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Correcting an Evident Error: A Plea to Revise *Jesner v. Arab Bank, PLC*

WILLIAM J. ACEVES*

In Jesner v. Arab Bank, PLC, the Supreme Court held that foreign corporations are not subject to lawsuits under the Alien Tort Statute (“ATS”). Written by Justice Kennedy, the highly fractured opinion offered several reasons for its holding. Although commentators have already criticized various aspects of Justice Kennedy’s opinion, one point has not received meaningful consideration and merits correction. In his plurality opinion, Justice Kennedy attached significance to the placement of the Torture Victim Protection Act (“TVPA”) as a statutory note to the ATS in the U.S. Code. In so doing, he disregarded longstanding practice and black letter law that the placement of a statutory note in the U.S. Code by the Office of Law Revision Counsel (“OLRC”) does not have any substantive impact on the law’s meaning, interpretation, or application. This error merits correction by the Court for several reasons. Although it undoubtedly influenced Justice Kennedy’s interpretation of the ATS, its implications extend beyond this case. It will affect future ATS and TVPA cases. It also creates uncertainty over the status of the countless statutory notes that populate the federal code. And, it raises constitutional concerns by attaching legal significance to OLRC’s placement decisions.

INTRODUCTION

There are hundreds of federal departments, agencies, and offices.¹ Many of them are well known; others operate in relative obscurity. These entities exist within each branch of the federal government. Despite their obscurity (or perhaps because of it), some of these entities can wield significant power. In 1992, one such entity made a decision that had a

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¹ See Hearing on “Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity” Before the S. Comm. on the Judiciary, 114th Cong. (2015) (prepared statement of Senator Chuck Grassley, Chairman, Senate Judiciary Committee) (“The Federal Register indicates there are over 430 departments, agencies, and sub-agencies in the federal government. And the pronouncements of this ever-expanding administrative state impact nearly every aspect of Americans’ daily lives.”).

surprising impact on the Supreme Court's April 2018 ruling in *Jesner v. Arab Bank, PLC*.²

In *Jesner*, the Supreme Court held that foreign corporations are not subject to lawsuits under the Alien Tort Statute ("ATS").³ Written by Justice Anthony Kennedy, the highly fractured opinion offered several reasons for its holding. According to the majority, federal courts should be reluctant to extend judicially created rights of action under the ATS, particularly in cases involving foreign corporations. Commentators have criticized various aspects of Justice Kennedy's opinion, including its excessive deference to the corporate form and its misunderstanding of how international norms are enforced.⁴ But, one aspect of the opinion has not received meaningful consideration. Given the arcane nature of statutory placement, this is, perhaps, understandable.

The Office of Law Revision Counsel ("OLRC" or "Office") operates within the U.S. House of Representatives.⁵ When federal laws are enacted, the Office is responsible for the placement of these new laws in the United States Code ("Code"). On some occasions, Congress indicates where new legislation should be placed within the Code. On other occasions, Congress is silent, and placement of new legislation in the Code is left to OLRC. When OLRC makes these decisions, they are not meant to have any substantive impact on the law's meaning, interpretation, or application.⁶ Accordingly, courts cannot attach any legal significance to the specific placement of these new laws in the Code.

² *Jesner v. Arab Bank, PLC*, No. 16-499 (U.S. Apr. 24, 2018).

³ *Id.* at 27. The Alien Tort Statute provides 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." 28 U.S.C. § 1350 (2012).

⁴ *See, e.g.*, William S. Dodge, *Jesner v. Arab Bank: The Supreme Court Preserves the Possibility of Human Rights Suits Against U.S. Corporations*, JUST SECURITY (Apr. 26, 2018), <https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/> [<https://perma.cc/AHX8-CW9M>]; Samuel Moyn, *Time to Pivot? Thoughts on Jesner v. Arab Bank*, LAWFARE (Apr. 25, 2018), <https://lawfareblog.com/time-pivot-thoughts-jesner-v-arab-bank> [<https://perma.cc/DY2Y-7UEB>]; Beth Stephens, *Five Things I Don't Like About the Jesner Opinion*, HUM. RTS. AT HOME BLOG (Apr. 29, 2018), http://lawprofessors.typepad.com/human_rights/2018/04/five-things-i-dont-like-about-the-jesner-decision.html [<https://perma.cc/L6GT-A67K>]; Christopher A. Whytock, *Whither Human Rights Litigation After Jesner v. Arab Bank?*, HUM. RTS. AT HOME BLOG (May 8, 2018), http://lawprofessors.typepad.com/human_rights/2018/05/whither-human-rights-litigation-after-jesner-v-arab-bank.html [<https://perma.cc/D29K-E3BV>]. *But see* Walter Olson, *Jesner v Arab Bank: Court Tightens Lid on Alien Tort Statute*, CATO INST. (Apr. 24, 2018), <https://www.cato.org/blog/jesner-v-arab-bank-court-keeps-lid-alien-tort-statute> [<https://perma.cc/3BBS-Q4QW>].

⁵ *About the Office and the United States Code*, OFFICE OF LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, <http://uscode.house.gov/about/info.shtml> [<https://perma.cc/TP34-32VY>]. *See generally* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2d 283 (2007).

⁶ *See generally* Richard J. McKinney, Assistant Law Librarian, Fed. Reserve Bd., *The Authority of Statutes Placed in Section Notes of the U.S. Code*, Presentation Before the

But in *Jesner*, Justice Kennedy attached significance to OLRC's placement of the Torture Victim Protection Act ("TVPA") as a statutory note to the ATS.⁷ He repeatedly referred to the TVPA as a "cause of action *under the ATS* created by Congress rather than the courts."⁸ In so doing, he disregarded longstanding practice and black letter law that the placement of a statutory note in the U.S. Code by the Office does not have any substantive impact on the law's meaning, interpretation, or application.⁹

This error merits correction by the Court for several reasons. Although it undoubtedly affected Justice Kennedy's interpretation of the ATS in *Jesner*, it will also affect future ATS and TVPA cases. In addition, it raises uncertainty over the status of the countless statutory notes that populate the federal code. More broadly, this interpretation raises constitutional concerns by attaching legal significance to OLRC's placement decisions.

