

# JUDICIAL ASSISTANCE AS INTENDED: RECONCILING § 1782'S PRESENT PRACTICE WITH ITS PAST

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*When litigation outside the United States needs discovery inside the United States, U.S. judges provide assistance to their foreign counterparts. 28 U.S.C. § 1782 was designed to provide the statutory mechanism for this form of judicial assistance. But a recent empirical study has shown that, nowadays, a majority of requests for discovery assistance under 28 U.S.C. § 1782 come from private parties rather than from tribunals. And the proportion of private-party § 1782 requests has been growing in recent years. Drawing on the history of judicial assistance in general and § 1782 in particular, this Note argues that there are two problems when U.S. judges assist private parties abroad. One, doing so is inconsistent with the historical understanding of the judicial power vested in the federal judiciary. Two, this assistance is inconsistent with Congress's intent in legislating § 1782. To avoid these problems, this Note proposes that U.S. judges adopt the presumptive requirement that the foreign tribunal must consent to the private-party request for judicial assistance.*

INTRODUCTION .....	514
I. THE MAKING OF THE CONTEMPORARY § 1782 .....	517
A. The Development of U.S. Court Assistance in the Taking of Evidence .....	518
1. Assisting Foreign Courts.....	518
2. Assisting International Tribunals.....	520
B. The Current Law, Doctrine, and Practice .....	522
1. The Modern § 1782 .....	522
2. <i>Intel</i> and the Current Doctrine .....	525
3. Growing Practice of § 1782 Requests.....	526
II. CONSTITUTIONAL AND STATUTORY PROBLEMS .....	528
A. Constitutional Problems .....	528
1. Judicial Assistance at Admiralty .....	529

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2. Analogue in the Ecclesiastical Courts.....	531
3. Early State Laws .....	532
B. Legislative Problems .....	534
1. Pre-Legislation Statutory Purpose.....	534
2. Statutory Purpose Revealed After Legislation.....	536
III. A § 1782 TRUE TO ITS ROOTS .....	538
A. Presumptively Requiring Tribunal Consent.....	539
1. Using Discretion to Presumptively Require Tribunal Consent.....	539
2. Fitting a Presumptive Requirement of Tribunal Consent Within Existing Doctrine.....	541
B. Resolving the Constitutional and Congressional Histories.....	543
1. Constitutional Resolution .....	543
2. Congressional Intent Resolution .....	544
CONCLUSION.....	546

#### INTRODUCTION

Can a War on Terror detainee confirm that the CIA performed enhanced interrogations at black sites in Poland? Can a Hong Kong investor get evidence located in Michigan for an arbitration in Berlin? These questions were recently before the United States Supreme Court. While the former question is more intriguing than the latter, what these questions share is that they both implicate 28 U.S.C. § 1782. The detainee of the War on Terror requested the black site information from former CIA contractors using § 1782.<sup>1</sup> In the arbitration case as well, the investor used the statute to compel discovery from its opponent.<sup>2</sup> Whether used for dramatic cases touching on national security issues or run-of-the-mill commercial disputes, § 1782 is a useful discovery tool—so useful that it has lent itself in recent years to abuse.

Section 1782 allows U.S. district court judges to provide assistance to foreign or international tribunals with obtaining testimony and documents.<sup>3</sup> The district court can order a person residing or found in the district to produce testimony, a document, or other evidence.<sup>4</sup> The statute codifies the ancient principle of judicial assistance, rooted in comity: Judges of one jurisdiction help the judges of a foreign jurisdiction, and

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1. *United States v. Zubaydah*, 142 S. Ct. 959, 963 (2022).

2. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2083 (2022).

3. 28 U.S.C. § 1782(a) (2018).

4. *Id.*

they do so in hopes that the beneficiaries will do the same in due course.<sup>5</sup> As discovery requests under § 1782 become increasingly common,<sup>6</sup> the recent prominence of § 1782 requests in the Supreme Court's docket is unsurprising.

With the rise of § 1782 discovery, rethinking the contemporary practice under that statute is as important as ever. Recent empirical findings show not only significantly more usage of § 1782 but also that growing trends of § 1782 practice implicate constitutional concerns<sup>7</sup> and raise questions about how faithfully courts are carrying out Congress's will.<sup>8</sup> While in 2004 a majority of the Supreme Court declined to adopt "supervisory rules" to govern § 1782 requests, reasoning that "[a]ny such endeavor at least should await further experience with § 1782(a) applications in the lower courts,"<sup>9</sup> almost two decades of further experience have taught that practice under § 1782 needs reworking.<sup>10</sup> At stake is abuse of the judicial power of the United States.

Simply put, the problem is that § 1782 requests increasingly come not from other countries' courts or tribunals but rather from private parties, often without the relevant foreign court's knowledge.<sup>11</sup> Instead of being used to assist foreign courts, § 1782 has become a weapon in the arsenal of transnational corporations with which to attack similarly transnational competitors.<sup>12</sup> This is an abuse of the judicial power vested in the federal judiciary and a departure from Congress's intent behind § 1782.

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5. See *ZF Auto.*, 142 S. Ct. at 2088 ("After all, the animating purpose of § 1782 is comity . . .").

6. See generally Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089 (2020) (documenting the recent surge in § 1782 discovery requests). Professor Yanbai Andrea Wang found that the number of annual civil requests approximately quadrupled from 2005 to 2017, *id.* at 2109, 2167 tbl.7, and that there were 3,160 total requests during this time, *id.* at 2166 tbl.6.

7. See *infra* section II.A.

8. See *infra* section II.B.

9. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004).

10. In *ZF Automotive*, the first § 1782 case decided since 2004, a unanimous Court gave guidelines on whether certain arbitral panels come within the purview of the statute. *ZF Auto.*, 142 S. Ct. at 2089–91.

11. See *infra* section I.B.3. In this Note, "private parties" are persons, such as corporations or individuals, who are neither courts or tribunals nor officers of courts or tribunals.

12. There is concern in the context of domestic disputes that discovery may become a weapon rather than a truth-uncovering tool. See, e.g., Frank H. Easterbrook, *Comment, Discovery as Abuse*, 69 B.U. L. Rev. 635, 637–38 (1989) (defining abusive discovery requests as those made primarily to impose costs on an adversary rather than to reveal helpful information).

This Note's author learned from conversations with litigators who represent global corporations that lawyers repeatedly encounter § 1782 requests launched by transnational corporations against global competitors. These litigators noted that, often, the primary purpose of these § 1782 requests is to impose costs rather than reveal helpful information. If the discovery request has a real nexus to an existing or potential legal proceeding, the

Furthermore, § 1782 is one—even if only a small one—of the elements of the United States’ attitude toward its place in the world.<sup>13</sup> As the U.S. role in global affairs stands at a crossroads, it is important to examine the nation’s outward-facing judicial practices.

This Note rethinks the latest trends in § 1782 practice from a historical perspective. The histories of both judicial assistance for the gathering of evidence generally<sup>14</sup> and § 1782 specifically<sup>15</sup> suggest that the growing trends in § 1782 practice present two legal tensions. First, the contemporary practice of § 1782—compelling the production of evidence to fulfill § 1782 requests from private parties—is inconsistent with the boundaries of the judicial power vested by Article III of the Constitution as it would have been understood at ratification. Second, the contemporary practice of § 1782 does not fulfill the express will of Congress manifest in the statute’s legislative history. This Note suggests a rather simple judicial solution

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proceeding, much like the discovery request, is typically designed to gain a business advantage rather than to enforce a right or redress a harm.

13. The global context of domestic judicial activities is well studied. See Pamela Bookman, *Litigation Isolationism*, 67 *Stan. L. Rev.* 1081, 1121, 1135–36 (2015) (noting the negative foreign relations consequences of some judicial avoidance doctrines); William S. Dodge, *International Comity in American Law*, 115 *Colum. L. Rev.* 2071, 2132–40 (2015) (discussing certain foreign affairs advantages to judicial management of comity considerations); Maggie Gardner, *Parochial Procedure*, 69 *Stan. L. Rev.* 941, 955–57 (2017) (observing a systemic bias toward domestic law and parties). For a discussion of the foreign dimensions of U.S. judicial activity, see generally Stephen Breyer, *The Court and the World* (2015).

14. Judicial assistance in the gathering (or taking) of evidence is a general term for the kind of procedure codified at § 1782: When a tribunal seeks evidence that is found in a different jurisdiction wherein the tribunal has no authority to compel the production of the evidence, the tribunal requests the assistance of the local judge that does have the authority to compel the production of the requested evidence. The local judge’s fulfillment of the request is judicial assistance. Throughout this Note, the term “judicial assistance,” unless otherwise clear, is used as a shorthand for this practice. Judicial assistance can also include other interjurisdictional actions, such as extradition, proof or execution of foreign judgments, service of documents in foreign states, and other related items. See Harvard Rsch. in Int’l L., *Draft Convention on Judicial Assistance*, 33 *Am. J. Int’l L. (Supp.)* 15, 26 (1939).

15. The history of judicial assistance in the United States since 1855 has been helpfully sketched in several sources. See, e.g., Brief for the United States as Amicus Curiae Supporting Affirmance at 3–7, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (No. 02-572), 2004 WL 214306 [hereinafter *Intel* Brief]; Helena Tavares Erickson, Barry H. Garfinkel, Karl Geercken, Timothy G. Nelson, James M. Rhodes, Vincent J. Vitkowsky & David Zaslowsky, *Comm. on Int’l Com. Disps.*, N.Y.C. Bar, 28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration—Applicability and Best Practices 2–13 (2008), [https://www.nycbar.org/pdf/report/1782\\_Report.pdf](https://www.nycbar.org/pdf/report/1782_Report.pdf) [https://perma.cc/Y49C-9J3P] [hereinafter N.Y.C. Bar Report]; Harry LeRoy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 *Yale L.J.* 515, 540 (1953); Robert H. Smit, Tyler B. Robinson & Lauren W. Brazier, *The History of 28 U.S.C. § 1782*, in *Obtaining Evidence for Use in International Tribunals Under 28 U.S.C. Section 1782*, at 1-1, 1-1 to -20 (Edward M. Mullins & Lawrence W. Newman eds., 2020). These works do not, however, examine the history of § 1782 that antedates U.S. statutory codifications of judicial assistance.

to the growing problem: Judges should presumptively require the consent of the foreign tribunal before granting § 1782 requests.

This Note proceeds in three parts. Part I examines the history of judicial assistance in the United States, starting from the first federal statute on the subject, enacted in 1855, and culminating in the contemporary practice of the current § 1782, enacted in 1964. Section I.A traces two “strands” of laws that were ultimately fused in the current statute—one strand devoted to assisting foreign courts, the other strand devoted to assisting international tribunals. Section I.B discusses the contemporary statute and its practice as governed by Supreme Court precedent and as described by recent empirical research.

Part II analyzes the current practice based on the history of judicial assistance. Section II.A concludes, using Anglo-American legal documents from before and around the time of the Founding, that extending judicial assistance to private parties was not originally practiced as part of the judicial power vested by Article III.<sup>16</sup> Section II.B then chronicles the passage of the modern § 1782 and concludes that, based on its legislative history, neither Congress nor the statute’s chief drafter intended for § 1782 to provide assistance to private parties. Thus, the history of judicial assistance in the United States is at odds with a growing feature of its contemporary practice.

Finally, Part III proposes a solution to this tension: Courts should presumptively require foreign tribunal consent before granting § 1782 requests. Section III.A explains in detail how judges are to presumptively require tribunal consent for § 1782 requests. Section III.B explains how this proposal in fact resolves the tension described in Part II.

