

SUING SPONSORS OF TERRORISM IN U.S. COURTS: *RUBIN V. ISLAMIC REPUBLIC OF IRAN* AND *JESNER V. ARAB BANK, PLC*: SCOTUS TRIMS TO STATUTORY BOUNDARIES THE RECOVERY IN U.S. COURTS AGAINST SPONSORS OF TERRORISM AND HUMAN-RIGHTS VIOLATIONS UNDER FSIA AND ATS

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I. INTRODUCTION: A TALE OF TWO STATUTES: THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 AND THE ALIEN TORT STATUTE, SECTION 9 OF THE JUDICIARY ACT OF 1789

When the U.S. Supreme Court in the same Term confronts cases requiring interpretation of both the Foreign Sovereign Immunities Act of 1976¹ and the Alien Tort Statute², a greater contrast in performing the same judicial task can scarcely be imagined. In each case, the Court was called upon to interpret the reach of a specific federal statute. However, the statute in the FSIA (Section 1610) is a festoon of words. The ATS, by contrast, is but a single sentence, a

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The author dedicates this article to a leading son of the State of Indiana, the late Joseph B. Board, Jr. Joe Board was born in Princeton, Indiana in 1931. He taught for forty years at the author's alma maters. He served as the Robert Porter Patterson Professor of Government at Union College of Union University, Schenectady, N.Y., and as an adjunct professor at Albany Law School of Union University. Professor Board earned his B.A. (1953, with highest honors, and election to Phi Beta Kappa), his J.D. (1958), and his Ph.D. (1959) from the University of Indiana at Bloomington. He was a Rhodes Scholar in 1955 (when he earned both an A.B. and M.A. at the Honours School of Jurisprudence at Oxford University) and later was a Fulbright Fellow. Professor Board was the author's advisor at Union College and taught the author International Law at Union College and Comparative Law at Albany Law School. After a glittering academic career studded with honors and accomplishments, Joe Board retired in 2003 and passed away on October 12, 2007. He is much missed. Professor Board's influence on the author is simply too profound and too pervasive to summarize here. Let the author's work in this article stand as an indicium of the profound impact of Joe Board's teaching, mentoring, and scholarship upon the author, which endures to this day.

1. 28 U.S.C. §§ 1346(b), 2671-2680 (2013).
2. 28 U.S.C. § 1350 (originally § 9 of the Judiciary Act of 1789).

mere 33-words long – and, by contrast to the FSIA, a judicial Rorschach test.

The differing nature of the two statutes leads to difference in the statutory interpretation problems they impose. The difference in those problems leads to the quite different analyses that emerged from the Supreme Court's opinions in *Rubin*³ and the *Jesner*,⁴ which were issued a few months apart in Spring 2018.

What adds extra interest here are the two facets that we see of Justice Sotomayor as a judicial opinion writer. When Justice Sotomayor was confirmed to the U.S. Supreme Court in 2009, the author noted that an opportunity to exceed expectations awaited her after a tense confirmation battle:

Justice Sotomayor comes to the U.S. Supreme Court with a portfolio of judicial opinions larger than that any other sitting Justice brought with them. She is credited with over 600 federal court opinions in the Federal Cases database on Westlaw, most of those written in the District Court. As might be expected of a talented writer and thinker, her opinions realize a baseline of quality in applying the four critical principles of effective cognitive communication that we have examined in our Part I and Part II articles. Adam Liptak speaks knowingly and well for her canon when he writes:

“Judge Sonia Sotomayor’s judicial opinions are marked by diligence, depth and unflashy competence. If they are not always a pleasure to read, they are usually models of modern judicial craftsmanship, which prizes careful attention to the facts in the record and a methodical application of layers of legal principles.”

This achievement, however, may leave room for further progress. As Liptak observes, her opinions written on the District and Circuit courts:

“[R]eveal no larger vision, seldom appeal to history and consistently avoid quotable language. Judge Sotomayor’s decisions are, instead, almost always technical, incremental and exhaustive, considering all of the relevant precedents and supporting even completely uncontroversial propositions with elaborate footnotes.”⁵

Despite Adam Liptak’s seemingly faint praise, I observed more sanguinely:

3. *Rubin v. Islamic Republic of Iran*, 583 U.S. ___, 138 S. Ct. 816 (Feb. 21, 2018).

4. *Jesner v. Arab Bank, PLC*, 584 U.S. ___, 138 S. Ct. 1386 (Apr. 24, 2018).

5. Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future From the Roberts Court to the Learned Hand - Segmentation, Audience, and the Opportunity of Justice Sotomayor*, 13 BARRY L. REV. 29, 30, 90 (2009) (“I will also discuss how the recent confirmation of the first U.S. Supreme Court Justice in our lifetimes with extensive experience on the U.S. District Court creates a unique opportunity for the Supreme Court to apply the lessons from Learned Hand’s strengths and opportunities in trial-court opinion writing to reclaim lost leadership among the world’s high courts.”).

For the first time in our lifetimes, we have a Supreme Court justice with considerable District Court, not to mention Court of Appeals, experience. This juncture in history, this hour of her dogged professional rise, presents an opportunity for Justice Sotomayor to influence the Roberts Court immediately and the Supreme Court institutionally. The influence of which I speak is not as avatar for so-called (and grossly oversimplified and infelicitously stereotyped) “liberal” or “conservative” political-legal agendas. Far more important than the ephemeral legal squabbles of the day is the influence Justice Sotomayor has the opportunity to wield in pursuit of a goal more enduring. [T]o make the Supreme Court a leader, once again, as a judicial communicator, so that its opinions enjoy influence not merely because they are “final,” but rather, because they embody higher principles of cognitive excellence.⁶

Now, some nine terms of Court later, we see two different Justice Sotomayors. Writing for a unanimous court in *Rubin*, we see the vision of Sotomayor as the technocratic, craftsperson-like, non-memorable-phraseology-spinning judge that Liptak described. In her dissent in *Jesner*, however, we see—to borrow a the title of a work from the Roman Stoic philosopher and playwright, Seneca—more of a *Sotomayor Furens*.⁷ This incarnation is a much less inhibited Sotomayor. One can almost visualize this Sotomayor standing atop a soapbox and calling the plurality on the carpet for “categorically foreclos[ing] foreign corporate liability,” thereby “absolv[ing] corporations from responsibility under the ATS for conscience-shocking behavior,” and declaring her disagreement “both with the Court’s conclusion and its analytic approach” that leads the Court to erroneously conclude that it, “as a matter of common-law discretion, [must] immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged.”⁸

In this article, we deal with the Court’s contrasting treatment of the FSIA and the ATS, and Justice Sotomayor’s crucial role in these decisions. In Section II, we discuss the statutory background of the FSIA and the place of the *Rubin* decision within a complex statutory scheme brimming with complications around the provisions later added concerning waiving sovereign immunity of nations that sponsor terrorism and collecting judgments from those nations using assets found in the United States. In Section III, we discuss an entirely different kind of statute – a statute so old and so terse that, after it had lain unused for nearly 200 years, it became the excuse for a massive amount of judicial legislating, which in three cases decided over the last 14 years the Supreme Court cut back considerably. In Section IV, the author offers additional reflections about where both the FSIA and ATS may be headed in the wake of this tale of two statutes. These reflections include consideration of [a] how a March 2019 Supreme Court

6. *Id.* at 100-01 (footnote omitted).

7. See, e.g., Denis Henry & B. Walker, *The Futility of Action: A Study of Seneca’s Hercules Furens*, 60 CLASSICAL PHILOLOGY 11 (1965).

8. *Jesner*, 138 S. Ct. at 1419 (Sotomayor, J., dissenting).

decision, *Republic of Sudan v. Harrison*,⁹ impacts judgment collection under the FSIA from a personal jurisdiction perspective, rather than an available-assets perspective, and [b] how several cases currently working their way through the lower federal courts in the wake of *Jesner* may one day become the Supreme Court case that completes the work of *Jesner* in further curbing ATS suits against corporate defendants.

II. PIERCING THE VEIL OF SOVEREIGN IMMUNITY IN COLLECTING A JUDGMENT FOR VICTIMS OF STATE-SPONSORED TERRORISM: STATUTORY CONSTRUCTION IN *RUBIN V. ISLAMIC REPUBLIC OF IRAN* REJECTS AN IMPLIED EXPANSION OF EXECUTABLE FOREIGN SOVEREIGN ASSETS UNDER THE FSIA

A. A Short History of FSIA

The common law inherited by American courts operated on the maxim, *rex non potest peccare*, or the “king can do no wrong.”¹⁰ This was the doctrine of absolute sovereign immunity, which began to erode in the mid-20th century with the enactment of domestic sovereign-immunity limited waiver laws such as the Federal Torts Claims Act.¹¹ One of the principal causes of the erosion of sovereign immunity doctrine, particularly in the United States and Europe, was the “restrictive theory” of sovereign immunity.¹² That theory views sovereign immunity as extended to “truly sovereign” and “public” acts by a government but not to “private” or “commercial” activities.¹³ Since the days of the Marshall Court, the federal courts had accepted the notion that U.S. courts had no jurisdiction over foreign sovereigns because of the sovereign immunity doctrine in international law.¹⁴ However, with changes in the view of sovereign immunity – and with the global havoc wreaked by some of the sovereigns in World War II – the U.S. State Department looked anew at sovereign immunity in a 1952 study by then-legal advisor, Jack Tate, who encouraged the State Department to embrace the restrictive theory and to make “suggestions” of sovereign immunity (or lack thereof) to American courts (i.e., filing briefs stating the State Department’s position on sovereign immunity in any given case) based on the

9. *Republic of Sudan v. Harrison*, 587 U.S. ___, 139 S. Ct. ___, 2019 WL 1333259 (U.S. March 26, 2019)

10. *See, e.g., Rex Non Potest Peccare*, DUHAIME.ORG, <http://www.duhaime.org/LegalDictionary/R/RexNonPotestPeccare.aspx> [<https://perma.cc/E8L9-55CQ>].

11. *See, e.g., Dalehite v. United States*, 346 U.S. 15, 24-35 (1953), *aff'g In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952).

12. *See, e.g., Dalehite*, 346 U.S. at 24-35.

13. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS 247 (5th ed. 2011) (Professor Van Detta has used this casebook extensively and with good results in his elective course, “International Civil Litigation” at Atlanta’s John Marshall Law School).

14. *See, e.g., The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

restrictive theory.¹⁵ This, in turn, required the State Department to “perform a judicial function” for which it was ill-suited, some argued, because, for example, it “lacked the capacity to take factual evidence or afford appellate review,” it was constrained in its determinations by “diplomatic and political pressures” outside of the merits of any particular assertion of sovereign immunity, and it therefore produced results that some have labeled “unpredictable” and “sometimes unprincipled.”¹⁶

Congress attended to these problems some quarter-century after the Tate Letter by using its powers under Articles II (§ 3, C. 8—to regulate commerce with foreign nations) and III (to define the jurisdiction of the federal courts) to subject to a fully-worked out statutory scheme, rather than *ad hoc* advice from the State Department, the determination of sovereign immunity for foreign nations in U.S. litigation:

In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to “assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process,” H.R.Rep. No. 94–1487, p. 7 (1976), reprinted in [1976] U.S.Code Cong. & Ad.News 6604. ***To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities.***¹⁷

While the FSIA greatly reformed and regularized the process of implementing the modern restrictive theory of sovereign immunity, it still left a fair number of interpretative provisions for the federal courts. More than a few of these FSIA interpretation cases have reached the U.S. Supreme Court.

B. The History of the Terrorism Exceptions to FSIA

One of the sources of continued disputes about how sovereign immunity issues shall be evaluated came with expansion of the FSIA to other bases on which sovereign immunity could be waived. Most significantly, as part of the Antiterrorism and Effective Death Penalty Act of 1996, Congress amended the FSIA to add a terrorism exception and to waive sovereign immunity of a number of nations declared to be state sponsors of terrorism.¹⁸ As international civil

15. BORN & RUTLEDGE, *supra* note 11, at 233-34.

16. *Id.* at 234 n.23. See also *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

17. *Verlinden BV*, 461 U.S. at 488. (emphasis supplied).

18. BORN & RUTLEDGE, *supra* note 11, at 351, n.221 (citing § 221(s) of the Act). This was codified in 28 U.S.C. § 1607(a)(7), which provided that a foreign state is not immune in any case * * * in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act

litigation scholars Born and Rutledge have observed, “[t]hat [1996] enactment triggered a wave of litigation against nations like Iran when the action did not otherwise fall under one of the other exceptions of the FSIA, such as the noncommercial tort exception.”¹⁹ There was also uncertainty surrounding the amendment – because it was not obvious what the underlying causes of action were that might be asserted against a foreign sovereign that sponsored terrorism. As a result, the need appeared for further Congressional action:

When the FSIA state sponsor of terrorism exception was first enacted in April of 1996, it was far from clear whether that statute, § 1605(a)(7), in and of itself, served as a basis for an independent federal cause of action against foreign state sponsors of terrorism. **While the waiver of foreign sovereign immunity was clear, and hence the provision authorized courts to serve as a forum to adjudicate certain terrorism cases, questions remained regarding whether any civil claims or money damages were available by virtue of that enactment. To clarify matters, Congress created what is commonly referred to as the Flatow Amendment, which was enacted a mere five months after the state sponsor of terrorism exception as part of the Omnibus Consolidated Appropriations Act, 1997. See Pub.L. 104–208, § 589, 110 (1996), 110 Stat. 3009–1, 3009–172 (codified at 28 U.S.C. § 1605 note). The Flatow Amendment provides in pertinent part that:**

An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his office, employment, or agency shall be liable to a United States national or the national’s legal representative for personal injury or death caused by acts of that official, employee, or agent for which courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code [repealed] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)²⁰

* * * engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act[.]

Socialist People’s Libyan Arab Jamahiriya v. Rein, No. 98-1449, Brief of the United States, at 3-4 (1998), available at: <https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-1449.resp.pdf> [<https://perma.cc/X5T2-7QZE>].

19. BORN & RUTLEDGE, *supra* note 11, at 351.

20. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 42-43 (D.D.C.

New – and meaningful – ground had now been broken in opening U.S. federal courts to U.S. citizens who had been injured – whether personally, or by injuries to those on whose behalf they came to litigate – by terrorist attacks that were directed, ordered, aided, or abetted by a foreign sovereign:

Stephen Flatow filed suit in this Court shortly after the enactment of the Flatow Amendment. As administrator of Alisa Flatow’s estate, plaintiff asserted a wrongful death claim and a claim for Alisa’s conscious pain and suffering prior to her death. *See Flatow I*, 999 F.Supp. at 27–29. Plaintiff also asserted solatium claims for the mental anguish and grief suffered by the decedent’s parents and siblings as a result of her murder by terrorists. *See id.* at 29–32. Plaintiff also sought punitive damages. *See id.* at 32–35. Iran did not enter an appearance in the action and has never appeared in any FSIA terrorism action to date. *See id.* at 6.⁵

The *Flatow* case was the first in the country to be decided against Iran under the terrorism exception to the FSIA. *See* 999 F.Supp. at 6 n. 2. In that decision, this Court examined the statutory language of the terrorism exception, § 1605(a)(7), and the Flatow Amendment, § 1605 note, *in pari materia* and found that those provisions collectively established both subject matter jurisdiction and federal causes of actions for civil lawsuits against state sponsors of terrorism. *See id.* at 12–13. This Court also ruled that the Flatow Amendment was intended to ensure large punitive damage awards against state sponsors of terrorism. *See id.* In this Court’s view, the express provision of punitive damages in the Flatow Amendment, in conjunction with the provisions’s legislative history, including statements by the Amendment’s co-sponsors, Representative Jim Saxton and Senator Frank Lautenberg of New Jersey, demonstrated that Congress believed punitive damage awards were absolutely necessary to ensure that civil actions against state sponsors of terrorism would effectively deter those nations from perpetuating international terrorism. *See id.* Thus, the Flatow Amendment served as an exception to the general rule, as expressed in § 1606 of the FSIA, that foreign sovereigns are not to be held liable for punitive damages.²¹

The amendment quickly showed its bite against sovereigns who had been found to have sponsored terroristic acts. For example, in the *Flatow* case, the

[c]ourt ultimately awarded a total of 22.5 million dollars in compensatory damages. More significantly, however, the Court also awarded 225 million dollars in punitive damages, approximately three times Iran’s annual expenditures on terrorist *45 activities at that time. *See id.* at 34. In providing for such a large award of punitive damages against Iran, this Court stressed the importance of such awards as a means to deter states

2009) (emphasis supplied)(citing 28 U.S.C. § 1605 Note).

21. *Id.* at 43-44.

like Iran from supporting terrorist organizations. The Court stated as follows:

By creating these rights of action, Congress intended that the Courts impose a substantial financial cost on states which sponsor terrorist groups whose activities kill American citizens. *This Cost functions both as a direct deterrent, and also as a disabling mechanism: if several large punitive damage awards issue against a foreign state sponsor of terrorism, the state's financial capacity to provide funding will be curtailed.*²²

Cases gathered energy, and “the popular sentiment was that terrorism victims were going to ‘sue the terrorists out of business.’”²³ Indeed, “[i]n the years immediately following the *Flatow* decision, many more plaintiffs relied on the original terrorism exception, § 1605(a)(7), in combination with the Flatow Amendment, to successfully litigate cases against Iran” and “[l]arge judgments against the state sponsor of terrorism amassed quickly.”²⁴ However, a D.C. Circuit decision put the brakes on the whole enterprise, by disagreeing with the district courts:

Nearly six years following the *Flatow* decision, and contrary to what this Court and others had determined, the D.C. Circuit Court of Appeals held that “[p]lainly neither section § 1605(a)(7) nor the Flatow Amendment, separately or together, establishes a cause of action against foreign state sponsors of terrorism.” *Cicippio-Puleo*, 353 F.3d at 1027. According to the Court of Appeals, the original terrorism exception to the FSIA, § 1605(a)(7), was “merely a jurisdiction conferring provision,” and therefore it did not create an independent federal cause of action against a foreign state or its agents. *Id.* at 1032. In other words, the prior version of the terrorism exception, § 1605(a)(7), merely waived foreign sovereign immunity for designated terrorist states with respect to actions taken by those states in furtherance of international terrorism, but it did not furnish a legal claim for money damages that a terrorism victim might then assert in a lawsuit against Iran or any other designated state sponsor of terrorism. Instead, plaintiffs in terrorism cases were required to find a cause of action based on some other source of law. *Id.* at 1037.²⁵

This left litigants in an untenable situation. Essentially, they were told that they’d have to find state-tort law theories under which to sue. But under what state’s law? And what could you do about uniformity? The federal courts decided to apply the law of the place where victims were domiciled at the time of their death

22. *Id.* at 45-46 (emphasis supplied).

23. *Id.*

24. *Id.*

25. *Id.* (discussing *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004)).

or injury at the hands of terrorists.²⁶ However, American tort law varies so much from state to state that a welter of inconsistent results were sure to – and did – arise based solely on the fortuitous circumstances of where an American victim had been domiciled.²⁷ And even beyond the unfairness inherent in making *Fortuna* – the deity implored by the familiar incantations of *Carmina Burana*²⁸ – the decider of recovery, there were nightmarish choice-of-law problems created, much like we see in multi district air disaster litigation.²⁹ As one federal court described it:

In addition to the unfairness caused by a lack of uniformity in the underlying state sources of law, the pass-through approach proved cumbersome and tedious in practical application. In a given case based on a single terrorist incident, this Court would usually have to resolve choice of law problems and then proceed through a lengthy analysis of tort claims under the laws of numerous different state jurisdictions. For example, in the *Heiser* case, a large consolidated action involving the Khobar towers bombing, this Court issued a 209–page opinion in which it ultimately applied the laws of 11 different state jurisdictions. *See* 466 F.Supp.2d 229. In *Peterson*, this Court had to apply the laws of nearly 40 different jurisdictions in order to resolve the victims’ claims. *See Peterson II*, 515 F.Supp.2d 25. To efficiently manage these terrorism cases under the pass-through regime imposed by *Cicippio–Puleo*, this Court would frequently refer the action to special masters after the Court determined under § 1605(a)(7) that Iran provided material support for a terrorist incident that killed or injured Americans.³⁰

And even if litigants could survive and persevere through these many hurdles, there was the other side of the coin – how do you enforce a judgment obtained against a foreign state sponsor of terrorism, such as Iran, since no such nation will pay?