Part I of this Article examines OLRC's work in preparing the United States Code. Part II then reviews the *Jesner* decision, and Part III explains Justice Kennedy's misunderstanding of the relationship between the ATS and TVPA. Finally, Part IV proposes revisions to the *Jesner* decision that would provide a more accurate reflection of the legislative record and the historical role of OLRC in the codification process.

I. THE OFFICE OF LAW REVISION COUNSEL AND THE PROCESS OF CODIFICATION

Congress established the Office of Law Revision Counsel in 1974, but its origins can be traced to the early twentieth century.¹⁰ OLRC operates within the U.S. House of Representatives. Although the Speaker of the House appoints the Law Revision Counsel, OLRC is non-partisan.¹¹ Its principal purpose is "to develop and keep current an official and positive codification of the laws of the United States."¹² By statute, OLRC's functions include the following:

LLSDC Legislative Research Special Interest Section Meeting (May 26, 2011), <http://www.llsdc.org/assets/sourcebook/usc-notes.pdf> [<https://perma.cc/BB5Q-5MBM>].

⁷ Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992). The TVPA provides a federal cause of action for torture and extrajudicial killing. It appears as a statutory note to 28 U.S.C. § 1350.

⁸ *Jesner v. Arab Bank, PLC*, No. 16-499, slip op. at 20 (U.S. Apr. 24, 2018).

⁹ See NORMAN J. SINGER & SHAMBIE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 47:14, 347 (7th ed. 2014) ("[H]eadings and notes are not binding, may not be used to create an ambiguity, and do not control an act's meaning by injecting a legislative intent or purpose not otherwise expressed in the law's body.").

¹⁰ Pub. L. No. 93-554, 88 Stat. 1771 (1974). Efforts to compile federal law can be traced to the 19th and even the late 18th centuries. See Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 133 (2010).

¹¹ 2 U.S.C.S. §§ 285a, 285c (LEXIS through Pub. L. No. 115-223).

¹² 2 U.S.C.S. § 285a.

- (1) To prepare, and submit to the Committee on the Judiciary one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form, separately stated, with a view to the enactment of each title as positive law.
- (2) To examine periodically all of the public laws enacted by the Congress and submit to the Committee on the Judiciary recommendations for the repeal of obsolete, superfluous, and superseded provisions contained therein.
- (3) To prepare and publish periodically a new edition of the United States Code (including those titles which are not yet enacted into positive law as well as those titles which have been so enacted), with annual cumulative supplements reflecting newly enacted laws.
- (4) To classify newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law.
- (5) To prepare and submit periodically such revisions in the titles of the Code which have been enacted into positive law as may be necessary to keep such titles current¹³

OLRC plays an important yet obscure role in codifying U.S. law. When the President signs a bill into law, the Office of the Federal Register assigns a Public Law number to the new law.¹⁴ These slip laws are eventually compiled in the Statutes at Large, which are “legal evidence of laws . . . in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.”¹⁵ OLRC works with the Office of the Federal Register to provide classifications “for inclusion as side notes . . . in the Statutes at Large.”¹⁶ These side notes

¹³ 2 U.S.C.S. § 285b (LEXIS through Pub. L. No. 115-223).

¹⁴ *Public Laws*, U.S. NAT’L ARCHIVES AND RECORDS ADMINISTRATION, <https://www.archives.gov/federal-register/laws> [<https://perma.cc/34GC-H86L>].

¹⁵ 1 U.S.C.S. § 112 (LEXIS through Pub. L. No. 115-223). Although the Public Laws that appear in the Statutes at Large are considered legal evidence of the law, the side notes indicating their anticipated placement in the United States Code are not part of the statutory text. E-mail from Ralph V. Seep, Office of Law Revision Counsel, U.S. House of Representatives, to William J. Aceves, Professor of Law, California Western School of Law (July 17, 2018) (on file with author).

¹⁶ *About Classification of Laws to the United States Code*, OFFICE OF LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, http://uscode.house.gov/about_classification.xhtml?jsessionid=E20314D11188CB2A3E552D966B94254F [<https://perma.cc/NPV2-2YGP>] [hereinafter *About Classification*].

indicate the anticipated placement of the new laws in the United States Code.

Because the Statutes at Large are released in chronological order and are not organized by subject, they are difficult to use in the day-to-day practice of law.¹⁷ To make the law more accessible, OLRC compiles and arranges the laws that appear in the Statutes at Large into the United States Code in a process “known as U.S. Code classification.”¹⁸ In many respects, the purpose of the Code is to organize federal law so it is manageable and understandable.¹⁹ But in contrast to the Statutes at Large, only those titles of the Code that were specifically enacted by Congress as a whole are considered positive law and legal evidence of the law.²⁰ All other titles of the Code are editorial compilations of federal statutes. They are considered non-positive law titles and are only prima facie evidence of the law.²¹

When Congress does not specifically designate the placement of a new law in the United States Code, OLRC is responsible for the new law’s placement.²² And, because only Congress can add or amend a section of a positive law title in the Code, the Office is limited in its ability to place these new laws in the Code.²³ On these occasions, the Office will place new laws as statutory notes or appendices to existing sections of positive

¹⁷ Dorsey, *supra* note 5, at 284 (“We do not like to read session laws, of course. It can be tough going.”); *see also* *HOLC Guide to Legislative Drafting*, OFFICE OF LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, https://legcounsel.house.gov/HOLC/Drafting_Legislation/Drafting_Guide.html [<https://perma.cc/VWF5-GRWD>] (“The only organizing principle behind the slip laws, and thus the Statutes at Large, is chronology. This makes it very difficult to find the law on a particular topic using those sources.”).