### I. THE MAKING OF THE CONTEMPORARY § 1782

This Part proceeds with two discussions. Section I.A discusses the two strands that combined to make § 1782: one older strand devoted to foreign courts and a second, newer strand devoted to international tribunals. In section I.B, the discussion moves to the text itself of the statute; *Intel*, the leading Supreme Court case that has shaped the way judges currently apply § 1782; and recent scholarship on the emerging contemporary practice under the statute. Overall, this Part shows that § 1782 emerged

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16. There are academic discussions about the constitutional issues relating to § 1782. See, e.g., David J. Gerber, *Obscured Visions: Policy, Power, and Discretion in Transnational Discovery*, 23 *Vand. J. Transnat'l L.* 993, 1007 (1991) (arguing that there is a potential violation of separation of powers when judges have too much discretion around transnational discovery); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *Yale L.J.* 1346, 1390–91 (2015) (discussing Article III issues with judicial assistance’s often *ex parte* nature); Wang, *supra* note 6, at 2142–45 (discussing due process concerns posed by § 1782’s lack of parity and notification requirements). This Note examines whether § 1782 is within the confines of the judicial power vested in federal courts by Article III as historically practiced.

from a long-standing regime designed to help foreign courts and tribunals, and it reports that, today, § 1782's users are increasingly neither courts nor tribunals but rather private parties.

A. *The Development of U.S. Court Assistance in the Taking of Evidence*

Today's § 1782 descends from several older statutes. Congress combined two strands of laws to make the contemporary § 1782.<sup>17</sup> Each strand related to a different recipient of judicial assistance in the taking of evidence. One strand related to foreign courts.<sup>18</sup> The other strand related to international tribunals and the litigants before them.<sup>19</sup> The history of these two strands shows how contemporary practice has departed from § 1782's beginnings. This departure is consequential, as discussed in Part II.

1. *Assisting Foreign Courts.* — The first strand that ultimately became § 1782 was designed to assist foreign courts. Congress passed the first federal law concerning letters rogatory in 1855.<sup>20</sup> In February of that year, U.S. Attorney General Caleb Cushing wrote that he had received a letter rogatory from a French court requesting assistance in the examination of a witness found in the United States.<sup>21</sup> Cushing expressed frustration that U.S. courts could not compel the requested witness to attend since there was no statute authorizing them to do so.<sup>22</sup> At Cushing's behest, Congress

17. See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2088 (2022) (describing § 1782 as a combination of “two statutory lines”); *In re NBC, Inc.*, No. M-77 (RWS), 1998 WL 19994, at \*4 (S.D.N.Y. Jan. 21, 1998) (“There are two strands of statutes which were combined in the 1964 amendments to the Statute leading to the current phrase ‘foreign and international tribunals.’”), *aff’d sub nom. NBC, Inc. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); N.Y.C. Bar Report, *supra* note 15, at 4 (describing the evolution of two strands of legislation); Smit et al., *supra* note 15, at 1-2 (“At more than one point in the history of American judicial assistance, parallel strands of legislation targeting similar issues developed separately.”).

18. *ZF Auto.*, 142 S. Ct. at 2088; *infra* section I.A.1.

19. See *infra* section I.A.2.

20. *Intel* Brief, *supra* note 15, at 3; N.Y.C. Bar Report, *supra* note 15, at 2; Jones, *supra* note 15, at 540; Smit et al., *supra* note 15, at 1-4. Letters rogatory are “a request by one tribunal to another tribunal asking the latter to obtain evidence.” Harvard Rsch. in Int’l L., *supra* note 14, at 67.

21. Rogatory Commissions, 7 Op. Att’y Gen. 56, 56 (1855); Jones, *supra* note 15, at 540.

22. Rogatory Commissions, 7 Op. Att’y Gen. at 56-57; Jones, *supra* note 15, at 540. Professor Harry LeRoy Jones notes that no statute was necessary to empower courts to entertain letters rogatory, since the power to do so was inherent in courts at common law. See Jones, *supra* note 16, at 540 n.74 (“That any domestic court has inherent power at common law to honor a letter rogatory should not be doubted.” (internal quotation marks omitted) (quoting 8 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence* § 2195a n.2 (3d ed. 1940))). Perhaps the attorney general’s inspiration for wanting a statute was the British statute of two decades prior, which empowered courts and judges in all “Colonies, Islands, Plantations, and Places under the Dominion of His Majesty in Foreign Parts” to compel testimony upon issuance of a commission, the common law analogue of the civil law’s letter rogatory. See Evidence on Commission Act 1831, 1 Will. 4 c. 22, § 1 (extending India’s courts’ power to honor discovery commissions, established in 1773 by An Act

passed “An Act to Prevent Mistrials,” allowing U.S. judges to execute letters rogatory.<sup>23</sup> The statute provided that U.S. courts could appoint a commissioner to examine witnesses and that this commissioner would have the power to compel the witnesses to appear and testify when “any court of a foreign country” addressed a letter rogatory “to any circuit court of the United States.”<sup>24</sup>

The next period in judicial assistance to foreign courts was a more constricted phase. In 1863 Congress passed a new, more limited law regulating the power of judges to honor letters rogatory.<sup>25</sup> Under the new statute, U.S. courts could provide assistance only in suits for money judgment “in which the government of such foreign country shall be a party or shall have an interest.”<sup>26</sup> In 1877, Congress appended language to § 875 of the Revised Statutes that was virtually identical to the more liberal 1855 statute.<sup>27</sup> But at the same time, §§ 4071 to 4073 of the Revised Statutes preserved the more restrictive language of the 1863 statute.<sup>28</sup> From 1867 until 1948, requests for assistance in the taking of evidence for use in foreign litigation were often denied.<sup>29</sup> Despite being more hostile to incoming requests for assistance, U.S. courts were nevertheless sending letters rogatory to judges abroad, especially for admiralty cases.<sup>30</sup>

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Establishing Certain Regulations for the Better Management of the Affairs of the East India Company, as Well in India as in Europe, 13 Geo. 3 c. 63, § 44, to other overseas British courts).

23. An Act to Prevent Mis-trials in the District and Circuit Courts of the United States, in Certain Cases, ch. 140, 10 Stat. 630 (1855) (current version at 28 U.S.C. § 1782 (2018)).

24. *Id.*

25. Courts and Congress were apparently unaware of the existence of the 1855 law, which was indexed under the heading “mistrials.” Jones, *supra* note 15, at 540 n.77.

26. An Act to Facilitate the Taking of Depositions Within the United States, to Be Used in the Courts of Other Countries, and for Other Purposes, ch. 95, 12 Stat. 769 (1863); Jones, *supra* note 15, at 540 n.77.

27. *In re Letter Rogatory From the Just. Ct., Dist. of Montreal, Can.*, 523 F.2d 562, 564 n.5 (6th Cir. 1975).

28. *Id.*

29. Jones, *supra* note 15, at 540–41; see also *In re Letters Rogatory From First Dist. Judge of Vera Cruz*, 36 F. 306, 306 (C.C.S.D.N.Y. 1888) (denying a request for assistance in connection with a smuggling investigation since it was ambiguous whether the proceedings “amount[ed] to ‘a [sic] suit for the recovery of money or property’” (quoting Rev. Stat. § 4071 (1878))); *In re Letters Rogatory of Republic of Colom.*, 4 F. Supp. 165, 165–66 (S.D.N.Y. 1933) (denying a request in aid of a customs investigation because “an investigation to discover whether a breach of the custom laws of a foreign country has been committed” did not come within the meaning of the word “suit,” which was taken to mean a civil, not criminal, case); *In re Spanish Consul’s Petition*, 22 F. Cas. 854, 854 (S.D.N.Y. 1867) (No. 13,202) (denying the petition on the basis that because the commission was not in the form of a letter rogatory and the proceedings were criminal rather than for money damages or property, they were beyond the ambits of the 1855 and 1863 statutes, respectively). For a summary of state court attitudes to foreign requests for assistance, see Jones, *supra* note 15, at 542–43.

30. See, e.g., *Rhodes v. United States*, 8 F. Supp. 124, 124 (E.D.N.Y. 1934) (admiralty; unexecuted abroad); *In re Companhia de Navegacao Lloyd Brasileiro*, 7 F.2d 235, 236 (E.D.

A return to more liberal judicial assistance ensued in 1948, when Congress passed § 1782 of the new Judicial Code, unifying the 1855 statute and the 1863 statute (and their progeny in the Revised Statutes) into one law.<sup>31</sup> The new statute no longer required that the foreign government have an interest in the proceeding.<sup>32</sup> A revision in 1949 relaxed the requirement that the request be for a civil action, allowing requests for “judicial proceeding[s].”<sup>33</sup>

The line of statutes that began by allowing U.S. district courts to execute letters rogatory became one of two strands that Congress later sought to integrate into the “new” § 1782 in 1964. The other strand, explored in the next section, comprised statutes empowering international arbitral commissions to compel testimony.<sup>34</sup>

2. *Assisting International Tribunals.* — The second strand focused on assistance to international tribunals rather than to judges or courts of foreign governments. Two episodes of international intrigue shaped the laws in this strand.

The first episode was the *I'm Alone* affair. In March 1929, a U.S. Coast Guard patrol boat suspected that the *I'm Alone*, a British ship of Canadian registry sailing in the Gulf of Mexico, was smuggling liquor.<sup>35</sup> After a hot pursuit, the Coast Guard patrol sank the schooner.<sup>36</sup> An existing 1924 convention between the United States and the United Kingdom “respecting the Regulation of the Liquor Traffic” governed the ensuing controversy. Under the so-called “Liquor Convention,”<sup>37</sup> a “Claims Commission” would arbitrate the dispute.<sup>38</sup> In 1930, at the instigation of Secretary of State Henry L. Stimson, Congress passed a law to allow the members of the

La. 1925) (admiralty); *De Villeneuve v. Morning J. Ass'n*, 206 F. 70, 70 (S.D.N.Y. 1913) (civil law); *Fields v. United States*, 27 App. D.C. 433, 442 (D.C. Cir. 1906) (criminal law).

31. Act of June 25, 1948, Pub. L. No. 80-773, § 1782, 62 Stat. 869, 949; Jones, *supra* note 15, at 541.

32. *Intel* Brief, *supra* note 15, at 4. Interestingly, the new law did not explicitly mention letters rogatory—or any device or procedure the foreign court was meant to use. See Jones, *supra* note 15, at 542.

33. Act of May 24, 1949, Pub. L. No. 81-72, § 93, 63 Stat. 89, 103.

34. See *infra* note 52 and accompanying text.

35. *Claim of the British Ship “I’m Alone” v. United States*, 29 Am. J. Int’l L. 326, 326 (1935).

36. *Id.* In contemporary international law of the sea, “[t]he hot pursuit of a foreign ship may be undertaken” by a state when the state’s authorities “have good reason to believe that the ship has violated the laws and regulations of that [s]tate.” U.N. Convention on the Law of the Sea art. 111, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397, 439 (entered into force Nov. 16, 1994). Additional restrictions apply under the Law of the Sea Convention. See *id.* The *I'm Alone* affair was one of the principal cases reflecting the right of hot pursuit under customary international law, which was codified in Article 111 of the Law of the Sea Convention. See Yoshifumi Tanaka, *The International Law of the Sea* 171–72 (2d ed. 2015) (discussing the historical importance of the *I'm Alone* case).

37. G.G. Fitzmaurice, *The Case of the I'm Alone*, 17 Brit. Y.B. Int’l L. 82, 82 (1936).

38. N.Y.C. Bar Report, *supra* note 15, at 6 n.14.



Commission to take evidence.<sup>39</sup> The law authorized each member of “an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments,” as well as its clerk or secretary, to administer oaths and issue subpoenas for the production of testimony and documentary evidence.<sup>40</sup> Thus, Congress allowed certain international tribunals to compel evidence—seemingly even without the assistance of the district courts.