That question raises two important sub-issues. First, what are the assets that are [a] located in the U.S. and [b] legally available to pay a judgment against a foreign sovereign who also is a sponsor of terrorism? Second, are there entities beyond the sovereign itself, but sufficiently related to the sovereign – “agencies

26. *Id.* at 45-47.

27. *Id.* at 46-47 (citing the examples of inconsistent state law on the question of whether IIED claims could be asserted in survivor’s actions by family members of Americans killed in terrorist attacks).

28. *See, e.g.,* Betsy Schwarm, *Carmina Burana*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Carmina-Burana-by-Orff> [<https://perma.cc/8SWS-JCN4>]; Toumas M.S. Lehtonen, *Review: Fortuna, Money, and the Sublunar World: Twelfth-Century Ethical Poetics and the Satirical Poetry of the “Carmina Burana.”*, 75 *SPECULUM* 491 (Apr. 2000).

29. *See, e.g., In Re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425 (N.D. Ill. 1990).

30. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d at 47.

and instrumentalities” of that sovereign, as the international lawyer’s lingo calls them – [a] who may be holding property legally available to satisfy the judgment and [b] whose relationship to the sovereign is sufficiently close to justify garnishing, sequestering, attaching – and then seizing and selling, or transferring – that property to satisfy judgments obtained by victims against the sovereign sponsor of terrorism?

1. *What are the assets that are [a] located in the U.S. and [b] legally available to pay a judgment against a foreign sovereign who also is a sponsor of terrorism?*

Most of Iran’s assets in the United States are tied up as a result of Presidential Executive Orders and related federal government action in the wake of the 1979-1981 Hostage Crisis precipitated by Iran’s seizure of the U.S. Embassy in Tehran, and the diplomatic accords that were reached later in an effort to sort out claims by a variety of parties against these assets.³¹ Meanwhile, most of these assets are “blocked” – i.e., they cannot be reached, accessed, or disposed of – pending future action that is ill defined and may, in fact, not come until the proverbial freezing over of Hades:

What few assets of Iran that might be found within jurisdiction of the United States courts since the Algiers Accords are a subject to a dizzying array of statutory and regulatory authorities due in large part to the federal government’s obligations under that bilateral executive agreement, but also in part because of the increasing hostility in the relationship between Iran and the United States in the wake of the hostage crisis and the continuous designation of Iran as a state sponsor of terrorism since 1984. In fact, much like the assets of other state sponsors of terrorism, most of Iran’s known property or interests in property are blocked, i.e., frozen, or otherwise regulated under any number of United States sanctions programs.³²

As the Congressional Research Service put it in a report:

According to the CRS, the blocked assets of Iran in the United States “includes property that is blocked under the Iranian Assets Control Regulations, 31 C.F.R. pt. 535, since the hostage crisis was resolved in 1981. The property blocked in 1981 remains blocked in part because of pending claims before the Iran–U.S. Claims Tribunal.” *Id.* at 10. Other blocked assets include Iran’s diplomatic and consular properties here in the United States, as well as any proceeds from the leasing of those properties, which are now managed and maintained by the State Department’s Office of Foreign Missions. *Id.* “Additionally, other sanction authorities designed to address national emergencies distinct

31. *Id.*

32. *Id.* at 52.

from terrorism have also resulted in the blocking of assets in which the Government of Iran has an interest.” *Id.* The report adds that Iran claims “miscellaneous blocked and non-blocked military property that it asserts was in the possession of private entities in the United States when the hostage crisis was resolved in 1981. *Id.* at 12. The United States disputes Iran’s claims[,] and the matters are pending before the Claims–Tribunal.³³

As for the residue of Iranian assets not hopelessly tied up with the 40-year old on-going disputes and effects from the Hostage Crisis, there are other, serious obstacles that have prevented prevailing plaintiffs from recovering on their terrorism judgments against Iran:

Beyond the imposition of economic sanctions and other regulatory controls, however, the inviolable doctrines of both foreign sovereign immunity and federal sovereign immunity have often precluded the attachment or execution of property that plaintiffs have identified as belonging to Iran. With respect to foreign sovereign immunity specifically, the FSIA itself has long forestalled plaintiffs’ efforts to enforce judgments entered under § 1605(a)(7). This is largely because, much like foreign sovereigns are generally immune from civil suit under the FSIA, *see* § 1604, any property belonging to a foreign nation is similarly immune from attachment and execution by judgment creditors. *See* § 1609. The relevant exceptions to the general rule of immunity from the attachment or execution are listed in § 1610. Prior to the enactment of last year’s reforms in the 2008 NDAA, however, these exceptions to the general rule of immunity for foreign government property were limited almost exclusively to property relating to the commercial activities of the foreign sovereign within the United States. *See* § 1610(a) and (b). Given the lack of formal relations between the United States and Iran, these provisions have been of little utility to the judgment creditors of Iran in FSIA terrorism cases. Thus, the FSIA facilitated a somewhat ironic and perverse outcome because on the one hand, in § 1605(a)(7), it created an opportunity for terrorism victims to sue Iran for money damages, while on the other hand, in §§ 1609 and 1610, it denied these victims the legal means to enforce their court judgments.

In addition to the immunity from attachment or execution that the FSIA has long provided to foreign property, assets held within United States Treasury accounts that might otherwise be attributed to Iran are the property of the United States and are therefore exempt from attachment or execution by virtue of the federal government’s sovereign immunity. *See Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999); *State of Arizona v. Bowsher*, 935 F.2d 332

33. *Id.* at 52 n.12 (citing OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, TERRORIST ASSETS REPORT 2, 10 (2007), <http://www.treas.gov/offices/enforcement/ofac/reports/tar2007.pdf>)

(D.C.Cir.1991). As the Supreme Court held in the seminal case of *Buchanan v. Alexander*, United States sovereign immunity is an extremely broad bar to jurisdiction that prevents creditors from attaching funds held by the United States treasury or its agents. 45 U.S. 20, 4 How. 20, 11 L.Ed. 857 (1846).³⁴

Given the dearth of locatable, accessible assets of Iran within the U.S., one district court observed despairingly in 2009 that:

In the case of Iran, however, the simple fact remains that very few blocked assets exist. In fact, according to OFAC's latest report, there are only 16.8 million dollars in blocked assets relating to Iran. This amount is inconsequential—a mere drop in the bucket—when compared to the staggering 9.6 billion dollars in outstanding judgments entered against Iran in terrorism cases as of August 2008, which is the last time the Congressional Research Service compiled data on this issue. The amount of Iranian non-blocked assets within the United States, as reported to OFAC, is similarly inconsequential in comparison to Iran's liability under the FSIA terrorism exception. According to OFAC, the amount of non-blocked Iranian assets is merely 28 million dollars.³⁵

It is not surprising that federal courts and prevailing plaintiffs in state-sponsors of terrorism suits under the FSIA began to refer to the virtually uncollectable default judgments as “Pyrrhic Victories,” because “a number of practical, legal, and political obstacles have made it all but impossible for plaintiffs in these FSIA terrorism cases to enforce their default judgments against Iran” in what the courts have labeled a “[n]ever-[e]nding struggle.”³⁶

2. Are there entities beyond the sovereign itself, but sufficiently related to the sovereign – “agencies and instrumentalities” of that sovereign – [a] who may be holding property legally available to satisfy the judgment and [b] whose relationship to the sovereign is sufficiently close to justify garnishing, sequestering, attaching – and then seizing and selling, or transferring – that property to satisfy judgments obtained by victims against the sovereign sponsor of terrorism?

The search for executable assets is complicated by the modern reality that if foreign sovereigns do have property in the United States, it is often not held directly by the foreign sovereign. Instead, foreign sovereigns typically have established some separate entity – broadly described as “an agency or instrumentality” of the foreign sovereign – to carry on various courses of conduct that would include generating and holding such assets.

Thirty-five years ago, the U.S. Supreme Court was asked to come squarely

34. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d at 52-53.

35. *Id.* at 58-59 (citations & footnotes omitted).

36. *Id.* at 49, 56.

to grips with the implications of this phenomenon in a case where a Cuban financial institution sought recovery on a letter of credit from an American financial institution, only to have the American financial institution assert a counterclaim seeking to set-off an amount it contended had been unlawfully expropriated by the Cuban government itself in a separate series of events. In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,³⁷ Justice O'Connor's majority opinion came down squarely and strongly in favor of establishing a presumption that such foreign-state agencies and instrumentalities are, *as presumptively separate legal entities*, not answerable for actions that have been taken by the sovereign – in other words, that they are *presumed not merely to be one with, or alter egos of*, the sovereign:

Increasingly during this century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks.¹³ The organization and control of these entities vary considerably, but many possess a number of common features. A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.

These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies. These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments.

[P]ublic enterprise, largely in the form of development corporations, has become an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan. Not infrequently, these public development corporations . . . directly or through subsidiaries, enter into partnerships with national or private foreign enterprises, or they offer

37. 462 U.S. 611, 626-28 (1983). See Raquel A. Rodriguez, *Holding Foreign Government Corporations Liable For The Wrongs Of The Government: A Clash Among Competing Policies*, 39 U. MIAMI L. REV. 341 (1985).

shares to the public.

Separate legal personality has been described as “an almost indispensable aspect of the public corporation.” Friedmann, *supra*, at 314. Provisions in the corporate charter stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities, thereby enabling third parties to deal with the instrumentality knowing that they may seek relief in the courts. Similarly, the instrumentality’s assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties.. Thus what the Court stated with respect to private corporations in *Anderson v. Abbott*, 321 U.S. 349 (1944), is true also for governmental corporations: “Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.”³⁸

Justice O’Connor warned of serious consequences for the modern ordering of business by sovereign governments if this basic concept of corporation law was not extended into the sphere of corporate-like entities created by sovereign nations:

Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality’s assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government’s guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations, see *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895), leads us to conclude—as the courts of Great Britain have concluded in other circumstances—that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.³⁹

Justice O’Connor then looked to the recently enacted FSIA itself to martial further support for this view:

We find support for this conclusion in the legislative history of the Foreign Sovereign Immunities Act. During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a

38. *Id.* at 624-26 (citations & footnotes omitted).

39. *Id.* at 626-27. Justice O’Connor elaborated on the British position: “The British courts, applying principles we have not embraced as universally acceptable, have shown marked reluctance to attribute the acts of a foreign government to an instrumentality owned by that government.” *Id.* at 627 n.18 (citing I Congreso del Partido, [1983] A.C. 244).

foreign state are to be accorded a presumption of independent status. In its discussion of FSIA § 1610(b), the provision dealing with the circumstances under which a judgment creditor may execute upon the assets of an instrumentality of a foreign government, the House Report states: “Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. *There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.* However, a court might find that property held by one agency is really the property of another.”

Thus, the presumption that a foreign government’s determination that its instrumentality is to be accorded separate legal status is buttressed by this congressional determination.⁴⁰

Justice O’Connor’s opinion also considered whether this presumption may be overcome in certain circumstances,⁴¹ and – of course – concluded that it could⁴²:

Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded. Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.⁴³

Just as Helen of Troy was said to be “the face that launched a thousand ships,”⁴⁴ Justice O’Connor and the Burger Court spawned a thousand soft, multi-factored balancing tests⁴⁵ – the kinds that clients and litigants loathe because of

40. *Id.* at 627-28 (footnotes omitted & emphasis added)(quoting H.R. Rep. No. 94-1487, at 29-30, U.S. Code Cong. & Admin. News 1976, at 6628-29.)

41. *Id.* at 628-29.

42. *Id.* at 629-35.

43. *Id.* at 634-35.

44. CHRISTOPHER MARLOWE, THE TRAGICAL HISTORY OF DR. FAUSTUS 163 (Rev. Alexander Dyce, ed. 1604), <http://www.gutenberg.org/files/779/779-h/779-h.htm> [https://perma.cc/S8FZ-ZX78](“Was this the face that launch’d a thousand ships/ And burnt the topless towers of Ilium— Sweet Helen, make me immortal with a kiss.—“).

45. *See, e.g.*, Eric J. Segall, *Justice O’Connor and the Rule of Law*, 17 U. FLA. J.L. & PUB. POL’Y 107 (2006); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992); Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319 (1992); Jennifer E. Spreng, *Failing Honorably: Balancing Tests, Justice O’Connor and Free Exercise of Religion*, 38 ST. L. U. L.J. 837 (1993).

[1] their lack of predictability in outcome and [2] the fact-focused, labor-intensive, and, therefore, unduly expensive process of litigating them, case by case by case.⁴⁶

The federal district and appeals courts thereafter shouldered the charge laid upon them by Justice O'Connor's opinion (which was known by the short form name for the respondent, *Bancec*) and created, over time, a set of factors derived from the principles discussed by Justice O'Connor.⁴⁷ However, the process by which the courts accomplished this was not a smooth one, nor was it an economical practice for those seeking to collect sovereign-owed judgments from these "agencies and instrumentalities." In addition to shouldering the heavy burdens of getting federal court jurisdiction over the sovereign under FSIA and proving the claims against the sovereign, plaintiffs then faced another round of lengthy, expensive, and procedurally daunting litigation in trying to discover and then present in court sufficient, highly case-specific information that would suffice to rebut *Bancec*'s presumption against "agency or instrumentality" liability. It doesn't take a great deal of cogitation to realize that this is an untenable way to proceed – a veritable thirteenth labor of Hercules.⁴⁸ As one commentator wrote of *Bancec*'s presumption, of the federal district and circuit courts' efforts to make sense of it, and of the challenge to those litigating to rebut the presumption:

We live in an era of increasingly powerful and influential SOCs [State-Owned Companies, i.e., "agencies and instrumentalities" of a foreign sovereign]. The current legal regime provided by the FSIA, as interpreted

46. See Jeffrey A. Van Detta, *Transnational Legal Services In Globalized Economies: American Leadership, Not Mere Compliance, With GATS Through Qualifying LL.M. Degree Programs For Foreign-Educated Lawyers Seeking State-Bar Admissions*, 13 HOFSTRA J. INT'L BUS. & L. 1, 19-20 (discussing similar problems created by World Trade Organization's use of "a soft, multi-factored balancing test" to determine the "like products" issue in claims for violations of the National Treatment Rule of the General Agreement on Trade & Tariffs (GATT) in cases such as *Japan-Taxes On Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, §H.1(a) (WTO Appellate Body 1998)); (I am indebted for the concept and the phrase to Jack Wallach, Esq., former Labor Counsel to the entity once known as Bell South Enterprises.).

47. *Rubin v. Islamic Republic of Iran*, 583 U.S. ___, 138 S. Ct. 816, 823 (Feb. 21, 2018); see, Haley Claxton, *Indiana Jones and The Foreign Sovereign Immunities Act (FSIA): Interpreting FSIA's State Sponsored Terror Exception* 66 U. KAN. L. REV. 181 193-194 (2017).

48. See Sandra S. Berns, *Hercules, Hermes and Senator Smith: The Symbolic Structure of Laws' Empire*, 12 BULLETIN OF THE AUSTRALIAN SOCIETY OF LEGAL PHILOSOPHY 35, 35-36 (April 1988); Evelyn Berg, *Alcestis and Hercules in the Catacomb of via Latina*, 48 VIGILIAE CHRISTIANAE 219 (Sept. 1994); (As one commentator remarked in 2002, the *Bancec* test "imposes a more formidable obstacle" and "has become one more impediment that terrorist victims must overcome in order to vindicate their claims."); Sebastian Caputto, *Semantic Victory: Why The Enforcement Of Aedpa Judgments Should Be Precluded*, 16 EMORY INT'L L. REV. 525, 550, 551 (2002); see also, Anneliese Gryta, *A Herculean Task For Judge Hercules: Analytical Avoidance In Iran v. Elahi*, 41 AKRON L. REV. 249, 273 n.149 (2004).

by the courts, is not only outdated in its application to SOCs, it is also conflicting and confusing. The best way to solve this problem is to amend the FSIA so that SOCs no longer enjoy a presumption of immunity. Doing so will better honor the restrictive theory of sovereign immunity applied around the world, including the United States since 1952.⁴⁹

Bancec's challenges were both noted – and protested. As observed in the pages of the *Harvard Law Review*,

Although *Bancec* established the alter ego test in the sovereign immunity context, it is hardly a bright-line standard. Lower courts have looked to “ordinary agency principles” to determine whether alter ego attribution is appropriate. The touchstone of these principles is the extent to which the subsidiary is controlled by its parent government, but “[c]ourts have long struggled, often with confusing results, to explain how much control is required before parent and subsidiary may be deemed principal and agent.” Generally, the plaintiff must show that the government’s involvement in the subsidiary “exceeds the normal supervisory control exercised by any corporate parent over its subsidiary.” Even this inquiry does not permit easy application. Some courts have held that “when a state-controlled corporation implements state policies, its separate corporate existence does not shield the state from liability,” whereas others have required that the government “dominate[] the operations of the company” such that it “abuses the corporate form.”⁵⁰

The bottom line was that “[i]n applying *Bancec*, instead of clear tests, ‘what one typically gets in most opinions is a laundry list of factors against which the facts of the case at bar are then compared.’”⁵¹

3. *The 2008 Solutions to Enforcing Judgments Against State Sponsors of Terrorism*

Thus, with these problems identified in the District Courts very much in mind, Congress returned to the terrorism subject for the third time since their original foray in 1996, and in 2008 made a number of key amendments to the FSIA. First, as then-Chief Judge Royce Lamberth has explained of the 2008 Amendment that gives us § 1605A,

The revised “state-sponsored terrorism” exception provides that a foreign sovereign will not be immune to suit in U.S. courts where:

49. Phillip Riblett, *A Legal Regime for State-Owned Companies in The Modern Era*, 18 J. TRANSNAT’L L. & POL’Y 1, 44-45 (2008).

50. *Too Sovereign to Be Sued: Immunities Of Central Banks In Times Of Financial Crisis*, 124 HARV. L. REV. 550, 559-560 (2010) (footnotes omitted).

51. *Id.* at 559 n.68 (quoting Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 509 (2001)).

money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

Most importantly, § 1605A creates a private, federal cause of action against a foreign state that is or was a state sponsor of terrorism, and provides for economic damages, solatium, pain and suffering, *and punitive damages*. See 28 U.S.C. § 1605A(c). **To establish liability against a foreign sovereign under § 1605A, plaintiffs must show that** (1) the foreign sovereign was designated by the State Department as a “state sponsor of terrorism;” (2) the victim or plaintiff was either U.S. national, a member of the armed forces, or a federal employee or contractor acting within the scope of employment at the time the acts took place; and (3) the foreign sovereign engaged in conduct that falls within the ambit of the statute.⁵²

In addition, § 1605A provides for some degree—somewhat confusingly articulated—of retroactivity of § 1605A suits to certain predecessor § 1605(a)(7) suits. The retroactivity issue is a vexing one, and beyond the scope of this article. Indeed, it deserves its own, thorough study. To sum it up, one leading authority has observed:

Unlike § 1605(a)(7), § 1605A explicitly allows for punitive damages awards against foreign sovereigns. Some plaintiffs have brought actions for punitive damages after they have already obtained judgments for compensatory damages under § 1605(a)(7)—with varying success. Courts have recognized that the statutory language of § 1605A “can reasonably be read to authorize only suits related to pending cases or, more broadly, to authorize any suit related to an earlier action brought under § 1605(a)(7), or the Flatow Amendment, regardless of whether that first suit was pending when the second suit was brought.” In *Hegna v. Islamic Revolutionary Guard Corps*, the court dismissed a second action brought under § 1605A, reasoning that, if the statute authorized “a second suit for damages based on the same nucleus of facts at the core of the final judgment in an earlier suit,” such an authorization “would raise a serious [constitutional] question as to whether it violated the Article III prohibition on the legislative revision of final judicial judgments.” But in *Bodoff v. Islamic Republic of Iran*, the court had awarded compensatory and punitive damages to plaintiffs in 2006, but still heard an action for punitive damages, which was brought within 60 days of

52. *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 35 (D.D.C. 2008)(quoting National Defense Authorization Act for Fiscal Year 2008 (“NDAA”), Pub. L. No. 110-181, 122 Stat. 3, § 1083).

passage of the § 1605A. The court confirmed its prior damages awards under § 1605A and held the Republic of Iran (the defendant in the prior suit) and the Iranian Ministry of Information and Security (the new defendant in the second suit) jointly and severally liable.⁵³

As to the difficulty of collecting judgments, Congress amended Section 1610, which deals with a separate question of sovereign immunity – under what circumstances can foreign-sovereign property be used to satisfy a judgment? The amendment added a new subsection (g) to the existing statute⁵⁴:

§ 1610. Exceptions to the immunity from attachment or execution

(g) Property in certain actions.—

(1) In general.--Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

- (A) the level of economic control over the property by the government of the foreign state;
- (B) whether the profits of the property go to that government;
- (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
- (D) whether that government is the sole beneficiary in interest of the property; or
- (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its

53. Crowell & Moring LLP, *The Foreign Sovereign Immunities Act: 2012 In Review*, 20 L. & BUS. REV. AM. 565, 597-598 (2014)(footnotes omitted). For an extensive treatment of these issues – and a plea for Congress and the Executive Branch to consider them more carefully in more detail, see *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 62-137 (D.D.C. 2009). Similarly, at least three federal courts have rejected as inapplicable to state-terrorism sponsors the “substantive Due Process” limits on the size of punitive damages in the line of cases proceeding from *Gore v. BMW of North America*, 517 U.S. 559 (1996), and its progeny. *Id.* at 598; see, e.g., *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14 (D.D.C. 2011); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 41-42 (D.D.C. 2012); *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 55-58 (D.D.C. 2012).