¹⁸ *About Classification*, *supra* note 16. This process actually begins as soon as an enrolled bill becomes available. *Id.* The enrolled bill represents the final version of the bill submitted to the President for signature.

¹⁹ *See* Dorsey, *supra* note 5, at 284 (emphasis in original) (“The Code is not law; it is a *law locator*, and a very useful one.”); *see also* Charles J. Zinn, *Codification of the Laws*, 45 L. LIBR. J. 2, 4 (1952) (“We believe that it is our job to make the laws understandable.”).

²⁰ 1 U.S.C.S. § 204(a) (LEXIS through Pub. L. No. 115-223) (“Whenever titles of [the] Code [] have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.”). *See* Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 L. LIBR. J. 545, 547 (2009).

²¹ *See* 1 U.S.C.S. § 204(a). The distinction between legal evidence and prima facie evidence was described by Charles Zinn, the head of the OLRC in 1957, in the following manner: “If you go into court and cite a section of the *United States Code*, your adversary may bring in a dozen *Statutes at Large* to show that what is in the *Code* is not an accurate statement. As a result, he may prevail because the *Statutes at Large* are legal evidence of the law, whereas the *Code* is only prima facie evidence.” Charles S. Zinn, *Revision of the United States Code*, 51 L. LIBR. J. 388, 389–90 (1958).

²² *See* *About Classification*, *supra* note 16.

²³ Tress, *supra* note 10, at 151–52.

law titles.²⁴ These statutory notes or appendices can include an entire Public Law or only portions of those laws.²⁵ These placement decisions by the Office are “a matter of opinion and judgment.”²⁶ The Office considers various factors in making classification decisions. These decisions are generally determined by similarities between the new law and existing Code sections as well as ease of use.²⁷ According to the Office, “[w]e try to insert the new law in that title of the Code where we think the average user will be most likely to look for it.”²⁸

Because OLRC, and not Congress, makes these placement decisions, no legal significance attaches to their location in the Code. Instead, “it is for the courts to find the meaning of all these statutes, all the amendments to those statutes, and all the amendments to the amendments.”²⁹ The Office has emphatically affirmed these principles:

A provision of a Federal statute is the law whether the provision appears in the Code as section text or as a statutory note, and even when it does not appear in the Code at all. The fact that a provision is set out as a note is merely the result of an editorial decision and has no effect on its meaning or validity.³⁰

Three points bear emphasis. First, OLRC is responsible for the placement of new laws in the U.S. Code when Congress does not specifically designate their placement in the Code. Second, these new laws are still binding even if OLRC places them as statutory notes within existing sections of the Code. Third, courts cannot attach any legal significance to the specific placement of these new laws in the Code.

Federal courts have long recognized that the placement of statutory notes by OLRC in the U.S. Code does not affect their meaning. In numerous decisions, the Supreme Court has acknowledged these principles of codification and statutory interpretation.³¹ In *United States v.*

²⁴ See *About Classification*, *supra* note 16; see also Michael J. Lynch, *The U.S. Code, the Statutes at Large, and Some Peculiarities of Codification*, 16 LEGAL REFERENCE SERV. Q. 69, 77–81 (1997). Some commentators have criticized the use of statutory notes because they are difficult to locate and undermine the organizational value of the Code. Tress, *supra* note 10, at 153.

²⁵ *Detailed Guide to the United States Code Content and Features*, OFFICE OF THE LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, http://uscode.house.gov/detailed_guide.xhtml [<https://perma.cc/FSC8-FA6S>] [hereinafter *Detailed Guide*].

²⁶ Zinn, *supra* note 19, at 3.

²⁷ See *About Classification*, *supra* note 16.

²⁸ Zinn, *supra* note 19, at 3.

²⁹ Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 182 (1986).

³⁰ *Detailed Guide*, *supra* note 25.

³¹ See, e.g., *Fourco Glass Co. v. Transmirra Prod's Corp.*, 353 U.S. 222, 227 (1957) (quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 198–99 (1912)) (“The change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment.”)

Welden, for example, the Supreme Court was interpreting the Appropriations Act of February 25, 1903—portions of which were subsequently codified in the United States Code.³² The Court was confronted with two sources of law, which the Court found to be inconsistent: the original Act of Congress and the subsequent codification of that law in the Code. In *Welden*, the Court had to decide which applied. It concluded that it must rely on the original Act of Congress if there was an inconsistency between the Statutes at Large and the Code:

Certainly where, as here, the ‘change of arrangement’ was made by a codifier without the approval of Congress, it should be given no weight. ‘If construction [of a section of the United States Code which has not been enacted into positive law] is necessary, recourse must be had to the original statutes themselves.’³³ Accordingly, in order to construe the immunity provision of the Appropriations Act of February 25, 1903, we must read it in the context of the entire Act, rather than in the context of the ‘arrangement’ selected by the codifier.³⁴

Other Supreme Court decisions have made similar determinations, further highlighting the distinction between Congress and the “codifiers.”³⁵

The lower courts have repeated this understanding regarding the legal significance of placement decisions in the U.S. Code. In *Springs v. Stone*, for example, the federal district court was interpreting the Aviation and Transportation Security Act (“ATSA”), which was adopted in response to the attacks of September 11, 2001.³⁶ Because Congress did not indicate where the ATSA should be placed in the Code, OLRC placed it as a statutory note to another federal statute.³⁷ According to the district court, this placement decision did not affect its interpretation: “[t]he laws of the United States are evidenced by the Statutes at Large, not by their placement within the United States Code.”³⁸ Other federal courts have

For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed.”); *Stephan v. United States*, 319 U.S. 423, 426 (1943) (“[T]he Code establishes ‘prima facie’ the laws of the United States. But the very meaning of ‘prima facie’ is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.”).

³² *United States v. Welden*, 377 U.S. 95, 96 (1964).

