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## Domestic Decisions and Foreign Fragility: Injuries Abroad and the Federal Tort Claims Act

Robert Galloway\*

### INTRODUCTION

Early in 2014, the United States Congress approved legislation to allow the Peace Corps Commemorative Foundation to create a monument in Washington D.C. honoring fallen Peace Corps volunteers who died while in service.<sup>1</sup> Since the creation of the Peace Corps in 1961,<sup>2</sup> 306 volunteers have died while serving in countries around the world.<sup>3</sup> The notable absence of this kind of information regarding volunteer safety was the focal point of a 2011 lawsuit brought against the Peace Corps by two former volunteers, Charles Ludlam and Paula Hirschhoff.<sup>4</sup> According to their complaint, the Peace Corps did not provide adequate information regarding volunteer safety statistics.<sup>5</sup>

The Peace Corps prides itself on sending volunteers to far-flung and remote locations, often where other NGOs and aid organizations do not bother to send staff.<sup>6</sup> As a result, in countries like Sierra Leone, for

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1. *About PCCF*, PEACECORPSDESIGN.NET (Oct. 11, 2016, 10:03 AM), <http://www.peacecorpsdesign.net/about/>.

2. President Kennedy established the Peace Corps with an executive order early in his presidency. Exec. Order No. 10,924, 26 Fed. Reg. 1,789 (Mar. 1, 1961). The idea for the Peace Corps emerged originally in a speech given at the University of Michigan, while Kennedy was still campaigning for the presidency. *The Founding Moment*, PEACECORPS.GOV (Feb. 5, 2017, 4:13PM), <https://www.peacecorps.gov/about/history/founding-moment/>.

3. *Fallen PCVs*, FALLEN PEACE CORPS VOLUNTEERS MEMORIAL PROJECT (Oct. 11, 2016, 10:06 AM), <http://fpcv.org/fallen-pcvs/>.

4. Lisa Rein, *Former Volunteers Sue Peace Corps*, THE WASHINGTON POST (Sept. 2, 2011), [https://www.washingtonpost.com/blogs/federal-eye/post/former-volunteers-sue-peace-corps/2011/03/23/gIQAfh3AvJ\\_blog.html](https://www.washingtonpost.com/blogs/federal-eye/post/former-volunteers-sue-peace-corps/2011/03/23/gIQAfh3AvJ_blog.html).

5. As quoted in Rein's article, the complaint stated that "[i]f the Peace Corps does not provide relevant information that enables the applicant to assess the quality of the program, the applicant should consider carefully whether or not to accept the invitation to serve . . . Applicants are being asked to spend two years of their lives as volunteers, so the least the agency can do is provide full transparency about the Peace Corps." *Id.* The typical Peace Corps term of service is two years long and the agency sends volunteers to countries around the world. *Peace Corps Two-Year Program*, PEACECORPS.GOV (Jan. 20, 2017), <https://www.peacecorps.gov/volunteer/is-peace-corps-right-for-me/two-year-program/>.

6. Volunteers have served in more than 140 countries since 1961, and currently there are almost 7,000 volunteers spread across 63 countries around the world. *Fast Facts*, PEACECORPS.GOV (Oct. 11, 2016), <https://www.peacecorps.gov/news/fast-facts/>.

example, volunteers are often almost entirely reliant on the agency and its in-country infrastructure for medical care, safety and security information, and support.<sup>7</sup> Even for returned volunteers, adequate medical care for injury or illness that occurred during service is difficult to obtain.<sup>8</sup> Officers in the Foreign Service, government aid organizations, or American embassies are frequently in similar positions of reliance on the United States government for healthcare and support.

With such control over the health and safety of its volunteers and officers, one might expect the government to be liable for its duty of care where a breach of that duty caused harm.<sup>9</sup> Of course, the government's failure to observe its duty of care has and does occur from time to time: for example, the death of volunteer Nicholas Castle in 2014 was described by *The New York Times* as "a trail of medical missteps."<sup>10</sup> In 2015, CBS

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7. See, e.g., *Sierra Leone: Health*, PEACECORPS.GOV (Feb. 5, 2017), <https://www.peacecorps.gov/sierra-leone/preparing-to-volunteer/health/>. The Peace Corps provides volunteers with "all necessary vaccinations, medications, and information to stay healthy." *Id.* A full-time medical officer works at each Peace Corps country post and is responsible for the medical care and health of volunteers during service, in addition to sending volunteers prescription medication. *Id.*

8. *Excerpts from RPCVs about Being Medically/Bureaucratically Displaced*, Health Justice for Peace Corps Volunteers, [http://healthjusticeforpeacecorpsvolunteers.org/historical\\_overview\\_2.html](http://healthjusticeforpeacecorpsvolunteers.org/historical_overview_2.html) (last visited Jan. 16, 2017).

9. Duties of affirmative action to prevent harm do, in some circumstances, exist and generally impose a duty of care where a special relationship exists. See, e.g., RESTATEMENT (SECOND) OF TORTS § 315 (AM. LAW INST. 1965). This note will assume that the government owes volunteers working abroad a reasonable duty of care with regard to their safety. The focus of the analysis will be on the ability to litigate that duty of care under the Federal Tort Claims Act.

10. Sheryl Gay Stolberg, *Trail of Medical Missteps*, N.Y. TIMES (July 25, 2014), [http://www.nytimes.com/2014/07/26/world/asia/peace-corps-death-china-medical-missteps.html?\\_r=0](http://www.nytimes.com/2014/07/26/world/asia/peace-corps-death-china-medical-missteps.html?_r=0). After Castle's death, eighteen months passed without an official report from the Peace Corps about the cause. *Id.* In August of 2014, Castle's family filed a federal tort lawsuit against the agency for "negligent, careless and reckless medical care and treatment provided to [Castle] by the United States Peace Corps and the acts and omissions of (the doctor who initially treated him)." Karen Rarey, *Brentwood Couple Files Claim Over Son's Death While Serving the Peace Corps*, THE MERCURY NEWS (Sept. 11, 2014), <http://www.mercurynews.com/2014/09/11/brentwood-couple-files-claim-over-sons-death-while-serving-the-peace-corps/>. A report on the death of Castle finally emerged, in which the Peace Corps' inspector general found that "cascading delays and failures in the treatment" of Mr. Castle were a factor in the death, and that "the Peace Corps doctor . . . had failed to use prudent judgment." Sheryl Gay Stolberg, *Report Faults Care of Peace Corps Volunteer*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/world/report-faults-care-of-peace-corps-volunteer.html>; see also Kathy A. Buller, Office of Inspector General, *Investigative Review of the Circumstances Surrounding the Death of a Volunteer in Peace Corps/China*, PEACECORPS.GOV (Nov. 17, 2014), [http://files.peacecorps.gov/multimedia/pdf/policies/PCIG\\_Investigative\\_Review\\_of\\_a\\_Volunteer\\_Death\\_in\\_Peace\\_Corps\\_China.pdf](http://files.peacecorps.gov/multimedia/pdf/policies/PCIG_Investigative_Review_of_a_Volunteer_Death_in_Peace_Corps_China.pdf). "The inspector general's report . . . cites numerous medical lapses strongly suggesting that Mr. Castle's death could in fact have been prevented, although it does not

News obtained a report from the Peace Corps that found that about one in five volunteers reported they had been sexually assaulted during their service.<sup>11</sup> The report was a follow-up to a 2011 report, finding that “Peace Corps’ safety and security failures have been a recurrent problem with tragic consequences for thousands of volunteers.”<sup>12</sup>

Medical care for Peace Corps volunteers in particular has been the recent subject of tort litigation in federal court.<sup>13</sup> In the 2016 case of *Thompson v. Corps*, pro se plaintiff-volunteer Sara Thompson brought suit against the Peace Corps for damages sustained as a result of the agency’s alleged negligent prescription of the anti-malarial drug mefloquine.<sup>14</sup>

Thompson brought the claim under the Federal Tort Claims Act (FTCA).<sup>15</sup> The FTCA waives U.S. government sovereign immunity that would otherwise bar claims against the federal government in some circumstances.<sup>16</sup> Thompson’s case, however, was dismissed without reaching the merits of her claim because of another FTCA provision, the “Foreign Country Exception.”<sup>17</sup> The Exception bars any claim brought under the FTCA “arising in a foreign country.”<sup>18</sup> Relying on a bright-line rule adopted by the Supreme Court in 2004,<sup>19</sup> the court in *Thompson* determined that because the injury occurred in Burkina Faso, the

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explicitly blame the Peace Corps.” Stolberg, *supra*. The doctor responsible for Castle’s care had been vetted and hired through the Peace Corps’ national office in Washington, D.C. *Id.*

11. *Peace Corps Volunteers Blamed, Punished for Reporting Sexual Assault?*, CBS NEWS (Nov. 30, 2015), <http://www.cbsnews.com/news/cbs-news-finds-peace-corps-volunteers-blamed-fired-after-reporting-sexual-assault/>. The report suggested systemic misconduct and mishandling of victims’ cases and their subsequent psychological and medical care. *Id.*

12. Joshua Norman, *Peace Corps Regrets Response to Rapes, Deaths*, CBS NEWS (May 11, 2011), <http://www.cbsnews.com/news/peace-corps-regrets-response-to-rapes-deaths/>.