54. 28 U.S.C. § 1610(g) (see §§1610 (a)-(f) to help visualize the structure of the statute and give full context to § 1610(g)).

obligations.

- (2) United States sovereign immunity inapplicable.--Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.
- (3) Third-party joint property holders.--Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.⁵⁵

Of this provision, the most veteran of the judges presiding over the Iranian terrorism lawsuits observed, with concern mingled with a tinge of optimism:

In an apparent effort to overcome some of the challenges relating to the execution of judgments, § 1605A entitles plaintiffs to what are in effect automatic pre-judgment liens on property belonging to a designated state sponsor of terrorism.²¹ In addition to these new prejudgment attachment procedures, any actions filed or otherwise maintained under § 1605A may benefit from certain reforms to § 1610, which is the section of the FSIA that prescribes the limited circumstances in which the property of a foreign state may be subject to attachment or execution upon a civil judgment. Specifically, § 1083 of the 2008 NDAA adds to § 1610 new provisions that are plainly intended to limit the application of foreign sovereign immunity or United States sovereign immunity as defenses to attachment or execution with respect to property belonging to designated states sponsors of terrorism. *See* § 1083(b) (“Conforming Amendments”) (codified at § 1610(g)). ***The full implications of § 1610(g) are far from clear. Only time will tell whether § 1610(g) will enable plaintiffs going forward with actions under § 1605A to experience greater success in executing civil judgments against Iranian assets. Given the scarcity of assets and the difficulty of locating what assets might be available—it seems unlikely that this provision will be of great utility to plaintiffs .***

..⁵⁶

Judge Lamberth’s skepticism has proven very well-founded.

55. 28 U.S.C. § 1610(g).

56. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d at 62.

4. Congress Giveth—But Not So Much

One might very well wonder at the oddity of § 1610(g)(1), which, unlike most statutes, gives us a laundry list of factors that it says are NOT relevant to a determination.

The determination in question goes to how widely the net can be cast for those who hold property of the foreign sovereign judgment creditor. Specifically, when can agencies or “instrumentalities” of a foreign state be treated as liable for a judgment that was entered against the foreign state and in favor of a private party? Congress clearly sought to create a bright-line rule without the *Bancec* presumption and the soft-multi-factored balancing test of rebuttal. The factors listed in 1610(g)(1)(A)-(E) are clearly the *Bancec* factors – and they’ve been abolished.

Score a victory for judgment enforcement. But is it another Pyrrhic victory?

There is, of course, no question that Iran enjoys no sovereign immunity under either FSIA § 1605A or its predecessor § 1605(a)(7). “Iran was designated a terrorist party pursuant to section 6(j) of the Export Administration Act of 1979” and “[t]hat designation means that Iran is not entitled to sovereign immunity for claims under § 1605A.”⁵⁷ There’s also no question that 1605A judgments can be collected under the provisions of § 1610(g). But just how far did that section go in opening up new sovereign assets to be collected? Certainly, as shown above, § 1605A removed the presumption from the *Bancec* case that “agencies and instrumentalities” of a foreign sovereign are separate—and thus, largely unreachable—entities. Yet that begs the question of which of the assets held by the agencies and instrumentalities of a foreign sovereign state-sponsor of terrorism are opened up to being attached, garnished, sequestered, otherwise seized, and then sold?

Some cases have dealt with efforts of Iran-terrorism judgment holders to seize assets that would create severe conflicts with the operations of third parties. One of the most intriguing examples resulted from efforts by judgment creditors who had obtained “judgments amounting to hundreds of millions of dollars against” the governments of Syria, North Korea, and Iran for terrorism claims brought under § 1605(a)(7) and its successor § 1605A.⁵⁸ The plaintiffs in these various cases served writs to attach “[i]nternet data” which is “managed by the Internet Corporation for Assigned Names and Numbers (ICANN),” including “the country-code top level domain names (ccTLD) and Internet Protocol (IP) addresses of Iran, Syria and North Korea, respectively.”⁵⁹ This would effectively

57. *Bennett v. Islamic Republic of Iran*, 626 F.3d 949, 955 (9th Cir. 2016) (citing 50 U.S.C. app. § 2405(j)) (effective Jan. 19, 1984).

58. *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 472, 477 (D.C. Cir. 2016) (listing specific cases and judgments, which ranged from \$16 million to \$378 million).

59. The opinion’s author, Judge Karen LeCraft Henderson, who was appointed to the D.C. Circuit by President George H.W. Bush in 1990, observed that “[n]either the ccTLD nor the IP address lends itself to easy description,” *Id.* at 473, and then devoted five full pages of the Federal Reporter Third Series attempting to describe and explain these items of intellectual property. *Id.*

take control away of the three countries' ccTLD designations from ICANN – to whom Congress effectively delegated that authority⁶⁰ – and place it in the hands of the judgment creditors.⁶¹ That would require ICANN to effectively “delegate management of the [“ir.”] ccTLD so to that the [judgment creditors] c[ould] ‘sell or license the operation of the ccTLD’” for these countries “to a third party.”⁶² After a lengthy analysis, the D.C. Circuit invoked an exemption from judgment enforcement under § 1610 for “an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment” if attachment would “impai[r]” that third party’s interest.⁶³ Finding that the third-party interests in protecting the stability and interoperability of the domain name system were both “enormous” and very seriously threatened by the attachment sought by the judgment creditors, the D.C. Circuit upheld the district judge’s decision to quash the writs of attachment sought for the judgment creditors in the seven cases before it.⁶⁴

However, in the course of reaching that ruling, the D.C. Circuit opined that but for the exception provided by § 1610(g)(3) for these domain-name internet assets, they would indeed have been subject to attachment. As Judge Karen LeCraft Henderson put it for the court, “the terrorist activity exception is, simply put, different. Once a section 1605A judgment is obtained, section 1610(g) strips execution immunity from *all* property of a defendant sovereign.”⁶⁵

The 9th Circuit also reached that conclusion in a case in which it authorized enforcement of “judgments total[ing] nearly \$1 billion” against Iran by attaching payments that two credit card providers owed to an Iranian government instrumentality, Bank Melli, “pursuant to a commercial relationship that involves the use of Visa credit cards in Iran.”⁶⁶ Bank Melli gamely argued that:

because § 1610(g) makes assets subject to attachment and execution only “as provided in this section,” it is not an independent exception to the immunity granted by 28 U.S.C. § 1609. Bank Melli reasons that subsection (g) applies only if some other part of S 1610 provides for

at 472-77.

60. As the D.C. Circuit explained,

In 1998, the United States government transferred much of its oversight role to ICANN, a California non-profit corporation. ICANN’s mission is to “protect the stability, integrity, interoperability and utility of the D[omain] N[ame] S[ystem] on behalf of the global Internet community,” and, pursuant to a contract with the United States Department of Commerce . . . [and] the organization now performs several functions essential to the functioning of the Internet.

Id. at 476 (citations omitted).

61. *Id.* at 486.

62. *Id.*

63. 28 U.S.C. § 1610(g)(3) (2018) (quoted in the text above).

64. *Weinstein*, 831 F.3d at 485-88.

65. *Id.* at 483.

66. *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 954, 956, 957 (9th Cir. 2016).

attachment and execution. Bank Melli argues that its assets cannot be attached or executed upon because the assets at issue in this case were not “used for a commercial activity in the United States,” a requirement in S 1610(a), and Bank Melli has not itself “engaged in commercial activity in the United States,” a requirement in § 1610(g).

By 2-1 vote,⁶⁷ the 9th Circuit panel rejected that statutory interpretation argument. Instead, the court insisted that § 1610(g) “contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities.”⁶⁸ Looking at the structure of § 1610, the two-judge majority refused to believe that Congress had intended – despite not actually having said so in so many words – to limit enforcement of terrorism judgments against state sponsors of terrorism only to assets that derive from commercial activity in the U.S. or to assets held by agents or instrumentalities engaged in commercial activity in the U.S., because “[i]n light of Congress’ mandate to the executive branch to assist in the collection of judgments in such cases, 28 U.S.C. § 1610(f), we cannot impute to Congress an empty statutory gesture.”⁶⁹ Rather, the two-judge majority observed, “[g]iven both the text of the statute and Congress’ intention to make it easier for victims of terrorism to recover judgments, we hold that § 1610(g) is a freestanding provision for attaching and executing against assets to satisfy a money judgment premised on a foreign state’s act of terrorism.”⁷⁰

Senior District Judge Dee V. Benson, sitting on the panel by designation, dissented on a number of grounds. Most intriguingly, however, Judge Benson warned that the “freestanding” view of § 1610(g) was simply not justified, in his view,⁷¹ because the consequences of such breadth should surely not be attributed

67. Judge Alex Kozinski was originally on the panel. *Id.* at 953. His reason for withdrawing from the hearing of a case argued in April 2015 and in which an opinion was issued in February 2016 is not clear. (This is well before the torrent of hostile-environment sexual harassment allegations against him erupted.) However, what is clear is that the bar was deprived of what likely would have been a *tour-de-force* opinion on the subject, and one which likely would have accurately predicted what the Supreme Court ended up doing with this statutory interpretation issue.

68. *Id.* at 959.

69. *Id.* at 960.

70. *Id.*

71. For those who don’t know the Utah Federal District Judge Dee Vance Benson: <https://fox13now.com/tag/dee-benson/> [<https://perma.cc/J5JA-6SGW>]. Judge Benson was confirmed to the U.S. District Court in 1991, and took Senior Status in 2014. *Dee Benson*, BALLOTPEDIA, https://ballotpedia.org/Dee_Benson [<https://perma.cc/466K-55FZ>]. As in Bennett, Judge Benson has a reputation as a pragmatist who is acutely up-to-date on the work of the federal courts. When the Utah Department of Health refused to list a same-sex couple as the parents of a child on the child’s birth certificate, Judge Benson ordered the Department in 2015 to change their practice immediately, commenting from the bench, “‘I’m just still trying to see if there’s any way you can, now that same sex marriage is legal, tell me Utah has a rational basis in discriminating

to Congress unless Congress had used language that make such problematic breadth unmistakable, rather than mere inferable. Focusing on the *Rubin* case itself, which was then working its way from the District Court in the Northern District of Illinois to the 7th Circuit, Judge Benson wrote:

Finally, the majority's holding ignores the practical limitation the commerce requirement places on § 1605A judgments. Reading § 1610(g) as a freestanding immunity exception does not just relax FSIA in the context of terrorism—it eliminates any immunity protection under FSIA for state sponsors of terror and their instrumentalities. For example, in *Rubin v. Islamic Republic of Iran*, American citizens sued and obtained default judgments against Iran for injuries and losses that arose out of a suicide bombing carried out by Hamas in Israel. 33 F.Supp.3d 1003, 1006 (N.D. Ill. 2014). The *Rubin* plaintiffs sought to “attach and execute on numerous ancient Persian artifacts” in possession of two museums in the United States to satisfy their default judgments against Iran. *Id.* Like the judgment creditors in this case, the *Rubin* plaintiffs argued that § 1610(g) is a freestanding immunity exception and, therefore, the plaintiffs may attach Iran's artifacts to satisfy their judgments. *Id.* at 1013.

The [district] court disagreed, finding: “The plain language indicates that Section 1610(g) is not a separate basis of attachment, but rather qualifies the previous subsections.” *Id.* The court concluded, “the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered.” *Id.* Currently, the *Rubin* case is pending appeal in the Seventh Circuit. *Rubin v. Islamic Republic of Iran*, 33 F.Supp.3d 1003 (N.D. Ill. 2014), *appeal docketed*, No. 14–1935 (7th Cir. Apr. 25, 2014).

Surely this Court's holding will be argued as precedent to allow the *Rubin* plaintiffs to seize Persian artifacts to be auctioned off to satisfy the *Rubin* plaintiffs' default judgments. **This would be an unjustified and unfortunate result. When Congress amended FSIA, the intention was to eliminate the *Bancec* presumption and relax the rigidity of §**

against this woman.” Ben Winslow, *Federal Judge Orders Utah To Put Same-Sex Couple On Their Child's Birth Certificate*, FOX13 SALT LAKE CITY (July 15, 2015), <https://fox13now.com/2015/07/15/federal-judge-orders-utah-to-put-same-sex-couple-on-their-childs-birth-certificate/> [<https://perma.cc/YLM5-7WRP>]. “In sometimes blistering questioning, Judge Benson pressed the state for reasons why the law should discriminate against the Roes versus a married, heterosexual couple.” *Id.* The state could not come up with any that Judge Benson did not immediately dismantle. In ordering the Utah Department here to issue the birth certificate, Judge Benson became the first federal judge in the country to order a state to do so in the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Id.*

1610 to make it easier for victims of terrorism to satisfy judgments against state sponsors of terror. *Congress did not, however, intend to open the floodgates and allow terrorism plaintiffs to attach any and all Iranian property in the United States. Rather, Congress intended the commerce limitation to remain in place. If a foreign state is designated as a state sponsor of terror, the state and the instrumentalities and agencies of the state lose the privilege of doing business in the United States without running the risk of property being seized to satisfy judgments.*⁷²

Judge Benson was rightly concerned. To open the door quite so far without much evidence of Congressional consideration of the fallout – in either statutory text or legislative history – is alarming. And with a country like Iran – ancient Persia – an area of unintended consequences would obviously include putting in private hands for piecemeal sale to the highest bidders at the whim of judgment plaintiffs a collection of artifacts that have survived the assaults of Alexander the Great and have “been likened to the ‘crown jewels of England, or the original document of the Magna Carta, or the Western Wall in Jerusalem, or the Parthenon in Athens.’”⁷³ This was particularly alarming since judgment plaintiffs would be collecting judgments that often consist of outsized punitive damages components. The *Rubin* case was seen as a battle “threaten[ing] to dismember [a] unique collection of antiquities by auctioning off each tablet piece by piece” such that “the single most important surviving insight into the organization of the 2,500-year-old Persian Empire would be sold into the living rooms of private collectors around the world.”⁷⁴ To do so would seem, as Judge Benson suggested in his *Bennett* dissent, a bridge too far.

And that is exactly what Judge Diane Sykes – a frequently mentioned nominee for the U.S. Supreme Court⁷⁵ – ruled in her opinion for the 7th Circuit. She roundly and emphatically rejected the 9th Circuit’s holding⁷⁶ – and in the process, overruled two 7th Circuit cases on which the 9th Circuit in *Bennett* had relied – and held that there was no freestanding exemption of assets created by the simple language Congress used in § 1610(g).⁷⁷ In so doing, she essentially

72. *Bennett*, 825 F.3d at 949 (Benson, D.J., dissenting) (emphasis added).

73. Claire E. Stephens, *Storming The Persian Gates: The Seventh Circuit Denies Attachment To Iranian Antiquities*, 12 SEVENTH CIR. R. 164, 164-165 (2016).

74. *Id.* at 164.

75. Shawn Johnson, *Milwaukee’s Diane Sykes Interviewed For SCOTUS Vacancy—Federal Appeals Court Judge Has Previously Been Mentioned As Possible Justice*, WIS. PUB. RADIO (Jan. 30, 2017), <https://www.wpr.org/milwaukeees-diane-sykes-interviewed-scotus-vacancy> [<https://perma.cc/T5AH-CUMT>]; Carol Felsenthal, *Trump’s Leading Lady for the Supreme Court Has Chicago Ties*, CHICAGO MAGAZINE (Jan. 16, 2017), <http://www.chicagomag.com/Chicago-Magazine/Felsenthal-Files/January-2017/Diane-Sykes/> [<https://perma.cc/8DY4-DXH8>].

76. *Bennett*, 825 F.3d at 949, 960-61 (citing *Gates v. Syrian Arab Republic*, 755 F.3d 568 (7th Cir. 2014), and *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015)).

77. *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 473, 474, 481-87 (7th Cir. 2016).

expanded upon the analysis that led the District Judge to the same conclusion.⁷⁸

The U.S. Supreme Court in its unanimity might simply have affirmed on Judge Sykes' thorough and thoughtful opinion. But it wanted to write its own opinion. And Justice Sotomayor got the task from Chief Justice Roberts. What results is a rather stolid exposition of statutory interpretation principles and rules that seem to come straight out of the book published a few years ago by legal writing guru Professor Garner as amanuensis for his co-author, the late Justice Scalia.⁷⁹ The opinion will certainly make good fodder for analysis taught in a statutory interpretation or legislative drafting course, and may perhaps find its way into the casebook written by a leading scholar of the area, Professor Hillel Levin.⁸⁰ Rather than inflict a summary on the reader, it is best for the reader to experience Justice Sotomayor's exposition in all of its original glory.⁸¹ While Justice Sotomayor's analysis is undoubtedly correct, it adds little to Judge Sykes' more accessible (complete with diagram) opinion for the 7th Circuit; and the orthodoxy of its approach – a bit like a Justice Scalia, except lacking the wit, the humor, and the style that made sober statutory interpretation bearable under his fierce tutelage – reminds one of Judge Posner's critique of the entire textualist exercise as conceived of by the late Justice Scalia:

This austere interpretive method leads to a heavy emphasis on dictionary meanings, **in disregard of a wise warning issued by Judge Frank Easterbrook, who though himself a self-declared textualist advises that “the choice among meanings [of words in statutes] must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.”**⁸²

In fact, this is one of the few cases where the headnote says it all, just as well, in a nutshell:

Provision of Foreign Sovereign Immunities Act (FSIA) section setting forth exceptions to attachment immunity, which stated that property of

78. *Rubin v. Islamic Republic of Iran*, 33 F.Supp.3d 1003, 2011-14 (N.D. Ill. 2014) (Gettleman, J.).

79. ANTONIN SCALIA & BRYAN A. GARNER: *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). For illuminating commentary on this controversial work, see, e.g., Karen Petroski, Michel Paradis, Brian S. Clarke, Christopher J. Walker, Andrew T. Mikac, William E. Trachman, Jordan Smith, Eric Segall, & Steven Hirsh, *Micro-Symposium on Scalia & Garner's 'Reading Law'*, 18 GREEN BAG 2d 1, 105, 105-123 (2014). Available at: <https://ssrn.com/abstract=2536452> [<https://perma.cc/J3HK-7QBV>]; Richard A. Posner, *The Incoherence Of Antonin Scalia*, THE NEW REPUBLIC (Aug. 24, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [<https://perma.cc/EEH2-HJM4>].

80. See HILLEL Y. LEVIN, *STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE* (2d ed. 2014).

81. *Rubin*, 583 U.S. at ___, 138 S. Ct. at 823-27.

82. Posner, *supra* note 74 (emphasis supplied).

a foreign state or its agency or instrumentality would be “subject to attachment in aid of execution” upon a judgment under FSIA’s terrorism exception to foreign sovereign immunity “as provided in this section,” did not provide a freestanding basis for creditors holding judgment against Islamic Republic of Iran under the terrorism exception to attach and execute against Iranian property held by United States university, where the immunity of the property was not otherwise rescinded under separate provision of FSIA’s attachment immunity section; abrogating *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, *Kirschenbaum v. 650 Fifth Avenue and Related Properties*, 830 F.3d 107.⁸³

5. A Search For Meaning

Many will focus on *Rubin* as a defeat for the victims of Iranian-sponsored global terrorism. After all, many of the victims and their families have been fighting to hold Iran financially accountable for terrorism-caused injuries for over 20 years. And so it is a heartbreaking outcome from that compelling perspective.