The second episode was the Black Tom affair. One night in July 1916, Black Tom Island in New York Harbor caught fire and exploded.<sup>41</sup> At the time, the island was a depot for munitions that would be sent to aid the British and French in World War I.<sup>42</sup> After years of confusion and investigation, German saboteurs were deemed responsible for the explosion.<sup>43</sup> U.S. nationals brought claims against Germany for the destruction before the U.S.–German Mixed Claims Commission.<sup>44</sup> The two countries had established this commission in 1922 to resolve claims arising out of World War I.<sup>45</sup> In 1931 and 1932, the U.S. agent prosecuting the claims of U.S. nationals motioned the Commission to subpoena witnesses, but the Commission refused to grant the subpoena.<sup>46</sup> The Commission reasoned that, despite the 1930 law arising from the *I’m Alone* affair, the Commission could not issue a subpoena without the consent of both governments.<sup>47</sup>

To solve this issue, Congress amended the 1930 law.<sup>48</sup> The amendment allowed the U.S. agent to the U.S.–German arbitral commission to

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39. Hans Smit, Assistance Rendered by the United States in Proceedings Before International Tribunals, 62 Colum. L. Rev. 1264, 1264 (1962) [hereinafter Smit, Assistance Before International Tribunals].

40. Act of July 3, 1930, Pub. L. No. 71-524, §§ 1–2, 46 Stat. 1005, 1005–06 (repealed by Pub. L. No. 88-619, § 3, 78 Stat. 995, 995 (1964)).

41. NYC. Bar Report, supra note 15, at 4 n.10; Smit et al., supra note 15, at 1-8 to -9 (“The explosion ‘was heard and felt some 90 miles in every direction, even as far as Philadelphia.’” (quoting Gilbert King, Sabotage in New York Harbor, Smithsonian Mag. (Nov. 1, 2011), <https://www.smithsonianmag.com/history/sabotage-in-new-york-harbor-123968672/> [<https://perma.cc/J7TZ-3AN5>])).

42. Smit et al., supra note 15, at 1-8 to -9.

43. NYC. Bar Report, supra note 15, at 9; Smit et al., supra note 15, at 1-9.

44. NYC. Bar Report, supra note 15, at 6 n.14; see also Agreement Between the United States and Germany for a Mixed Commission to Determine the Amount to Be Paid by Germany in Satisfaction of Germany’s Financial Obligations Under the Treaty Concluded Between the Two Governments on August 25, 1921, Ger.-U.S., Aug. 10, 1922, 42 Stat. 2200.

For more on the intriguing backstory to the Black Tom incident and its role in shaping the 1930 amendment, see NYC. Bar Report, supra note 15, at 6–8; Smit et al., supra note 15, at 1-9 n.38.

45. NYC. Bar Report, supra note 15, at 6 n.14.

46. See *Lehigh Valley R.R. Co. (U.S.) v. Germany*, 8 R.I.A.A. 104, 105–06 (Mixed Cl. Comm’n 1932). For notes on the interesting procedural posture of this case, see Smit et al., supra note 15, at 1-9 n.38.

47. See *Lehigh Valley R.R. Co.*, 8 R.I.A.A. at 105–06.

48. NYC. Bar Report, supra note 15, at 7–8; Smit et al., supra note 15, at 1-10.

apply to the U.S. district court for subpoenas to require witnesses' attendance and testimony before the U.S. district court.<sup>49</sup> The power of the agent to request a U.S. district court's assistance extended only to claims in which the United States, whether on its own behalf or on behalf of its nationals, was a party claimant or respondent before an international tribunal or commission.<sup>50</sup> The amendment also gave the U.S. district court power to subpoena the requested testimony commensurate with the agent's power to request the subpoena.<sup>51</sup> Thus, the second strand ripened into a statute allowing judicial assistance to the international tribunal.

The 1930 law and the 1933 amendment were codified at 22 U.S.C. §§ 270 to 270c and 270d to 270g, respectively.<sup>52</sup> Congress did not extensively discuss the statutes while drafting them, and judges did not make much use of the statutes once they were passed.<sup>53</sup> Congress would later integrate this strand—intended to empower the U.S. agent before international arbitral commissions in which the United States had an interest—into the new § 1782 in 1964, in addition to the statutes concerning assistance to foreign courts and honoring letters rogatory and commissions.<sup>54</sup>

In each of the two strands, Congress enabled a form of judicial assistance. While in the first strand the judicial assistance is provided to foreign courts, in the second strand assistance is provided to international tribunals to which the United States is party or before which the United States has a claim.

#### B. *The Current Law, Doctrine, and Practice*

These two strands eventually fused into the modern § 1782. The discussion that follows examines how the statutory text reflects this fusion, the Supreme Court's precedent on the statute, and the growing practice of § 1782 requests. This section suggests that the practice of § 1782 requests is increasingly unlike the requests that the modern § 1782 was designed to address.

1. *The Modern § 1782.* — The modern § 1782 integrated the two existing strands discussed above and liberalized some of the parameters for granting judicial assistance. In 1958, Congress decided to overhaul

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49. Act of June 7, 1933, Pub. L. No. 73-31, §§ 5-8, 48 Stat. 117, 117-18 (repealed by Pub. L. No. 88-619, § 3, 78 Stat. 995, 995 (1964)).

50. *Id.* § 5. For more discussion on the passage of this amendment, see Smit, *Assistance Before International Tribunals*, supra note 39, at 1264 (citing S. Rep. No. 73-88, at 2 (1933)).

51. § 6, 48 Stat. at 117-18.

52. 22 U.S.C. §§ 270-270g (repealed by Pub. L. No. 88-619, § 3, 78 Stat. 995, 995 (1964)); Smit, *Assistance Before International Tribunals*, supra note 39, at 1264.

53. *Id.*

54. *In re NBC, Inc.*, No. M-77 (RWS), 1998 WL 19994, at \*4-7 (S.D.N.Y. Jan. 21, 1998), *aff'd sub nom. NBC, Inc. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).

§ 1782.<sup>55</sup> Noting “[t]he extensive increase in international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation,” Congress instituted the Commission on International Rules of Judicial Procedure.<sup>56</sup> The Commission’s instructions were, among other things, to propose legislation improving “the procedures of our State and Federal tribunals” for “the rendering of assistance to foreign courts and quasi-judicial agencies.”<sup>57</sup> Working with Professor Hans Smit and the Columbia Law School Project on International Procedure,<sup>58</sup> the Commission “drafted and recommended adoption of (1) amendments to the Federal Rules of Civil and Criminal Procedure, (2) amendments to sections of the United States Code, and (3) a Uniform Interstate and International Procedure Act, to be enacted by individual States.”<sup>59</sup> In 1964, Congress endorsed the Commission’s recommendations for amending the United States Code, verbatim, into law.<sup>60</sup>

The new § 1782, whose language remains relatively unchanged today,<sup>61</sup> reads, in relevant part, as follows:

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55. NYC. Bar Report, *supra* note 15, at 8. The congressional will to overhaul the existing legal framework for international judicial assistance seems to have been prompted by the efforts of Harry LeRoy Jones. Mr. Jones was Chief Attorney in the Justice Department’s Alien Property Bureau. The Papers of Harry LeRoy Jones, UVA L. Special Collections, <https://archives.law.virginia.edu/records/mss/85-7> [<https://perma.cc/2A6L-VGN7>] (last visited Oct. 8, 2022). In this position, Mr. Jones would have been acquainted with litigation in the United States with international dimensions as former property owners sought to recover their property from Alien Property Custodians. See Smit et al., *supra* note 15, at 1-10 n.42. Mr. Jones was later appointed director of the Commission on International Rules of Judicial Procedure. *Id.* at 1-11.

56. S. Rep. No. 85-2392, at 3 (1958), as reprinted in 1958 U.S.C.C.A.N 5201, 5202–03; see also Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743; *Intel* Brief, *supra* note 15, at 4–5.

57. § 2, 72 Stat. at 1743.

58. See Smit, *Assistance Before International Tribunals*, *supra* note 39, at 1264–65, 1264 n.7. The Columbia Law School Project director was Professor Hans Smit; future-Justice Ruth Bader Ginsburg was associate director. Sarah Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 CUNY L. Rev. 391, 397 (2004). Professor Smit also served as the reporter to the Commission on International Rules of Judicial Procedure. *In re Letter of Request From Crown Prosecution Serv. of U.K.*, 870 F.2d 686, 690 n.2 (D.C. Cir. 1989); Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 *Syracuse J. Int’l L. & Com.* 1, 1 (1998) [hereinafter Smit, *Section 1782 Revisited*].

59. *Intel* Brief, *supra* note 15, at 5 (citing Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H.R. Doc. No. 88-88, at 2 (1963)).

60. See Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995, 997 (codified at 28 U.S.C. § 1782 (2018)); Smit et al., *supra* note 15, at 1-12.

61. Congress amended the new § 1782 only in 1996 to add the words “including criminal investigations conducted before formal accusation.” National Defense Spending Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 186, 486. For a discussion about the purpose of this amendment, see Smit et al., *supra* note 15, at 1-20 to -21 (“This addition appears to have been included to make it abundantly clear that assistance under

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.<sup>62</sup>

Three features of the new § 1782 are noteworthy here. First, the new statute unified both strands of judicial assistance—relating to foreign courts and international tribunals—into one law.<sup>63</sup> The phrase “foreign or international tribunal” manifests this unification.<sup>64</sup>

Second, the new statute broadened the set of institutions on behalf of whom U.S. district courts may compel testimony. The new statute allows assistance for a “foreign or international tribunal,”<sup>65</sup> whereas the old statute required that the assistance “be used in any *civil action* pending in any *court* in a foreign country.”<sup>66</sup> The new language allows assistance to a broader set of institutions: In addition to “conventional” courts, the new term “tribunals” is supposed to include investigating magistrates, administrative tribunals, and quasi-judicial agencies.<sup>67</sup>

Third, the new statute allows “any interested person” to apply for assistance from a U.S. court. This addition is a reflection of the liberalizing design of the new § 1782.<sup>68</sup> The phrase “any interested person” is intended to include “not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person,”

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§ 1782 is available where criminal matters are being investigated, but charges or a formal accusation have not yet been laid or made, and/or are not yet ‘imminent.’”). The latest-amended text is provided here for currency.

62. § 1782(a).

63. See *supra* section I.A.

64. See S. Rep. No. 88-1580, at 3-4 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3785 (“[I]t is only appropriate that the United States make the same assistance available to litigants before international tribunals that, in section 1782 of title 28, United States Code, it makes available to litigants before foreign tribunals.”); Smit, *Assistance Before International Tribunals*, *supra* note 39, at 1271-72 (proposing an amendment to the 1958 version of § 1782, which addressed foreign courts, such that the statute would make assistance available to international tribunals as well); Hans Smit, *International Litigation Under the United States Code*, 65 *Colum. L. Rev.* 1015, 1027 (1965) [hereinafter Smit, *International Litigation*] (explaining that the newly amended § 1728 provides assistance not only to foreign courts but also international tribunals).

65. See N.Y.C. Bar Report, *supra* note 15, at 11.

66. Act of June 25, 1948, Pub. L. No. 80-773, § 1782, 62 Stat. 869, 949 (emphases added).

67. See S. Rep. No. 88-1580, at 7; H.R. Rep. No. 88-1052, at 9 (1963).

68. See Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 *Am. Rev. Int'l Arb.* 153, 153 (1997).

regardless of whether the person “be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance.”<sup>69</sup> This broadening phrase has become central to growing trends in the contemporary practice of § 1782. In sum, in addition to integrating the two strands of judicial assistance, the new § 1782 expanded both the institutions to whom judicial assistance may be given and the entities that may request it.