³³ *Id.* at 99 n.4 (quoting *Murrell v. Western Union Tel. Co.*, 160 F.2d 787, 788 (5th Cir. 1947)).

³⁴ *Welden*, 377 U.S. at 99 n.4.

³⁵ *Warner v. Goltra*, 293 U.S. 155, 161 (1934) (“The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so. As to that the command of Congress is too clear to be misread.”).

³⁶ *Springs v. Stone*, 362 F. Supp. 2d 686, 690 (E.D. Va. 2005).

³⁷ Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 114 (2012)).

³⁸ *Springs*, 362 F. Supp. 2d at 697 n.7.

made similar determinations, indicating that the placement of a law as a statutory note in the Code without the approval of Congress “is of no legal significance,”³⁹ “of no moment,”⁴⁰ and carries “no weight.”⁴¹

In sum, a statutory note’s placement in the United States Code by OLRC should have no impact on its meaning, interpretation, or application. Courts may not attach any legal significance to the specific placement of these new laws in the Code. But, this longstanding practice and black letter principle were disregarded in *Jesner v. Arab Bank, PLC*.

II. THE *JESNER* DECISION

In *Jesner*, thousands of victims of terrorist attacks in the Middle East brought five civil actions under the ATS against Arab Bank, PLC.⁴² The plaintiffs alleged Arab Bank had served as a financial intermediary to several designated terrorist organizations, thereby allowing them to conduct campaigns of violence against innocent civilians.⁴³ The district court dismissed the lawsuits in 2015, relying on circuit precedent that corporations may not be sued under the ATS, and the Second Circuit affirmed the dismissal.⁴⁴ In its decision, the Second Circuit suggested the Supreme Court was best situated to address the issue of corporate liability.⁴⁵ A divided *en banc* panel of the Second Circuit declined to rehear the case.⁴⁶ In a sharply worded dissent from the denial of *en banc* review, three judges argued that the Second Circuit’s earlier decision rejecting corporate liability was a “flawed opinion,” a “lone ‘outlier’ among ATS cases,” and that it was “blunting the natural development of the law.”⁴⁷

In a 5-4 decision, the Supreme Court affirmed the Second Circuit’s decision and held that foreign corporations are not subject to civil liability under the ATS. Writing for the majority, Justice Kennedy argued that federal courts should be reluctant to extend judicially created rights of action.⁴⁸ Such hesitation, which is informed by separation of powers considerations, should be even more pronounced in cases involving

³⁹ *Stadther v. Dep’t of Homeland Sec.*, No. 11-1297, 2012 WL 4372570, at *4 n.1 (D. Minn. Aug. 7, 2012).

⁴⁰ *Conyers v. Merit Sys. Prot. Bd.*, 388 F.3d 1380, 1382 n.2 (Fed. Cir. 2004).

⁴¹ *Turner v. Glickman*, 207 F.3d 419, 428 (7th Cir. 2000) (citing *United States v. Welden*, 377 U.S. 95, 99 (1964)).

⁴² Two of the five lawsuits also raised claims under the Anti-Terrorism Act, which provides a cause of action for acts of international terrorism. 18 U.S.C. § 2333(a) (2012).

⁴³ *Jesner v. Arab Bank, PLC*, No. 16-499, slip op. at 1 (U.S. Apr. 24, 2018).

⁴⁴ *In re Arab Bank PLC Alien Tort Statute Litigation*, 808 F.3d 144, 148, 158 (2d Cir. 2015) (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff’d*, 569 U.S. 108 (2013)).

⁴⁵ *See id.* at 157.

⁴⁶ *In re Arab Bank, PLC Alien Tort Statute Litigation*, 822 F.3d 34, 35 (2d Cir. 2016).

⁴⁷ *Id.* at 41 (Pooler, J., dissenting) (citation omitted).

⁴⁸ *See Jesner*, slip op. at 18–19.

corporate entities and foreign nations.⁴⁹ In these cases, Justice Kennedy indicated that courts should defer to the political branches of government.⁵⁰ “[A]bsent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.”⁵¹

In Part I of the *Jesner* opinion, the Court made its initial reference to the TVPA. The majority examined the development of ATS jurisprudence, beginning with the Second Circuit’s decision in *Filartiga v. Pena-Irala*, which held that the ATS provided subject matter jurisdiction in cases of torture.⁵² After describing the *Filartiga* decision, the Court addressed, albeit briefly, the TVPA:

In the midst of debates in the courts of appeal over whether the court in *Filartiga* was correct in holding that plaintiffs could bring ATS actions based on modern human-rights laws absent an express cause of action created by an additional statute, Congress enacted the Torture Victim Protection Act of 1991 (TVPA).⁵³

The Court indicated the TVPA was “codified as a note following the ATS” and that it “creates an express cause of action for victims of torture and extrajudicial killing in violation of international law.”⁵⁴ After describing the adoption of the TVPA, the Court went on to discuss subsequent developments in ATS jurisprudence, including its decisions in *Sosa v. Alvarez-Machain* and *Kiobel v. Royal Dutch Petroleum Co.*⁵⁵ In these cases, the Court highlighted the foreign policy implications of ATS litigation and used this reasoning to narrow the statute’s reach.

In Part II(B)(2) of the *Jesner* opinion, Justice Kennedy, now joined only by Chief Justice Roberts and Justice Thomas, returned to the TVPA. To better interpret the ATS, Justice Kennedy indicated the Court should look to “analogous statutes for guidance on the appropriate boundaries of judge-made causes of action.”⁵⁶ According to Justice Kennedy, such references are particularly important in cases involving international law.⁵⁷ “Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS

⁴⁹ *Id.* at 19, 25–27.

⁵⁰ *Id.* at 19.

⁵¹ *Id.*

⁵² *Id.* at 9 (discussing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)). In *Filartiga*, the Second Circuit held that torture violates international law and that the ATS provides federal jurisdiction “whenever an alleged torturer is found and served with process by an alien within our borders” *Filartiga*, 630 F.2d at 878.