But there is another perspective from which *Rubin* is not a defeat, but rather, a victory – a victory for knowledge, history, and museum curation. For the Court’s *Rubin* ruling has – at least for now – placed securely back in the museum priceless artifacts whose study is the result of a time of close cultural collaboration between the United States and Persia, rather than the result either of imperialism and artifact looting or the result of commercial enterprise of agencies or instrumentalities of a modern state which has chosen to embrace medieval ways. As one cultural organization has put it:

In 1933, a team of archaeologists from the University of Chicago’s Oriental Institute were clearing the ruined palaces of Kings Darius, Xerxes, and other Achaemenid rulers when they came upon a startling discovery— tens of thousands of clay tablets, all records from the height of the Achaemenid Persian Empire in the reign of Darius the Great.

These tablets survived the destruction Persepolis and would provide the world’s only window into Persia of 2,500 years ago—through which we hear the words of ancient men and women just as their own hands wrote them and see the impressions of their seals just as their own hands pressed them into the clay.

In an unprecedented act of trust, the entire collection was sent to Chicago in 1936 on indefinite loan for conservation, analysis, and publication. Thousands of the tablets have been recorded and published. Even now, more than 75 years after the discovery, work on the tablets is producing a stream of new results and sometimes startling discoveries. While many

83. 28 U.S.C.A. § 1610 note (West 2018) (Satisfaction of Judgment).

have been returned to Iran, thousands of tablets remain to be recorded and analyzed.

The effort to understand our history as told by the Tablets is led by Professor Matthew Stolper, head of the Persepolis Fortification Archive Project. For decades, he has studied and catalogued the Persepolis Collection. He is one of very few experts who can translate the Tablets from Elamite into English, and thereby reveal the story of day-to-day life in the Persian Empire under the Achaemenians. He expects to spend the rest of his working life harvesting this priceless knowledge and building a team to keep this work going.⁸⁴

Or, in the immortal words of the most famous archeologist never to have actually lived, Dr. Indiana Jones, “[t]hat belongs in a museum!”⁸⁵



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84. *The Persepolis Fortification Archive Project: Unlocking the Secrets of the Tablets*, NATIONAL AMERICAN IRANIAN COUNCIL (Mar. 30, 2010), <https://www.niacouncil.org/persepolis-tablets-resource-center/> [<https://perma.cc/8KA5-XHVB>].

85. Haley Claxton, Comment, *Indiana Jones And The Foreign Sovereign Immunities Act (FSIA): Interpreting FSIA's State Sponsored Terror Exception*, 66 U. KAN. L. REV. 181, 181 n.1-2 (2017).

86. “*Relief of a Gift Bearer from Persepolis*, Southern Iran (Persepolis), 500–450 B.C., Los Angeles County Museum of Art, gift of Carl Holmes[.]” Linda Theung, *From the Collection: Relief of a Gift Bearer from Persepolis*, LACMA: UNFRAMED (Feb. 23, 2015), <https://unframed.lacma.org/2015/02/23/collection-relief-gift-bearer-persepolis> [<https://perma.cc/LV5V-YY7V>]. This is not an artifact from the Persepolis Collection at issue in *Rubin*, but it is one that gives a visual flavor of the culture which the priceless cuneiform tablets in the collection document and illuminate. While terrorism-victim judgment creditors seek to break up collections of stunning ancient artifacts from Persia, whose collection has preserved them, there are those in extreme elements known as ISIL have made it among their rapacious missions to

Rubin has, in short, sent up a sizable sigh of relief from several intersecting communities of universities, cultural exchange programs, cultural studies organizations, and academic professionals who study, catalogue, write, and teach about collections of foreign cultural artifacts as both their vocation and avocation.⁸⁷ But, of course, *Rubin* is not necessarily the final word – either on the Persepolis Collection or any other cultural artifacts from nations or areas wherein the current political sovereigns are found, by the processes of the U.S. Department of State, to be state-sponsors of terrorism. Nothing—nothing whatsoever—can stop Congress from rejecting the *Rubin* ruling, short of politics. In terms of power, Congress clearly has the power to amend FSIA Section 1610 (g)(1) in a variety of ways to make it unambiguously clear that Congress intends to waive sovereign immunity over all assets of the sovereign and any and all of its agencies and instrumentalities that may be found in the United States.⁸⁸ Indeed, some have argued that there are other, discretionary processes within the executive branch purview to which a government, agency, or instrumentality whose cultural property is targeted for attachment may apply for an executively

destroy the cultural artifacts of the areas they take over. See, e.g., Alyssa Buffenstein, *A Monumental Loss: Here Are The Most Significant Cultural Heritage Sites That ISIS Has Destroyed To Date--Cultural Heritage Sites Continue To Be Casualties Of The Ongoing Syrian Civil War*, ARTNEWS.NET (May 30, 2017), <https://news.artnet.com/art-world/isis-cultural-heritage-sites-destroyed-950060> [<https://perma.cc/NCH6-T5KD>]. There is, of course, no equivalency of any sort to be drawn between the victims of terrorism and the perpetrators of terrorism and human and cultural genocide. We must simply, and sadly, observe that the preservation of historical artifacts faces inroads from all quarters, leaving these artifacts with few fervent friends. One cannot help but think of the damages done in Egypt, for example, by Napoleon's and Caesar's forces, some 18 centuries apart.

87. See, e.g., Sebastian Heath & Glenn M. Schwartz, *Legal Threats to Cultural Exchange of Archaeological Materials*, 113 AM. J. ARCHAEOLOGY 459, 460-61 (2009); Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 VILL. L. REV. 479, 517 (2008); *On the Attachment of Cultural Objects to Compensate Victims of Terrorism*, ARCHAEOLOGICAL INST. AM. (Feb. 9, 2009), <https://www.archaeological.org/pdfs/AIAAttachment.pdf> [<https://perma.cc/42P8-YBRK>]. Academics also argue that allowing such a practice would violate the UNESCO Cultural Property Convention. See Claire R. Thomas, *"That Belongs in a Museum!" Rubin v. Iran: Implications for the Persian Collection of the Oriental Institute of the University of Chicago*, 31 LOY. L.A. INT'L & COMP. L. REV. 257, 288 (2009); see also Constitution of the United Nations Educational, Scientific and Cultural Organisation art. 1(2)(c), Nov. 16, 1945, 61 Stat. 2495, 4 U.N.T.S. 275 [hereinafter UNESCO Constitution]; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 27 U.S.T. 37, 823 U.N.T.S. 231 [hereinafter UNESCO Cultural Property Convention].

88. In addition to choosing apt language for the task, Congress can also employ a preamble with a set of findings which would buttress the interpretation of the express language that Congress intends. For the history, role, and effects of preambles in Constitutions and legislation, see, e.g., Jeffrey A. Van Detta, *Compelling Governmental Interest Jurisprudence of the Burger Court: A New Perspective on Roe v. Wade*, 50 ALBANY L. REV. 675, 701 n.125 (1986).

decreed exemption.⁸⁹ That, of course, would make it all the more tempting for Congress to act to abrogate *Rubin*. But the Congress of 2008 that passed the extent FSIA §§ 1605A and 1610(g) was a vastly different body than the Congress of 2018—or the Congress seated after the November 2018 mid-term elections. Whether there is the political will or the institutional coordination at this point to accomplish anything so subtle as re-evaluation of § 1605A and § 1610(g) as urged by District Judge Royce Lamberth, the most experienced judge in the country in these matters, is a question not admitting of an easy or obvious answer.

In the event, however, that Congress somehow manages to get its act together and do so, and the Administration can focus on it long enough to prioritize it, then all of the niceties of statutory construction, plain language, textualism, and international cultural cooperation will evaporate in the blink of an eye. Concomitantly, arising like a phoenix from those ashes will be attainable sources of compensation for those who are injured. Whether that is a better balance than the one currently struck in the *Rubin*-interpreted § 1610(g)(1) is a complex question of diplomacy, politics, and policy that does not admit of an easy resolution.

III. HOLDING CORPORATIONS ACCOUNTABLE FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS: *JESNER V. ARAB BANK* AND THE INCREDIBLE SHRINKING ALIEN TORT STATUTE

A. The Background of the Alien Tort Statute, and Its Use in Seeking Compensation for Injuries Inflicted By Terrorism

The author has written extensively about the history of, and controversies arising under, the Alien Tort Statute.⁹⁰ At the present juncture of this paper, the

89. Alyssa N. Speichert, *The Persepolis Complex: A Case For Making The Collections Process Easier Under Section 1610(g) Of The Foreign Sovereign Immunities Act For Victims Of Foreign State-Sponsored Terrorism*, 2017 MICH. ST. L. REV. 547, 585 (2017). Ms. Speichert argues:

Foreign states may avail themselves of the protections under the Immunity From Seizure Act (IFSA) if the state is genuinely concerned for its artifacts. The IFSA provides recourse for foreign states to protect their cultural artifacts from being seized while they are on loan to American museums and institutions. If the requirements for an IFSA application are met by the foreign state, and the State Department grants immunity for the cultural property, then a judgment creditor—such as the *Rubin* plaintiffs and others with outstanding judgments against state-sponsors of terrorism—cannot seize that foreign state’s property that is in the United States while on a “cultural exchange.”

Id. at 589 (footnotes omitted)(citing 22 U.S.C. § 2459(a) (1965)).

90. See Jeffrey A. Van Detta, *Some Legal Considerations For EU-Based MNEs Contemplating High-Risk Foreign Direct Investments In The Energy Sector After Kiobel v. Royal Dutch Petroleum and Chevron Corporation v. Naranjo*, 9 S.C. J. INT’L L. & BUS. 161 (2013); Jeffrey A. Van Detta, *Politics And Legal Regulation In The International Business Environment:*

author refers the reader to Part II of his 2013 article published in the *South Carolina Journal of International Law & Business*, pages 200-268, for the complete discussion of the history of the ATS, its 200-year dormancy, its resurrection from obscurity in the early 1980s (originally as a vehicle to hold former foreign government officials found in the U.S. liable to the victims of their torture and their extra-judicial killings), and the judicial efforts to contain the efforts by other judges to legislate into existence an ATS never intended by its drafters and in no way supported by the meager, 33-word statute that has come down to us from the Judiciary Act of 1789. For our purposes here, we will add only what is needed to put the 2018 *Jesner* decision in a proper perspective of [a] litigation devices against perpetrators of terrorism, particularly when supported by corporations and [b] the Supreme Court's efforts to put the ATS genie firmly back in its bottle.

The first major case in which plaintiffs used the ATS as the vehicle to seek recovery in U.S. courts for acts of terrorism is *Tel-Oren v. Libyan Arab Republic*, which is well known to international human rights lawyers and ATS scholars.⁹¹ The facts of the case were compelling:

On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization (hereinafter "the PLO") turned a day trip into a nightmare for 121 civilian men, women and children. The PLO terrorists landed by boat in Israel and set out on a barbaric rampage along the main highway between Haifa and Tel Aviv. They seized a civilian bus, a taxi, a passing car, and later a second civilian bus. They took the passengers hostage. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded. Most of the victims were Israeli citizens; a few were American and Dutch citizens.⁹²

The case is also notable for producing one of the finest pieces of judicial writing from D.C. Circuit Judge, and later almost-Justice, Robert Bork.⁹³ In 1986, the Supreme Court had not yet rendered a single decision on the scope or applicability of the ATS. Over the next 32 years, in four decisions⁹⁴, the Supreme Court majority has been slowly groping its way along the path that Judge Bork

An FDI Case Study Of Alstom, S.A., In Israel, 21 U. MIAMI BUS. L. REV. 1 (2013).

The complete text of the first article is available for free download from: <https://scholarcommons.sc.edu/scjilb/vol9/iss2/4/> [<https://perma.cc/SE9C-WJB4>]. The complete text of the second article is available for free download from: <https://repository.law.miami.edu/umblir/vol21/iss1/3/> [<https://perma.cc/7ELW-RQMU>].

91. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., Robb, J., Bork, J., with separate concurring opinions) (per curiam).

92. *Id.* at 776 (Edwards, J., concurring).

93. *Id.* at 813-14 (Bork, J., concurring).

94. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

limned in *Tel-Oren*.

In *Tel-Oren*, Judge Bork agreed with the colleagues that the victims' action against the PLO must be dismissed, but offered a distinctively unsentimental view of the statute:

The district court dismissed the action for lack of subject matter jurisdiction. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C.1981). We agree that the complaint must be dismissed, although our reasons for agreement differ. I believe, as did the district court, that, in the circumstances presented here, appellants have failed to state a cause of action sufficient to support jurisdiction under either of the statutes on which they rely. 28 U.S.C. §§ 1331, 1350 (1976 & Supp. V 1981). Neither the law of nations nor any of the relevant treaties provides a cause of action that appellants may assert in courts of the United States. Furthermore, we should not, in an area such as this, infer a cause of action not explicitly given. In reaching this latter conclusion, I am guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations.

The question in this case is whether appellants have a cause of action in courts of the United States for injuries they suffered in Israel. Judge Edwards contends, and the Second Circuit in *Filartiga* assumed, that Congress' grant of jurisdiction also created a cause of action. **That seems to me fundamentally wrong and certain to produce pernicious results.** For reasons I will develop, it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal. It will be seen below, however, that no body of law expressly grants appellants a cause of action; the relevant inquiry, therefore, is whether a cause of action is to be inferred. That inquiry is guided by general principles that apply whenever a court of the United States is asked to act in a field in which its judgment would necessarily affect the foreign policy interests of the nation.⁹⁵

But Judge Bork also issued an emphatic caution:

Historical research has not as yet disclosed what section 1350 was intended to accomplish. The fact poses a special problem for courts. A statute whose original meaning is hidden from us and yet which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by

95. See *Tel-Oren*, 726 F.2d at 799, 801 (Bork, J., concurring)(emphasis supplied)(citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980)).

the judiciary with great circumspection. It will not do simply to assert that the statutory phrase, the “law of nations,” whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules. It will not do because the result is contrary not only to what we know of the framers’ general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs.⁹⁶

The quest for meaning of the ATS is rapidly coming to an end. As Judge Bork trenchantly observed, “Section 1350 can probably be adequately *understood only in the context of the premises and assumptions of a legal culture that no longer exists.*”⁹⁷ Judge Bork was willing to be proven wrong – as wrote in 1986, “[p]erhaps historical research that is beyond the capacities of appellate judges will lift the darkness that now envelops this topic, but that has not yet occurred, and we should not attempt to anticipate what may or may not become visible.”⁹⁸ In the 32 years that have elapsed, we know no more now about the history of the ATS – whether from the labors of judges or the researches of scholars – than we did then.⁹⁹

Charles Evans Hughes, a two-time Supreme Court Justice, and one of the author’s judicial heroes, said something long ago that is quite apt here. “It is well to be liberal, but not messy.”¹⁰⁰ In their careening and out-of-control *pas de deux* with the 33 words of the ATS, the federal district and appeals courts have not just been messy—they’ve spilled the entire inkpot for the Rorschach test all over themselves.

The author has explored the history and problems with the ATS statute. Its use as a meaningful way to address terrorism acts outside of the United States was put under severe limits by the Supreme Court’s 2013 ruling in *Kiobel v. Royal Dutch Petroleum* exorcising the extra-territorial impact of many proposed ATS suits by discovering a limitation inherent in the statute such that it not only applies exclusively to those claims for a narrow violation of international norms analogous to piracy, assaults on ambassadors, and violation of safe conducts, but also that it only applies when those claims themselves actually “touch and concern the territory of the United States.”¹⁰¹

96. *Id.* at 812.

97. *Id.* at 815.

98. *Id.*

99. In fact, what we know now resoundingly confirms what Judge Bork taught us then. See Thomas Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006); see also Daniel Hulsebosch, *Magna Carta for the World: The Merchant’s Chapter and Foreign Capital in the Early American Republic*, 94 N.C. L. REV. 1599 (2016).

100. See FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 105 (1981) (discussing the judicial philosophy of Chief Justice Hughes).

101. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124, 125 (2013); see generally

However, the Court was not – *could not* – yet be done with corralling in the excesses of the extravagant view of the ATS that the federal circuit courts had ginned up after the *Filartiga*¹⁰² decision in 1980. More had to be done to return the statute to its original state, which was accurately described by Judge Bork in his *Tel-Oren* concurrence.

Now that geography had been addressed in *Kiobel* (through its requirement that for an ATS action to lie, the litigation and the parties had to intersect in a manner that “touches and concerns the territory of the United States”),¹⁰³ it was time to take on *the parameters of potentially liable entities*. Who, besides an individual, could be sued by an alien plaintiff in a U.S. District Courts for one of the narrow “torts in violation of the law of nations” spoken of in the ATS?

The *Kiobel* case originally came to the Supreme Court on that issue—the issue of whether a corporation could be a proper ATS defendant. One might not have thought to question that point.¹⁰⁴ Why should it matter whether the ATS defendant had a soul, or was soul-less?¹⁰⁵ Judge Jose Cabranes set out in an exhaustive (and exhausting) opinion to show exactly why — all to prove that corporations *per se* cannot be proper ATS defendants.¹⁰⁶

In 2010, when the author first read Judge Cabranes’ panel opinion in *Kiobel*, he set about to write a blistering critique, which he introduced in the following words (including the original footnotes):

A most remarkable tour de force of judicial activism, posing as a paragon of judicial restraint, was issued by a split panel of the U.S. Second Circuit Court of Appeals on September 17, 2010 in the case of *Kiobel v. Royal Dutch Shell*.¹⁰⁷ Corporations are *per se* not liable, ruled the majority, in a “civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁰⁸ Thus, under the Alien Tort Statute (ATS), from which these words are directly quoted, the Second Circuit has eliminated the most significant class of potential defendants who might be held accountable for such torts in the 21st century, a time in which, concurrently, multi-national corporations (MNCs) have grown dominant in world affairs and sovereign governments have privatized many of their functions by delegating them to MNCs.¹⁰⁹ The Second Circuit rationalizes this remarkable result in

Professor Van Detta’s articles cited *supra* note 90.

102. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

103. Van Detta, *supra* note 84, at 202-09, 217-29.

104. *Id.* at 201-02.

105. Inspiration for this use of the word “soul-less,” as the author spells it, comes from Professor Susannah Kim Ripken. Susannah M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 ILL. L. REV. 764 (2000).

106. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

107. ___ F.3d ___, Docket Nos. 06-4800-cv, 06-4876-cv (2d Cir. Sept. 17, 2010).

108. 28 U.S.C. § 1350 (2018).

109. See generally Jeffrey A. Van Detta, *Justice Restored: Using A Preservation-Of-Court*

large part by ignoring that the statute provides a cause of action *for torts*, for which corporations are, and have been for years, liable. Instead, Judge Cabranes purports to interpret the statute as if it authorized only civil actions by an alien for *a violation of international law*. The rest of the majority's rationales propagate from this fundamentally flawed premise, with legal reasoning impressed into the service of classic unprincipled instrumentalism.¹¹⁰

In this article, the “unbearable lightness of being”¹¹¹ — the author's allusive metaphor for a rigorous examination of judicial decisions from the perspective of both legal and cognitive principles — is brought to bear on Judge Cabranes' majority opinion.¹¹² In so doing, the author will expose the many flaws underlying *Kiobel*, as well as some of the loose discussions of the nature of international law itself that have appeared in earlier opinions involving ATS claims. The article will not burst the girth of this law-journal's volume with extended rehearsals of the lengthy majority and dissenting opinions in *Kiobel*. Familiarity with the court's widely disseminated opinion will be assumed. Nor will it re-plough old furrows with extensive ruminations and speculations on the ATS's origins and functions. Links to both the *Kiobel* opinion and scholarly treatment of the ATS appear in the footnotes, which, in the online format in which most readers peruse law-review articles, will permit the unacquainted to become familiar with both the Second Circuit's opinion as well as with a representative sampling of ATS scholarship. Instead, this article will focus on determining whether *Kiobel* can stand up to dissection of both its rhetorical as well as doctrinal elements.