13. *Thompson v. Corps*, 159 F. Supp. 3d 56 (D.D.C. 2016).

14. *Id.* at 57-58. The FDA issued a warning regarding the use of Mefloquine as an anti-malarial drug, which had been used extensively by the American military and the Department of Defense. Dr. Remington Nevin, *Mefloquine: The Military’s Suicide Drug*, THE HUFFINGTON POST (Sept. 25, 2013), [http://www.huffingtonpost.com/dr-remington-nevin/mefloquine-the-militarys-b\\_3989034.html](http://www.huffingtonpost.com/dr-remington-nevin/mefloquine-the-militarys-b_3989034.html).

According to Dr. Nevin, a former Army epidemiologist and preventative medicine officer, the drug “is neurotoxic and can cause lasting injury to the brainstem and emotional centers in the limbic system. As a result of its toxic effects, the drug is quickly becoming the ‘Agent Orange’ of this generation, linked to a growing list of lasting neurological and psychiatric problems including suicide.” *Id.*

15. *Thompson*, 159 F. Supp. 3d at 60.

16. *See* 28 U.S.C. § 1346(b) (2012).

17. 28 U.S.C. § 2680(k) (2012) [Hereinafter *Exception*].

18. *Id.*

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

government had not waived its sovereign immunity to such a claim, and it was therefore barred.<sup>20</sup> Several similar cases have since been quickly dismissed relying on this bright-line rule regarding injuries that occur outside the territorial United States and its possessions.<sup>21</sup> Instead, a volunteer's path to medical care provided by the government for Peace Corps-related injury goes through the Department of Labor and, as a government task-force found, can take years or even decades to resolve.<sup>22</sup>

This Note will address the court's historical and contemporary interpretations of the Foreign Country Exception in light of the legislative intent of the FTCA and its case law. In sum, it will recommend an approach to the interpretation of the foreign-country exception of the FTCA similar to the approach taken by Justice Ginsburg's concurring opinion in *Sosa v. Alvarez-Machain*.<sup>23</sup> Part I addresses the background of common law sovereign immunity, and the legislative history of the FTCA and its foreign country exception. Part II examines federal cases that have developed a two-prong analysis of the Exception.<sup>24</sup> It also revisits the 2004 Supreme Court decision in *Sosa v. Alvarez-Machain*.<sup>25</sup> Part III explores suits between private parties where injuries occurred abroad, and when United States courts have allowed such claims. Part IV argues that the

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20. *Thompson*, 159 F. Supp. 3d at 63.

21. *See, e.g., Hernandez v. United States*, 757 F.3d 249, 258 (5th Cir. 2014) (holding that a wrongful death claim by the family of a teenage boy, standing on the Mexican side of the border, who was shot and killed by a U.S. Border Patrol Agent, standing on the American side, was barred by the Exception), adhered to in part on reh'g en banc, 785 F.3d 117 (5th Cir. 2015), vacated and remanded on other grounds sub nom. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); *Gross v. United States*, 771 F.3d 10, 12 (D.C. Cir. 2014) (a subcontractor's claim against USAID for inadequate warning and training resulting in injury in Cuba was dismissed under the Exception); *Ortega-Chavez v. United States*, No. 11-CV-1507 BEN DHB, 2012 WL 5988844, at \*1 (S.D. Cal. Nov. 29 2012) (same holding as in *Hernandez* under almost identical circumstances); *Harbury v. Hayden*, 444 F. Supp. 2d 19, 25-26 (D.D.C. 2006) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and barring a claim for injury in Guatemala caused by people working for the CIA), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008).

22. *Ex-Volunteers Accuse Peace Corps of Health Care Neglect*, CBS NEWS (Dec. 14, 2015), <http://www.cbsnews.com/news/peace-corps-report-lack-of-health-care-medical-reimbursement-for-returning-volunteers/>. Many volunteers report being satisfied with medical care during and after their service, but some interviewed for the news story described the current method of making claims for medical care through the Department of Labor as a "heavy bureaucratic mess." *Id.*

23. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703 (2004) (Ginsburg, J. concurring).

24. 28 U.S.C. § 2680(k). *See infra* note 33, at 608-12. The analytical history of the exception began with cases focusing on the meaning of the words "foreign country," in the Exception, while later cases shifted their focus to the meaning of "arising in." *Id.*

25. 542 U.S. 692 (2004).

bright line rule adopted by the majority in *Sosa* is ill-equipped to serve the purposes of the FTCA and the Exception. Finally, Part V proposes a broader tort analysis under the Exception that provides tort claimants a forum to make a case for causation under traditional tort doctrines. The Note concludes that the broader analysis proposed is more in line with the interpretation of the substantive provisions of the FTCA, and also with other federal cases where tortious injury outside the United States and its territories was permitted to move forward.<sup>26</sup>

#### I. THE HISTORY OF THE FTCA AND SOVEREIGN IMMUNITY

Before the passage of the FTCA in 1946, claims against the United States government were resolved through congressional bill, a time-consuming and unwieldy process.<sup>27</sup> Such claims required legislative action because of the common law jurisprudential doctrine of sovereign immunity, which “provides that a sovereign state can be sued only to the extent that it has consented to be sued and that such consent can be given only by its legislative branch.”<sup>28</sup> The FTCA does not itself create a cause of action against the government, however, it is merely a waiver of this common law immunity.<sup>29</sup>

The operative provision waiving sovereign immunity under the FTCA, § 1346, provides a United States district court with exclusive jurisdiction over all civil claims in which the United States is a defendant.<sup>30</sup> The provision waives sovereign immunity “where the United States, if a

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26. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 580 F. Supp. 1242, 1254 (E.D.N.Y. 1984) (holding that decisions to develop, use, and continue to use Agent Orange were made within the United States, and therefore the Exception was not a bar to injury claims).

27. Although not a complete bar to claims arising from tortious conduct, before the FTCA citizens would have to petition congress for specific legislative relief associated with their injury or injuries. See generally Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L. J. 1105, 1107-08 (2009). Before passage of the FTCA in 1946, Congress was burdened with thousands of claim bills each session. *The Federal Tort Claims Act*, 56 YALE L. J. 534, 535 (1947).

28. Figley, *supra* note 27, at 1107.

29. “The FTCA was designed primarily to remove the sovereign immunity of the United States from lawsuits in tort and, with certain specific exceptions, to render the government liable in tort as a private individual would be under like circumstances.” *Thompson*, 159 F. Supp. 3d at 60 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004)) (internal quotation marks omitted).