2. *Intel and the Current Doctrine.* — The seminal Supreme Court case interpreting and applying § 1782 is *Intel*.<sup>70</sup> The 7-1 majority opinion, written by Justice Ruth Bader Ginsburg,<sup>71</sup> emphasized the liberalizing spirit of § 1782 and announced discretionary factors for judges to consider.<sup>72</sup>

The case arose from rivals of the technology industry. Advanced Micro Devices (AMD) filed an antitrust complaint against its competitor, Intel.<sup>73</sup> AMD filed the suit with the Directorate-General for Competition of the Commission of the European Communities.<sup>74</sup> To support its complaint before the Directorate-General, AMD requested that the U.S. district court for the Northern District of California order Intel to produce evidence under § 1782.<sup>75</sup>

The Court’s decision has two notable holdings. First, the district court was authorized to compel discovery since AMD was an “interested person” within the meaning of § 1782; this made AMD a legitimate source for a § 1782 request.<sup>76</sup> The then-existing doctrine provided that litigants and sovereigns (as well as the agents of sovereigns) were “interested person[s]” within the meaning of the statute.<sup>77</sup> The Court extended the phrase “any interested person” to include complainants, such as AMD.<sup>78</sup> While AMD was not a *litigant*, since it was not litigating anything before the Directorate-General, it did have a “significant role in the process” of the European

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69. Smit, *International Litigation*, supra note 64, at 1027.

70. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). The Supreme Court has decided only one other case directly addressing § 1782. See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2083 (2022) (holding that § 1782 does not authorize district courts to compel production in assistance to certain overseas private arbitral tribunals because they do not count as “foreign or international tribunal[s]” within the meaning of the statute).

71. See supra note 58 (describing some of Justice Ginsburg’s prior work relating to the subject matter of the case).

72. See *Intel*, 542 U.S. at 260, 264–65.

73. *Id.* at 246.

74. *Id.*

75. *Id.* For a broader summary of the decision and the relevant lower court decisions, see, e.g., Mousa Zalta, Note, Recent Interpretation of 28 U.S.C. § 1782(a) by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*: The Effects on Federal District Courts, Domestic Litigants, and Foreign Tribunals and Litigants, 17 *Pace Int’l L. Rev.* 413, 426–36 (2005).

76. See *Intel*, 542 U.S. at 256–57.

77. See *id.* at 256.

78. See *id.* at 256–57.

Commission investigation.<sup>79</sup> The Court decided that, as a complainant, AMD had an important enough role because it prompted the antitrust investigation, had the right to submit information for the Directorate-General's consideration, and could proceed to court if the Commission discontinued or dismissed the complaint.<sup>80</sup> Because of these participation rights, the Court ruled that AMD possessed a reasonable interest in obtaining judicial assistance and therefore qualified as an "interested person."<sup>81</sup> Thus, after *Intel*, sovereigns, their agents, private litigants, and even private complainants are included in "any interested person" for the purposes of § 1782.

*Intel's* second relevant holding is its reinforcement of the U.S. district courts' discretion when fulfilling § 1782 requests. "[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so."<sup>82</sup> The Court outlined different factors for lower courts to consider when exercising discretion.<sup>83</sup> In fact, although the Court allowed AMD's § 1782 request, the lower court ultimately exercised its discretion to deny the request.<sup>84</sup>

3. *Growing Practice of § 1782 Requests.* — Today, § 1782 requests come increasingly from private parties of all sorts, including litigants and complainants, rather than from foreign tribunals. Professor Yanbai Andrea Wang's recent scholarship studying § 1782 requests between 2005 and 2017 demonstrates this trend.<sup>85</sup>

Importantly, Professor Wang's study found that the share of requests originating from private parties (approximately 55%) far exceeded those coming from tribunals or judges (approximately 44%) during the study period.<sup>86</sup> (The remaining requests came from a "broader class of 'interested persons'" [0.77%.])<sup>87</sup> Private-party requests are more "sophisticated" and "varied," while tribunal requests are more "straightforward" and "homogenous."<sup>88</sup> This is manifest in the fact that while nearly one-third (28%) of private-party requests are for use in multiple proceedings around

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79. See *id.* at 256.

80. See *id.*

81. See *id.* at 256–57 (internal quotation marks omitted) (quoting Smit, *International Litigation*, *supra* note 64, at 1027).

82. *Id.* at 264.

83. *Id.* at 264–65 (including factors such as whether the discovery target is a nonparty to the foreign proceeding, "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance").

84. *Advanced Micro Devices v. Intel Corp.*, No. C 01-7033, 2004 WL 2282320, at \*2 (N.D. Cal. Oct. 4, 2004) ("[T]his Court, in its discretion, holds that AMD's application for discovery should be denied in full.").

85. Wang, *supra* note 6, at 2113–14.

86. *Id.* at 2113, 2168.

87. *Id.*

88. *Id.* at 2109.

the world, “[v]irtually all” tribunal requests are, unsurprisingly, for use in only one proceeding.<sup>89</sup>

Some indications suggest that the private-party usage of § 1782 is increasingly corporation driven.<sup>90</sup> Topically, private-party requests are concentrated in contract law, intellectual property and trade secret law, and corporate law (27%, 19%, and 12% of private-party requests, respectively).<sup>91</sup> In contrast, requests from tribunals are heavily concentrated in family law, followed by contract law and employment law (52%, 15%, and 12% of tribunal requests, respectively).<sup>92</sup> Among private-party requests, the share of contract law–related requests has remained steady, while the number of intellectual property law and corporate law–related requests has grown, and the number of family law–related requests has decreased.<sup>93</sup>

Professor Wang found private-party requests to be more complex than tribunal requests. While the former typically required three orders for resolution, the latter usually required only one order (granting or denying the request).<sup>94</sup> While U.S. judges almost always granted § 1782 requests (approximately 91.9% of the time), they were less likely to grant private-party requests than tribunal requests (86.6% and 98.1%, respectively).<sup>95</sup>

Another important conclusion from Professor Wang’s study is that it is unclear whether foreign tribunals are aware of the § 1782 requests made by private parties.<sup>96</sup> When entertaining § 1782 requests, U.S. judges are operating at an “informational disadvantage.”<sup>97</sup> Namely, they are often missing the inputs of key stakeholders in the request, such as the relevant tribunal and adverse party.<sup>98</sup> U.S. judges thus have to make decisions that directly concern the work of foreign courts without the foreign courts’ awareness, much less input.

The takeaway from Professor Wang’s study is that § 1782 requests come increasingly from private parties rather than tribunals or government agents litigating before them. The trend indicates that private-party requests will only continue to multiply. This, combined with the high grant rates of § 1782 requests, means that judicial assistance has a new look. Far from the letters rogatory from the French court of the 1850s and the U.S. agent’s requests for testimony for the U.S.–German tribunal of the 1930s,<sup>99</sup>

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89. *Id.* at 2115.

90. *Id.* at 2116.

91. *Id.* at 2115.

92. *Id.*

93. *Id.* at 2115–16.

94. *Id.* at 2120–21.

95. *Id.*

96. *Id.* at 2124, 2137.

97. *Id.* at 2099.

98. *Id.* at 2134, 2138 (noting the “lack of input from foreign tribunals and foreign opposing parties” particularly given that many courts accept *ex parte* § 1782 applications).

99. See *supra* sections I.A.1–2.

U.S. courts today extend their assistance increasingly to private parties that request it. Part II presents two modes of assessing the legitimacy of this new practice, both grounded in history.

## II. CONSTITUTIONAL AND STATUTORY PROBLEMS

Part II evaluates the state of judicial assistance today by examining the history of the practice. The evaluation concludes that the current trends in § 1782 practice exceed the historical limits of the judicial power of U.S. judges and run afoul of Congress's intention behind the new § 1782. Specifically, section II.A argues, based on Founding-era documents, that the judicial power vested in U.S. judges by Article III of the Constitution would have been understood to include judicial assistance but not the extension of that assistance to private parties. Section II.B argues, based on the pre-legislation history of § 1782, that Congress's mandate to provide judicial assistance does not include providing assistance to private parties. A solution reconciling the current practice of § 1782 with the Constitution and congressional intent is proposed in Part III.

### A. *Constitutional Problems*

The history of judicial assistance suggests that using judicial power to grant § 1782 requests from private parties goes beyond the historical confines of the judicial power vested in the federal judiciary by Article III. Although no modern argument raises this constitutional concern, doubts (misguided as they were) about the constitutionality of judicial assistance in general predate the 1855 episode of the flustered attorney general.<sup>100</sup> Previously, members of Congress had tried, unsuccessfully, to legislate statutory authority for judges to provide assistance to foreign tribunals that sent letters rogatory to the United States.<sup>101</sup> During one of these attempts, Judah P. Benjamin, a senator from Louisiana,<sup>102</sup> challenged the bill on the grounds that it would exceed the power of federal courts under Article III. Admitting he had not yet read the bill, he nevertheless professed

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100. See *supra* section I.A.1.

101. See Cong. Globe, 32d Cong., 2d Sess. 761 (1853). Charles Sumner, a Massachusetts senator, introduced a bill during the thirty-second Congress "to provide for the reciprocal execution of letters rogatory by the courts of the United States in behalf of the courts of justice of friendly nations." *Id.* The bill did not make it into law. By the next Congress, the Senate debated a bill "to provide for the execution, by the courts of the United States, of commissions to take testimony issuing from the courts of justice of friendly nations," which had been reported from the Committee on the Judiciary. Cong. Globe, 33d Cong., 1st Sess. 433 (1854).

102. Benjamin, here playing the part of staunch defender of the U.S. Constitution, later joined Jefferson Davis's Confederate cabinet and, after the Civil War, fled to London. For an interesting biographical account, see Dara Horn, *Adventures With Dead Jews, Unsinkable Jews*: Ep. 6, *Tablet* (Oct. 8, 2021), <https://www.tabletmag.com/podcasts/adventures-with-dead-jews/episode-six-unsinkable-jews-confederacy-judah-p-benjamin-jefferson-davis-abraham-lincoln> (on file with the *Columbia Law Review*).



“insuperable objections”<sup>103</sup> to any “extension” by the Congress of the judicial power “not granted by the Constitution.”<sup>104</sup>

Benjamin was, of course, wrong. At the ratification of Article III, the “judicial [p]ower”<sup>105</sup> included the power to compel testimony in assistance to foreign tribunals, as courts did in response to letters rogatory even without the statute. This power was seen as “inherent” in courts, arising from the “law of nations.”<sup>106</sup> Courts of admiralty at the time, for example, had virtually identical practices to those that would ultimately be codified in § 1782, and the ecclesiastical courts of England before the American Founding had similar procedures.<sup>107</sup>

There is today, however, a valid concern about exceeding the limits of Article III’s grant of judicial power. The outstanding difference between Benjamin’s unfounded concern and the present legitimate one is that when courts at the time of the Founding provided assistance in the taking of evidence, they provided the assistance to other courts or tribunals. There is no indication that courts provided judicial assistance to private parties without at least the awareness of the foreign court. Yet this is exactly the growing practice observed today. The discussions that follow show the historical practice of judicial assistance at admiralty, in the ecclesiastical courts, and in early state law. These historical practices shed light on the scope of “the judicial power” in Article III at the time of the Founding.

1. *Judicial Assistance at Admiralty.* — Historically, admiralty courts would request judicial assistance from courts of foreign jurisdictions. This is evident from the treatises published and studied before and at the time of the Founding. One example is the treatise of John Godolphin, Judge of the High Court of Admiralty in England, which enjoyed many years of citation in successive treatises.<sup>108</sup> Among the powers of the admiralty court,

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103. Cong. Globe, 33d Cong., 1st Sess. 434.

104. *Id.* Benjamin is recorded as having declared,

I object to any extension by the Congress of the United States of the judicial power of the United States not granted by the Constitution. The bill proposes to invest in the circuit and district courts of the United States certain jurisdiction in relation to controversies arising in foreign countries. By reference to the provision of the Constitution of the United States, I find that the judicial power extends to certain defined cases, and that this is not one of the cases for which the Constitution provides.

*Id.* After Benjamin’s objections, debate on the bill was postponed (in part to give Benjamin the opportunity to read the bill). The bill encouraged by the attorney general became law in 1855. See *supra* text accompanying note 24.