That *Kiobel* cannot bear the light our analysis will cast upon it, either rhetorically or doctrinally, will be demonstrated in the following critique. First, we will examine *Kiobel* from the perspective of rhetoric, legal

Access Approach to Replace Forum Non Conveniens In Five International Product-Injury Cases, 28 NORTHWESTERN J. OF INT'L L. & BUS. 53 (2003).

110. Jeffrey A. Van Detta, *The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically A Substance-Procedure Dissonance Exemplified By Forum Non Conveniens Dismissals In International Product Injury Cases*, 87 MARQUETTE L. REV. 425 (Spring 2004).

111. The allusion, of course, is to Milan Kundera's celebrated 1984 novel known in English-speaking countries under the title, *THE UNBEARABLE LIGHTNESS OF BEING*. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* (1984).

112. Thus, the author concedes that he uses the title of Kundera's work in two different senses. The first is a different sense than the discourse on eternal recurrence and other philosophical issues that underlie the novel. The second sense, however, is closer to Kundera's idea — i.e., that the non-entity status of corporations found in *Kiobel* creates a “lightness of non-being” that is unbearable for its lack of legal principle and its utter detachment from the realities of the 21st century's economic-political complex at which MNCs, rather than governments, lie at the center.

linguistics, and the lessons for judicial opinion writing offered by principles and corollaries of cognitive psychology. Second, we will examine *Kiobel* from the perspective of its doctrinal elements – the court’s use, and abuse, of statutory interpretation, history, and precedent.¹¹³

The author still questions Judge Cabranes’ approach, and the sincerity of the entire question of corporate liability for “a tort [in] violation of the law of nations” under the ATS.¹¹⁴ While the author is no fan of the ATS beyond its most fundamental elements — to give aliens access to an unbiased American court for redress of a narrow range of torts the alien has suffered that “touch and concern the territory of the United States,”¹¹⁵ in order to reduce diplomatic tensions with the alien’s home nation — and agrees with Judge Bork’s devastating and thorough *Tel-Orien* analysis, the author continues to reject the line of judicial thought that has sought to make corporations a special favorite of the law under the ATS by exempting them from liability simply because they are corporations.¹¹⁶



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113. Jeffrey A. Van Detta, *The Unbearable Lightness of Not Being: Kiobel v. Royal Dutch Petroleum and The Juridical Personage Of Corporations In Alien Tort Statute Suits*, at 1-2 (2010) (unpublished manuscript) (on file with the author).

114. Van Detta, *Some Legal Considerations*, 9 S.C. J. INT'L L. & BUS. 161, 243-54 (2013).

115. 569 U.S. at 124-25.

116. Van Detta, *supra* note 115, at 209

117. U.S. Second Circuit Court of Appeals Judge Jose Cabranes, slayer of corporate liability under the ATS. Joseph Asch, *A Comment on Trustee Cluelessness*, DARTBLOG (Aug. 23, 2013), <http://www.dartblog.com/data/2013/08/011015.php> [perma.cc/K74S-RUNL].

A. Jesner v. Arab Bank: A SCOTUS Majority Further Shrinks the Judicially-Inflated Scope of the ATS Back to a Size That Fits the Statutory Language—While Justice Sotomayor Goes from Pedant to Roman Candle in Her Dissent

In an ironic merging of seemingly cosmic forces, the first ATS case of note in some time to deal with a claim rooted in state-sponsored terrorism reached the Supreme Court in the same term as the state-terrorism provisions of the FSIA reached the Court in *Rubin*. The case, *Jesner v. Arab Bank, PLC*,¹¹⁸ provided the most recent opportunity – the second in five years, the third in 14 years – to reign in the ATS.

Jesner consisted of a series of related cases filed in the magnet forum for ATS-litigation: the U.S. District Court for the Southern District of New York. After several years of proceedings, the District Court – like so many federal district courts in so many ATS lawsuits before it – dismissed the ATS claims. In fact, in its 229-year history, ATS claims reaching jury trials on the issue of liability are rarer than hen’s teeth.¹¹⁹ That’s *not* because of settlements, mind you – ATS settlements have been few and far between.¹²⁰ It has primarily been because of dismissals on a plethora of procedural grounds, as epitomized in the case that provided a virtual encyclopedia of those grounds: *Sarei v. Rio Tinto PLC*.¹²¹ In an appeal from the dismissals in *Jesner*, 2d Circuit Senior Judge Robert Sack described the history – and essential allegations of the cases – in this way:

The plaintiffs in this case filed five separate lawsuits between 2004 and 2010 in the United States District Court for the Eastern District of New York against the defendant, Arab Bank, PLC. Oran Almog, et al. v. Arab Bank, PLC, No. 04–CV–5564 (E.D.N.Y. filed Dec. 21, 2004); Gila Afriat–Kurtzer, et al. v. Arab Bank, PLC, No. 05–CV–0388 (E.D.N.Y. filed Jan. 21, 2005); Joseph Jesner, et al. v. Arab Bank, PLC, No. 06–CV–3869 (E.D.N.Y. filed Aug. 9, 2006); Yaffa Lev, et al. v. Arab Bank, PLC, No. 08–CV–3251, (E.D.N.Y. filed Aug. 11, 2008); Viktoria Agurenko, et al. v. Arab Bank, PLC, No. 10–CV–0626 (E.D.N.Y. filed Feb. 11, 2010).

118. *Jesner v. Arab Bank, PLC*, 584 U.S. ___, 138 S. Ct. 1386 (Apr. 24, 2018).

119. See Roger Alford, *Jury Trials and Choice of Law in ATS Cases*, OPINIO JURIS (Aug. 9, 2007), <http://opiniojuris.org/2007/08/09/jury-trials-and-choice-of-law-in-ats-cases/> [perma.cc/44PU-9WZK].

120. See, e.g., Susan Farbstien, *Breaking News: Settlement in Abdullahi v. Pfizer*, HARVARD HUMAN RIGHTS BLOG (Feb. 23, 2011), <http://hrp.law.harvard.edu/alien-tort-statute/breaking-news-settlement-in-abdullahi-v-pfizer/> [perma.cc/A7LW-EWFG]; Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, THE AMERICAN SOCIETY OF INTERNATIONAL LAW, <https://www.asil.org/insights/volume/13/issue/14/wiwa-v-shell-155-million-settlement> [perma.cc/S2KU-7TZY].

121. See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *en banc*, *vacated and remanded on other grounds*; *Rio Tinto PLC v. Sarei*, 569 U.S. 945 (2013).

The plaintiffs are aliens who were injured or captured by terrorists overseas, or family members and estate representatives of those who were injured, captured, or killed. The plaintiffs seek judgments against Arab Bank, PLC—a bank headquartered in Jordan with branches in various places around the world—for allegedly financing and facilitating the activities of organizations that committed the attacks that caused the plaintiffs' injuries. It is undisputed that, as a PLC, Arab Bank is a corporation for purposes of this appeal.

The plaintiffs allege violations by Arab Bank of the Anti-Terrorism Act (the "ATA"), 18 U.S.C. § 2333(a) (providing that "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States"), the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS") (providing that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), and federal common law. The ATS differs from the ATA in that, among other things, it provides jurisdiction only with respect to suits by "aliens," while the ATA provides jurisdiction only for suits by "national[s] of the United States."

Between 2007 and 2010, the plaintiffs' federal common-law claims were dismissed as redundant and lacking what the district court called a "sound basis." On May 24, 2013, the defendant also moved to dismiss the plaintiffs' ATS claims, arguing that the law of this Circuit prohibits ATS suits against corporate entities. In their briefing in the district court, the plaintiffs responded to the defendant's arguments on their merits but also argued, in the alternative, that if the district court granted the defendant's motion, it should also reinstate the plaintiffs' federal common-law claims or permit the plaintiffs to plead related non-federal common-law claims.¹²²

On August 23, 2013, the district court issued the following order:

The law of this Circuit is that plaintiffs cannot bring claims against corporations under the ATS. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir.2010), *aff'd*, *Kiobel v. Royal Dutch Petroleum Co.*, [— U.S. —] 133 S.Ct. 1659 (2013). A decision by a panel of the Second Circuit "is binding unless and until it is overruled by the Court en banc or by the Supreme Court." *Baraket v. Holder*, 632 F.3d 56, 59 (2d Cir.2011). Because the Supreme Court affirmed [this Circuit's *Kiobel* decision] on other grounds, the Second Circuit's holding on corporate liability under the ATS remains intact. Nothing in the Supreme

122. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144, 146-148 (2d Cir. 2015) (footnotes and emphasis omitted).

Court's affirmance undercuts the authority of the Second Circuit's decision. Plaintiffs' request to reinstate their federal common law claims or, in the alternative, assert non-federal common law claims is denied. The federal common law claims were dismissed not only as redundant, but also because Plaintiffs offered "no sound basis" for them. *Almog v. Arab Bank, PLC*, 471 F.Supp.2d 257 (E.D.N.Y.2007). Plaintiffs also offer no sound basis for repackaging these claims under unidentified "non-federal common law" theories.

Jesner v. Arab Bank, 06–CV–3869, Unnumbered Dkt. Entry on Aug. 23, 2013. Soon thereafter, judgments on the pleadings were entered in each of the individual cases as to the ATS claims. The plaintiffs filed timely appeals as to these claims.¹²³

The defendant, Arab Bank PLC, is a corporation headquartered in Jordan.¹²⁴ The conduct in which it allegedly engaged to give rise to claims under, *inter alia*, the ATS were described by the 2d Circuit as follows:

According to the plaintiffs, over the past two decades, four prominent Palestinian terrorist organizations—the Islamic Resistance Movement ("HAMAS"), the Palestinian Islamic Jihad ("PIJ"), the Al Aqsa Martyrs' Brigade ("AAMB"), and the Popular Front for the Liberation of Palestine ("PFLP") (collectively "the terrorist organizations")—have conducted widespread murderous attacks, including suicide bombings, against citizens of Israel—mostly Jews. The terrorist organizations allegedly arranged those attacks in part by promising, and later delivering, financial payments to the relatives of "martyrs" who were killed—along with those who were injured or captured—while perpetrating the attacks.

The plaintiffs assert that the terrorist organizations funded these attacks in two ways. The organizations solicited public and private donations directly and deposited them in bank accounts throughout the Middle East. The organizations also raised funds through affiliated, purportedly charitable proxy organizations, including two entities created in Saudi Arabia: the Popular Committee for Assisting the Palestinian Mujahideen and the Saudi Committee for Aid to the Al-Quds Intifada (the "Saudi Committee"). These two organizations allegedly set up their own bank accounts, under the shared label "Account 98," at various banks in Saudi Arabia in order to hold funds collected for the families of "martyrs."

According to the amended complaint, Arab Bank—one of the largest financial institutions in the Middle East, with branches and subsidiaries in more than twenty-five countries, including a New York branch that

123. *Id.*, *aff'd sub nom*, *Jesner v. Arab Bank, PLC*, __ U.S. __ 138 S. Ct. 1386 (2018).

124. ARAB BANK, <http://www.arabbank.com/mainmenu/home/about/our-profile> [perma.cc/YMB4-YL7G] (last visited Feb. 18, 2019).

provides clearing and correspondent banking services to foreign financial institutions—deliberately helped the terrorist organizations and their proxies to raise funds for attacks and make payments to the families of “martyrs.” The plaintiffs further allege that Arab Bank used some of those facilities—the New York branch among them—to support the terrorist organizations in three ways.

First, Arab Bank allegedly maintained accounts that the terrorist organizations used to solicit funds directly. The plaintiffs allege, with respect to HAMAS specifically, that Arab Bank “collected” funds into HAMAS accounts in its Beirut, Lebanon, and Gaza Strip branches. Supporters knew to donate to HAMAS directly through Arab Bank because the HAMAS website directed supporters to make contributions to Arab Bank’s Gaza Strip branch, and because there were various advertisements publicized throughout the Middle East calling for donations to Arab Bank accounts. According to the plaintiffs, Arab Bank knew that the donations were being collected for terrorist attacks.

Second, Arab Bank allegedly maintained accounts that proxy organizations and individuals used to raise funds for the terrorist organizations. For example, according to the amended complaint, Arab Bank maintained accounts, solicited and collected donations, and laundered funds for some of the purported charitable organizations that acted as fronts for the terrorist organizations. Arab Bank also maintained accounts for individual supporters of terrorist organizations such as HAMAS and al Qaeda. Again, responsible officials at Arab Bank purportedly knew that the accounts of these various organizations and individuals were being used to fund the suicide bombings and other attacks sponsored by the terrorist organizations.

Third, Arab Bank allegedly played an active role in identifying the families of “martyrs” and facilitating payments to them from the Saudi Committee’s “Account 98” funds, on behalf of the terrorist organizations. According to the plaintiffs, Arab Bank first worked with the Saudi Committee and HAMAS to finalize lists of eligible beneficiaries. Arab Bank then created individual bank accounts for the beneficiaries and facilitated transfers of “Account 98” funds into those accounts, often routing the transfers through its New York branch in order to convert Saudi currency into Israeli currency. Once the accounts were filled, Arab Bank provided instructions to the public on how to qualify for and collect the money, and made payments to beneficiaries with appropriate documentation.

The plaintiffs allege that Arab Bank’s involvement with the terrorist organizations—particularly its facilitation of payments to the families of “martyrs”—incentivized and encouraged suicide bombings and other

murderous acts that harmed the plaintiffs.¹²⁵

The 2d Circuit panel which heard the appeals from this dismissal order decided to affirm them using Judge Cabranes' corporate *per se* non-liability reasoning from *Kiobel*, rather than apply the "touch and concern" extraterritoriality test on which basis SCOTUS had affirmed the dismissal of the *Kiobel* plaintiffs' ATS suit:

We conclude that *Kiobel I* is and remains the law of this Circuit, notwithstanding the Supreme Court's decision in *Kiobel II* affirming this Court's judgment on other grounds. We affirm the decision of the district court on that basis. We do so despite our view that *Kiobel II* suggests that the ATS may allow for corporate liability and our observation that there is a growing consensus among our sister circuits to that effect. Indeed, on the issue of corporate liability under the ATS, *Kiobel I* now appears to swim alone against the tide.¹²⁶

In fact, every other federal circuit to have addressed the issue by that time had rejected Judge Cabranes' approach and had found that corporations could indeed be proper defendants in an ATS suit, as Judge Richard Posner had pointedly observed in 2011.¹²⁷ Judge Sack nonetheless saw the bright-line, *per-se* corporate non-liability rule to be a more tenable basis for affirming dismissal of the *Jesner* ATS suits than wading into the thicket created by Chief Justice Roberts' "touch and concern" extraterritoriality rule:

It is tempting to seek to avoid grappling with issues requiring an analysis of the relationship between *Kiobel I* and *Kiobel II* and the continuing viability of *Kiobel I* simply by affirming the district court's judgments on the basis of *Kiobel II* alone. We nevertheless decline to do so for several reasons. First, inasmuch as the district court did decide the case based solely on a mechanical application of *Kiobel I*, if it is "good law," an affirmance on the basis of *Kiobel I* is the

125. *In re Arab Bank*, 808 F.3d at 149-150 (citations and footnotes omitted).

126. *Id.* at 151. The cases cited as components of that "tide" against the *per se* corporate non-liability rule that Judge Cabranes' announced in *Kiobel* included *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir.2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C.Cir.2011), *vacated on other grounds*, 527 Fed.Appx. 7 (D.C.Cir.2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir.2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir.2008); *see also* *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir.2014) (holding that the district court erred in concluding that it lacked subject matter jurisdiction over an ATS claim against a corporate defendant on extraterritoriality grounds, and finding that the plaintiffs' ATS claims sufficiently "'touch[ed] and concern[ed]' the territory of the United States" based on, *inter alia*, the corporate defendant's "status as a United States corporation"); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir.1999) (dismissing ATS claims against corporate defendants under Rule 12(b)(6), and to that extent appearing to implicitly assume jurisdiction over ATS claims against corporate defendants). *Jesner*, 808 F.3d at 156.

127. *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017 (2011)(citing cases).

simplest, most direct route to that result. By contrast, in order to affirm on the grounds that law established by *Kiobel II* prohibits the assumption of jurisdiction in this case, **we would have to decide in the first instance that the alleged activities underlying the plaintiffs' claims do not touch and concern the United States sufficiently to justify a conclusion that the district court had subject matter jurisdiction under *Kiobel II*'s extraterritoriality test.** *It seems to us to be unwise to decide the difficult and sensitive issue of whether the clearing of foreign dollar-denominated payments through a branch in New York could, under these circumstances, displace the presumption against the extraterritorial application of the ATS, when it was not the focus of either the district court's decision or the briefing on appeal.*¹²⁸

The judges in active service then considered—and rejected—a suggestion to rehear the case in banc.¹²⁹ In a published concurrence in the decision to deny in banc rehearing, Judge Dennis Jacobs – a longtime ally of Judge Cabranes on the corporate ATS immunity ruling – noted that the panel could readily have come to the same place by applying Chief Justice Roberts “touch and concern” extraterritoriality test:

In this case, the underlying offense against the law of nations is terrorism against citizens of Israel by four Palestinian terrorist groups. Arab Bank, PLC, which is headquartered in Jordan, is named as defendant because funds allegedly passed through its branches to other countries for distribution to terrorists.

The only contact with the United States mentioned in the *Arab Bank* opinion is that terrorist groups used branches of Arab Bank in a score of countries (including a single U.S. branch, in Manhattan) for, among other ordinary transactions, the conversion of funds from one currency to another The New York branch is not differentiated in any way from Arab Bank's numerous other branches. This is no more than the “mere corporate presence” that is insufficient to displace the presumption against extraterritoriality.¹³⁰

We note these words, because they reinforce where *Tel-Orien* left the ATS in terms of addressing terrorist acts through civil lawsuits: *a dead letter*. Unless a terrorist act occurs in American territory and the victim is an alien seeking to sue an allegedly liable defendant in a U.S. federal court under the ATS, it is difficult to imagine that the ATS will have much of a rule in any future litigation against

128. *Id.* at 158 (emphases added).

129. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 822 F.3d 34, 36 (2d Cir. 2016) (Jacobs, J. and Cabranes, J. concurring) (Pooler, J. and Chin, J. dissenting) (internal citations omitted).

130. *Id.* at 36 (Jacobs, J., concurring in the denial of rehearing in banc) (internal citations omitted).

terrorists or sponsors of terrorism.¹³¹

The Circuit split, however, finally got the better of SCOTUS. In their petition for certiorari, the *six thousand* plaintiffs in *Jesner* argued that their case “presents the question this Court granted certiorari to resolve, but ultimately left undecided, in *Kiobel v. Royal Dutch Petroleum Co.* . . . : Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.”¹³² After the Court granted certiorari¹³³, the government of Jordan responded with a vigorous amicus brief supportive of Arab Bank. The brief strongly emphasizes the discord, dissension, and strife that allowing this case to go forward would work on Jordan’s economy (in which Arab Bank PLC plays an outsized role and on Jordan’s alliance with the U.S.:

Jordan’s economic stability is linked to Arab Bank’s financial health. The Bank’s market capitalization accounts for between one-fifth and one-third of the total market capitalization of the Amman Stock Exchange. And Jordan’s primary pension fund holds a sizeable stake in the Bank. The Bank also plays a key role in Jordanian-U.S. cooperation. The Bank processes U.S. foreign aid to Jordan. And as the United States has told this Court, the Bank serves as “a constructive partner with the United States in working to prevent terrorist financing,” and is “a leading participant in a number of regional forums on anti-money laundering and combating the financing of terrorism.” By exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan’s economy and undermine its cooperation with the United States.

This case has been a recurring source of concern in the U.S.-Jordan relationship for more than a decade. Jordan has consistently voiced its view that subjecting a Jordanian corporation to U.S. jurisdiction on the basis of claims by foreign citizens for injuries sustained abroad is a grave affront to Jordan’s sovereignty. Jordan is a beacon of political stability in the Middle East. Its laws comprehensively regulate its financial sector

131. We know already from *Argentine Rep. v. Amerada Hess*, 488 U.S. 428, 438 (1989), that the ATS can’t be used as the basis for a suit against a foreign sovereign in the U.S. federal courts. Justice Rehnquist made this crystal clear: “We think that Congress’ decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA, and the express provision in § 1604 that ‘a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607’ preclude a construction of the Alien Tort Statute that permits the instant suit. The Alien Tort Statute, by its terms, does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.” *Id.* at 438 (citations omitted).