⁵³ *Jesner*, slip op. at 9 (citations omitted).

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 10–11 (discussing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)).

⁵⁶ *Jesner*, slip op. at 19–20 (citations omitted).

⁵⁷ *Id.* at 20 (citing *Sosa*, 542 U.S. at 726).

created by Congress rather than the courts.”⁵⁸ In support of this interpretation, Justice Kennedy referenced the House and Senate reports for the TVPA and quoted from the House report: “[a]s explained above, Congress drafted the TVPA to ‘establish an unambiguous and modern basis for a cause of action’ under the ATS.”⁵⁹

Having established the connection between the ATS and TVPA, Justice Kennedy then explained the implications of this connection for purposes of interpreting the ATS:

Congress took care to delineate the TVPA’s boundaries. In doing so, it could weigh the foreign-policy implications of its rule. Among other things, Congress specified who may be liable, created an exhaustion requirement, and established a limitations period. In *Kiobel*, the Court recognized that “[e]ach of these decisions carries with it significant foreign policy implications.”⁶⁰ The TVPA reflects Congress’ considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.⁶¹

Thus, Justice Kennedy viewed the TVPA as “the only cause of action under the ATS created by Congress rather than the courts.”⁶² He reiterated this position by emphasizing that “[t]he TVPA reflects Congress’ considered judgment of the proper structure for a right of action *under the ATS*.”⁶³

And, having established a formal connection between the two statutes, Justice Kennedy went on to graft the TVPA’s restrictions to ATS claims. “Congress’ decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case.”⁶⁴ This ultimately led the Court to hold “foreign corporations may not be defendants in suits brought under the ATS.”⁶⁵

Justice Sonia Sotomayor issued a lengthy dissenting opinion joined by Justices Breyer, Ginsburg, and Kagan. She questioned the majority’s approach to corporate liability under international law and argued the decision would absolve foreign corporations from responsibility for human rights abuses.⁶⁶ According to Justice Sotomayor, “[t]he text,

⁵⁸ *Jesner*, slip op. at 20.

⁵⁹ *Id.* (citation omitted).

⁶⁰ *Id.* (citing *Kiobel*, 569 U.S. at 117).

⁶¹ *Jesner*, slip op. at 20.

⁶² *Id.*

⁶³ *Id.* (emphasis added).

⁶⁴ *Id.* In an earlier case, the Court held corporations cannot be sued under the TVPA. *See id.* (citing *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012)).

⁶⁵ *Jesner*, slip op. at 27.

⁶⁶ *Id.* at 1 (Sotomayor, J., dissenting).

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.”⁶⁷ She also disagreed with the plurality’s reliance on the TVPA in interpreting the ATS.⁶⁸

Jesner represents the Court’s most recent retrenchment of the Alien Tort Statute. By focusing on the foreign policy implications of ATS litigation, it follows the reasoning of the Court’s earlier decisions in *Sosa* and *Kiobel*. However, the Court’s reliance on the TVPA to support its reasoning is different.

III. ASSESSING THE PROPER RELATIONSHIP BETWEEN THE ATS AND TVPA

Justice Kennedy’s plurality opinion in *Jesner* is built upon a misunderstanding of the TVPA and its relationship to the ATS. In Part I, the majority opinion indicates the TVPA was “codified as a note following the ATS”⁶⁹ This statement is an accurate description of the TVPA’s current placement in the United States Code. In Part II(B)(2), however, the plurality opinion mischaracterizes the relationship between the ATS and TVPA. According to Justice Kennedy, Congress drafted the TVPA “to ‘establish an unambiguous and modern basis for a cause of action’ *under the ATS*,” and the TVPA is “the only cause of action *under the ATS* created by Congress rather than the courts.”⁷⁰

In support of these statements, Justice Kennedy cited language from the House and Senate reports to the TVPA.⁷¹ However, the cited language does not support these statements or reflect the proper relationship between the two statutes. The House report indicated “[t]he TVPA would *establish an unambiguous and modern basis for a cause of action* that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)”⁷² The Senate Report used nearly identical language.⁷³ Thus, the House and Senate Reports did not indicate the TVPA was established, authorized, or adopted under the ATS. At most, they indicate the ATS inspired the adoption of the TVPA and that the two statutes were analogous.⁷⁴ There is certainly strong support in the legislative record for this limited proposition.⁷⁵

⁶⁷ *Id.*

⁶⁸ *Id.* at 25–29.

⁶⁹ *Id.* at 10 (majority opinion).

⁷⁰ *Id.* at 20 (plurality opinion) (emphasis added) (citations omitted) (quoting H.R. REP. NO. 102-367, at 3 (1991); S. REP. NO. 102-249, at 4–5 (1991)).

⁷¹ *See id.*

⁷² H.R. REP. NO. 102-367, at 3 (1991) (emphasis added).

⁷³ S. REP. NO. 102-249, at 4 (1991).

⁷⁴ Both the House and Senate reports reference Judge Bork’s concurring opinion in *Tel-Oren v. Libyan Arab Republic* as the impetus behind the movement to adopt the TVPA. H.R. REP. NO. 102-367, at 4 (discussing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 103 (1985)); S. REP. NO. 102-249, at 4 (same). In *Tel-Oren*, Judge Bork argued that “an explicit grant of a cause of action” is essential

More significantly, statutory construction must always begin with the language employed by Congress.⁷⁶ The TVPA contains no mention of the ATS.⁷⁷ Instead, the TVPA's preamble indicates it was adopted to carry out U.S. obligations under international law "pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."⁷⁸ This language appears in the enrolled bill and the Statutes at Large, but OLRC omitted the preamble when it placed the TVPA in the U.S. Code.⁷⁹ However, the preamble is considered part of the legislative enactment; therefore, it should be accorded some weight in statutory interpretation.⁸⁰

The TVPA is also silent on its placement in the U.S. Code.⁸¹ Accordingly, OLRC was responsible for determining its proper placement in the Code. And, in fact, it was OLRC that placed the TVPA as a statutory note to the ATS.⁸² Because Title 28 is a positive law title, the Office did not have the authority to add or revise any of the existing Code sections. Thus, it could not amend the language of the ATS or place the TVPA in a new Code section. It could only attach the TVPA as a statutory note to an existing section of the Code, which it did at 28 U.S.C. § 1350.⁸³ Under established practice, therefore, the TVPA's placement as a statutory note to the ATS has no legal significance when interpreting these statutes.