30. 28 U.S.C. § 1346(b) (2012).

private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”<sup>31</sup> There being no federal tort law, the act directs courts to look to the place where the “act or omission” occurred in order to determine the law that applies in any particular case.<sup>32</sup> The FTCA thus served the purposes behind its enactment: that there be an increase in the government’s responsibility in tort in the interests of “justice and fair play”;<sup>33</sup> that the FTCA render the government liable as a private individual would be;<sup>34</sup> and that Congress be relieved of some of the burden of the thousands of claim bills brought before the legislature each session.<sup>35</sup>

If sovereign immunity is a moat around the United States government protecting it from tort litigation, the FTCA is a drawbridge over which certain claims may pass.<sup>36</sup> The Exception, which barred the claim in *Thompson*, bars some claims brought under the FTCA against the United States government.<sup>37</sup>

The Foreign Country Exception states that the waiver of sovereign immunity described in § 1346(b) of the FTCA shall not apply to “any claim arising in a foreign country.”<sup>38</sup> Congress included this limitation because without it, the Government might be subject to foreign law under § 1346(b).<sup>39</sup> Thus, courts have interpreted the purpose of this exception as congressional unwillingness to allow the United States to be subject to

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31. *Id.*

32. *The Federal Tort Claims Act*, 56 YALE L. J., 534, 536 (1947).

33. Kelly McCracken, *Away from Justice and Fairness: The Foreign Country Exception to the Federal Tort Claims Act*, 22 LOY. L.A. L. REV. 603, 616 (1989) (quoting COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *Sovereign Immunity: The Tort Liability of Government and Its Officials* 43 (1979)).

34. 28 U.S.C. § 2674 (2012). “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.” *Id.*

35. See Figley, *supra* note 26, at 535; McCracken, *supra* note 33, at 606-07.

36. *Jaffee v. United States*, 592 F.2d 712, 717 n.10 (1979). The colorful metaphor described in this case is used here for its helpful illustration of the concept.

37. See *Thompson*, 159 F. Supp. 3d at 63.

38. 28 U.S.C. § 2680(k).

39. Assistant Attorney General Francis M. Shea spoke before Congress: “Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.” See *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. On the Judiciary*, 77th Cong., 35 (1942) (statement of Francis M. Shea, Assistant Attorney General) [Hereinafter *Hearings*].

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liability based on the laws of a foreign power.<sup>40</sup>

## II. CASES INTERPRETING THE FTCA'S FOREIGN COUNTRY EXCEPTION

The meaning of the Exception in the statute has been the subject of several federal court cases involving tort claims brought by U.S. government aid workers and volunteers working abroad.<sup>41</sup> Until recently, the analysis of this provision was largely in line with the overall congressional intent behind the passage of the FTCA in 1946,<sup>42</sup> and with the intent of the Exception more specifically as found in past case law.<sup>43</sup>

Interpretation of the statute in courts since passage in 1946 has focused on two questions: (1) what is a “foreign country” within the meaning of the statute,<sup>44</sup> and (2) what actions or injuries constitute a tort claim “arising in” a foreign country?<sup>45</sup> The Supreme Court first interpreted the

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40. *United States v. Spelar*, 338 U.S. 217, 221 (1949); *Sami v. United States*, 617 F.2d 755, 762 (D.C. Cir. 1979).

41. *See generally* McCracken, *supra* note 33, at 608-10. *See also* *Straneri v. United States*, 77 F. Supp. 240 (E.D. Pa. 1948) (plaintiff could not recover for injuries caused by a negligently operated motorcycle by a member of the United States Army in Ghent, Belgium); *Brunell v. United States*, 77 F. Supp. 68 (S.D.N.Y. 1948) (plaintiff could not recover for injury suffered in Saipan because United States trusteeship of the island did not change its status as a foreign country); *Meredith v. United States*, 330 F.2d 9 (9th Cir. 1964) (a claim arising out of injury on the grounds of the United States embassy in Bangkok, Thailand was barred because it arose in a foreign country).

42. *See* McCracken, *supra* note 33, at 612-13. McCracken's article calls for an expansive use of the “Headquarters Doctrine,” a concept this note will address below. This doctrine previously allowed suits to move forward in spite of the Exception, even though the injury complained of occurred in a foreign country. The Headquarters Doctrine was the Ninth Circuit's rationale in ruling that the plaintiff's claim in *Sosa* was not barred by the Exception. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 692 (2004); *see also* *Alvarez-Machain v. United States*, 331 F.3d 604, 638 (9th Cir. 2003). The Headquarters Doctrine was explicitly abrogated by the Supreme Court in *Sosa*, 542 U.S. at 692-93.

43. *Spelar*, 338 U.S. at 221.

44. *See id.* (holding the land leased by the U.S. in Newfoundland met the definition of “foreign country”); *United States v. Meredith*, 330 F.2d 9, 10-11 (1964) (holding that injury at an American embassy in Thailand was in a “foreign country”); *Brunell v. United States*, 77 F. Supp. 68, 72 (1948) (holding that “foreign country” is any area that is not “a component part or political subdivision of the United States”); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 4 (1932) (involving the court's interpretation of the meaning of “foreign country” within the meaning of the internal revenue code).

45. *See* *Beattie v. United States*, 756 F.2d 91, 96 (D.C. Cir. 1985) (holding that the negligent acts of Navy air-traffic controllers which occurred within the United States, and which merely had their operative effect in Antarctica, were not acts which arose in a foreign country, and thus were not barred by the Exception); *Eaglin v. United States*, 794 F.2d 981, 983-84 (5th Cir. 1986) (finding the Plaintiff failed to show a causal nexus between the alleged negligent acts from which the claim arose, and the

foreign country exception in *United States v. Spelar*,<sup>46</sup> considering only the first question: the meaning of “foreign country” in the statute.

*A. The Meaning of “Foreign Country” in § 2680(k)*

In *Spelar*, a widow brought a claim against the United States government for negligent operation of Harmon Field, which she alleged caused the wrongful death of her husband, a Navy pilot, in a plane crash.<sup>47</sup> The claim implicated the Exception because Harmon Field was located in Newfoundland, and the land for the airfield was under a ninety-nine year lease to the United States from Great Britain.<sup>48</sup> The *Spelar* Court did not analyze the meaning of the “arising in” language of the statute as that was not in dispute, but instead decided the case solely on the question of what Congress meant by “foreign country” within the statute.<sup>49</sup> The Court analyzed the legislative history of the FTCA and held that the amended foreign country exception in its final form in the FTCA shows that “[Congress] was unwilling to subject the United States to liabilities depending upon the laws of a foreign power.”<sup>50</sup> Therefore, because the widow’s claim would be “premised entirely upon Newfoundland’s law,” it must be barred by the foreign country exception.<sup>51</sup>

Although the decision was unanimous, Justice Frankfurter’s concurrence is notable because he criticizes the majority’s holding as focused only on defining “foreign country” too simply and mechanically, and lacking further inquiry into the underlying issue of sovereignty and

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actual injury occurring in Germany); *and* Leaf v. United States, 588 F.2d 733, 736 (9th Cir. 1978) (holding that allegations that a government agency committed negligent acts in the United States “were sufficient to raise reasonable questions about agency and proximate cause.”).

46. 338 U.S. 217 (1949).

47. *Id.* at 218.

48. *Id.*

49. *Id.* at 219.

50. *Id.* at 221. Congressional hearings on the FTCA included discussion of an earlier version of the exception. Hearings in 1942 by the House Committee on the Judiciary discussed a draft of the bill that barred claims “arising in a foreign country *in [sic] behalf of an alien*” (emphasis added). *See* H.R. 5373, 77th Cong., 2d Sess., s 303 (12). Assistant Attorney General Francis M. Shea recommended the removal of the last five words saying, “[c]laims arising in a foreign country have been exempted from this bill, H.R. 6463, whether or not the claimant is an alien.” *Id.* at 29, 35, 66. The Justice Department’s revised version was H.R. 5373, and was adopted into law by 60 Stat. 812 (1946).

51. *Spelar*, 338 U.S. at 221.