132. Petition for Certiorari, *Jesner v. Arab Bank, PLC*, (No. 16-499m) 2016 WL 6069100, at i-ii (U.S. Oct. 5, 2016).

133. Certiorari was granted on April 3, 2017. See Order Granting Petition for Writ of Certiorari, *Jesner v. Arab Bank, PLC*, 137 S. Ct. 142 (2017) (No. 16-499).

and its courts administer those laws fairly. Petitioners' effort to hale Arab Bank into a U.S. court denigrates Jordan's institutions and offends its sovereign dignity.

The Court should put an end to this litigation, once and for all. For years, petitioners' baseless invocation of the Alien Tort Statute ("ATS") has cast an unwarranted cloud over Jordan's key financial institution - and thus on Jordan, its economy, and the Jordanian people.¹³⁴

The Jordanian government was heard—loudly and clearly—by the Justices, who cited exacerbation of diplomatic tensions, rather than amelioration of such tensions, as a principal reason for holding that foreign corporations are not proper defendants in ATS suits.

1. The Plurality Within a Majority—and the Seeds of Future ATS Self-Destruction?

SCOTUS's main opinion in *Jesner* was written by Justice Kennedy. Although it commanded a majority as to result – affirmation of the federal district and appeals courts – it commanded a mere plurality in balance as to one of the essential pillars of its reasoning.

The core of the opinion on which the 5-4 majority agreed can be summarized in the following five propositions:

[1] “The principal objective of the [statute], when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen.”¹³⁵

[2] “In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case. Either way, absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.”¹³⁶

[3] “Petitioners are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank's New York branch

134. Brief for the Hashemite Kingdom of Jordan as Amicus Curiae Supporting Respondent at 1-3, *Jesner v. Arab Bank, PLC*, 2017 WL 3726004, 1-3 (2017)(No. 16-499) (internal citations omitted).

135. *Jesner*, 138 S. Ct. at 1397.

136. *Id.* at 1403.

and a brief allegation regarding a charity in Texas. The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to “touch and concern” the United States under *Kiobel*.¹³⁷

[4] At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. ***For 13 years, this litigation has “caused significant diplomatic tensions” with Jordan, a critical ally in one of the world’s most sensitive regions.*** Brief for United States as Amicus Curiae 30. “Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria.” *Id.*, at 31. The United States explains that Arab Bank itself is “a constructive partner with the United States in working to prevent terrorist financing.” *Id.*, at 32 . . . ***Jordan considers the instant litigation to be a “grave affront” to its sovereignty.*** See Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 3; see *ibid.* (“By exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan’s economy and undermine its cooperation with the United States”).¹³⁸

[5] “Petitioners insist that whatever the faults of this litigation—for example, its tenuous connections to the United States and the prolonged diplomatic disruptions it has caused—the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them. That misses the point. As demonstrated by this litigation, foreign corporate defendants create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.”¹³⁹

The most interesting thing about the separate, concurring opinions of Justices Thomas, Alito, and Gorsuch is not only the emphasis each placed on the statute’s being one not to “precipitate exactly the sort of diplomatic strife that the law was enacted to prevent.” What is even more intriguing is the reassertion, in the words of Justice Thomas, of the long simmering view of several Justices that “Courts should not be in the position of creating new causes of action under the Alien Tort Statute”¹⁴⁰ – a direct critique of Justice Souter’s famous holding in *Sosa* that “federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action that aliens may assert under the ATS.”¹⁴¹ Justice Alito was not nearly so demure. He simply threw down the gauntlet – and a very important gauntlet it is – by declaring that “[f]or the reasons articulated by Justice Scalia in *Sosa* and by Justice GORSUCH today, I am not

137. *Id.* at 1406.

138. *Id.* at 1406-07 (emphases added).

139. *Id.*

140. Jesner, 138 S. Ct. at 1408 (Thomas, J., concurring).

141. *Id.* at 1409.

certain that *Sosa* was correctly decided.”¹⁴² For his part, Justice Gorsuch wrote a line that will now be memorable in ATS lore: “I would end ATS exceptionalism.”¹⁴³ He then aimed straight for the powder magazine of the *Sosa* decision itself:

In this case, the plaintiffs seek much more. They want the federal courts to recognize a new cause of action, one that did not exist at the time of the statute’s adoption, one that Congress has never authorized. While their request might appear inconsistent with *Sosa*’s explanation of the ATS’s modest origin, the plaintiffs say that a caveat later in the opinion saves them. They point to a passage where the Court went on to suggest that the ATS may *also* afford federal judges “discretion [to] consid[e]r [creating] new cause [s] of action” if they “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three] 18th-century” torts the Court already described.

I harbor serious doubts about *Sosa*’s suggestion. In our democracy the people’s elected representatives make the laws that govern them. Judges do not. The Constitution’s provisions insulating judges from political accountability may promote our ability to render impartial judgments in disputes between the people, but they do nothing to recommend us as policymakers for a large nation. Recognizing just this, our cases have held that when confronted with a request to fashion a new cause of action, “separation-of-powers principles are or should be central to the analysis.” The first and most important question in that analysis “is ‘who should decide’ . . . , Congress or the courts?” and the right answer “most often will be Congress.” Deciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law. And in our constitutional order the job of writing new laws belongs to Congress, not the courts. Adopting new causes of action may have been a “proper function for common-law courts,” but it is not appropriate “for federal tribunals” mindful of the limits of their constitutional authority.

Nor can I see any reason to make a special exception for the ATS. As *Sosa* initially acknowledged, the ATS was designed as “a jurisdictional statute creating no new causes of action.” And I would have thought that the end of the matter. A statute that creates no new causes of action . . . creates no new causes of action. To the extent *Sosa* continued on to claim for federal judges the discretionary power to create new forms of liability

142. *Id.* (Alito, J., concurring) (citing 542 U.S. at 739-51, 124 S. Ct. 2739 (Scalia, J., dissenting); *Jesner*, 138 S. Ct. at 1412-14 (Gorsuch, J., concurring in part and concurring in judgment)).

143. *Id.* at 1412 (Gorsuch, J., concurring).

on their own, it invaded terrain that belongs to the people's representatives and should be promptly returned to them.¹⁴⁴

Make no mistake: *Sosa*'s days, and the entire modern ATS enterprise with it, are numbered. Chief Justice Roberts, the incrementalist,¹⁴⁵ set the process in motion with *Kiobel*, and stepped back and let it work in *Jesner*. From the separate opinions supporting the judgment of affirmance in *Jesner*, it is clear that Justices Thomas, Alito, and Justice Gorsuch are prepared to overrule *Sosa* if the right case presents the opportunity. Chief Justice Roberts did not tip his hand, but may have been waiting for the Justice who would replace Justice Kennedy. He had every reason to expect that Justice would be likely to share the Gorsuch-Alito-Thomas view of *Sosa*. With the confirmation of Justice Brett Kavanaugh in October 2018, it seems likely that those expectations are now fulfilled. With those four votes, *Sosa*'s prospects teeter on whether the Chief Justice is ready to write—or join in—an opinion in the right case to overrule *Sosa* entirely. The only question for the next ATS case to be taken up by SCOTUS—whatever case that may be—is whether it will simply deliver the *coup-de-gras* to domestic corporate liability, as Judge Cabranes has sought to do since his 2010 *Kiobel* opinion, or whether will it go further and take out *Sosa* too?¹⁴⁶ Justice Souter's admonitions that federal courts should be extremely cautious in recognizing tort claims under the ATS and must keep the 18th century paradigms for violations of the “law of nations” firmly in mind when considering whether to do so have been largely ignored.¹⁴⁷ Thus, one can understand why the aforementioned Justices

144. *Id.* at 1412-13 (Gorsuch, J., concurring) (citations omitted).

145. Tom Curry, *Roberts Rule: Conservative But Incremental*, NBC NEWS (Jun. 25, 2007), <http://www.nbcnews.com/id/19415777/ns/politics/t/robertss-rule-conservative-incremental/#.W6GyM-hKgdU> [perma.cc/KQ52-JVJL]; Tom Goldstein, *The John Roberts Method*, NEW REPUBLIC (Jun. 30, 2009), <https://newrepublic.com/article/63513/the-john-roberts-method> [perma.cc/2DFK-QZD8]; Mary Wood, *Roberts Court Makes Incremental Moves Toward More Conservative Legacy, Professors Say*, U. VA. SCH. OF L. (Sept. 11, 2009), https://www.law.virginia.edu/news/2009_fall/scotus_roundup.htm [perma.cc/YDA3-QT72].

146. Justice Kennedy's opinion already sets up the next decision on domestic corporate liability under the ATS. *See* 138 S. Ct. at 1403-04; *see* Ursula Tracy Doyle, *The Cost Of Territoriality: Jus Cogens Claims Against Corporations*, 50 Case Western Res. J. Int'l L. 225, 226 (2018) (“The Court expressly limited its holding to foreign corporations, but made clear that it saw no reason to use the ATS to confer subject matter jurisdiction over a claim against a U.S. corporation given the [avail]ability of diversity jurisdiction to do the same,” and the Court also observed that the TVPA's limitation to individual liability “was all but dispositive” of liability for corporations, be they foreign or domestic.).

147. *See, e.g.*, Rich Stamp, *U.S. Supreme Court Continues To Nibble Away At Alien Tort Statute's Sweep*, FORBES (Apr. 25, 2018), <https://www.forbes.com/sites/wlf/2018/04/25/u-s-supreme-court-continues-to-nibble-away-at-alien-tort-statutes-sweep/#386d420dd9fe> [perma.cc/2X6Y-RYK3]. (“Lower Courts Largely Ignored *Sosa*[:] Most federal appeals courts largely ignored *Sosa*'s strong words of caution. Instead, they interpreted *Sosa* as sanctioning business as usual. The number of ATS suits filed against corporations for violating human rights

may be keenly interested in an opportunity to pump the brakes on what *Sosa* appeared—despite its protestations—to have rekindled.

Whether in one step or two, the ATS may be about to return to the obscurity “whence it came.”¹⁴⁸

2. *Sotomayor Furens*

The imagery of the classic pedant—replete with green eye-shade, dusty dictionary, and wire-rimmed spectacles—evaporated when Justice Sotomayor announced the dissenting opinion in *Jenser*, in which Justices Ginsburg, Breyer, and Kagan joined.

Justice Sotomayor was as somber and staid when she wrote the statutory interpretation case of the statute that Congress passed in an apparent panic (and President George H.W. Bush signed) after the powerful questioning of *Filartiga* by the *Tel-Oren* panel, the Torture Victim Protection Act (TVPA),¹⁴⁹ as she later would be in the *Rubin* opinion. In *Mohamad v. Palestinian Authority*, decided earlier, she had the Scalia and Garner playbook out again. She wrote a stolid opinion for a unanimous Court and held—unremarkably—that the word “individuals” in a statute refers to individual human beings, not corporations.¹⁵⁰

Conversely, in apprehending the ATS—which speaks of “aliens” bringing an action “in tort only” for “a violation of the law of nations”¹⁵¹—Justice Sotomayor saw not the stern lines of a *Dürer etching*, but the swirling drama and broad-brush colors of a J.M.W. Turner painting. Indeed, her dissent illustrates why Judge Henry Friendly’s rather passively hostile moniker for the ATS – a “legal Lohengrin . . . no one seems to know whence it came”¹⁵²—is actually not fully apt. In fact, the ATS is an artifact, not unlike the muted cuneiform tablets from the Persepolis Collection that judgment creditors coveted in *Rubin*, whose age and fragmentation leave it an enduring mystery. Perhaps it is even better to compare the ATS to Stonehenge. Like that iconic collection of boulders, there are many theories but few facts. We see different things for it and speculate different uses; however, we cannot talk to those who built it, just as we cannot talk to those who wrote the ATS. And surprisingly like those who built Stonehenge—who had no writing of which we know—the drafters of the ATS — who were men of letters and wrote prodigiously on other subjects concerning the organization of the new government — left no writing directly discussing *how* the ATS came to be in the

in foreign countries (or, more frequently, for aiding and abetting such violations by others) increased in the years following *Sosa*. Federal appeals courts overwhelmingly ruled that such suits were actionable and interpreted *Sosa* as having endorsed recognition of the sorts of claims that had been filed in the two decades prior to the decision.”)

148. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.).

149. Kathryn L. Pryor, Comment, *Does The Torture Victim Protection Act Signal The Imminent Demise Of The Alien Tort Claims Act?*, 29 VA. J. INT'L L. J. 969, 1011-13 (1989).

150. *See Mohamad v. Palestinian Authority*, 566 U.S. 449, 132 S. Ct. 1702 (2012).

151. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

152. *Id.*

1789 Judiciary Act, and *what* in the world they thought the federal courts and private litigants should end up doing with it.



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Thus, we would have to rebuild it in the image we want, since we cannot know what it means. But laws cannot be rebuilt by judges. That is a legislative function.

Nonetheless unlike the TPVA, which Congress birthed from the ATS,¹⁵⁴ Justice Sotomayor sees the ATS differently and brimming with potential.

Justice Sotomayor did not overly trouble herself with the text and the problems that expansive and fanciful judicial projections upon it had caused over the last 38 years (since *Filartiga*). Instead, she built her cathedral upon *Filartiga*'s wispy foundations, declaring at the outset that: "The text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS."¹⁵⁵

Her three pillars, (1) text; (2) history; and (3) purpose of the ATS, seem to turn the tables on the reader by arguing the three weakest points of the modern ATS enterprise as that enterprise's strength. What does she do with each?

She paints her language with a broad brush, attributing to the ATS characteristics that really come from the realm of modern case law, including *Sosa*.¹⁵⁶ Indeed, she devotes a good deal of her dissent to parsing *Sosa*, including even a footnote in *Sosa*, which, although cited by the plurality, is merely gloss and not the core issue with allowing the *Jesner* plaintiffs to proceed under the ATS.¹⁵⁷ Similarly, Justice Sotomayor's dissent argues that "[g]iven that the First

153. Deborah Byrd, *Summer Solstice At Stonehenge*, EARTHSKY (Jun. 19, 2018), <http://earthsky.org/earth/gallery-the-summer-solstice-as-seen-from-stonehenge> [perma.cc/FGC5-BMRB] ("View of the Heel Stone at summer solstice sunrise, as seen from inside the Stonehenge monument. Image via mysticrealms.org").

154. See Pryor, *supra* note 140, at 1011-13 (This Article is one of the leading, early articles on the TVPA, published before its eventual passage and Presidential signature in 1991.).

155. *Jesner*, 138 S. Ct. at 1419 (Sotomayor, J., dissenting).

156. *Id.* at 1419-21.

157. *Id.* at 1421-25.

Congress authorized suit for violations based on ‘the law of nations’ and ‘treat[ies] of the United States,’ . . . it is natural to conclude that Congress intended the district courts to consider new claims under the law of nations as that law and our Nation’s treaty obligations continued to develop.”¹⁵⁸ This, however, begs the question: What branch of government ought to be limning these claims? She continues, “[i]f Congress intended to limit such cases to violations of safe conduct, assaults against ambassadors, piracy, and . . . ‘personal injuries that U.S. citizens inflicted upon aliens resulting in less than \$500 in damages,’ . . . it easily could have said so.”¹⁵⁹ It is interesting to see how Justice Sotomayor here attributes a presumption of a broad meaning to statutory language because *had* Congress intended a limited meaning, “it easily could have said so.”¹⁶⁰ That is exactly the opposite of the way she employed this notion in *Mohamad*, in which she argued that the term “individual”—although not defined among the TVPA’s copious definitions section—should *not* be held to encompass corporations, because, in effect, had Congress wanted that, it could have said so.¹⁶¹ Recognizing that her own work in *Mohamad* creates problem for her vision of ATS (that it should have the potential to be judicially expanded with few limits), she uses the fact that in another statute, the Antiterrorism Act of 1990, Congress wrote corporate liability into the statute, evidencing that the ATS should be presumed to allow corporate liability. Her argument strikes the reader as incongruous if not entirely circular:

[T]he ATS and TVPA are related but distinct statutes that coexist independently. There is no basis to conclude that the considered judgment Congress made about who should be liable under the TVPA for torture and extrajudicial killing should restrict who can be held liable under the ATS for other law-of-nations violations, particularly where Congress made a different judgment about the scope of liability under the ATA for terrorism.¹⁶²

After reading her discussion on the ATS text—and the text of other, modern statutes—one gets the distinct feeling that, as Justice Jackson once described it, one “leave[s] by the same door through which he enters.”¹⁶³ Justice Sotomayor uses *Sosa*, a 21st century case, to justify her views of what the ATS’s 18th century text means.

Justice Sotomayor’s discussion of history is completely undisciplined, unlike her tediously scrupulous journey through the TVPA or the FSIA. Two of the more egregious examples set the tone for the whole of her discussion. She cites precedent for “corporate liability” from the 1850s,¹⁶⁴ a world far removed from

158. *Id.* at 1427.

159. *Id.*

160. *Id.*

161. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1706-09 (2012).

162. *Jesner*, 138 S. Ct. at 1434.

163. *Dalehite v. United States*, 346 U.S. 15, 49 (1953) (Jackson, J., dissenting).

164. *Jesner*, 138 S. Ct. at 1425 (“Corporations have long been held liable in tort under the

the agrarian society of the framers, and an obscure attorney general's advisory opinions from the late Gilded Age that supposedly endorse corporate liability.¹⁶⁵

On the question of the ATS's purpose, Justice Sotomayor engages in a strange—and rather empirical—in the worst sense of that word—discussion of what various members of Congress, including Senators Whitehouse and the late Senator Arlen Specter, had written to the Court in connection with *Kiobel* and *Jesner* about their views of corporate liability. Again, this is far from the Scalia and Garner playbook she used in *Rubin*, and an extravagant line of argument by any measure:

The Court urges that “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” I agree that the political branches are well poised to assess the foreign-policy concerns attending ATS litigation, which is why I give significant weight to . . . when Members of Congress have weighed in on the question whether corporations can be proper defendants in an ATS suit, it has been to advise the Court against the rule it now adopts . . . [Thus] I find it puzzling that the Court so eagerly departs from the express assessment of the Executive Branch and Members of Congress that corporations can be defendants in ATS actions.¹⁶⁶

In reply, one can almost once again hear the counterpoint provided by these famous words of Justice Robert Jackson:

I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.¹⁶⁷

In fact, the more one reads the dissent, the more apparent it becomes that the whole is much less than the sum of its parts. The only real organizing principle is a pointillistic response to aspects of the opinions by Justices Kennedy, Alito, and Gorsuch. In so doing, however, Justice Sotomayor does not project the methodical mind that seemed to be the best characteristic at work behind her pre-

federal common law. *See Philadelphia, W., & B.R. Co. v. Quigley*, 21 How. 202, 210, 16 L.Ed. 73 (1859”).

165. *Id.* at 1426 (“Finally, the conclusion that corporations may be held liable under the ATS for violations of the law of nations is not of recent vintage. More than a century ago, the Attorney General acknowledged that corporations could be held liable under the ATS. *See* 26 Op. Atty. Gen. 250, 252 (1907”).

166. *Id.* at 1431-32 (internal citations omitted).

167. *United States v. P.U.C.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

SCOTUS judicial work and her opinions in *Mohamad* and *Rubin*. Rather, she appears to range from argument to argument in a round of judicial whack-a-mole, trying to hammer down each argument as it pops up in her consciousness. By this episodic, search-and-destroy mode, one is reminded of Seneca's line for Hercules: "Though thou run and hide in the Thunderer's bosom, everywhence shall this hand seek thee and hale thee forth!"¹⁶⁸ And so she has. Justice Sotomayor's dissent resembles a tragic flawed character rather than the optimized Judge whom Ronald Dworkin once conjured by the same name.¹⁶⁹ The analysis is entirely instrumental. *The ATS is useful in getting at corporate wrongdoers and at least some courts have used it, so why not run with it?* Here, we see a jurisprudence of activism, one that treats law as either friend or foe depending on whether it helps or hinders the judge from getting to the desired result. That result appears to be an ATS that is interpreted according to very 21st century notions that are unmoored from the realities of the text, history, and purpose of the ATS. It is in this sense that the Sotomayor of the *Jesner* dissent is more like the mythological Hercules in the Seneca play than Ronald Dworkin's Hercules, "who reflects the whole of the legal order in the integrated character of his own commitment to principles."¹⁷⁰

2. *The Dubious Road Ahead—The Fate of U.S. Corporations as Proper Parties to the ATS—or Simply an Outright Overruling of Sosa?*

As suggested in Section II.B.1, the ATS seems headed for a date with judicial destiny, in which its applicability to domestic corporations will be denied and the blessing of adapting the ATS to *felt* modern needs by judges will be reversed, leaving the ATS solely to deal with torts to foreign diplomats in the United States, to piracy, and to violations of safe conducts and equivalent documents.