"before a private plaintiff be allowed to enforce principles of international law in a federal tribunal." *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring).

⁷⁵ See H.R. REP. NO. 102-367, at 3-4; S. REP. NO. 102-249, at 4-5; see also *The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the H. Comm. on Foreign Affairs*, 100th Cong. 34-36 (1988) (prepared statement of Association of the Bar of the City of New York, Committee on International Human Rights).

⁷⁶ See *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) (quoting *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (citations omitted)). In fact, the Supreme Court has indicated that reliance on legislative history is unnecessary when a statute's language is clear. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.8 (2010).

⁷⁷ The enrolled bill does not mention the ATS. See *Torture Victim Protection Act*, H.R. 2092, 102d Cong. (1992) (as passed by Senate, Mar. 3, 1992).

⁷⁸ *Torture Victim Protection Act of 1991*, Pub. L. No. 102-256, 106 Stat. 73, 73 (1992).

⁷⁹ As a general policy, the LRC Office does not include preambles in the U.S. Code. E-mail from Ralph V. Seep, Office of Law Revision Counsel, U.S. House of Representatives, to William J. Aceves, Professor of Law, California Western School of Law (July 17, 2018) (on file with author).

⁸⁰ See generally 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:14 (7th ed. 2017).

⁸¹ The enrolled bill contains no reference to the United States Code. See *Torture Victim Protection Act*, H.R. 2092, 102d Cong. (1992) (as passed by Senate, Mar. 3, 1992). In contrast, the earliest version of the TVPA did, in fact, address its placement in the Code. H.R. 4756 would have amended Title 28 of the Code by adding a new section that granted federal courts jurisdiction over claims of torture or extrajudicial killing. See H.R. 4756, 99th Cong. § 3 (1986). See Kathryn L. Pryor, *Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act?*, 29 VA. J. INT'L L. 969, 1015-16 (1989) (describing the earlier version of the TVPA).

⁸² E-mail from Ralph V. Seep, Office of Law Revision Counsel, U.S. House of Representatives, to William J. Aceves, Professor of Law, California Western School of Law (June 1, 2018) (on file with author).

⁸³ *Id.*

There are, of course, other problems with interpreting the TVPA as a cause of action under the ATS. As Justice Sotomayor recognized in her *Jesner* dissent, “[o]n its face, the TVPA is different from the ATS in several significant ways.”⁸⁴ Most significantly, the ATS is a jurisdictional statute that also grants federal courts limited authority to establish a cause of action “by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁸⁵ The TVPA, by contrast, is available to both aliens and U.S. citizens, but it only creates a cause of action for torture and extrajudicial killing.⁸⁶

If the TVPA is considered a cause of action *under the ATS*, U.S. citizens would be unable to bring TVPA claims because the jurisdictional grant in the ATS only extends to aliens. Presumably, U.S. citizens can rely on the jurisdictional grant afforded by the federal question statute to bring TVPA claims.⁸⁷ However, such a bifurcated approach to TVPA claims is awkward and there is nothing in the TVPA’s text or legislative history to support it. For these reasons, Justice Sotomayor acknowledged “[i]t makes little sense, then, to conclude that the TVPA has dispositive comparative value in discerning the scope of liability under the ATS.”⁸⁸

The formal relationship between the two statutes becomes even more tenuous when considered in light of the Supreme Court’s decision in *Sosa v. Alvarez-Machain*.⁸⁹ In *Sosa*, the Court made clear the ATS functioned on its own and did not require further implementing legislation.⁹⁰ To hold otherwise would have left the ATS a dead letter. According to Justice Souter:

[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.⁹¹

⁸⁴ *Jesner v. Arab Bank, PLC*, No. 16-499, slip op. at 25 (U.S. Apr. 24, 2018) (Sotomayor, J., dissenting).

⁸⁵ 28 U.S.C. § 1350 (2012).

⁸⁶ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992).

⁸⁷ See 28 U.S.C. § 1331 (2012). Courts have previously indicated that TVPA claims may also be brought under the federal question statute. See *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995).

⁸⁸ *Jesner*, slip op. at 25–26 (Sotomayor, J., dissenting); see also *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) (reasoning that the ATS has “no comparative value” in assessing the meaning of the word “individual” as used in the TVPA).

⁸⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁹⁰ *Id.* at 724.

⁹¹ *Id.* at 719.

When the Court in *Sosa* addressed the TVPA, it viewed the statute as distinct from the ATS and reinforced this point with several references to the TVPA's legislative history.⁹²

Jesner is not the first case in which this issue has arisen. The D.C. Circuit previously addressed the relationship between the ATS and TVPA in *Belhas v. Ya'alon*, which involved an ATS/TVPA lawsuit brought against a high-ranking Israeli government official accused of complicity in the shelling of a U.N. compound in Lebanon that killed dozens of civilians.⁹³ The court affirmed the lower court's dismissal of the lawsuit by holding the Foreign Sovereign Immunities Act ("FSIA") conferred immunity upon individuals acting in their official capacity for a foreign state.⁹⁴ In considering the plaintiffs' claims, the court rejected the assertion that the TVPA abrogated the immunity of foreign government officials.⁹⁵ It also noted the TVPA did not amend the FSIA.⁹⁶ In fact, the court attached some significance to the TVPA's placement with the ATS and suggested Congress was responsible for this connection: "When Congress passed the TVPA in 1991, it did not amend the FSIA and instead appended it to the ATCA [ATS], a statute the Supreme Court held in *Amerada Hess* to be subject to all provisions in the FSIA."⁹⁷