United States control of the location of the injury: “[A] ‘foreign country’ in which the United States has no territorial control does not bear the same relation to the United States as a ‘foreign country’ in which the United States does have the territorial control that it has in the air base in Newfoundland.”<sup>52</sup> Justice Frankfurter cautioned that, “[t]o assume that terms like ‘foreign country’ and ‘possessions’ are self-defining, not at all involving a choice of judicial judgment, is mechanical jurisprudence at its best.”<sup>53</sup> However, he agreed with the majority that the Exception covered the claim and therefore sovereign immunity in this instance had not been waived.<sup>54</sup>

*B. The Meaning of “Arising In” in § 2680(k)*

The broad interpretation of “foreign country” found by the *Spelar* court continued to bar claims arising outside the United States and its possessions.<sup>55</sup> However, using the *Spelar* Court’s analysis, the D.C. Circuit Court held in 1985 that a claim for an injury that occurred in Antarctica was *not* barred.<sup>56</sup> In *Beattie v. United States*, plaintiffs sought relief under a wrongful death claim.<sup>57</sup> The plaintiffs in *Beattie* sought

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52. *Id.* at 223 (Frankfurter, J., concurring). In drawing this distinction, Justice Frankfurter compares what he sees as the mutable meanings of “foreign country” and “possession of the United States” with the immutable meanings the majority seems to give each of these concepts. *Id.* Justice Frankfurter would not so categorically demarcate a “foreign country,” where the FTCA would be inapplicable, from a United States “possession,” where it would be applicable, based solely upon the terminology used to describe the situs of the omission. *Id.* at 224.

53. *Id.* at 223.

54. *Id.* at 224. Justice Frankfurter strikes a note of caution on account of the court’s decision interpreting the term “possessions” in the Fair Labor Standards Act in *Vermilya-Brown Co. v. Connell*, finding that in the context of that act, “possession” included a military base in Bermuda. *Vermilya Brown Co. v. Connell*, 335 U.S. 377, 390 (1948).

55. *See Meredith v. United States*, 330 F.2d 9, 10-11 (9th Cir. 1964) (holding that claims arising on the grounds of a United States embassy in Thailand were likewise in the category of those arising in a “foreign country” and were therefore barred); *Straneri v. United States* 77 F. Supp. 240, 241 (E.D. Pa. 1948) (holding that “foreign country” meant “all lands other than those for which [Congress] is the supreme legislative body. That is . . . the tort must have been committed on lands within the boundaries of the United States or its territories and possessions.”).

56. *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1985).

57. *Id.* at 92. Plaintiffs alleged that the negligence of United States Navy Air Traffic Controllers at McMurdo Naval Air Station in Antarctica caused the crash of an Air New Zealand plane in 1979, killing all passengers on board. After the government filed a motion to dismiss, the D.C. Circuit held that Antarctica was not a “foreign country” within the meaning of the statute, and therefore denied the

recovery under the FTCA for the deaths of family members in an airplane crash allegedly caused by air-traffic controller negligence at McMurdo Naval Air State in Antarctica.<sup>58</sup> Citing *In Re Agent Orange Product Liability Litigation*,<sup>59</sup> the *Beattie* court found that “[those cases] support[] the proposition that § 2680(k) [i.e. the Exception] is not a bar to jurisdiction over cases arising at least in part outside the United States, and in areas where there is no theoretical justification for application of foreign law.”<sup>60</sup> Thus, injury that occurs in places outside the United States and its possessions is not *necessarily* a bar to a valid tort claim, so long as proximate causation between domestic negligence and foreign injury can be adequately alleged by the plaintiff.<sup>61</sup>

The *Beattie* court summarized a series of earlier federal cases and began to shift the analysis of § 2680(k) away from the exact meaning of “foreign country,” instead labeling earlier cases interpreting § 2680(k) as the “operative effect” cases.<sup>62</sup> The *Beattie* court found that:

These operative effect cases related “not so much the definition of ‘foreign country,’ but to the meaning of ‘arising in.’ They determine that ‘arising in’ does not necessarily refer to the situs of the injury, but to *the situs of the negligence*. The operative effect cases support subject matter jurisdiction over a portion of the plaintiffs’ claims in this case, those which have been characterized as the ‘headquarters claims.’”<sup>63</sup>

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government’s motion. *Id.*

58. *Id.*

59. 580 F. Supp. 1242 (E.D.N.Y. 1984), *aff’d*, 745 F.2d 161 (2d Cir. 1984); *see also In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1221 (E.D.N.Y. 1985). Litigation was ultimately settled between the chemical companies and the individual tort claimants. *See Procedural History of the Agent Orange Product Liability Litigation*, 52 BROOK. L. REV. 335, 339 (1986). Various appeals and cross-appeals challenged the adequacy of the settlement in the following years, but after the United States ceased to be a defendant, the issue of the FTCA and the Exception was not raised again during the litigation. *Id.* at 340.

60. *Beattie v. United States*, 756 F.2d 91, 98 (D.C. Cir. 1985). (“*Agent Orange*, like the present case, involved an undetermined mix of acts or omissions, some occurring within the United States and others in a distant land, all contributing to the harm complained of.”).

61. *Id.*

62. *Id.* at 96.

63. *Id.* (emphasis added). The *Beattie* court refers to *Sami v. United States*, in which an Afghan economist was falsely arrested by German police, in Germany, under the orders of a United States official. The court in *Sami* found that because “the instructions to make the arrest and most of the operative facts in *Sami* occurred in the District of Columbia, this Court determined that § 2680(k) was not a bar, because the case actually arose in the United States.” *Id.* (analyzing *Sami*, 617 F.2d 755 (D.C. Cir. 1979)).

The court in *Beattie* would find grounds for relief by examining the claim under what would later become known as the “Headquarters Doctrine.”<sup>64</sup> This reasoning mirrors Supreme Court and federal circuit choice-of-law decisions holding that the applicable state tort law to be applied under the FTCA for multistate tort claims is the jurisdiction where the negligent act or omission took place, not necessarily where that act or omission had its “operative effect.”<sup>65</sup> The rationale for allowing Headquarters Doctrine claims was that the scheme of the FTCA generally was focused on the location of the wrongful act or omission,<sup>66</sup> not the place of the injury.<sup>67</sup>

*C. A Return to ‘Foreign Country’ Analysis and the Decline of the  
Headquarters Doctrine*

*Beattie* was narrowly abrogated by a 1993 Supreme Court decision, *Smith v. United States*, deciding that Antarctica was a “foreign country” within the meaning of the Exception.<sup>68</sup> Considering a similar fact pattern to the situation in *Beattie*,<sup>69</sup> the Supreme Court narrowly held that *not* defining Antarctica as a foreign country under the FTCA would lead to an absurd result when combined with § 1346(b) of the FTCA, because that

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64. *Beattie*, 756 F.2d at 98; compare *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), with *Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir. 1986) (finding that “a headquarters claim exists where negligent acts in the United States proximately cause harm in a foreign country.”).

65. See generally 35 Am. Jur. 2d, Federal Tort Claims Act § 74; see also *Richards v. United States*, 369 U.S. 1, 10 (1962) (holding in a domestic, multistate tort action that the FTCA directs courts to look first to the place where the negligence took place, not where the negligence had its operative effect); *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3rd Cir. 2000); *Hitchcock v. United States*, 665 F.2d 354, 359 (D.C. Cir. 1981); *Raflo v. United States*, 157 F. Supp. 2d 1, 8 (D.D.C. 2001).

66. See generally 28 U.S.C. § 1346(b)(2012); *Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978) (allowing a headquarters claim for a negligently planned DEA investigation in Mexico); *Eaglin v. United States*, 794 F.2d 981, 983-84 (5th Cir. 1986) (dismissing a slip-and-fall claim on a military base in West Germany finding that the plaintiff failed to allege “a plausible proximate nexus or connection between act or omissions in the United States and the resulting damage or injury in a foreign country”); and *Sami*, 617 F.2d at 761 (finding that the entire statutory scheme of the FTCA focuses on where a negligent act or omission occurred and thus negligent acts in the United States that cause foreign harm are not barred by the Exception).

67. *Sami*, 617 F.2d at 762 n.7.

68. 507 U.S. 197 (1993).