It is worth saying, however, that the ever-optimistic Justice Kennedy, in Section III of the *Jesner* opinion (which did not command a majority), turned to Congress and suggested that Congress might legislatively address just how far the ATS should go. "With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make."¹⁷¹ Justice Kennedy then went on to suggest some helpful alternatives that Congress could consider:

[1] "The political branches can determine, referring to international

168. LUCIUS ANNAEUS SENECA, *HERCULES FURENS* l. 1010 (Frank Justus Miller trans.) (1917), available at <http://www.theoi.com/Text/SenecaHerculesFurens.html> [perma.cc/76YG-V29Q].

169. See Robert D. Brussack, *The Second Labor of Hercules: A Review Of Ronald Dworkin's Law's Empire*, 23 GA. L. REV. 1129, 1143-47 (1989).

170. Paul W. Kahn, *Judicial Ethos and the Autonomy of Law*, 110 PENN ST. L. REV. 933, 938 (2006).

171. *Jesner*, 138 S. Ct. at 1407.

law to the extent they deem proper, whether to impose liability for human-rights violations upon foreign corporations in this Nation's courts, and, conversely, that courts in other countries should be able to hold United States corporations liable."¹⁷²

[2] "Congress might determine that violations of international law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations, and so that, even when those efforts cannot be faulted, compensation for injured persons will be a cost of doing business."¹⁷³

[3] "If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate."¹⁷⁴

[4] "It is still another possibility that, in the careful exercise of its expertise in the field of foreign affairs, Congress might conclude that neutral judicial safeguards may not be ensured in every country; and so, as a reciprocal matter, it could determine that liability of foreign corporations under the ATS should be subject to some limitations or preconditions. Congress might deem this more careful course to be the best way to encourage American corporations to undertake the extensive investments and foreign operations that can be an important beginning point for creating the infrastructures that allow human rights, as well as judicial safeguards, to emerge."¹⁷⁵

[5] "Congress might find that corporate liability should be limited to cases where a corporation's management was actively complicit in the crime. Cf. ALI, Model Penal Code § 2.07(1)(c) (1985) (a corporation may be held criminally liable where "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment"). Again, the political branches are better equipped to make the preliminary findings and consequent conclusions that should inform this determination."¹⁷⁶

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1407-08.

176. *Id.* at 1408.

It is not often that we see a high court instructing a legislature how to do its job.¹⁷⁷ Congress took up the challenge once to legislate around the ATS, but not at the Supreme Court's behest.¹⁷⁸ It transformed the *Filartiga* side of the judicially conjured details of the mute ATS into a statute.¹⁷⁹ The author wrote about this precise problem shortly before the SCOTUS decision in *Kiobel* was issued in 2013:

The purpose of this aspect of an FDI analysis is not to defend corporate misconduct. Complicity of MNEs in the murder, torture, enslavement, wrongful detention, and other criminal abuses of human beings--e.g., "ethnic cleansing, genocide, torture" and other human rights violations--are serious, and intolerable. Corporate social responsibility is a modern, and overdue, movement that gives MNEs the opportunities, as well as the incentives, to self-police and to participate in the formulation of a legal regime that effectively regulates MNE conduct and to the extent MNEs fail to do so, gives home- and host-state governments the standards by which to legislate compliance. But such regulation should be more predictable and clearly stated than the common-law-style case adjudication that courts have attempted under the ATS, particularly where that adjudication is done by courts in nations other than where the MNE's conduct, or the effects of the MNE's conduct, transpired. A legislative process, like the one that led to Congress's enactment of the TVPA, allows for a considerably more nuanced and holistic assessment of the wide range of relevant economic and foreign relations factors implicated in such law-making than courts can even approach in case-by-case adjudication. Judge Bork's observation in *Tel-Oren* is quite apropos here: that the subjects to which courts have been asked since *Filartiga* to extend the ATS are far better committed to "a modern Congress that ma[kes] clear its desire that the federal courts police the behavior of foreign individuals and governments" in a statute that "embod[ies] a legislative judgment that is" both "current" and "clear."¹⁸⁰

177. An even more extensive example comes from the Supreme Judicial Court of Massachusetts, which once instructed the Massachusetts Legislature as to the specifics to which that body needed to give considerable consideration in drafting a much-needed statute to regulate the contractual and related aspects of biological and gestational surrogacy in the Commonwealth. To this day, the invitation has yet to be embraced. *See R.R. v. M.H. & Another*, 689 N.E.2d 790 (Mass. 1998).

178. *See Pryor*, *supra* note 140, at 1011-22.

179. *See id.* at 1011-13.

180. Jeffrey A. Van Detta, *Politics and Legal Regulation In The International Business Environment: An FDI Case Study Of Alstom, S.A., In Israel*, 21 U. MIAMI BUS. L. REV. 1, 81-84 (2013) (footnotes omitted). For example, former State Department Legal Advisor John Bellinger identified several recurring areas under § 1350 to which call out for legislation to bring both currency and clarity. John B. Bellinger, III, *Enforcing Human Rights In U.S. Courts And Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 5-6 (2009)

Whether Congress has the commitment or skill to do so with far more complicated human-rights and anti-terrorism sides of modern litigation is doubtful. Thirteen years ago, one year into the first year of President George W. Bush's second term, there was a bill floating about under the provisional title, "The Alien Tort Statute Reform Act."¹⁸¹ The bill was sponsored by Senator Diane Feinstein—who ended up withdrawing the bill without a great deal of (rational) explanation.¹⁸² Nothing has come since.¹⁸³ One might be forgiven for wondering

("[C]ontinued litigation under the ATS reflects fundamental problems with how lower courts have approached these suits. These problems center on five key issues: First, whether the ATS applies extraterritorially—that is, whether a U.S. court can properly apply U.S. federal common law under the ATS to conduct that occurred entirely in the territory of a foreign State. Second, even if such a cause of action could properly be recognized, whether exhaustion of adequate and available local remedies in that foreign country should be a prerequisite to bringing an ATS suit. Third, whether corporations or other private entities may be held liable under the ATS for aiding and abetting human rights abuses perpetrated by foreign governments. A fourth issue is how to apply [the Supreme Court's] requirement that an international law norm be sufficiently accepted and specific. And fifth, in what circumstances should courts dismiss suits based on what *Sosa* referred to as 'case-specific deference to the political branches'").

181. S. 1894, 109th Cong., 1st Sess. (2005), available at: <https://www.gpo.gov/fdsys/pkg/BILLS-109s1874is/pdf/BILLS-109s1874is.pdf> [perma.cc/J7LX-PHLB] ("To amend title 28, United States Code, to clarify jurisdiction of Federal Courts over a tort action brought by an alien, and for other purposes.").

182. *See id.*; *see also* Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1363, 1384 & n.1 (2008) (noting that "[o]n October 17, 2005, a bill entitled the Alien Tort Statute Reform Act was introduced in the Senate, proposing to amend 28 U.S.C. § 1350 in order to, among other things, 'clarify jurisdiction of Federal Courts over a tort action brought by an alien,'" but that [o]nce introduced, this bill was referred to the Committee on the Judiciary; at the time of this writing, no further action has been taken on the bill") (citing S. 1874, 109th Cong., 1st Sess. (2005).); Keith A. Petty, *Who Watches the Watchmen: Vigilant Doorkeeping, the Alien Tort Statute, and Possible Reform*, 31 LOY. INT'L & COMP. L. REV. 183, 185, 217-19 (2009) (proposal for amending § 1350 by, inter alia, "mirroring the CIL violations specified in the Third Restatement of foreign relations law," "adding a simple provision to the statute allowing for case by case deference to the executive when cognizable foreign policy interests are at stake"); Lucien J. Dhooge, A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations, 13 U.C. DAVIS J. INT'L L. & POL'Y 119 (2007); Roger Alford, *What is Feinstein Thinking in Amending the ATS?*, *Opinio Juris* (Oct. 22, 2005), <http://lawofnations.blogspot.com/2005/10/what-is-feinstein-thinking-in-amending.html> (describing the details of Senator Feinstein's proposed amendment and her rationales for the proposal); Roger Alford, *Senate Considers Removing International Law from the Alien Tort Statute*, *Opinio Juris* (Oct. 19, 2005), <http://lawofnations.blogspot.com/2005/10/senate-considers-removing.html> [perma.cc/4JDJ-V7V5] (observing that "Sen. Feinstein is proposing that Congress 'de-internationalize' the Alien Tort Statute" by replacing the current judicial practice of "looking to foreign courts or international tribunals (or to international law professor articles)" and instead creating a full statutory scheme so that the courts "considering a

if, as Senator Sheldon Whitehouse of Connecticut, her colleague on the Senate Judiciary Committee, frequently asks judicial nominees,¹⁸⁴ there might have been some “dark money” or other home-state pressure from California MNEs who are or have been corporate defendants in ATS suits, that persuaded Senator Feinstein to back off. That does not appear to have been the case. Rather, the bill appears to have been *urged by* corporate constituents who sought at least some statutory structure and predictability to ATS litigation (along with limiting its use as an across-the-board class action style lawsuit against a cornucopia of practices throughout the world), and *opposed by* human rights groups who wanted the heyday of *Filartiga* judicial activism using the ATS to continue.¹⁸⁵

Apparently, these groups did not foresee: 1. the Roberts Court; 2. Judge Cabranes and his fellow 2d Circuit judges’ vigorous campaign to rein in the ATS dramatically; 3. the *Kiobel* decision; 4. the *Jesner* decision; and 5. the incremental

claim under the ATS would look to the text of the statute and the legislative history”) (also providing the text of the proposed bill); Roger Alford, *Feinstein Withdraws ATS Amendment*, OPINIO JURIS (Oct. 26, 2005), <http://lawofnations.blogspot.com/2005/10/feinstein-withdraws-ats-amendment.html>, (describing Senator Feinstein’s “terse letter to Senator Specter states that while the legislation was designed to address concerns about the clarity of the existing statute in light of *Sosa* ‘I believe that the legislation in its present form calls for refinement in light of concerns raised by human rights advocates, and thus a hearing or other action by the Committee on this bill would be premature.’”).

183. *Student Project: Alien Tort Statute: Legislative History*, PACE L. SCH. LIBRARY RES. GUIDES, <https://libraryguides.law.pace.edu/c.php?g=452982&p=3287457> [<https://perma.cc/RB2W-U5VC>].

184. Jeffrey Toobin, *What Makes Sheldon Whitehouse Angry?*, NEW YORKER (Apr. 1, 2017), <https://www.newyorker.com/news/daily-comment/what-makes-sheldon-whitehouse-angry> [perma.cc/6UF2-4DZT]; Marilyn Odendahl, *Barrett Confirmation Highlights Fierce Fight Over Judiciary*, INDIANA LAWYER, Nov. 2, 2017, <https://www.theindianalawyer.com/articles/45296-barrett-confirmation-highlights-fierce-fight-over-judiciary> [perma.cc/F743-E54W]; *Gorsuch Grilled About ‘Dark Money’ Spent on SCOTUS Fights*, NBC NEWS (Mar. 21, 2017), <https://www.nbcnews.com/card/gorsuch-grilled-about-dark-money-spent-scotus-fights-n736606> [perma.cc/Y4QW-QUGZ]; Susan Jones, *Sen. Whitehouse: ‘Enormous Suspicion’ That Kavanaugh Plotted With ‘Special Interests’*, CBS NEWS (Jul. 10, 2018), <https://www.cbsnews.com/news/article/susan-jones/personal-destruction-sen-whitehouse-suggests-kavanaugh-plotted-special> [perma.cc/2YJR-L6W9].

185. Kevin R. Carter, Comment, *Amending the Alien Tort Claims Act: Protecting Human Rights or Closing off Corporate Accountability*, 38 CASE W. RES. J. INT’L L. 629, 645-50 (2007). The student author, who declares that the ATS (which he mislabels the ATCA, as if it were companion legislation to the FTCA, a law passed 157 years later) “needs no amending” reminds one of the ancient denizens of Pompeii and Herculaneum. *Id.* at 150; See PLINY THE YOUNGER “LETTERS LXV, LXVI. TO TACITUS” IN IX HARVARD CLASSICS. Pt. IV (Charles W. Eliot, ed. 1909). Just as those ancient Romans paid little heed to the rumblings of a nearby volcano, the student author, and the self-described activists whose views he parrots, apparently were insensible to rumblings of the Supreme Court in *Sosa* which burst forth and overflowed the ATS landscape in *Kiobel* and *Jesner*.

creep toward overruling *Sosa*, which human rights groups decried for limiting the freewheeling days of the ATS, but which has turned out to be the only thing standing between the ATS and its retirement to the museum of failed legislation. The mistakes of the human rights advocates who pressured Senator Feinstein to abandon the bill, and Senator Feinstein's own mistake in heeding them, have proven costly to the vindication of both human rights and justice against terrorists in American courts. Perhaps if they had been possessed of the humility to embrace, rather than the hubris to summarily reject, the prescient views expressed by Judge Bork in *Tel-Oren*, things could have been different.

IV. THE MOST RECENT UPDATES: WHAT'S NEXT IN THE WAKE OF THIS TALE OF TWO STATUTES?

In the weeks between the Symposium at which the author presented this paper¹⁸⁶ and the time this issue of the *Law Review* went to press, issuance of a major Supreme Court decision concerning the FSIA, along with further research and reflection by the author about recent lower court cases citing *Jesner* in applying the ATS, have occasioned the author's further reflections about what we can anticipate in the next one to three years for further developments in the FSIA and ATS. The purpose of this concluding section is to set forth those further reflections. First, in Section IV.A, we examine the new FSIA case that the Supreme Court decided in March 2019. Second, in Section IV.B, we discuss several recent ATS cases from the federal district and appeals courts which cite *Jesner* and address issues left open by the Supreme Court in *Jesner*.

A. *The FSIA in Rubin's Wake*

The next act in the FSIA drama did not take long to unfold. In the Term after the *Rubin* opinion was issued, the Supreme Court took up another FSIA issue raised when American plaintiffs filed suit to enforce a judgment won against a foreign sovereign alleged to be a state sponsor of terrorism.¹⁸⁷ Rather than against ancient artifacts, the plaintiffs here sought to enforce the judgment against various bank accounts of the foreign sovereign held by U.S. financial institutions.

The plaintiffs in *Harrison v. Republic of Sudan*¹⁸⁸ were survivors and family members of crew on the U.S. Navy's guided-missile destroyer, *U.S.S. Cole*, which was attacked by Al Qaeda on October 12, 2000.¹⁸⁹ "The attack ripped a

186. See the author's footnote, *supra*.

187. *Republic of Sudan v. Harrison*, 587 U.S. ___, 139 S. Ct. ___, 2019 WL 1333259 (U.S. March 26, 2019).

188. *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 28 (D.D.C. 2012).

189. *Harrison v. Republic of Sudan*, 882 F. Supp. 2d at 26; *see, e.g.*, John F. Burns & Steven Lee Myers, *The Warship Explosion: The Overview—Blast Kills Sailors On U.S. Ship In Yemen*, N.Y. TIMES (Oct. 13, 2000), <https://www.nytimes.com/2000/10/13/world/the-warship-explosion-the-overview-blast-kills-sailors-on-us-ship-in-yemen.html> [<https://perma.cc/72GU-2VYU>]; Patrick E. Tyler, *A Nation Challenged: Evidence—British Detail bin Laden's Link to U.S. Attacks*, N.Y. TIMES (Oct. 5, 2001), <https://www.nytimes.com/2001/10/05/world/a-nation-challenged-evidence->

thirty-two-by-thirty-six-foot hole in the side of the vessel when it was berthed in Yemen's Aden Harbor," killing seventeen servicemen and women and injuring another 42.¹⁹⁰ The eighteen plaintiffs in *Harrison* included "fifteen former sailors who were injured while on the *Cole* and three of their spouses, who, although not on the *Cole* during the attack, allegedly suffered emotional distress upon learning of the incident."¹⁹¹ The Republic of Sudan was alleged to be liable for these injuries by virtue of its support of Al Qaeda, which perpetrated the *Cole* bombing.¹⁹² Sudan defaulted and made no appearance.¹⁹³ Invoking the "state-sponsored terrorism" exception to the FSIA,¹⁹⁴ the *Harrison* plaintiffs won a default judgment against Sudan before U.S. District Judge Royce Lamberth, who entered judgment against Sudan and in plaintiff's favor on March 30, 2012, for "\$78,676,474 in compensatory damages and \$236,029,422 in punitive damages, for a total award of \$314,705,896."¹⁹⁵

In due course, the plaintiffs initiated judgment enforcement proceedings against assets of the Sudanese sovereign in the Southern District of New York, where the financial institutions holding those assets are located.¹⁹⁶ Roused from its default by the imminent execution on these monies, the Sudanese sovereign appeared through its Central Bank in the federal district court and sought to open the default under Fed. R. Civ. P. 60(b)(4), a motion which the district court denied.¹⁹⁷

Sudan appealed these district court rulings in the collection proceedings to the U.S. 2d Circuit Court of Appeals. In the appeal, Sudan collaterally attacked the default judgment on the grounds that personal jurisdiction was not properly established under the FSIA's statute on serving foreign sovereigns.¹⁹⁸ Several federal appeals courts had ruled on whether that service provision, Section 1608(a)(3), permitted service by dropping off a copy of the summons and complaint at that country's embassy in the United States:

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(3) . . . by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be

british-detail-bin-laden-s-link-to-us-attacks.html [https://perma.cc/M5FR-3CSX].

190. *Harrison v. Republic of Sudan*, 882 F. Supp. 2d at 26.

191. *Id.*

192. *Id.*

193. *Id.* at 28.

194. 28 U.S.C. § 1605A.

195. 882 F. Supp. 2d at 23, 51.

196. *See, e.g., Harrison v. Republic of Sudan, et al.*, 2017 WL 5558716 (S.D.N.Y. Jan. 4, 2017); *Harrison v. Republic of Sudan*, 2017 WL 946422 (S.D.N.Y. Feb. 10, 2017).

197. *Harrison v. Republic of Sudan, et al.*, 309 F. Supp. 3d 46 (S.D.N.Y. 2018).

198. 28 U.S.C. § 1608(a)(3).

addressed and dispatched by the clerk of the court *to the head of the ministry of foreign affairs of the foreign state concerned*¹⁹⁹

As the Solicitor General of the United States put it in an amicus brief filed when the *Harrison* case reached the U.S. Supreme Court, these cases pose the following fundamental question:

The question presented is whether service under Section 1608(a)(3) may be accomplished by requesting that the clerk mail the service package to the embassy of the foreign state in the United States, if the papers are directed to the minister of foreign affairs, or whether Section 1608(a)(3) requires that process be mailed to the ministry of foreign affairs in the country concerned.²⁰⁰

Unlike the other federal appeals courts that had confronted this issue,²⁰¹ the 2d Circuit ruled that Section 1608(a)(3) permitted the district court clerk to mail the process to the ministry of foreign affairs *either* at his or her address in the country concerned, *or* to the ministry “*via*” *its embassy in the United States*, the latter being the approach used by the *Harrison* plaintiffs.²⁰² In so ruling, the 2d Circuit created not only an interpretation issue, but also a potential clash with the Vienna Convention on Diplomatic Relations, which, *inter alia*, declares “inviolable” the premises of foreign embassies in signatory countries.²⁰³

Once again, the Supreme Court pulled out its textualist statutory interpretation toolkit, and held, 8 to 1, that Section 1608(a)(3) permitted mailing of the process only directly to the foreign minister in his or her home country, not

199. 28 U.S.C. § 1608(a)(3) (emphasis supplied). The statute has four methods of service, which are listed in the order in which they are to be attempted when available. The methods listed in Section 1608(a)(1) and (2) were not available with respect to the Republic of Sudan. Thus, plaintiffs used the service methodology permitted under Section 1608(a)(3).