105. U.S. Const. art. III, § 1.

106. Cf. *In re Pac. Ry. Comm’n*, 32 F. 241, 256 (C.C.N.D. Cal. 1887) (executing letters rogatory to assist foreign courts “has . . . been classed among [Article III courts’] inherent powers”).

107. See *infra* section II.A.1–2.

108. See, e.g., Alexander Justice, *A General Treatise of the Dominion and Laws of the Sea* 258 (London, S. & J. Sprint 1705) (“[T]he Learned *Godolphin* L.L.D. in his *View of the Admiral Jurisdiction*, gives a very succinct and nice Accou[n]t of that Affair [in admiralty law] to the following Purposes.”); 1 *The Laws, Ordinances, and Institutions of the Admiralty of*

Godolphin lists the issuing of a “Commission for examining of Witnesses at Home, or *sub mutuae vicissitudinis obtentu* beyond Sea.”<sup>109</sup> Issuing a commission *sub mutuae vicissitudinis obtentu* to obtain the examination of witnesses overseas would have logically only been addressed to the overseas entity with the power to provide that examination—namely, a court. And since *sub mutuae vicissitudinis obtentu* means “under the pretense of mutual assistance,” the implication was that the issuing court would offer its assistance, when the need would arise, to the overseas court from which the issuing court was now requesting assistance.<sup>110</sup> In other words, Godolphin’s admiralty law treatise only discusses the exchange of judicial assistance between courts, not between private parties.

Another treatise similarly contemplates exchanging judicial assistance only between tribunals. John Elihu Hall’s 1809 work, *The Practice and Jurisdiction of the Court of Admiralty: In Three Parts*, provides more detail on the procedure for exchanging judicial assistance.<sup>111</sup> The piece includes Hall’s English translation of Francis Clerke’s 1666 work on admiralty, published posthumously in London in Latin.<sup>112</sup> Hall published his translation in Baltimore and added his notes on American admiralty practice. While discussing testimony at admiralty, Hall spends several pages on the issuing and honoring of letters rogatory, or commissions *sub mutuae vicissitudinis*.<sup>113</sup> Hall claims that the principle of mutual judicial assistance comes from the “Law of Nations.”<sup>114</sup> He notes that English courts used to issue letters rogatory and recounts an episode recorded in Henry Rolle’s *Abridgment*,<sup>115</sup> in which an English court collected testimony via a letter rogatory to a court in Holland.<sup>116</sup>

Although Hall laments what he perceived as the lack in the American admiralty practice of letters rogatory,<sup>117</sup> he delineates what the doctrine

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Great Britain, Civil and Military 111–17 (London, A. Millar 1746) (citing *A View of the Admiral Jurisdiction* at length for its authority on admiralty law).

109. John Godolphin, *A View of the Admiral Jurisdiction* 42 (London, Edmund Paxton & John Sherley eds., W. Godbid 1661).

110. Erastus C. Benedict, *The American Admiralty, Its Jurisdiction and Practice, With Practical Forms and Directions* 307 (Edward Grenville Benedict ed., 4th ed. 1910) (“[T]hat is, with an offer on the part of the court making the request to do the like for the other in a similar case.”)

111. John Elihu Hall, *The Practice and Jurisdiction of the Court of Admiralty: In Three Parts* 37–42 (Baltimore, Geo. Dobbin & Murphy 1809).

112. *Id.* at 3–118.

113. *Id.* at 37–43.

114. *Id.* at 37.

115. Henry Rolle, *Un Abridgment des Plusieurs Cases et Resolutions del Common Ley, Alphabeticalment Digest Desouth Sevrall Titles* 530 (London, A. Crooke, W. Leake, A. Roper, F. Tyton, G. Sawbridge, T. Dring, T. Collins, J. Place, W. Place, J. Starkey, T. Basset, R. Pawlett & S. Heyrick 1668).

116. Hall, *supra* note 111, at 38.

117. *Id.* at 41 (“It is to be regretted that the principle of the Civil Law with respect to Letters Rogatory, has not been introduced into our practice.”).

concerning letters rogatory would be, were they to be part of American admiralty practice: “[I]f Letters Rogatory come from a Court or Tribunal of a foreign country, directed as they usually are, to the Judge of a particular place, without any designation, the District Judge, having Admiralty jurisdiction is the proper person to cause them to be complied with.”<sup>118</sup> Hall contemplates that the hypothetical letters rogatory could come from a “Court or Tribunal,” not from a private litigant.<sup>119</sup>

A work printed in 1802 emphasizes that the request for judicial assistance had to issue from the holder of state power. The treatise includes the common law equivalent of a letter rogatory from King George II.<sup>120</sup> The request, dated October 6, 1759, was worded as a request from the monarch for judicial assistance in the deposition of witnesses found in San Sebastian, Spain, and was made “in aid of justice and in assurance of the like assistance from us, when occasion shall require.”<sup>121</sup> Since the request was signed by the king himself (rather than, for example, Sir Thomas Salisbury, mentioned in the request as “president and judge” of the high court of admiralty, who had “constituted and appointed” the relevant proceedings<sup>122</sup>), the request is about as far as possible from contemporary requests issuing from private parties who hold no state power.

2. *Analogue in the Ecclesiastical Courts.* — The ecclesiastical courts, like the courts of admiralty, also had procedures for mutual assistance in the taking of testimony. These procedures also contemplated judicial assistance exchanged between judges or tribunals rather than private parties.

This is evident from an 1831 treatise on ecclesiastical law, translating and expanding on a 1738 treatise published in Latin,<sup>123</sup> which discusses the procedure for commission *sub mutuae vicissitudinis obtentu* in the ecclesiastical courts.<sup>124</sup> The party seeking the assistance had to ask the judge of his diocese to “decree[.]” a commission grounded on the mutual convenience to the different ecclesiastical jurisdictions and in the mutual

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118. *Id.* at 42–43.

119. *See id.*

120. *Formulare Instrumentorum: Or, a Formulary of Authentic Instruments, Writs, and Standing Orders, Used in the High Courts of Admiralty of Great Britain, of Prize and Instance 183–87* (London, G. Cooke 1802). The work was “perused and approved as correct by Sir James Marriott, late judge” of the High Courts of Admiralty, *id.* at i, and includes a copy of a “Requisition for Examination of Witnesses” made to collect testimony for a prize dispute, *id.* at 183–87.

121. *Id.* at 184.

122. *Id.* at 183.

123. Thomas Oughton, *Ordo Judiciorum* (London 1738). Oughton has “a lasting place of honour as [one of] the principal writers on the procedure of the Church courts in England in its traditional form.” J. H. Baker, *Famous Canon Lawyers VI: Francis Clarke and Thomas Oughton*, 3 *Ecclesiastical L.J.* 136, 136 (1994).

124. James Thomas Law, *Forms of Ecclesiastical Law; Or, the Mode of Conducting Suits in the Consistory Courts 249* (London, Saunders & Benning 1831).

support of each other's authority.<sup>125</sup> The party had to request that the judge direct the commission to the "bishop of that diocese in which the witnesses dwell" and to his vicar-general.<sup>126</sup> Even this treatise, which emphasizes the role of the requesting party in requesting the judicial assistance, still describes the procedure for the request as being from one ecclesiastical judge to another.

Another source confirms this description: In a series of lectures delivered at the University of Dublin that were published as a treatise, the same procedure is described briefly.<sup>127</sup>

3. *Early State Laws.* — Like the courts of admiralty and ecclesiastical courts, state courts had procedures for requesting assistance from courts in other jurisdictions in the taking of testimony.

An eighteenth-century Virginia law allowed for any court having jurisdiction over a will in probate to request judicial assistance from a liberal set of entities. Private parties, however, could not issue the request for judicial assistance.<sup>128</sup>

Pennsylvania appears to be the only state that explicitly allowed its courts, by statute, to honor letters rogatory from courts outside of Pennsylvania before the passage of the first federal statute on the subject

125. *Id.*

126. *Id.*

127. 2 Arthur Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty, Being the Substance of a Course of Lectures Read in the University of Dublin* 121 (London, R.E. Mercier & Co. 1799) (reciting that if the witnesses required do not live in the jurisdiction of the presiding judge, "letters requisitory must go to the bishop within whose diocese they reside, requesting him to examine . . . *sub mutuae vicissitudinis obtentu* from the mutual aid thus mutually granted by the several ecclesiastical jurisdictions"). Notably, a different edition of Arthur Browne's lectures references the practice at admiralty discussed *supra* section II.A.1. See 2 Arthur Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty, Being the Substance of a Course of Lectures Read in the University of Dublin* 422 (London, G. Woodfall 1802) ("[L]etters requisitory must go to the judge within whose jurisdiction they reside, requesting him to examine, or have them examined, as it is called, *sub mutuae vicissitudinis obtentu* from the mutual aid thus mutually granted by these several jurisdictions . . .").

Interestingly, Browne was born in Newport, Rhode Island, to the rector of Trinity Church there; began his studies at Harvard College; and transferred to Trinity College, Dublin, where he became Regius Professor of civil and canon law in 1785. Joseph C. Sweeney, *Browne, Arthur*, *Oxford Dictionary of Nat'l Biography* (Sept. 23, 2004), <https://doi.org/10.1093/ref:odnb/3668> (on file with the *Columbia Law Review*). One wonders if during his youth in New England he ever observed these practices he describes.

128. Act of November 29, 1792, ch. 141, § 15, reprinted in *A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force* 278, 279 (Richmond, Samuel Pleasants 1803). The court could issue the request to the presiding judge of any court of law, to any notary public, mayor, or other chief magistrate of any city, town, corporation, or county, or to such other person or persons as by laws of such country, where such witness or witnesses may be found, are duly authorised to administer an oath.

*Id.*

in 1855.<sup>129</sup> Its law only contemplated letters rogatory received from courts of foreign jurisdictions. Nowhere does it mention requests for judicial assistance from private parties.<sup>130</sup>

In sum, there is no evidence that, at or around the Founding, U.S. courts could assist private litigants in the taking of evidence abroad. Even where procedures existed for taking evidence overseas or giving a foreign jurisdiction local testimony, the official request for assistance always originated with a judge, court, or the like—never a private party.

It makes sense that Founding-era courts only assisted *other courts* to take evidence, not private parties. The concept of judicial assistance is rooted in comity, the principle that courts mutually support other jurisdictions' judicial activity, including evidence production. Since private parties cannot offer any assistance in return to a supportive judge, the idea of comity between courts and private parties in a different jurisdiction is incoherent.

The preceding historical perusal suggests that when judges grant private parties' § 1782 requests, they exceed the judicial power granted to them by Article III as it would have been understood when it was ratified. "The judicial Power' created by Article III, § 1, of the Constitution" is "the power to act in the manner traditional for English and American courts," not "whatever judges choose to do, or even whatever Congress chooses to assign them."<sup>131</sup> Providing judicial assistance to foreign courts and officials

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129. See Act of April 8, 1833, ch. 402, § 18, reprinted in James Dunlop, *The General Laws of Pennsylvania, From the Year 1700, to April 22, 1846, Chronologically Arranged* 501, 503 (Philadelphia, T. & J.W. Johnson 1847).

U.S. Attorney General Cushing observed in response to the letter rogatory received from France that spurred the first federal legislation on the matter, "In some of the States limited provision exists by statute for the execution of such commissions; but there is no provision therefor in any law of the United States." *Rogatory Commissions*, 7 Op. Att'y Gen. 56 (1856).

130. Act of April 8, 1833, ch. 402, § 18, reprinted in Dunlop, *supra* note 129, at 503. The law read:

In all cases where letters rogatory shall be issued out of any court of any one of the several states composing the United States, or out of any court of any territory of the said United States, requesting any court of common pleas in this commonwealth to afford its aid in the examination of any witness or witnesses within the limits of the jurisdiction of such court of common pleas, it shall be competent for such court of common pleas to issue subpoenas to such witnesses as may be required by any party concerned, requiring their attendance either before such court of common pleas, or before a commissioner or commissioners, to be by the said of court of common pleas named, at a certain hour and place therein designated, having regard to the distance of such witness or witnesses, and under a penalty not exceeding one hundred dollars.