69. *Id.*

provision directs courts to look to the place where the act or omission occurred in order to determine the choice of law for the tort claim.<sup>70</sup> If Antarctica were not a “foreign country” within the meaning of § 2680(k) such that the FTCA applied to a claim arising therein, then 1346(b) would direct courts to look to Antarctic tort law to resolve the case, which obviously does not exist and where it is notoriously difficult to get a court date.<sup>71</sup> This absurdity ruled out such an interpretation for the Court in *Smith*.<sup>72</sup> The *Smith* Court did not specifically address where the claim arose with regard to the negligent act or omission.<sup>73</sup>

The analysis in *Smith* did not discuss the Exception’s legislative purpose to keep the United States from being subject to a foreign power’s tort law. Instead, the Court was more concerned with the fact that the FTCA directed courts to look to sovereignless places without any formal law whatsoever.<sup>74</sup> In a prescient dissent in *Smith*, Justice Stevens highlighted the problem the Court’s broad construction of the Exception’s language might pose for these sovereignless places, especially in outer space.<sup>75</sup>

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70. *Smith*, 507 U.S. at 201-02.

71. *Id.*

72. *Id.* The court further explained its conclusion noting that there is a presumption against the FTCA being applied extraterritorially. *Id.* at 197. As noted by Justice Stevens in his dissenting opinion, however, the FTCA has been held to be applicable extraterritorially in cases involving injury on the high seas. *Id.* at 207 (Stevens, J., dissenting).

73. *Id.* at 199 (majority opinion). The plaintiff’s husband died after falling down a crevasse while hiking near McMurdo station in Antarctica: “Petitioner filed this wrongful-death action against the United States under the FTCA in the District Court for the District of Oregon, the district where she resides. Petitioner alleged that the United States was negligent in failing to provide adequate warning of the dangers posed by crevasses in areas beyond the marked paths. It is undisputed that petitioner’s claim is based exclusively on acts or omissions occurring in Antarctica.” *Id.*

74. *Id.* at 201-02.

75. *Id.* at 205 (Stevens, J., dissenting). In an article examining the issue of the FTCA’s coverage of outer space, the author notes, “the courts’ regular and express application of the FTCA to the sovereignless region of the high seas between the time it was enacted and 1960, when the SIA was amended to provide an exclusive but comparable remedy, undermines any suggestion that the Act should not be applied extraterritorially.” Lauren S. B. Bornemann, *This Is Ground Control to Major Tom...Your Wife Would Like to Sue But There’s Nothing We Can Do...The Unlikelihood That the FTCA Waives Sovereign Immunity for Torts Committed By United States Employees in Outer Space: A Call for Preemptive Legislation*, 63 J. AIR L. & COM. 517, 529 (1998); see also *Smith*, 507 U.S. at 207 (Stevens, J., dissenting) (finding that the FTCA provisions at issue did not “identif[y] any territorial limit on the coverage of the Act”); *United States v. Gavagan*, 280 F.2d 319, 321 (5th Cir. 1960) (liability under the FTCA for death resulting from negligent rescue efforts on the high seas), *cert. denied*, 364 U.S. 933 (1961); *Blumenthal v. United States*, 189 F. Supp. 439, 446 (E.D. Pa. 1960) (“In the same manner as a private person is liable under the Death on the High Seas Act, so, too, is the

Indeed, American law has often found it necessary to use its own law in such circumstances, or even, as Justice Holmes found in *American Banana Co. v. United Fruit Co.*, when local law is inadequate.<sup>76</sup> Injury in outer space caused by government negligence has not often been the subject of litigation, but the 1986 Space Shuttle Challenger disaster and the Shuttle Columbia disaster in 2003 were unfortunate examples of injured parties without means of redress through the FTCA.<sup>77</sup> In his dissent, Justice Stevens expressly rejected the government's argument that the FTCA and the Exception should be interpreted as having "an exclusive domestic focus that applies only within the territorial jurisdiction of the United States."<sup>78</sup>

The relatively narrow holding in *Smith*, that the FTCA did not apply to such sovereignless anomalies as Antarctica, allowed the survival of claims that grew out of the *Beattie* and *Agent Orange* line of cases under the Headquarters Doctrine.<sup>79</sup> Under that doctrine, a plaintiff who could

Government under the Federal Tort Claims Act"), *aff'd*, 306 F.2d 16 (3rd Cir. 1962); *Roberts v. United States*, 498 F.2d 520, 525–26 (9th Cir. 1974) (noting that FTCA waived sovereign immunity for claims under the general maritime law).

76. 213 U.S. 347, 355-56 (1909). In his opinion, Holmes stated, "no doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive." *Id.*; *see also* *Old Dominion S.S. Co. v. Gilmore*, 207 U.S. 398, 403-04 (1907) (holding that a Delaware wrongful death statute applied where injury occurred on the high seas because both parties were incorporated in Delaware and "the bare fact of the parties being outside the territory, in a place belonging to no other sovereign, would not limit the authority of the state"). American criminal law has also been held to apply extraterritorially. *See United States v. Flores*, 289 U.S. 137, 155 (1933) (finding that the language of the criminal statute meant that "an American vessel outside the jurisdiction of a state 'within the admiralty and maritime jurisdiction of the United States'; is broad enough to include crimes in the territorial waters of a foreign sovereignty.").

77. Adam Liptak, *Loss of the Shuttle: The Courts; No Legal Precedent Is Seen Should Columbia Families Choose to Sue*, N.Y. TIMES (Feb. 6, 2003), <http://www.nytimes.com/2003/02/06/us/loss-shuttle-courts-no-legal-precedent-seen-should-columbia-families-choose-sue.html>. Four families of astronauts killed on the Shuttle Challenger reportedly settled their case for \$750,000. Ronald J. Ostrow, *4 Challenger Families Get Settlement: Each Will Receive At Least \$750,000; Thiokol to Pay 60%*, L.A. TIMES (Dec. 30, 1986), [http://articles.latimes.com/1986-12-30/news/mn-1303\\_1\\_morton-thiokol](http://articles.latimes.com/1986-12-30/news/mn-1303_1_morton-thiokol). Families of Shuttle Columbia astronauts reached a similar settlement in 2004 worth \$26.6 million. Jim Leusner, *\$26.6 Million Paid to Families of Seven Killed*, ORLANDO SENTINEL (Apr. 15, 2007), [http://articles.sun-sentinel.com/2007-04-15/news/0704140183\\_1\\_kalpana-chawla-settlement-details-astronauts](http://articles.sun-sentinel.com/2007-04-15/news/0704140183_1_kalpana-chawla-settlement-details-astronauts).

78. *Smith*, 507 U.S. at 206-07 (Stevens, J., dissenting).

79. *See supra* note 33, at 612.

properly allege that negligent acts or omissions occurring in the United States proximately caused his or her injury thereby stated a claim for relief under the FTCA, even if the injury actually occurred in a foreign country.<sup>80</sup> However, this more flexible doctrine—allowing claims to go forward on pleadings that could show a substantial causal connection to a breach of the government’s duty of care in a U.S. jurisdiction—ceased in 2004.<sup>81</sup>

In *Sosa v. Alvarez-Machain*, the Supreme Court adopted a bright-line rule stating that the “foreign country” exception to waiver of government’s immunity “bars *all* claims against [the] government based on any injury suffered in a foreign country, regardless of where the tortious act or omission giving rise to that injury occurred.”<sup>82</sup> With such a bright-line rule in place, the district court needed only brief analysis of the plaintiff’s claim in *Thompson* to find that the foreign country exemption barred the Peace Corps volunteer’s claim against the agency, which arose from an injury suffered while serving in Burkina Faso.<sup>83</sup> Thus, the bifurcation of claims by the Exception—those adequately alleging domestic negligence and foreign injury being allowed, and other claims alleging both foreign negligence and foreign injury being barred—ended with *Sosa*. This bright-line rule has since been followed by federal circuit courts.<sup>84</sup>

Going forward, the bright-line rule will continue to deny the claims of Peace Corps volunteers, and similarly situated U.S. government aid

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80. *Id.*

81. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703 (2004).

