

Bellia & Clark on the Original Meaning of the Alien Tort Statute

Anthony Bellia (Notre Dame Law School) and Bradford Clark (The George Washington University Law School) have published an article on the Alien Tort Statute and The Law of Nations in the last issue of the *Chicago Law Review*. The abstract reads:

Courts and scholars have struggled to identify the original meaning of the Alien Tort Statute (ATS). As enacted in 1789, the ATS provided “[t]hat the district courts . . . shall . . . have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” The statute was rarely invoked for almost two centuries. In the 1980s, lower federal courts began reading the statute expansively to allow foreign citizens to sue other foreign citizens for all violations of modern customary international law that occurred outside the United States. In 2004, the Supreme Court took a more restrictive approach. Seeking to implement the views of the First Congress, the Court determined that Congress wished to grant federal courts jurisdiction only over a narrow category of alien claims “corresponding to Blackstone’s three primary [criminal] offenses [against the law of nations]: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” In this Article, we argue that neither the broader approach initially endorsed by lower federal courts nor the more restrictive approach subsequently adopted by the Supreme Court fully captures the original meaning and purpose of the ATS. In 1789, the United States was a weak nation seeking to avoid conflict with other nations. Every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens—from the most serious offenses (such as those against ambassadors) to more commonplace offenses (such as violence against private foreign citizens). If a nation failed to redress such violations, then it became responsible and gave the other nation just cause for war. In the aftermath of the Revolutionary War, Congress could not rely upon states to redress injuries suffered by aliens (especially British subjects) at the hands of Americans. Accordingly, the First Congress enacted the ATS as one of several civil and criminal provisions designed to redress law of nations violations

committed by United States citizens. The ATS authorized federal court jurisdiction over claims by foreign citizens against United States citizens for intentional torts to person or personal property. At the time, both the commission of—and the failure to redress—such “torts” violated “the law of nations.” The statute thus employed these terms to create a self-executing means for the United States to avoid military reprisals for the misconduct of its citizens. Neither the ATS nor Article III, however, authorized federal court jurisdiction over tort claims between aliens. Indeed, federal court adjudication of at least one subset of such claims—alien-alien claims for acts occurring in another nation’s territory—would have contradicted the statute’s purpose by putting the United States at risk of foreign conflict. Despite suggestions that the true import of the ATS may never be recovered, the original meaning of the statute appears relatively clear in historical context: the ATS limited federal court jurisdiction to suits by aliens against United States citizens but broadly encompassed any intentional tort to an alien’s person or personal property.