Id.

131. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (emphasis omitted) (citations omitted); but see *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001) ("The judicial power clause . . . has never before been thought to encompass a constitutional limitation on how courts conduct their business.").

is ancient judicial practice. But providing judicial assistance to private parties without the knowledge of the relevant court or tribunal is not traditional for English and American courts; it is a modern, growing excess of the powers vested in the federal judiciary.

B. *Legislative Problems*

A statutory standpoint also poses challenges to the current practice of § 1782 requests. Namely, judicial assistance to private parties contradicts both the legislative intent expressed in § 1782 and its legislative history.

1. *Pre-Legislation Statutory Purpose*. — The 1964 overhaul of the judicial assistance laws was always intended to assist foreign governments and their courts and quasi-judicial institutions. In 1958, the act of Congress establishing the Commission on International Rules of Judicial Procedure charged the Commission with drafting and recommending any legislation necessary to improve “the procedures of our State and Federal tribunals for the rendering of assistance to *foreign courts* and *quasi-judicial agencies*.”<sup>132</sup> Congress did not contemplate judicial assistance to private parties, which makes sense because “the animating purpose of § 1782 is comity,”<sup>133</sup> and comity between U.S. district courts and private litigants is incoherent.<sup>134</sup>

The writings of Professor Smit, the chief drafter of the language that Congress ultimately legislated into the new § 1782,<sup>135</sup> do not confirm that he intended judicial assistance to extend to private parties before foreign or international tribunals. Professor Smit’s writings are important for understanding the new § 1782—the Supreme Court has relied on them for authoritative insight into the meaning of the statute.<sup>136</sup> His writings from before the statute’s passage do not show that he envisioned it enabling

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132. Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (emphasis added) (establishing a commission to “investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements”).

133. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2088 (2022).

134. See *id.* (arguing that “[i]t is difficult to see how enlisting district courts to help private bodies would serve [comity]” and asking why Congress would “lend the resources of district courts to aid purely private bodies adjudicating purely private disputes abroad”).

135. See *supra* notes 58–60 and accompanying text.

136. See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256–58 (2004). In *Intel*, the Court relied on Professor Smit’s 1965 law review article, *International Litigation Under the United States Code*, to find that AMD qualified as an “interested person[]” authorized to apply for judicial assistance under § 1782(a).” *Id.* at 256–57 (quoting Brief for Petitioner at 26–27, *Intel*, 542 U.S. 241 (No. 02-572), 2003 WL 23138394); see also Smit, *International Litigation*, *supra* note 64, at 1027. The Court then considered whether the assistance AMD sought in obtaining documents “[met] the specification ‘for use in a foreign or international tribunal.’” *Intel*, 542 U.S. at 257–58. Again citing Smit’s article, the Court held that it did, reasoning that “§ 1782 . . . ‘permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers.’” *Id.* at 257 (quoting Smit, *International Litigation*, *supra* note 64, at 1027 n.73); see also Smit, *International Litigation*, *supra* note 64, at 1026–27 & nn.71, 73.

judicial assistance toward private parties. Nothing he wrote before 1965 included private parties as a beneficiary of expanding judicial assistance.<sup>137</sup>

Properly understood, even his writings that seem to extend judicial assistance to private parties do not in fact do so. In one passage from 1962, Professor Smit proposed improvements to § 270d,<sup>138</sup> part of the international-tribunal strand of the then-extant legal regime for international judicial assistance in the taking of evidence.<sup>139</sup> He suggested that judicial assistance should be available to “litigants before international and foreign tribunals.”<sup>140</sup>

The key to understanding this passage is recalling the U.S. agent before the U.S.–German Mixed Claims Commission, who represented a sovereign (the United States) before an international tribunal.<sup>141</sup> The U.S. agent was the representative of a sovereign—namely, the United States. Importantly, he was a litigant before an international tribunal. When Professor Smit discusses litigants before international tribunals, he is referring to litigants who, like the U.S. agent, represent sovereigns or have a comparable relationship to a government.<sup>142</sup>

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137. For a discussion on Professor Smit’s writings from 1965 and on, see *infra* section II.B.2.

138. Smit, *Assistance Before International Tribunals*, *supra* note 39, at 1274.

139. See *supra* section I.A.

140. Smit, *Assistance Before International Tribunals*, *supra* note 39, at 1274. Smit noted:

The assistance made available is limited to the United States agent before an international tribunal, while the evidence to be produced must, according to section 270d, relate to “any matter or claim in which the United States on its own behalf or on behalf of any of its nationals is concerned as a party claimant or respondent . . .” These limitations are undesirable. The interest of the United States in peaceful settlement of international conflicts is clearly not limited to those disputes to which it is a party; moreover, it would seem appropriate for the United States to make at least the same kind of assistance available to litigants before international tribunals that it provides to litigants before foreign tribunals.

*Id.* (quoting 22 U.S.C. § 270d (1958) (repealed 1964)).

141. See *supra* note 44 and accompanying text.

142. See Smit *et al.*, *supra* note 15, at 1-18. In the 1962 passage, Professor Smit notes two problems and proposes two solutions.

First, the assistance § 270d makes available “is limited to the United States agent before an international tribunal” rather than also extending to the agents of other sovereigns before international tribunals (e.g., the German agent before the U.S.–German claims commission). Smit, *Assistance Before International Tribunals*, *supra* note 39, at 1274. The solution: Since “[t]he interest of the United States in peaceful settlement of international conflicts is clearly not limited to those disputes to which it is a party,” U.S. law should allow for the agents of other sovereigns to also enjoy judicial assistance. *Id.* This solution became part of the 1964 statute in the phrase “any interested person,” which covers the agents of foreign governments. See *id.* at 1274–75.

Second, the “same kind of assistance” was not “available to litigants before international tribunals” as was the more robust assistance that was available “to litigants before foreign courts.” Namely, litigants before foreign tribunals could request that the tribunal petition a U.S. court for assistance regardless of whether the United States or one of its nationals was a party to the proceeding, while litigants before international tribunals

Since the 1964 Senate committee report for the new § 1782 copies Professor Smit's words nearly verbatim, it should similarly be understood not to contemplate private parties.<sup>143</sup> The legislative history mentions that the new § 1782 would extend judicial assistance to "international tribunals and litigants before such tribunals."<sup>144</sup> This would be achieved by eliminating the second strand of judicial assistance laws—§§ 270 to 270g—and replacing them with the new § 1782.<sup>145</sup> "Litigants" before international tribunals evokes, as it did in Professor Smit's writings, the U.S. agent and similarly governmental individuals. Private parties are not contemplated.

Another indication that private parties were not contemplated by the Senate when it enacted § 1782 in 1964 comes from omission. The committee report, like Professor Smit's writings on the subject published before the statute's passage, makes no special mention of the inserted words "any interested person." One would expect that legislative history would discuss—at least once—the consequences of allowing private parties to receive judicial assistance if such a novelty were intended by the proposed legislation. No such discussion appears, likely because the phrase was not intended to allow private parties to receive judicial assistance.

2. *Statutory Purpose Revealed After Legislation.* — The strongest argument that the drafters *did* intend to extend judicial assistance to private parties through the new § 1782 rests on Professor Smit's retrospective discussions of the new § 1782. But even these post-facto revelations of the drafter's intention are unpersuasive.

In 1965, Professor Smit elucidated for the first time the newly enacted statutory phrase "any interested person." The term, he wrote, "is intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention *or merely possess a reasonable interest in obtaining the assistance.*"<sup>146</sup> The year after the statute became law, Professor Smit understood there to exist a person who (a) is

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could not. See *id.* at 1274. The solution: combine the foreign tribunals strand with the international tribunals strand into one statute, and allow judicial assistance to foreign and international tribunals regardless of the nationality of the parties. *Id.* This solution became part of the 1964 statute in the phrase, "foreign or international tribunal," which made the same kind of assistance available to litigants before foreign or international tribunals. In his own words, Professor Smit suggested this as the catchall solution to the problems mentioned above: "These problems would seem to make it advisable to repeal these two sections [22 U.S.C. §§ 270d, 270e] and to amend Section 1782 of the Judicial Code to make the assistance provided by that section also available to litigants before international tribunals." *Id.* The "assistance provided by that section" did not include assistance to private parties. *Id.* Thus, this passage indicates no intention by Professor Smit that § 1782 should provide assistance to private parties.

143. See S. Rep. No. 88-1580, at 4 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3785.

144. *Id.* at 8; H.R. Doc. No. 88-88, at 45 (1963).

145. S. Rep. No. 88-1580, at 8; H.R. Doc. No. 88-88, at 45.

146. Smit, *International Litigation*, *supra* note 64, at 1027 (emphasis added).



not an official and has no designation by foreign or international law but who (b) still possesses a reasonable interest in obtaining the assistance. And this person is included within the statutory term “any interested person.” Admittedly, such a person is likely a private party, like any of the private parties responsible for more than half of the recent § 1782 requests.<sup>147</sup> This is the strongest indication that the drafter of § 1782 intended the statute’s provision of judicial assistance to extend to private parties.

Other post-enactment writings of Professor Smit, however, can still be explained by insisting that when he mentions litigants before foreign or international tribunals he refers to entities like the U.S. agent before the U.S.–German Mixed Claims Commission. For example, in the same article discussed in the preceding paragraph, Professor Smit wrote another passage suggesting, less clearly, the inclusion of private parties.<sup>148</sup> He distinguished between requests emanating from a foreign court and requests submitted by individual litigants, the former of which should command greater respect from the U.S. district court.<sup>149</sup> But this individual litigant can still be understood to mean an individual in a capacity similar to the U.S. agent to the U.S.–German Mixed Claims Commission.

A passage from 1998 can also be understood to refer to litigants similar to the U.S. agent to the U.S.–German Mixed Claims Commission rather than to private parties. Professor Smit reviewed courts’ application of his statute until that time.<sup>150</sup> He thought it safe to assume that individual litigants would carefully consider whether the evidence they were requesting could be used in the relevant proceedings.<sup>151</sup> This “individual litigant” can still be understood as referring to litigants similar to the U.S. agent before the U.S.–German Mixed Claims Commission.

Interpreting Congress’s and Professor Smit’s writings as not extending to private parties is in line with the early practice of the new

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147. See *supra* note 86 and accompanying text.

148. See Smit, *International Litigation*, *supra* note 64, at 1029 (“Section 1782 gives the district court discretion to determine whether its assistance should be granted. The elimination of the former restriction . . . make[s] this grant of discretionary power of quintessential importance.”).

149. *Id.* at 1029 n.87.

150. Smit, *Section 1782 Revisited*, *supra* note 58, at 2.

151. *Id.* at 8. Professor Smit was addressing the concern that providing judicial assistance could interfere with the orderly processes of foreign or international tribunals. Professor Smit advocated that U.S. courts should refrain from deciding whether providing the assistance would offend foreign or international law, since that is a question best left to the foreign or international tribunal to decide. *Id.* He proposed that “it may also safely be assumed that a litigant before a foreign or international tribunal will carefully consider whether it will be able to” use the requested evidence in the relevant proceedings. *Id.*

Questions like the discoverability in the foreign or international forum of the requested evidence characterized judicial considerations of § 1782 requests at the time. *Intel* would settle this question. See Bruce S. Marks & Thomas C. Sullivan, *Discretionary Factors Under Intel, in Obtaining Evidence for Use in International Tribunals Under 28 U.S.C. Section 1782*, *supra* note 15, at 7-1, 7-1 to -10.

§ 1782. For the first fifteen years of practice under the statute, no reported case came from a private party.<sup>152</sup> Not until 1980 did the first reported § 1782 request come from a private party.<sup>153</sup> This data suggests that the statute was not understood to extend judicial assistance to private parties.