200. Amicus Brief for the United States of America, https://www.supremecourt.gov/DocketPDF/16/16-1094/60413/20180822185139412_16-1094%20Republic%20of%20Sudan.pdf.

201. *Kumar v. Republic of Sudan*, 880 F.3d 144 (4th Cir. 2018), petition for certiorari docketed, Mar 09, 2018 (No. 17-1269); *Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 29-30 (D.C. Cir. 2015); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995); *Magness v. Russian Fed’n*, 247 F.3d 609, 611-13 (5th Cir. 2001), cert. denied, 534 U.S. 892 (2001); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748-49 (7th Cir. 2007), cert. denied, 552 U.S. 1231 (2008).

202. *Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015), reh’g en banc denied with op., 838 F.3d 86 (2d Cir. 2016), rev’d, 587 U.S. ___, 139 S.Ct. ___, 2019 WL 1333259 (U.S. March 26, 2019).

203. Article 22(1) of the Vienna Convention provides: “The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.” Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3237, T.I.A.S. No. 7502.

to the foreign minister “via” its American embassy.²⁰⁴ This time, however, the tools of textualism were wielded by Justice Alito, with Justice Sotomayor among the other seven Justices who joined Justice Alito’s opinion.²⁰⁵ Somewhat surprisingly, however, Justice Clarence Thomas — the Court’s chief disciple of textualism after the death of Justice Scalia²⁰⁶ —dissented.²⁰⁷ Purportedly applying the same toolkit of textualism that Justice Alito had used,²⁰⁸ Justice Thomas came to the opposite conclusion — *i.e.*, that the language of Section 1608(a)(3) of the FSIA permits service on the state sovereign’s foreign minister “via” the sovereign’s U.S. embassy.²⁰⁹

Harrison, then, is one of a number of recent cases that display the emerging and increasingly problematic cognitive dissonance among sitting judges about one of the most fundamental judicial functions — statutory interpretation.²¹⁰ When

204. 587 U.S. ___, 139 S. Ct. ___, 2019 WL 1333259, at *4 - *10 (U.S. March 26, 2019).

205. *Id.* at *2.

206. *See, e.g.*, H. Brent McKnight, *The Emerging Contours of Justice Thomas’s Textualism*, 12 REGENT U. L. REV. 365 (1999-2000).

207. 2019 WL 1333259, at *10 - *14 (Thomas, J., dissenting).

208. Although there has been speculation that Justice Alito’s textualist toolkit may differ from the one Justice Scalia handed off to Justice Thomas. *See, e.g.*, Elliott M. Davis, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J. L. & PUB. POL’Y 983 (2006); Todd W. Shaw & Steven G. Calabresi, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. __ (2019)(forthcoming).

209. *Id.* at *10 - *14. Justice Thomas elaborated:

The Court holds that service on a foreign state by certified mail under the Foreign Sovereign Immunities Act (FSIA) is defective unless the packet is “addressed and dispatched to the foreign minister at the minister’s office in the foreign state.” This bright-line rule may be attractive from a policy perspective, but the FSIA neither specifies nor precludes the use of any particular address. Instead, the statute requires only that the packet be sent to a particular person—“the head of the ministry of foreign affairs.” 28 U.S.C. § 1608(a)(3).

Given the unique role that embassies play in facilitating communications between states, a foreign state’s embassy in Washington, D. C., is, absent an indication to the contrary, a place where a U.S. litigant can serve the state’s foreign minister. Because there is no evidence in this case suggesting that Sudan’s Embassy declined the service packet addressed to its foreign minister—as it was free to do—I would hold that respondents complied with the FSIA when they addressed and dispatched a service packet to Sudan’s Minister of Foreign Affairs at Sudan’s Embassy in Washington, D. C. Accordingly, I respectfully dissent.

Id. at *10 (Thomas, J., dissenting).

210. *Kieber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019) (en banc), *reversing* 888 F.3d 868 (7th Cir. 2018), is a recent and illustrative example. There was a glaring divide among three different factions of the 7th Circuit in a case in which the en banc panel majority held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 et seq., does not permit outside job

all is said and done, however, the *Harrison* decision does at the front end of the anti-terrorism litigation under the FSIA what the *Rubin* decision did at the back end – it makes it more difficult for the victims of state-sponsored terrorism to recover against the state sponsors *and* leaves Congress with the task of returning to previously enacted legislation to amend it if Congress did not intend the reading divined by the Supreme Court.

B. The Flotsam and Jetsam of the ATS After It Foundered in Jesner

Scanning the judicial horizon of reported cases since *Jesner* reveals a number of ATS cases that could eventually be headed towards certiorari — *and*, if certiorari were granted, that would give the Supreme Court the opportunity to complete the work begun in *Jesner* – i.e., deciding either (1) whether the circumstances of domestic corporations make their amenability to suit as ATS defendants plausible despite *Jesner*'s exclusion of foreign corporations, or (2) to take the even bigger step, advocated by Justices Thomas, Alito, and Gorsuch in *Jesner*, of putting the judicial pen through the heart of *Sosa*.

Nahl v. Jaoude,²¹¹ currently at the pleading stages in the Southern District of New York, is one of these cases. It might be the start of an attack on *Sosa*, given the district judge's decision to permit plaintiffs to amend an ATS claim in a complaint by which minority shareholders in a corporation purport to bring a derivative action by way of the ATS against the corporation, its former deputy general manager, its former assistant general manager, and its majority owners,

applicants to sue an employer under the ADEA for hiring practices that have a demonstrably disparate impact on applicants who are age 40 and over. Comparing the en banc majority's opinion by newly appointed Judge Scudder (who replaced Richard Posner after he abruptly retired in 2017); to the dissent based on a middle ground by Judge Easterbrook; to Judge Hamilton's dissent based on legislative purpose and legislative history, we see the deep divide among contemporary judges to something as basic as reading a commonplace, every day statute. The result is chaos in what should be order -- having the same effect as a doctrinal schism among ultra-conservative, moderate, and more liberal elements in a major, organized religion. Years ago, Judge Learned Hand warned judges that the surest way to misread any text is to read it literally, without reference to context; and the great--and yet still conservative--federal appeals judge who was appointed to the 2d Circuit during Hand's last two years on that Court, Henry Friendly, followed Hand's admonitions intelligently. *See, e.g.*, DAVID DORSEN, HENRY FRIENDLY: GREAT JUDGE OF HIS ERA, at 348 (2012). The judges now being confirmed to the federal appeals courts from coast to coast have much to learn from the opinions and thought of Judges Hand and Friendly. Whether they do or not ultimately depends on whether they have the humility and introspection to delve into the legacy of these long-gone legal giants, or whether they conclude they have nothing to learn from the past. Taking the long view, it is clear that these issues seem nearly intractable to courts — past, present, and future. *See, e.g.*, Lon L. Fuller, *The Case Of The Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

211. 354 F. Supp. 3d 489 (S.D.N.Y. Dec. 18, 2018); see the same court's dissection of an earlier version of plaintiff's complaint at 2018 WL 2994391 (S.D.N.Y. June 14, 2018).

alleging they were harmed by defendants' alleged "aiding and abetting" of terrorism by laundering money on behalf of Hezbollah through United States correspondent banks and used car dealerships, culminating in corporation's forfeiture of \$102 million to the United States."²¹² The defendants in that case "argue that *Jesner* effectively overruled the two-part test announced in *Sosa*,"²¹³ but the district court noted that although "three Justices expressed a desire to overrule *Sosa* and limit ATS liability to the three international law violations common in 1789 when the ATS was passed – 'violation of safe conducts, infringement of the rights of ambassadors, and piracy'" – the plurality opinion did not go that far.²¹⁴ Instead, the district judge noted, "[w]hile the Supreme Court has narrowed the ability of the ATS to redress modern violations of international law — see *Jesner*, 138 S.Ct. at 1407 (holding that the ATS does not apply to foreign corporations), *Kiobel II*, 569 U.S. at 124 (holding that the presumption against extraterritoriality bars ATS claims for violations of international law occurring entirely outside the United States) — *Sosa* remains binding law."²¹⁵ Depending on the stamina and finances of the parties, *Nahl v. Jaoude* presents the potential of one day reaching a Supreme Court that may very well be ready, with the addition of Justice Kavanaugh to that bench, to declare *Sosa* —or at least the

212. 354 F. Supp. 3d at 493-94.

213. The two-part test of *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-733 (2004), has been described in the following terms:

First, the plaintiff must demonstrate that the alleged violation is "of a norm that is specific, universal, and obligatory." Second, "it must be determined . . . whether allowing th[e] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority . . ."

354. F. Supp. 3d at 498 (citations omitted). The root of this test is the observation, expressed by Justice Souter, that courts could extend the notion of "a tort . . . committed in violation of the law of nations" beyond strict 1780s understanding: "Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. Justice Souter disagreed with historical arguments that the ATS's obscurity was "sufficient to close the door to further independent judicial recognition of actionable international norms" because, in his view, "other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at 729. This is the aspect of *Sosa* that Justices Gorsuch, Alito, and Thomas so firmly denounced in their *Jesner* dictum.

214. *Id.* at 499 ("[T]here is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case.") (quoting *Jesner*, 138 S. Ct. at 1403).

215. *Id.*

manner in which lower federal courts have applied *Sosa* over the last 15 years — no longer to be binding law.

Although *Nahl v. Jaoude* involves an apparently domestic corporation, the defendants have not yet raised the other side of the *Jesner* coin — that *Jesner* should be extended, per the reasoning of Judge Jose Cabranes in the original *Kiobel* decision²¹⁶, to categorically exclude *all* corporations as putative defendants, *not* just foreign corporations. That issue *has* been squarely put on the table in another, even more recent district court decision, *Estate of Alvarez v. Johns Hopkins University*.²¹⁷

In *Alvarez*, the plaintiffs are Guatemalan nationals who allege that Johns Hopkins University (founded in and located in Baltimore, Maryland²¹⁸), along with various affiliated domestic entities, subjected them and their family members to medical experiments in Guatemala without their knowledge or consent.²¹⁹

216. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

217. ___ F. Supp. 3d ___, 2019 WL 95572 (D. Md. Jan. 3, 2019).

218. *History and Mission*, JOHNS HOPKINS UNIVERSITY, <https://www.jhu.edu/about/history/> [<https://perma.cc/TV3E-8CNL>].

219. *Alvarez*, 2019 WL 95572, at *1 (“Plaintiffs Estate of Arturo Giron Alvarez and 773 other Guatemalan nationals have filed a civil action against the Johns Hopkins University and four affiliated entities, the Rockefeller Foundation, and Bristol-Myers Squibb Company. Plaintiffs allege that Defendants subjected them or their family members to medical experiments in Guatemala without their knowledge or consent during the 1940s and 1950s, in violation of the law of nations.”). As a previous decision on the sufficiency of an earlier complaint in the case explained:

This case arises out of what is referred to as “the Guatemala Study.” From about 1946 to the early or mid-1950s, officials of the United States Public Health Service engaged in nonconsensual medical experimentation in Guatemala and managed to conceal their actions for some sixty years.

In 2010, when the Guatemala Study became known, President Obama called the President of Guatemala “offering profound apologies and asking pardon for the deeds of the 1940s.” CNN Wire Staff, *US Apologizes for Infecting Guatemalans with STDs in the 1940s*, CNN (Oct. 1, 2010). Secretary of State Hillary Clinton and Secretary of Health and Human Services Kathleen Sebelius jointly stated:

We deeply regret that it happened, and we apologize to all the individuals who were affected by such abhorrent research practices.

The conduct exhibited during the study does not represent the values of the United States, or our commitment to human dignity and great respect for the people of Guatemala.

Id.

The United States Government officials’ expressions of regret were not followed by any

Having been allowed to re-plead the suit several times before, plaintiffs' counsel enjoyed success in surviving Fed. R. Civ. P. 12(b)(1) and 12(b)(6) motions by defendants²²⁰ and, most recently, a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings.²²¹ In the Rule 12(c) motion, the defendants concentrated heavy and extensive fire on their contention that *Jesner* – despite the Supreme Court's limitation of its decision to foreign corporations – leaves no possible room for ATS suits against *any* corporation. After a very extensive discussion of the plurality and concurring opinions in *Jesner* and of the cases that preceded *Jesner*, the district court concluded “[t]o the extent that *Jesner* provides guidance on how to assess whether ATS liability is available against domestic corporations, such guidance does not lead to the conclusion that domestic corporate liability is

recognition of an obligation to compensate the victims of the Guatemala Study for the injuries they sustained. When a class of Guatemala Study victims sued the United States in federal court in Washington, the Government successfully claimed immunity, and the suit was dismissed in 2012.

Estate of Alvarez v. Johns Hopkins University, 205 F.Supp. 3d 681, 683 (D. Md. 2016)(footnote omitted). The details of the experiments concealed by the government, the university, and the pharma companies involved are, to put it mildly, horrifying:

From 1946 to 1953, officials from the United States Public Health Service and the Pan American Sanitary Bureau conducted medical studies in Guatemala that “involved deliberate infection of people with sexually transmitted diseases (“STDs”) without their consent.” (the “Guatemala Study”). “Subjects were exposed to syphilis, gonorrhea, and chancroid, and included prisoners, soldiers from several parts of the [Guatemalan] army, patients in a state-run psychiatric hospital, and commercial sex workers.” None of the subjects of the Guatemala Study gave “their informed consent to participate,” as they were not provided with “information about the procedures or their risks” prior to participating in the study. “Instead of consent from the subjects [housed in institutions], the medical team sought cooperation from the institution[s] in which their prospective subject pool resided” by providing those institutions with “essential supplies, such as epilepsy medication to the mental asylum, malaria medication to the orphanage, and refrigerators for medications.”

One of the objectives of the Guatemala Study was “to determine whether penicillin, then a recently-discovered cure for syphilis, could also be used as a prophylaxis.” “[A]nother goal was to find the most effective way to inoculate patients with [syphilis].” The study was conducted in Guatemala for several reasons, including that it was “a location where [the medical team could] carry out more invasive methods of inoculation with venereal diseases without ethical scrutiny.” “In total, the medical team intentionally exposed nearly 700 people to syphilis, nearly 600 to gonorrhea, and over 100 to chancroid—all serious venereal diseases.”

Id. at 684 (quoting *Garcia v. Sebelius*, 867 F. Supp. 2d 125, 130 (D.D.C. 2012), *vacated in part*, 919 F. Supp. 2d 43 (D.D.C. 2013)).

220. *Alvarez v. Johns Hopkins University*, 275 F. Supp. 3d 670, 710-11 (D. Md. 2017).

221. *Alvarez*, 2019 WL 95572, at *1, 2, 9.

categorically foreclosed under the ATS.”²²² Judge Chuang then set forth a succinct, but compelling, analysis that even under the twin-aims of *Kiobel* and *Jesner*, permitting ATS suits against domestic corporations is the only plausible reading of the statute:

[T]he Court finds that the need for judicial caution is markedly reduced. Unlike a suit against a foreign corporation as in *Jesner*, which can cause, and has caused in other cases, diplomatic tension or objections from foreign governments that a suit is an “affront” to their sovereignty, suits against U.S. corporations likely will not generate such complaints. Moreover, allowing domestic corporate liability would further the purposes of the ATS, by affording a remedy in U.S. courts to foreign nationals for violations of international law by a U.S. corporation. Permitting such suits to go forward would thus “promote harmony” rather than “provoke foreign nations.” Thus, the analysis in *Jesner* underlying the barring of ATS suits against foreign corporations does not lead to the same result for ATS suits against domestic corporations.²²³

Elsewhere in the 4th Circuit, District Judge Leonie Brinkema reached a similar conclusion in the recent case of *Al Shimari v. CACI Premier Tech., Inc.*²²⁴ Meanwhile, a 9th Circuit panel has also embraced a similar reading of *Jesner* on the issue of domestic corporate liability in the latest opinion to issue in the long-running ATS suit (filed 15 years ago) over allegations that Nestle and other companies, including Cargill, aided and abetted the use of child slavery to harvest cocoa in the Ivory Coast.²²⁵ Once the pending petition for rehearing and suggestion for rehearing en banc are resolved in *Doe v. Nestle*,²²⁶ the defendants may very well again, as they have previously done, file a petition for writ of certiorari to the U.S. Supreme Court.²²⁷

222. Alvarez, 2019 WL 95572, at *7.

223. *Id.* at *8.

224. *Al Shimari v. CACI Premier Tech., Inc.*, 320 F. Supp. 3d 781 (E.D. Va. 2018)(denying 12(b)(1) motion to dismiss ATS suit brought by Iraqi citizens against American corporation that served as U.S. government contractor when its employees alleged abused and tortured plaintiffs during their incarceration as suspected enemy combatants in Iraq’s infamous Abu Ghraib prison). Judge Chuang cited *Al Shimari* in his own opinion in *Alvarez*. 2019 WL 95572, at *9.

225. *Doe v. Nestle, S.A.*, 906 F.3d 1120 (9th Cir. 2018), petition for hearing and suggestion for rehearing en banc filed Nov. 27, 2018 (9th Circuit Docket, No. 17-55435, Docs. 70 & 71).

226. *See, e.g.*, Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Cargill Incorporated in *Doe v. Nestle*, No. 17-55435 (9th Cir. Nov. 27, 2018), available at <https://www.chamberlitigation.com/sites/default/files/cases/files/18181818/Petition%20for%20Rehearing%20--%20Doe%20I%20v.%20Nestle%20USA%2C%20Inc.%20%28Ninth%20Circuit%29.pdf>

227. It should be noted, however, that *Doe* may still not be optimally postured for certiorari consideration, because the 9th Circuit panel has (once again) remanded the case to the district court to determine whether plaintiffs might (yet) further amend their complaint to avoid dismissal:

The author thinks that these courts are quite correct that domestic corporations are proper ATS defendants, as Judge Richard Posner explained some years ago.²²⁸ Nonetheless, one of these three cases may end up being the case in which the Supreme Court settles—once and for all—whether domestic corporations are subject to ATS suits. And one of these cases may also end up being the one in which the Court re-examines *Sosa*, either to reaffirm it, or to reject its methodology. As this article goes to print, the outcome of such a future case may well be gestating “in the womb of time.”²²⁹ And by the time that gestation is completed, there may well be not merely one Justice not heretofore heard on the ATS, but two: a Justice Amy Coney Barrett,²³⁰ in addition to Justice Brett Kavanaugh.

Yet, we must not forget that its Chief Justice’s incrementalism has defined the Roberts Court.²³¹ How many more increments are needed to “tame” the ATS—or to inspire Congress to legislate it back to life—may be known only to the Chief Justice himself.

As we observed in *Nestle I*, “[i]t is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law, unless it is clear that amendment would be futile.” We are mindful that this case has lingered for over a decade, and that delay does not serve the interests of any party. But we cannot conclude that amendment would be futile, so we remand with instructions that plaintiffs be given an opportunity to amend their complaint. On remand, plaintiffs must remove those defendants who are no longer amenable to suit under the ATS, and specify which potentially liable party is responsible for what culpable conduct.

For the reasons set forth above, we REVERSE the district court and REMAND to allow plaintiffs to amend their complaint to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case. 906 F.3d at 1126-1127 (quoting *Doe v. Nestle*, 766 F.3d 1013 (9th Cir. 2014)).

228. *Flomo*, 643 F.3d at 1017-21.

229. William H. Rehnquist, Remarks On The Process Of Judging, 49 Wash. & Lee L. Rev. 263, 266 (1992) (quoting *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1944) (Hand, C.J., dissenting)).

230. See, e.g., Chantal da Silva, *Who Is Amy Coney Barrett And What Does She Have To Do With Ruth Bader Ginsburg?*, NEWSWEEK (Apr. 1, 2019), <https://www.newsweek.com/who-amy-coney-barrett-and-what-does-she-have-do-ruth-bader-ginsburg-1381685> [https://perma.cc/MN7P-4NM3].

231. See, e.g., Adam Liptak, *Sidebar—Roberts’s Incremental Approach Frustrates Supreme Court Allies*, N.Y. TIMES (Apr. 14, 2014), <https://www.nytimes.com/2014/07/15/us/supreme-court-shows-restraint-in-voting-to-overrule-precedents.html> [https://perma.cc/NSS5-RVSH].