In his concurring opinion, Judge Stephen Williams agreed with the majority's holding although he took issue with its analysis of the TVPA's legislative history.⁹⁸ He rightly noted the TVPA's placement in the United States Code should have no impact on its interpretation:

[T]he majority states that "[w]hen Congress passed the TVPA in 1991, it did not amend the FSIA and instead appended it to the ATCA, a statute the Supreme Court held in *Amerada Hess* to be subject to all provisions in the FSIA." Indeed Congress did not amend the FSIA, but a further inference of congressional intent from the placement of the statute within the United States Code is dubious, at least absent some indication—lacking here—that Congress itself, rather than simply the Office of Law Revision Counsel directed that placement.⁹⁹

⁹² *Id.* at 728, 731.

⁹³ *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008), *abrogated by* *Samantar v. Yousuf*, 560 U.S. 305 (2010). The Court in *Samantar* held that the FSIA does not apply to former foreign government officials. 560 U.S. at 308.

⁹⁴ *Belhas*, 515 F.3d at 1283.

⁹⁵ *Id.* at 1288–89.

⁹⁶ *Id.* at 1289.

⁹⁷ *Id.* (citing *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 438 (1989)).

⁹⁸ *See Belhas*, 515 F.3d at 1293 (Williams, J., concurring).

⁹⁹ *Id.* (citations omitted) (quoting *id.* at 1289 (majority opinion)) (first citing Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992); then citing 2 U.S.C. §§ 285–285g (2008)).

The *Belhas* decision reveals the mischief that arises when courts attach significance to the placement of the TVPA as a statutory note to the ATS.¹⁰⁰ Justice Kennedy's plurality opinion in *Jesner* both exemplifies and magnifies this problem.¹⁰¹

IV. REVISING THE *JESNER* DECISION

In *Jesner*, Justice Kennedy's description of the relationship between the ATS and TVPA is simply wrong. The plurality opinion is particularly troubling in light of the Supreme Court's repeated admonitions that courts should defer to Congress in these cases because of their foreign policy implications.¹⁰² Instead of relying on Congress, the plurality relies on the placement decisions of the Office of Law Revision Counsel. The opinion also raises uncertainty over the status of statutory notes in the United States Code because it implies their placement in the Code by OLRC is relevant for purposes of statutory interpretation. For these reasons, the Court should revise the opinion to correct this error.¹⁰³

¹⁰⁰ Other courts have also mischaracterized the TVPA as an amendment to the ATS. *See, e.g.,* Rodriguez v. Swartz, 899 F.3d 719, 743 (9th Cir. 2018) (referring to the TVPA as "an amendment to the Alien Tort Claims Act").

¹⁰¹ Commentators have made similar misstatements regarding the relationship between the ATS and TVPA. *See, e.g.,* Luisa Antonioli, *Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law Before U.S. Federal Courts*, 12 IND. J. GLOBAL LEGAL STUD. 651, 658 n.29 (2005) (asserting that the TVPA was passed as an amendment to the ATS); Ekaterina Apostolova, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640, 642 (2010) ("The fact that the TVPA was codified as a note to the ATS implies that they are intended to interact closely."); Carole Basri, *The Jewish Refugees from Arab Countries: An Examination of Legal Rights—A Case Study of the Human Rights Violations of Iraqi Jews*, 26 FORDHAM INT'L L.J. 656, 715 n.315 (2003) (referring to the TVPA as an amendment to the ATS); Anthony Blackburn, *Striking A Balance to Reform the Alien Tort Statute: A Recommendation for Congress*, 53 SANTA CLARA L. REV. 1051, 1070–71 (2013) ("Historically, Congress codified the TVPA as a note to the ATS, which implies intent for them to interact closely.").

¹⁰² *See, e.g.,* *Jesner v. Arab Bank, PLC*, No. 16-499, slip op. at 18–19 (U.S. Apr. 24, 2018) ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.").

¹⁰³ This proposal shares some of the features of recent scholarship that rewrites important judicial decisions. *See, e.g.,* FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al. eds., 2010); INTEGRATED HUMAN RIGHTS IN PRACTICE: REWRITING HUMAN RIGHTS DECISIONS (Eva Brems & Ellen Desment eds., 2017); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack Balkin ed., 2002). Unlike prior scholarship, however, this proposal asks the Court to revise its own opinion.

The Supreme Court often revises its opinions after they are issued.¹⁰⁴ This controversial practice occurs for various reasons. On some occasions, the Court is simply correcting grammatical or format errors.¹⁰⁵ But on other occasions, these revisions are more substantive.¹⁰⁶ Although the Court has engaged in this practice for many years, it only began publicizing its revisions in 2015.¹⁰⁷ Most commentators appear to support this practice as long as it is transparent.¹⁰⁸

In fact, the Court has already made some revisions to its *Jesner* decision. Six days after the Court issued its original decision, it released a revised version of the decision on its website.¹⁰⁹ Minor corrections, which did not affect the Court’s reasoning or holding, were made to the opinions of Justices Kennedy and Sotomayor.¹¹⁰

The plurality’s position on the relationship between the ATS and TVPA merits similar treatment. The following revisions would address this error without requiring any additional drafting. These revisions would appear on page twenty of Justice Kennedy’s slip opinion and would simply delete the language that refers to the TVPA as a cause of action under the ATS:

Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—~~the only cause of action under the ATS created by Congress rather than the courts. As explained above, Congress drafted the TVPA to “establish an unambiguous and modern basis for a cause of action” under the ATS. H. R. Rep., at 3; S. Rep., at 4–5.~~

¹⁰⁴ See Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 555 (2014) (“[T]he Court makes all sorts of revisions, ranging from the most mundane to the most intriguing, with the vast majority not surprisingly falling into the first category.”); see also Jonathan H. Adler, *Post-Decision Revisions of Supreme Court Decisions*, WASH. POST: THE VOLOKH CONSPIRACY (May 25, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/25/post-decision-revisions-of-supreme-court-opinions/?utm_term=.120d0b665b69 [<https://perma.cc/5CMU-ACMF>]; Adam Liptak, *Final Word on U.S. Law Isn’t: Supreme Court Keeps Editing*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2014/05/25/us/final-word-on-us-law-isnt-supreme-court-keeps-editing.html> [<https://perma.cc/DS2Q-KCBS>].

