroad in violation of a substantive international law norm without any support or sanction by the United States should not be sued by an alien under the ATS. In this sense, my normative vision of the ATS is narrower than that of human rights advocates like Professor Cassel, and of those who believe the law of nations wing of the ATS is constitutionally grounded in Article III alienage jurisdiction like Professors Bellia and Clark. From a policy perspective, rendering U.S. corporations liable under the ATS when foreign corporations are not liable may risk undermining U.S. competitiveness abroad. But more important is the realization that the ATS was and should be designed to remedy personal injuries and property damage suffered by aliens under circumstances in which the United States would be considered responsible under international law.

CONCLUSION

Examining the history of the Alien Tort Statute reveals a trajectory of punctuated equilibria tying perceptions about the meaning of the ATS at different times to the United States' standing in the world. At its genesis the ATS was a national security statute designed and implemented to deploy newly created national courts as an institution for preserving the peace with Great Britain and fostering trade and commerce with the European powers. Those reasons were forgotten as the United States itself became a great power. Nearly 200 years later, the United States had become a superpower, and the ATS experienced a second life as a platform for exporting American-style individual rights norms around the world under the rubric of international human rights law—norms later inflected by the corporate social responsibility movement.

We are now at a point in time where doubts are strong within the United States about using the federal courts as free-roving engines of individual rights expansion, both domestically and also on a global scale given the diminution of American influence on the rest of the world in recent years. At the same time, there has been a revival of interest in the role of the national courts in promoting the economy, including by advancing business interests involved in global development projects. Using the national courts both to protect the individual rights of aliens and to grow the global economy was perceived as wholly complementary at the time of the ATS's genesis; today they appear at loggerheads.

The normative claim of this Article has been that, in this context, we should return to the original meaning of the ATS as a national security statute affording damages to friendly and neutral aliens who suffer personal injury or property damage under circumstances implicating U.S. state responsibility. It should no longer be viewed as a vehicle for the vindication of international human rights law violations by anyone anywhere. At the same time, the cosmopolitan turn of ATS litigation during the *Filartiga* interlude is not without some justification with respect to international law implicit in the genesis of the statute. But *Kiobel*'s presumption that the ATS is generally not available to redress claims arising from conduct outside of the United States is also partly right. Both positions have some merit to them.

As a general matter, there seems to be a far greater range of differences in our understanding of the judiciary's role in matters touching upon foreign policy than there has been about the role of Congress or the President in foreign relations. If, however, the Constitution may be fairly construed to authorize all the different positions within this range of understandings, then it does not seem inconsistent with the Constitution to allow the Supreme Court to self-regulate how much judicial power it should deploy in foreign relations via the ATS at any point in time.¹⁰³ The upshot of this realization is that ATS doctrine should not be viewed as a curious anomaly instrumentally exploited by progressive legal entrepreneurs and shut down by conservative legal formalists. Nonetheless, in contrast to the Court's approach in *Kiobel*, we should understand that determining what should be actionable under the ATS is not an elementary exercise in routine statutory interpretation via the presumption against extraterritoriality. Rather, the inquiry should focus on how to deploy the ATS given the contemporaneous foreign policy picture of the United States. On that view, it makes sense to allow friendly or neutral foreigners who have suffered personal injury or property damage anywhere in the world because of U.S.-sponsored acts or omissions to have access to U.S. courts for a chance at a damages remedy.

103 It is part of the bigger principle, implicit in *Marbury v. Madison* itself, that courts have the power to define the scope of their jurisdiction. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146–48 (1803).