82. *Id.* at 712. In *Sosa*, a Mexican national, who had been acquitted in a United States court of the murder of a DEA agent in Mexico, sued the government for violation of his civil rights as a result of his capture and extradition to the United States for trial. Interestingly, the Eastern District of California declined to follow the decision in dicta on the Supreme Court’s finding in this case regarding the Alien Tort Statute (ATS), but the ATS is beyond the scope of this note. *Id.* Justice Ginsburg, while concurring in the judgment in *Sosa*, would have issued a narrower holding, while still expressly rejecting the Headquarters Doctrine used in earlier federal cases interpreting § 2680(k). *Id.* at 751 (Ginsburg, J., concurring in the judgment). Justice Ginsburg’s concurrence embraces earlier Supreme Court rulings on the FTCA and the applicable jurisdiction to a given claim based on the location of the negligence from which the injury arose. *See id.*

83. 159 F. Supp. 3d at 63. The court did not analyze any of Thompson’s substantive negligence claims, but instead decided the claim solely on the place of injury. *Id.* A related claim by Thompson under the Peace Corps Act was also dismissed. *Id.*

84. *See, e.g.*, *Hernandez v. United States*, 757 F.3d 249, 258 (5th Cir. 2014) adhered to in part on reh’g en banc, 785 F.3d 117 (5th Cir. 2015), vacated and remanded on other grounds sub nom. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017).

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workers abroad, and will prevent them from being able to seek recovery under the FTCA regardless of whether the negligence causing the injury occurred in the United States.

*D. Suits Between Private Parties Where Injury Occurred in a Foreign Country*

The FTCA makes the government liable “where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”<sup>85</sup> In suits between private parties, where the United States is not a defendant, plaintiffs are permitted to demonstrate a substantial connection between an alleged tortious act in a United States jurisdiction and injury occurring abroad for purposes of determining the propriety of venue.<sup>86</sup>

In *Estate of Abtan v. Blackwater Lodge Training Center*, a suit by families of victims killed by Blackwater security staff survived a motion to dismiss and were permitted to conduct additional discovery and amend their complaint in order to show sufficient causal connection between the injury suffered in Iraq and negligent acts by the security contractor in the United States.<sup>87</sup> Thus, the plaintiffs suing a non-government defendant were granted a forum for further discovery of tortious conduct within United States that, on a systemic level, may have given rise to their injury in Iraq.<sup>88</sup>

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85. 28 U.S.C. § 1346(b) (2012).

86. See *Estate of Abtan v. Blackwater Lodge and Training Ctr.*, 611 F. Supp. 2d 1, 8 (D.D.C. 2009). Families of civilians killed by Blackwater security contractors in Iraq brought tort action in federal court against the private security firm for injuries and death that occurred in Baghdad, Iraq. *Id.* at 3-5.

87. *Id.* at 12. In finding that dismissal of their claim was inappropriate, the court suggested that “when determining whether a substantial part of the events or omissions giving rise to the plaintiff’s claim occurred or did not occur in a particular district . . . the facts that courts focus on include the place where the allegedly tortious actions occurred *and* the place where the harms were felt.” *Id.* at 8 (quoting Charles A. Wright, Arthur R. Miller, Edward H. Cooper, *The Fallback Provision*, 14D FED. PRAC. & PROC. JURIS. § 3806.1 (4th ed.)).

88. *Estate of Abtan*, 611 F. Supp. 2d at 11. The court found, “it is entirely proper for this court to hear the plaintiffs’ claims so long as they bear a substantial connection to the District of Columbia. [] It is unclear, however, from the plaintiffs’ pleadings and memoranda of law whether such a connection

*E. Suits Against Private Parties and the United States Government, the Agent Orange Litigation*

Similarly, Vietnam War veterans, alongside their families, were allowed to bring negligence claims against chemical companies and the United States government for the use of Agent Orange during the war.<sup>89</sup> Both the claims against the United States and the United States-based chemical companies survived motions to dismiss, and the court found that the Exception was not a bar because it was “undisputed that the initial decision to use Agent Orange, the decision to continue using it, and decisions relating to the specifications for Agent Orange were made in this country.”<sup>90</sup> Although the court does not use the term “Headquarters Doctrine,” the court analyzes the government’s use of *Agent Orange* in light of the “operative effect” cases cited by *Beattie*<sup>91</sup> in finding that the government’s allegedly negligent decision-making and planning occurred in the United States.<sup>92</sup> After the initial finding that the Exception was not a

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exists in these cases. The Court would therefore be well within its discretion to simply grant the defendants’ motion to dismiss or transfer and relieve itself of further consideration of this matter. But if the plaintiffs had formally requested venue discovery on the issue of the defendants’ purported written submissions transmitted to this jurisdiction at the outset of the case, they may well have satisfied the Court’s concerns about the ambiguity of their assertions. To penalize the plaintiffs for this failure on their part would unduly elevate the formal requirements of the Federal Rules of Civil Procedure over the substantive merits of the plaintiffs’ position.” *Id.*

89. See *In re Agent Orange Prod. Liab. Litig.*, 580 F. Supp. 1242 (E.D.N.Y. 1984). There, Agent Orange was a defoliant used by the United States Army to try and reduce the jungle canopy in Vietnam, making it easier to detect enemy soldiers from the air. *Id.* Agent Orange is a dioxin and plaintiffs alleged it caused various physical injuries, including cancer, in those exposed to the chemical. *Dioxin (Agent Orange, Dowcide 7)—Military Use of Agent Orange*, AM. L. PROD LIAB. 3d § 110:33 (2016).

90. *In re Agent Orange Prods. Liab. Litig.*, 580 F. Supp. at 1255.

91. 756 F.2d 91, 96 (D.C. Cir. 1985).

92. *In re Agent Orange Prods. Liab. Litig.*, 580 F.Supp. at 1254. The claims against the chemical companies were ultimately settled, and third-party claims of wives and children of the soldiers against the United States government were dismissed under *Feres/Stencel* doctrine, another exception to the FTCA outside the scope of this note. *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 782 (E.D.N.Y. 1980); *Procedural History of the Agent Orange Prod. Liab. Litig.*, 52 *BROOK. L. REV.* 335, 339 (1986). The *Feres-Stencel* doctrine bars claims of military service members and their families for injuries incident to that military service. *In re Agent Orange Prods. Liab. Litig.*, 506 F. Supp. at 770.

bar to the claims against the government in *In re Agent Orange*, the court did not again consider that question in its ultimate dismissal of claims against the United States on other grounds.<sup>93</sup>

Thus, before *Sosa*'s bright-line rule, federal courts were willing to consider tort claims against private parties and the United States government as claims that arose within the United States because of negligent decision-making here at home. Using a consistent analytical approach to determine whether a claim arises domestically or abroad, regardless of whether a claim is against a private party or the government, would allow Peace Corps volunteers to recover for negligent domestic decision-making that causes injury outside the United States.

### III. ANALYSIS

With the holding in *Sosa* and the Supreme Court's rejection of the Headquarters Doctrine, litigants that can convincingly trace their foreign injury to a negligent act by the government in a United States jurisdiction are denied a forum for claims under the FTCA, and thereby relief, solely because that injury occurred outside United States.<sup>94</sup> This strictly territorial approach to the FTCA's waiver of sovereign immunity is at odds with the legislative intent of the Exception and the Act more generally,<sup>95</sup> and is also at odds with existing case law involving non-governmental tortfeasors.<sup>96</sup> I believe the note of caution sounded in Justice Frankfurter's concurrence in *Spelar*<sup>97</sup> foreshadowed this later difficulty in interpreting the Exception, where injuries occur outside the United States, but the FTCA could and should allow such suits to go forward.

In his majority opinion in *Sosa*, Justice Souter noted that the Supreme

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93. *Id.* at 782.

94. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 693 (2004).

95. *See generally supra* note 41.

96. *See generally supra* note 75, at 528.

97. *United States v. Spelar*, 338 U.S. 217, 223 (1949). The reader will recall that Justice Frankfurter warned against assuming "that terms like 'foreign country' and 'possessions' are self-defining, not at all involving a choice of judicial judgment," because such assumptions would be "mechanical jurisprudence at its best." *Id.* Such mechanical jurisprudence should likewise be avoided in determining the extraterritorial application of suits where injury occurs in a foreign country, but the act or omission giving rise to that injury occurred in the United States.