In sum, the current practice of providing judicial assistance to private parties is in tension with the history of judicial assistance and § 1782. At and leading up to the Founding, treatises and written laws relating to judicial assistance did not contemplate requests originating from private parties. Such a practice would not have been understood as within the judicial power vested by Article III of the Constitution.<sup>154</sup> Similarly, around 1964, § 1782's legislators, chief drafter, and reported practitioners did not understand the statute as extending to private parties.<sup>155</sup> This historical analysis suggests that when judges use their power to compel testimony on behalf of private parties' § 1782 requests, they are exceeding their constitutional powers as traditionally conceived and running afoul of congressional intent. The next Part proposes a path forward in § 1782 practice that is more consistent with the Constitution and Congress's intent.

### III. A § 1782 TRUE TO ITS ROOTS

As shown in Part II, the current practice of compelling the production of evidence on behalf of private litigants abroad is inconsistent with the history of judicial assistance in general and § 1782 in particular. Part III presents a judicial solution to this inconsistency: To conform with historical understanding of the limits of judicial power and avoid violating the congressional intent behind § 1782, judges should presumptively require the consent of the relevant foreign or international tribunal before granting a private litigant's § 1782 request.<sup>156</sup>

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152. This Note's author searched on Westlaw and LexisNexis for reported cases citing to 28 U.S.C. § 1782 after 1964 and found none suggesting the request came from a private party before 1980. See *infra* note 153 and accompanying text. Tellingly, reported cases before 1980 do feature § 1782 requests from government entities that were rejected because the government entity that requested them was not sufficiently tribunal-like. See, e.g., *In re Letters Rogatory Issued by the Dir. of Inspection of the Gov't of India*, 385 F.2d 1017, 1020 (2d Cir. 1967).

153. *In re Avant Indus.*, Misc. No. M12-329, 1980 U.S. Dist. LEXIS 14170 (S.D.N.Y. Oct. 3, 1980). The U.S. court did not object to the private party's requests *per se*, denying the request instead on the grounds that the requested witnesses were already in Italy, so ordering them to testify would be an intrusion into the Italian proceedings. *Id.* at \*9. The court used telling language in denying the petition, writing that if the party cannot procure the discovery it seeks in Italy, it should "obtain letters rogatory from the Italian court directed to persons or documents found in this district." *Id.*

154. See *supra* section II.A.

155. See *supra* section II.B.1.

156. A statutory amendment could also solve the problem. An amendment could simply insert the words "with the consent of the foreign or international tribunal" after "or upon the application of any interested person." Such a statutory amendment, of course, would

Section III.A discusses this proposal in detail and considers how it may fit within the existing doctrine. Section III.B explains how this proposal resolves tensions between current § 1782 practice and both the historical understanding of the limits of judicial assistance and congressional intent.

A. *Presumptively Requiring Tribunal Consent*

Having received a § 1782 request from a foreign private litigant, judges should, in general, only consider whether to grant it if there is evidence of the relevant tribunal's consent to the request. Without evidence of tribunal consent, judges should, in general, not consider granting a § 1782 request.

Thus, judges should adopt a presumptive requirement of tribunal consent. In other words, while some cases will warrant granting a § 1782 application without tribunal consent, judges should, by default, require tribunal consent as an exercise of their ample discretion in the disposal of § 1782 requests.<sup>157</sup>

1. *Using Discretion to Presumptively Require Tribunal Consent.* — U.S. judges should adopt a presumption that § 1782 requests require the consent of the relevant tribunal. Without the consent of the tribunal, U.S. judges should use their discretion to reject § 1782 requests originating from private parties, absent special circumstances. This rejection can be without prejudice, so that the party can remake the request once it has obtained tribunal consent. This presumptive requirement of tribunal consent is more consistent with the history of judicial assistance in general and of the new § 1782 in particular, because it ensures that foreign tribunals are aware of and consent to requests from private parties.<sup>158</sup>

How should judges define tribunal consent? Because the presumptive requirement of tribunal consent is a function of judges' discretion, a formal rule is not necessary. Rather, judges should use their discretion and

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ensure greater uniformity in practice across all jurisdictions and eliminate more uncertainty in this area of transnational litigation. And it would shield the law from a declaration of unconstitutionality by a judge persuaded that lending assistance in limited circumstances is within the judicial power, but the grant of discretion to judges is not enough to cure the constitutional defect. The preference for a judicial solution, however, is based on the low likelihood of mustering the congressional consensus required for successful enactment of legislation. Given congressional gridlock, a judicial approach is likely to provide a quicker, and at least equally as effective, solution.

157. The court's discretion is based on the permissive language of the statute: "The district court of the district in which a person resides or is found *may* order him to give his testimony . . ." 28 U.S.C. § 1782(a) (2018) (emphasis added); see also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004) ("The statute authorizes, but does not require, a federal district court to provide assistance to a complainant . . ."); *id.* at 264 ("[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.").

158. See *infra* section III.B.

judgment in determining whether the tribunal has in fact given its consent to the request.

Judges should, in general, require persuasive evidence of a tribunal's approval of the request. An example of persuasive evidence is a letter written by the foreign tribunal addressed to the U.S. court stating that it supports the requested discovery. Another example is a form appended to the § 1782 request declaring that the tribunal has reviewed the request and does not object to it, signed by the foreign official presiding over the proceedings or by the clerk of the foreign tribunal. This example is more efficient and more realistically plausible, as it would allow the foreign judge to express consent without having to produce and send an additional piece of correspondence that would drain the foreign court's resources.

In general, U.S. judges should use their discretion to refuse a § 1782 request when there is persuasive evidence of a tribunal's objection to the request. An example of persuasive evidence of a tribunal's objection to the request is a letter written by the foreign tribunal addressed to the U.S. court stating that it opposes the requested discovery.<sup>159</sup>

In the absence of persuasive evidence of a tribunal's approval or disapproval, U.S. judges should use their discretion and, in general, consider granting a § 1782 request only when they believe that granting the request will in fact assist a foreign tribunal. Parties requesting and opposing the § 1782 request may also submit arguments to the U.S. judge on how to use their statutory discretion (as is done now). Unless the U.S. court has good reason to be certain of the foreign tribunal's consent, it runs the risk of granting a request that lacks the foreign tribunal's consent.

This presumptive requirement of tribunal consent implies that there are instances in which the presumption is rebutted and consent is not in fact required. Tribunal consent may not be required in cases in which tribunal consent is obvious but is formally lacking. One can imagine an instance in which a § 1782 request, previously submitted with persuasive evidence of tribunal consent, needs to be resubmitted for whatever reason. If the new, identical § 1782 request does not have the attendant persuasive evidence of tribunal consent, the U.S. court can still be sure it is providing historically legitimate assistance; the court should not block international cooperation by demanding this formality.<sup>160</sup>

In summary, courts should presumptively require tribunal consent to § 1782 applications. Persuasive evidence of the tribunal's consent should

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159. See, e.g., *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006) (placing heavy weight on a foreign tribunal's letter that "has explicitly stated that it opposes the discovery . . . and is not receptive to U.S. judicial assistance").

160. This consideration is in line with one of the twin aims of § 1782, "providing efficient assistance to participants in international litigation." *Intel*, 542 U.S. at 252 (internal quotation marks omitted) (quoting *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002)).

be required in most cases. In some cases, however, the court, using its discretion, may grant a § 1782 request even without persuasive evidence of tribunal consent and still not run afoul of the historical limits on the Article III judicial power or congressional intent in § 1782.

2. *Fitting a Presumptive Requirement of Tribunal Consent Within Existing Doctrine.* — While this specific exercise of discretion detailed above is urged by the history of judicial assistance and § 1782 in particular, neither the text of the statute itself nor case law dictates exactly this solution. Nevertheless, exercising judicial discretion to presumptively require tribunal consent is consistent with both the statutory text and precedent.

It is uncontroversial that the text of the statute grants judges discretion in attending to § 1782 requests. This discretion includes the prerogative to deny a § 1782 request even if the request would otherwise conform with the statutory criteria for eligibility for judicial assistance. This is plainly apparent from the permissive text of the statute (“*may order*”).<sup>161</sup> Congress understood the statute to confer ample discretion on judges, including the discretion to deny an otherwise eligible request if judicial assistance would be “improper.”<sup>162</sup> The Supreme Court has reaffirmed this understanding.<sup>163</sup> In the words of the statute’s chief drafter, “It would seem beyond doubt that Section 1782 of the Judicial Code, 28 U.S.C., grants a district court discretion in determining whether assistance should be rendered.”<sup>164</sup>

It is therefore in line with the statute’s text for a court to use its discretion to presumptively require tribunal consent to § 1782 requests.<sup>165</sup> If there were ever reasons for judges to exercise discretion and deny § 1782 requests, staying within Article III bounds and fulfilling congressional intent are good reasons.<sup>166</sup>

Like the statutory text, case law also does not force judges to grant § 1782 requests without foreign tribunal consent. To the contrary, *Intel*

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161. 28 U.S.C. § 1782(a) (emphasis added).

162. S. Rep. No. 88-1580, at 7–8 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3789; see also *id.* at 7 (describing courts’ discretion under the revised § 1782 and noting some instances in which the court might use its discretion to refuse requests for judicial assistance).

163. *Intel*, 542 U.S. at 255, 264 (“The statute authorizes, but does not require, a federal district court to provide assistance to a complainant . . .”).

164. Smit, *Assistance Before International Tribunals*, *supra* note 39, at 1272 n.40.

165. As a matter of statutory interpretation, some of the text in § 1782 may in fact allow for requests from private parties that lack tribunal consent. For example, “any interested person,” as a matter of plain meaning, may indeed include a private litigant without regard to the tribunal’s consent to the litigant’s request. See, e.g., *Intel*, 542 U.S. at 267 (Scalia, J., concurring in the judgment) (arguing that the text of the statute is sufficient to conclude that a private litigant is not categorically barred from making a § 1782 request). Yet, as already observed, just because the statute allows for “any interested person” to request assistance does not mean that judges must grant it.

166. Cf. S. Rep. No. 88-1580, at 8 (anticipating courts will use their discretion to deny § 1782 requests when judicial assistance would be improper because of strained relations with the foreign country).

emphasized courts' discretion and elaborated guidelines for exercising that discretion.<sup>167</sup>

Currently, some courts weigh the foreign tribunal's receptivity to the § 1782 application, which can be understood as a proxy for the foreign tribunal's consent to the request.<sup>168</sup> Some courts require that the requesting party provide authoritative proof of the foreign tribunal's receptivity.<sup>169</sup> These courts will find the presumptive requirement of tribunal consent to be very similar in practice.<sup>170</sup>

In some circuits, however, adopting a presumptive requirement of tribunal consent may require more careful alignment with existing precedent. Such an adoption would certainly feel newer in the Second Circuit, which requires "authoritative proof" of a foreign tribunal's *objection* to consider a foreign court sufficiently unreceptive to the discovery requested.<sup>171</sup> In other courts, such as the Third<sup>172</sup> and Seventh<sup>173</sup> Circuits, the receptivity of the foreign court is assumed until the opposing party provides a rebuttal. With the emergence of new trends in § 1782 requests, however,<sup>174</sup> these courts would do well to consider presumptively requiring "authoritative proof" of tribunal *consent*.

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167. See *Intel*, 542 U.S. at 264.

168. The foreign court's receptivity is one of the factors that *Intel* recommended for courts' consideration when exercising their discretion to grant a § 1782 request. *Id.*

169. See, e.g., *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 241 (D. Mass. 2008) (noting neither party had presented authoritative proof as to receptivity); see also *In re Deposito Centralizado de Compensacion y Liquidacion de Valores Decevale, S.A.*, No. 20-25212-MC, 2021 WL 2323226, at \*8 (S.D. Fla. June 1, 2021) (finding the second *Intel* factor not to favor denying the request because neither party had presented authoritative proof), appeal dismissed sub nom. *Deposito Centralizado de Compensacion y Liquidacion de Valores Decevale, S.A. v. Ecuador High Yield Fund, LLC*, No. 21-11889-CC, 2021 WL 4049325 (11th Cir. July 7, 2021).