¹⁰⁵ Lazarus, *supra* note 104, at 562–63.

¹⁰⁶ *Id.* at 569–73.

¹⁰⁷ Ryan Gabrielson, *Legal Footnote: You Have to Look Hard to See the Supreme Court Correct Its Mistakes*, PROPUBLICA (Jan. 2, 2018, 1:20 PM), <https://www.propublica.org/article/legal-footnote-you-have-to-look-hard-to-see-the-supreme-court-correct-its-mistakes> [<https://perma.cc/W7BA-MRBM>].

¹⁰⁸ See Charles Rothfeld, *Should the Supreme Court Correct its Mistakes?*, 128 HARV. L. REV. F. 56, 61–62 (2014) (suggesting that the Court should disclose “every change that it makes to every opinion after initial publication”).

¹⁰⁹ See *Jesner v. Arab Bank, PLC*, No. 16-499 (U.S. Apr. 24, 2018), https://www.supremecourt.gov/opinions/17pdf/16-499diff_868c.pdf (providing original version next to revised version and noting revisions).

¹¹⁰ See *id.* at 9 (replacing “Peruvian” with “Paraguayan”); *id.* at 10 n.3 (Sotomayor, J., dissenting) (making formatting corrections).

Congress took care to delineate the TVPA's boundaries. In doing so, it could weigh the foreign-policy implications of its rule. Among other things, Congress specified who may be liable, created an exhaustion requirement, and established a limitations period. In *Kiobel*, the Court recognized that "[e]ach of these decisions carries with it significant foreign policy implications." ~~The TVPA reflects Congress' considered judgment of the proper structure for a right of action under the ATS.~~ Absent a compelling justification, courts should not deviate from that model.¹¹¹

These revisions can be presented to the Reporter of Decisions at the Supreme Court, who could "then refer the matter to the appropriate Justice for consideration."¹¹² The revisions could easily be made before the final, official text of the Court's opinion is released.¹¹³ Past practice suggests such revisions could be made without the need for rehearing or even prior notice to the parties.¹¹⁴

Significantly, these revisions would not change the outcome of the *Jesner* case. Foreign corporations would still be immune from civil liability under the ATS. But, these revisions would eliminate the inaccuracies regarding the placement of the TVPA and its relationship to the ATS.

If the Supreme Court does not remedy this error, the lower courts should not repeat it. Quite simply, the plurality opinion's understanding of the connection between the ATS and TVPA is wrong. Although the lower courts remain bound by the Court's limited holding in *Jesner*, they are certainly not bound to recognize a connection between the ATS and TVPA that does not exist.¹¹⁵ Recognition is even less warranted in light of the plurality's limited reach, particularly when the three votes of the plurality on this issue are compared with the four votes of the dissent that reject the connection. Accordingly, the reasoning behind the *Jesner*

¹¹¹ See *Jesner*, slip op. at 20 (plurality opinion) (citations omitted) (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013)).

¹¹² STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 32 (10th ed. 2013).

¹¹³ See *Information About Opinions*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/opinions/info_opinions.aspx [<https://perma.cc/SWP7-TY86>] (describing the process by which Supreme Court opinions are released to the public and printed). Justice Kennedy's retirement may complicate such efforts although the Court presumably has some mechanism for addressing these situations. Although the Court could also clarify this issue in a future case, there is no guarantee the Court will address an ATS or TVPA case in the near future, if at all.

¹¹⁴ *Lazarus*, *supra* note 104, at 566–72.

¹¹⁵ There are occasions when lower courts may deviate from Supreme Court precedent. See generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (assessing the reasons for hierarchical precedent); Timothy Schwartz, *Cases Time Forgot: Why Judges Can Sometimes Ignore Controlling Precedent*, 56 EMORY L.J. 1475 (2007) (examines the phenomena of judges ignoring precedent).

decision should be extended with great caution in other ATS and TVPA cases.¹¹⁶

CONCLUSION

Attaching significance to the placement of a statutory note in the United States Code poses risks. It can imply connections that Congress did not intend, thereby affecting statutory interpretation. But it can also have constitutional implications because it conflates OLRC decisions with congressional action. This is precisely what happened in *Jesner*. This outcome is particularly ironic because the Supreme Court has repeatedly admonished lower courts to defer to Congress in ATS and TVPA cases. For these reasons, OLRC's placement decisions should have no bearing in statutory interpretation.

Correcting *Jesner*'s evident error would ensure that future cases involving the ATS and TVPA are informed by the will of Congress instead of the decisions of the Office of Law Revision Counsel. More broadly, these revisions would reaffirm longstanding practice regarding the proper interpretation of statutory notes in the United States Code.

¹¹⁶ Lower courts presented with ATS or TVPA cases could, for example, give a narrow construction to the plurality's reasoning in *Jesner*, if they give it any weight at all. See generally Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189 (2014) (arguing that stare decisis is not always applied consistently by the courts); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (criticizing the current approach to stare decisis and suggesting a new, more refined theory); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2014) (discussing lower courts' practice of narrowly interpreting Supreme Court precedent and indicating that the practice can be acceptable when lower courts adopt reasonable interpretations).