Court's holding in *Richards*<sup>98</sup> observed that “the general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties”<sup>99</sup>—even though that approach was ultimately contrary to the Court's holding in *Richards*. Thus, under the *Restatement (First) of Conflict of Laws*, in the case of bodily injury, the choice of law is to be “the place where the harmful force takes effect on the body.”<sup>100</sup> In the case of injury occurring in a foreign country, this necessarily would invoke foreign law and go against the expressed legislative intent of keeping the United States from being beholden to the law of a foreign sovereign.<sup>101</sup>

However, that interpretation of choice of law doctrine is not universal in American tort law.<sup>102</sup> Other states depart from the more general conflict-of-laws rule by “tak[ing] into the interests of the State having significant contact with the parties in the litigation,” in order to apply the tort law of the state where the act or omission occurred.<sup>103</sup> Ultimately, *Richards* advocates for the more flexible view of the FTCA to allow for States that depart from the general rule, “where its application might appear inappropriate or inequitable.”<sup>104</sup> In a multistate tort action, the *Richards* court rejected the defendant's assertion that “Congress intended the words ‘act or omission’ to refer to the place where the negligence had its operative effect,”<sup>105</sup> and instead concluded that Congress “enacted a rule which requires federal courts, in multistate tort actions, to look in the first instance to the law of the place where the acts of negligence took

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98. *Richards v. United States*, 369 U.S. 1, 11-12 (1962).

99. *Sosa*, 542 U.S. at 704.

100. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377, note 1 (AM. LAW INST. 1934). Interestingly, the hypothetical situation posed in the *Restatement* is the exact situation that arose in *Hernandez*. 757 F.3d 249 (5th Cir. 2014). In the hypothetical, X shoots Y where each is standing on the opposite side of the border between two states. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377, *supra*. In *Hernandez* the tortfeasor and the victim were standing on opposite sides of the border between the United States and Mexico. 757 F.3d at 255.

101. See generally *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. On the Judiciary*, 77th Cong., 35 (1942) (statement of Francis M. Shea, Assistant Attorney General).

102. *Richards*, 369 U.S. at 11-12. The Court goes on to observe that some states have moved away from the territorial rigidity of choosing applicable law based on where tortious harm affects the body. *Id.* at 12.

103. *Id.*

104. *Id.* at 13.

105. *Id.* at 10. Where the act or omission has its “operative effect” is synonymous with the place of injury. *Id.*

place.”<sup>106</sup> Thus the Supreme Court previously interpreted the FTCA to allow claims that arise in jurisdictions where the act or omission occurred, and not simply where the injury occurred. The Second Restatement suggests courts look to the “state which, with respect to that issue, has the most significant relationship to the occurrence.”<sup>107</sup> Thus, this could be either the state where the injury occurred or where the negligence occurred. Furthermore, in multi-state tort actions like that in *Richards*, it would allow the court to consolidate various cases under one umbrella-case addressing the negligent behavior of defendants in one jurisdiction. The holding in *Sosa* contradicts this analysis under *Richards* by directing courts to look only to where the injury occurred, with no consideration given to the place of the negligent act or omission.<sup>108</sup>

Government employees and volunteers working abroad may face a significant obstacle in finding tort relief against the government, which in turn may contribute to negligent decision-making and planning on a systemic level within government agencies like the Peace Corps.<sup>109</sup> Under the current interpretation of the Exception, when negligent policies cause injury abroad, those policies would be shielded from claims under the FTCA and robust American tort law would be unable to reach the negligent acts that caused the injury in the first instance.

The bright-line rule adopted by the majority in *Sosa* is discordant with past decisions interpreting the FTCA<sup>110</sup> and its choice-of-law provisions.<sup>111</sup> It is also a harsh and inequitable interpretation that, while protecting the United States from being subject to foreign law as Congress explicitly intended,<sup>112</sup> fails to render the government liable in tort as a private individual would be under like circumstances.<sup>113</sup> Such private parties have been liable in tort, even where injury occurred abroad, in the case of *In re*

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106. *Id.*

107. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW. INST. 1988).

108. *Sosa*, 542 U.S. at 712 (“[w]e therefore hold that the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred”).

109. *See supra* note 10.

110. *Richards*, 369 U.S. at 10-13.

111. *Id.*

112. *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. On the Judiciary*, 77th Cong., 35 (1942) (statement of Francis M. Shea, Assistant Attorney General)

113. *See* 28 U.S.C. § 1346(b).

*Estate of Abtan*<sup>114</sup> and even where plaintiffs sued private parties and the government under the same cause of action as in the *Agent Orange* litigation.<sup>115</sup>

The strict territoriality in *Sosa* has barred claims that bring the inequity of such an interpretation of the Exception into focus. In *Hernandez v. United States*,<sup>116</sup> a fifteen-year-old boy was shot and killed while playing on the Mexican side of the border by a United States Border Patrol Agent standing on the United States side.<sup>117</sup> Even though the court in *Richards* would have directed the analysis to where the act or omission causing the injury occurred (i.e. the firing of the gun), the Fifth Circuit relied on *Sosa* to bar the claim stating that “at all relevant times, Hernandez was standing in Mexico. Any claim will therefore necessarily be based on an injury suffered in a foreign country.”<sup>118</sup> Thus the difference between an allowable claim under the FTCA and that claim being barred is not the application of foreign law of the United States, as intended by Congress in adopting the Exception,<sup>119</sup> but is instead only a physically territorial distinction. If the *Hernandez* case were interpreted in light of the holding in *Richards*, there would be no need to consider Mexican tort law at all since the negligent act occurred in the United States.<sup>120</sup>

## V. PROPOSAL

Government workers and volunteers abroad may be more vulnerable to negligent acts or omissions committed by the United States than citizens living stateside because of their substantial reliance on medical and security services provided by the government.<sup>121</sup> Regarding the sexual

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114. *Estate of Abtan v. Blackwater Lodge and Training Ctr.*, 611 F. Supp. 2d 1, 8 (D.D.C. 2009).

115. *In re Agent Orange Prod. Liab. Litig.*, 580 F. Supp. 1242, 1254 (E.D.N.Y. 1984).

116. 757 F.3d 249 (5th Cir. 2014), adhered to in part on reh'g en banc, 785 F.3d 117 (5th Cir. 2015), vacated on other grounds sub nom. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (hearing at the Supreme Court was limited to *Bivens* issues and the border agent's qualified immunity).

117. *Id.* at 255.

118. *Id.* at 258.

119. *Hearings*, 77th Cong., 35 (1942) (statement of Francis M. Shea, Assistant Attorney General)

120. *Richards v. United States*, 369 U.S. 1, 11 (1962). The holding in *Richards* was limited to multistate tort actions, but I believe the analysis works equally well in the case of cross-border or foreign injury allegations, which I propose below.

121. *See supra* note 10.

assault of Peace Corps volunteers in 2011,<sup>122</sup> the Government Accountability Office found that “some volunteer leaders who assist in site selection and volunteer monitoring and who act as contact points in the event of an emergency do not receive adequate training and are not prepared to discharge their safety-related duties.”<sup>123</sup> Similar complaints have been leveled at the Peace Corps regarding medical care.<sup>124</sup> These government reports critical of the Peace Corps and its handling of volunteer deaths or injury have often been slow to emerge.<sup>125</sup> Such systemic issues contributing to harm abroad could be more readily and adequately addressed through robust tort litigation for claims where injury occurs in a foreign country. Such a system would properly give compensation to victims, settle disputes as to the legal rights of victims, and properly punish wrongdoers in order to deter such negligent decision-making in the future.<sup>126</sup>

Private individuals have previously been the subject of litigation where injury occurs abroad but where negligent acts or omissions occurred within the United States.<sup>127</sup> As in the *Estate of Abtan* and *Agent Orange* cases, claims adequately alleging negligent acts or omissions in the United States were permitted to move forward. Such an approach to suits under the FTCA should involve a similar analysis. Doing so would bring to light the kinds of systemic issues complained of in agencies like the Peace

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122. Laura Strickler, *Where Are Peace Corps Volunteers Most At Risk of Sexual Assault?*, CBS NEWS (May 11, 2011), <http://www.cbsnews.com/news/where-are-peace-corps-volunteers-most-at-risk-of-sexual-assault/>; Tim Mak, *Whistleblower: Peace Corps Ignored and Then Blamed Sexual Assault Victims*, THE DAILY BEAST (Nov. 30, 2015), <http://www.thedailybeast.com/articles/2015/11/30/whistleblower-peace-corps-ignored-and-then-blamed-sexual-assault-victims.html>.