170. The difference between receptivity (the proxy) and tribunal consent (the principal) is small. One imagines a different outcome between the two approaches perhaps in a case in which a foreign tribunal usually welcomes judicial assistance from U.S. courts but has not expressed any awareness of the specific § 1782 request before the U.S. court. While such circumstances may show receptivity, they do not show consent. See, e.g., *In re Potanina*, No. CV 14-19-BLG-SPW, 2014 WL 12600449, at \*5 (D. Mont. Apr. 16, 2014) ("Since Russian courts are generally receptive to receiving discovery obtained through § 1782(a), [the second *Intel*] factor cuts in favor of the Petitioner.").

171. See, e.g., *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995) ("[W]e believe that a district court's inquiry into the discoverability of requested materials should consider only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782.").

172. See *In re Biomet Orthopaedics Switz. GmbH*, 742 F. App'x 690, 698 (3d Cir. 2018) (assuming a German court's receptivity, absent opposing party's showing to the contrary, because of previous reception of § 1782 requests).

173. See *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 597 (7th Cir. 2011) (assuming a German court's receptivity, absent opposing party's showing to the contrary).

174. See *supra* section I.B.

Thus, adopting a presumptive requirement of tribunal consent fits within existing law. Aligning § 1782 practice with the constitutional and congressional concerns discussed above requires no significant departure from Supreme Court precedent and no statutory amendment.

B. *Resolving the Constitutional and Congressional Histories*

The presumptive requirement for tribunal consent, as described above, would restore a § 1782 practice consistent with the Constitution, because it would ensure that the foreign tribunal is both aware of the request and could potentially reciprocate the assistance, two elements that were historically essential for providing judicial assistance. It also would restore a § 1782 practice consistent with congressional intent because it would ensure that the assistance is provided to the entities to which Congress intended to provide assistance, and because it would ensure that judges compel testimony with the purpose of rendering assistance in the way foreign and international tribunals would want it.

1. *Constitutional Resolution.* — Presumptively requiring tribunal consent resolves most of the tension with Article III. When a § 1782 request has tribunal consent, the U.S. court receiving the request can be sure of the foreign tribunal’s awareness of the request. Foreign tribunals’ awareness of requests for judicial assistance was required before and at the Founding. Obtaining the foreign tribunal’s awareness provides two elements that can cure the current practice’s constitutional dubiousness.

First, the U.S. court will know that the foreign tribunal can eventually reciprocate the assistance on the basis of comity. Comity, a principle derived from the “Law of Nations,” was understood as an integral part of the judicial power,<sup>175</sup> or as inherent in the judicial power, at the time of the Founding. Comity is exactly the “animating purpose of § 1782.”<sup>176</sup> Thus, even if the foreign tribunal did not itself originate the request, its awareness of the request means that it can keep a loose, informal “ledger” of the help it has received from U.S. courts against the help it has rendered to U.S. courts.

Second, the U.S. court can know that the foreign tribunal has had the opportunity to protest an unsanctioned request from a private litigant or potential private litigant. Providing judicial assistance to a foreign court over the protests of that foreign court is inherently incomprehensible and outside the judicial power as understood at the Founding.<sup>177</sup>

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175. See Jones, *supra* note 15, at 540 n.74; see also Cong. Globe, 33d Cong., 1st Sess. 433 (1854) (statement of Sen. Bayard).

176. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2088 (2022); see also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 271 (2004) (Breyer, J., dissenting) (calling comity the interest § 1782 was “designed to serve”).

177. See *supra* section II.A.3. *Intel* should not be seen as conflicting directly with this reality. *Intel* held that a foreign court’s objection is not dispositive of a U.S. court’s *authority* to honor a § 1782 request. See *Intel*, 542 U.S. at 265–66 (declining to bar § 1782 discovery

To satisfy the constitutional worries, the request does not need to originate with the foreign court. As long as the foreign court is aware of and consents to the request, enough of the constitutional tension is resolved. This is for the reasons mentioned above: Aware of the request that the U.S. court is entertaining, the foreign court can now participate in mutual judicial assistance if the U.S. court grants the request. And the foreign court can protest the request to signal to the U.S. court that granting the request would not in fact assist the foreign court. The tribunal's consent can, in a legal-fictional manner, allow the U.S. court to treat the request as if it originated from the foreign tribunal itself for the purposes of the mutual assistance calculus. By presumptively requiring that the foreign court consent to the § 1782 request, U.S. courts can ensure that when they exercise judicial power by compelling the production of evidence, they are doing so as an act of mutual judicial assistance, as required by the historical practice of judicial power under Article III.

2. *Congressional Intent Resolution.* — Presumptively requiring the consent of the foreign tribunal would also align the practice of § 1782 requests with the congressional intent for the statute. With the consent of the foreign tribunal, the U.S. court can be sure that it is fulfilling the congressional mandate to assist foreign courts and quasi-judicial agencies. Without the consent of the foreign tribunal, fulfilling a § 1782 request could frustrate the foreign tribunal, achieving exactly the opposite of congressional intent.

Since Congress wanted § 1782 to provide assistance to foreign governments and their judiciaries and quasi-judicial agencies, it would help to know what kind of assistance those same foreign governments seek when attempting to fulfill Congress's intent.

One example of international agreement provides a clear image of how foreign governments understand judicial assistance to work: the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,<sup>178</sup> a treaty on the taking of evidence. The Hague Evidence Convention indicates that foreign governments prefer that governments offer international judicial assistance only to other courts and tribunals and not to private litigants. Accordingly, adopting the presumptive requirement of tribunal consent ensures that the judicial

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in that case despite the European Commission's statement in *amicus curiae* briefs to the Supreme Court "that it does not need or want the District Court's assistance"). The Court arrived at this conclusion based on the parties' arguments before it.

178. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter *Hague Evidence Convention*]. The Convention entered into force in the United States after its ratification in 1972. The World Organisation for Cross-Border Coop. in Civ. & Com. Matters, Status Table, 20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82> [<https://perma.cc/3D27-HWLJ>] [hereinafter *Status Table*] (last updated Jan. 19, 2023).



assistance offered is indeed desired by the foreign governments that Congress intended to assist through § 1782.

The Hague Evidence Convention shows countries' preference that only judicial authorities originate requests for assistance in the taking of evidence. Through the Convention, states agreed on procedures for international judicial assistance in the taking of evidence. The Convention provides that the "judicial authority" of a state party to the Convention may request the "competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act."<sup>179</sup> One of the defining features of the Convention is its establishment of a "Central Authority" for each member state.<sup>180</sup> The judicial authority of the requesting state addresses its request for assistance to the Central Authority of the foreign state.<sup>181</sup> Once the Central Authority receives the letter of request, it forwards the letter of request to the relevant "authority competent to execute" it.<sup>182</sup> The competent authority of the receiving state can refuse a request only on narrow grounds.<sup>183</sup>

The Convention provides that the requesting entities are the "judicial authorities" of state parties. Since the Convention is the expression of the will of sixty-five state parties,<sup>184</sup> including a unanimous U.S. Senate,<sup>185</sup> it underscores a global understanding that mutual assistance in the taking of evidence should be requested by judicial authorities rather than private litigants.<sup>186</sup> This fact should inform U.S. judges when deciding whether

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179. Hague Evidence Convention, *supra* note 178, at 2557.

180. *Id.* at 2558.

181. *Id.*

182. *Id.* In the United States, the Office of International Judicial Assistance (OIJA), an office within the Department of Justice, is the designated Central Authority. Once OIJA receives a letter of request under the Hague Evidence Convention, OIJA reviews the request for "straightforward technical requirements" and attempts to obtain the evidence without compulsion. Then, if unsuccessful in gathering the evidence without compulsion, OIJA "forwards the request to the appropriate federal district court for compelled discovery under § 1782." Wang, *supra* note 6, at 2101, 2104.

183. See Hague Evidence Convention, *supra* note 178, at 2562–63. These grounds include if: "(a) [I]n the State of execution the execution of the Letter does not fall within the functions of the judiciary; or (b) the State addressed considers that its sovereignty or security would be prejudiced thereby." *Id.* The Convention further narrows refusal by providing that "[e]xecution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it." *Id.*

184. See Status Table, *supra* note 178.

185. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 530 (1987) (citing 118 Cong. Rec. 20,623 (1972)).

186. The application of the Hague Evidence Convention in practice has been criticized as ineffective. Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 *Law & Contemp. Probs.* 103, 132 (1994); see also Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, 57 *Law & Contemp. Probs.* 78, 78 (1994). Although the Convention's purpose

their fulfillment of a private litigant's § 1782 request will achieve the congressional objective of providing *assistance* to the courts, tribunals, magistrates, and agencies of foreign countries.

Thus, the foreign tribunals that Congress sought to assist in § 1782, through their governments, have expressed a clear view on who should originate the request for international judicial assistance. Tribunals should; private parties should not. Therefore, to fulfill the congressional mandate of providing assistance to foreign and international courts and tribunals, U.S. judges should presumptively require tribunal consent to § 1782 requests from private parties.

This is how a simple judicial solution can help fix a growing problem in § 1782 practice. It fits within the statutory text and aligns with existing precedent. Informed by the history of judicial assistance and § 1782, judges can ensure they observe constitutional boundaries and fulfill the will of Congress.

#### CONCLUSION

As the United States continues to redefine its role in the world,<sup>187</sup> it is important for U.S. judges to consider their approach to § 1782 requests from private parties. This Note has argued that despite the growing practice of granting § 1782 requests from private litigants, the correct approach is to require, at least presumptively, the foreign tribunal's consent to the private-party request.

This proposal would help ensure that U.S. judges provide judicial assistance as intended—as intended by the Constitution, Congress, and the relevant foreign tribunal. The consent of the foreign tribunal helps alleviate significant problems with the current practice of § 1782 requests. It helps ensure that U.S. judges, in exercising their judicial power by compelling evidence to assist foreign tribunals, stay within the confines of

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was to bridge the gap between common and civil law discovery practices, there is still friction even among common law signatories, such as over pretrial discovery. Burbank, *supra*, at 132.

There is also disagreement among state parties as to whether the Convention is the exclusive means of obtaining discovery among signatories. *Id.* In *Aérospatiale*, the U.S. Supreme Court held that the Convention was not the exclusive means of obtaining discovery among signatories. *Aérospatiale*, 482 U.S. at 544. Rather, lower courts were free to apply a comity analysis when deciding whether to govern discovery under the Federal Rules of Civil Procedure as opposed to the Hague Evidence Convention. *Id.*

Importantly, the Convention allows state parties to permit by municipal law or practice for “any act provided for in this Convention to be performed upon less restrictive conditions” and to permit by municipal law or practice “methods of taking evidence other than those provided for in this Convention.” Hague Evidence Convention, *supra* note 178, at 2569. The Convention is instructive despite these caveats.

187. See, e.g., George Ingram, *Renewing US Global Engagement in a Changed World*, Brookings Inst. (Jan. 12, 2021), <https://www.brookings.edu/blog/up-front/2021/01/12/renewing-us-global-engagement-in-a-changed-world/> [https://perma.cc/MYC7-QGP8]; *supra* note 13 and accompanying text.

the power vested by Article III. It helps ensure that U.S. judges apply § 1782 as Congress intended. And it helps ensure that U.S. judges provide assistance that, if it does not help, at least does not hurt foreign tribunals. By bringing the practice under § 1782 back to its historical roots, judges can ensure that their judicial power is invoked not to embolden competitors as they launch discovery wars against each other but rather to assist courts and tribunals abroad in gathering evidence that is important for the administration of justice around the world.