123. See U.S. Gov’t Accountability Off., GAO-02-818, *Peace Corps: Initiatives for Addressing Safety and Security Challenges Hold Promise, But Progress Should be Addressed* 23 (2002). The report, authored in 2002, was critical of Peace Corps administrative training for volunteer leaders who, the report found, were serving with no or inadequate training regarding volunteer safety. Significant media focus on this issue did not emerge until nine years later in 2011. See Rein *supra* note 4.

124. See *supra* note 22.

125. See *supra* note 10. The report on the death of Peace Corps Volunteer Nick Castle was finally published almost two years after his death. Karen Rarey, *Brentwood Couple Files Claim Over Son’s Death While Serving the Peace Corps*, THE MERCURY NEWS (Sept. 11, 2014), <http://www.mercurynews.com/2014/09/11/brentwood-couple-files-claim-over-sons-death-while-serving-the-peace-corps/>.

126. RESTATEMENT (FIRST) OF TORTS § 901 (AM. LAW INST. 1939).

127. *Estate of Abtan v. Blackwater Lodge and Training Ctr.*, 611 F. Supp. 2d 1, 8-9 (D.D.C. 2009); *In re Agent Orange Prod. Liab. Litig.*, 580 F. Supp. 1242, 1254 (E.D.N.Y. 1984).

Corps.<sup>128</sup> It would also spur meaningful change within government agencies creating policies and procedures for their operations abroad. Analyzing cases under the FTCA in this manner would thus be more in line with the legislative intent of the FTCA,<sup>129</sup> and of the Exception specifically,<sup>130</sup> and it would also be more consistent with other federal court cases between private parties where the alleged injury occurred abroad but was caused by domestic acts or omissions.<sup>131</sup> Such an interpretation would also be more in line with general tort principles such as compensation for victims and encouraging the exercise of due care.

I propose that the court should move away from the rigidly territorial approach described in the bright-line ruling of *Sosa* and apply a “last significant omission” rule under 2680(k). This doctrine would allow the well-developed American tort concept of proximate causation to be the bar to tortious injury abroad caused by domestic negligence.<sup>132</sup> Such an approach to claims under the FTCA need not subject the United States to foreign law. The last significant omission rule would still require that act or omission giving rise to the claim be within the United States in order to escape being barred by the Exception. Thus, claims resulting from foreign injury may still, in some circumstances, “arise in” the United States, as demonstrated in *Hernandez*. This approach both abrogates other holdings advocating the “Headquarters Doctrine,” addressing the Court’s concern that such a doctrine threatens to swallow the Exception whole,<sup>133</sup> and this rule would also grant a forum for relief to citizens suffering injury abroad that was proximately caused by domestic government negligence.

In the case of *Thompson*,<sup>134</sup> facts were not alleged to show that the last significant omission occurred at Peace Corps in Washington, D.C., but

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128. See *supra* note 12.

129. See McCracken, *supra* note 33, at 619.

130. *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. On the Judiciary*, 77th Cong., 35 (1942) (statement of Francis M. Shea, Assistant Attorney General).

131. See, e.g., *Estate of Abtan*, 611 F. Supp. 2d 1; *In re Agent Orange*, 580 F. Supp. 1242.

132. *Sosa*, 542 U.S. at 758 (Ginsburg, J., concurring). Justice Ginsburg advocates interpreting § 2680(k) alongside the substantive provision of the FTCA, § 1346(b), finding “the choice-of-law regime of the jurisdiction in which the last significant act or omission occurred . . . has the salutary effect of avoiding the selection of a jurisdiction based on a completely incidental ‘last contact,’ while also avoiding the conjecture that alternative inquiries often entail.” *Id.* at 769-70 (quoting *Simon v. United States*, 31 F.3d 193, 204 (3rd Cir. 2003)).

133. *Sosa*, 542 U.S. at 703.

134. *Thompson v. Corps*, 159 F. Supp. 3d 56 (D.D.C. 2016).

under a *Richards* analysis, the plaintiff would at least be permitted to make her case that such a domestic act or omission caused her injury in Burkina Faso. According to one former Army Medical Officer, the widespread prescription of mefloquine is akin to the government's use of Agent Orange in Vietnam.<sup>135</sup> Similar cases could be filed for volunteers who were injured or have died abroad as a result of negligent acts or omissions that may be part of a systemic problem causing widespread harm.<sup>136</sup>

Actions brought under the FTCA involving foreign injury should be read in light of *Richards*,<sup>137</sup> especially with regard to Peace Corps volunteers whose health and safety abroad are often controlled by decisions made at the agency's headquarters in Washington, D.C. Although the holding in *Richards* was limited to tort cases involving the conflict of laws between two states,<sup>138</sup> its analysis that looks first to the place of the negligent act or omission should likewise be used in the case of foreign injury. If courts were to look first to the place of the last significant negligent act or omission, then plaintiffs adequately alleging that such acts proximately caused their injury would state a valid claim for relief. The government would thus be liable as a private individual would be under similar circumstances.<sup>139</sup> Therefore, the congressional intent of the FTCA would be properly carried out.

### CONCLUSION

Government volunteers and aid workers are among the most important international ambassadors accomplishing meaningful work around the world,<sup>140</sup> while also helping to educate people around the world about

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135. Nevin, *supra* note 14. Mefloquine, also known by its brand name, Lariam, received a "black-box" warning label from the FDA in 2013. Katie Thomas, *F.D.A. Strengthens Warnings on Lariam, an Anti-Malarial Drug*, N.Y. TIMES (July 29, 2013), <http://www.nytimes.com/2013/07/30/business/fda-strengthens-warnings-on-lariam-anti-malaria-drug.html>. Black box warnings are used with drugs with particularly severe side effects. *Id.*

136. *See supra* note 10.

137. *Richards*, 369 U.S. at 11.

138. *Id.* ("We conclude that Congress has, in the Tort Claims Act, enacted a rule which requires federal courts, in multistate tort actions, to look in the first instance to the law of the place where the acts of negligence took place.")

139. 28 U.S.C. § 2674.

140. *See Peace Corps Accomplishments: 2001-2004*, PEACECORPS.GOV (April 2005), <http://files.peacecorps.gov/multimedia/pdf/policies/accomplishments.pdf>. The open letter introduces a

American values and culture.<sup>141</sup> To help encourage Americans to participate in these important goals, the government should pledge itself to an adequate duty of care for those citizens who choose to participate in the effort. The FTCA should be allowed to render the government liable, as any private party would be, so the watchful eye of American tort law can provide relief to people injured by negligence abroad, and so that it can encourage the proper discharge of the government's duty of care.

The strictly territorial approach adopted in *Sosa* is at odds with previous interpretations of the FTCA involving multistate domestic claims,<sup>142</sup> and is antithetical to the overall purposes of the FTCA.<sup>143</sup> This approach fails to make the government liable as a private individual would be in like circumstances,<sup>144</sup> and also frustrates the interests of justice and fair play for tort victims<sup>145</sup> and past case law.<sup>146</sup> Thus the court should refocus its analysis in foreign injury cases under the FTCA to the last significant act or omission causing the injury, allowing meritorious claims to find relief without subjecting the United States to foreign law.

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report of facts, figures, and anecdotes detailing the agency's accomplishments during Vazquez's tenure as Director of the Peace Corps. *See id.* at 7.

141. *Changing Lives the World Over*, PEACECORPS.GOV (Jan. 20, 2017), <https://www.peacecorps.gov/about/>. The Peace Corps' three goals—to help (1) the people of interested countries in meeting their need for trained men and women, (2) promote a better understanding of Americans on the part of the peoples served, and (3) promote a better understanding of other peoples on the part of Americans—are a helpful illustration of the role these international aid agency's can and do serve around the world.

142. *Richards*, 369 U.S. at 11.

143. *See supra* note 33, at 624-25.

144. 28 U.S.C. § 2674.

145. *See supra* note 33, at 616.

146. *Richards*, 369 U.S. at 11.