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ROADBLOCKS TO REMEDIES: RECENTLY DEVELOPED BARRIERS TO RELIEF FOR ALIENS INJURED BY U.S. OFFICIALS, CONTRARY TO THE FOUNDERS' INTENT

Gwynne L. Skinner *

INTRODUCTION

The founders of the United States, especially those who wrote the Constitution and the subsequent First Judiciary Act,[1] wanted to ensure that aliens who were victims of torts in violation of the law of nations (now commonly referred to as customary international law[2]) had the ability to seek redress in federal court for the injuries they suffered.[3] Providing remedies for violations of the law of nations to aliens was important in order to demonstrate that the young country took the law of nations seriously and to prevent foreign conflicts, some of which might lead to war. At the time of the nation's founding, just as it does now, international

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1. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (commonly referred to as the First Judiciary Act).

2. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 n.2 (2d Cir. 2003) ("[W]e have consistently used the term 'customary international law' as a synonym for the term the 'law of nations.'"); The Estrella, 17 U.S. (4 Wheat.) 298, 307–08 (1819) (referring to the non-treaty-based law of nations as the "the customary . . . law of nations").

3. Aliens possessed the right to seek redress for violations of the law of nations in some state courts, but Congress wanted to ensure aliens had access to federal courts thinking they would offer a fairer tribunal for their claims, an important part of assuring fair redress for purposes of peaceful foreign relations. *See* Gwynne Skinner, *Federal Jurisdiction over U.S. Citizens' Claims for Violation of the Law of Nations in Light of* Sosa, 37 GA. J. INT'L & COMP. L. 53, 77–78, 84 n.163 (1988).

law required that nations provide remedies to foreign citizens who were wrongfully injured while under the protection of the host nation,[4] an obligation the founders took seriously.

The founders ensured the availability of such remedies by enacting the Alien Tort Statute[5] ("ATS") in 1789, which allowed aliens to sue for violations of the law of nations in federal courts.[6] The ATS does not specify or limit who may be a defendant in such suits.[7] Although the traditional thinking has been that Congress enacted the ATS in response to an incident where a foreign citizen was the perpetrator—the Marbois affair[8]—Congress had U.S. citizens equally in mind as it did foreign citizens as likely defendants in these claims. Importantly, the founders understood and intended that even U.S. officials could be defendants in such

4. At the time of the First Judiciary Act's enactment, Congress contemplated the remedying of injuries that occurred within the host country's borders, whether by its own citizens for by foreign citizens. *See* discussion *infra* Section I.B. Later, with the publishing in 1795 of an opinion by Attorney General Bradford involving civil liability under the Alien Tort Statute against U.S. citizens for their role in an attack on a British colony in Sierra Leone, the executive branch contemplated that remedies should be provided for injuries done by U.S. citizens, even those that took place extraterritorially. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (citing Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 455, 469–70 (1995)); discussion *infra* Section I.B.

5. The First Congress enacted the Alien Tort Statute ("ATS") in 1789 as part of the First Judiciary Act. The ATS reads, "The district courts shall have jurisdiction over tort claims for violations of the law of nations and treaties." 28 U.S.C. § 1350 (2006). The ATS was enacted as Section 9 of the Judiciary Act of 1789. *See* Judiciary Act, § 9, 1 Stat. 73.

6. The First Judiciary Act provided federal courts with diversity jurisdiction over claims where an alien was a party when the amount in controversy was over $500. Judiciary Act, § 11, 1 Stat. at 78–79. The $500 requirement for claims involving aliens was the result of a compromise involving the difficulty of British debt collections under the Treaty of Paris. WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 9 (Herbert A. Johnson ed., 1995). By providing for federal jurisdiction over cases involving aliens only where the amount in controversy exceeded $500, a large majority of such litigation would be forced to proceed in state courts, which were much more sympathetic to U.S. citizens. *Id.* Thus, without the ATS, there would have been no federal court jurisdiction generally involving aliens for claims under $500. By enacting the ATS, Congress ensured federal court jurisdiction for claims brought by aliens even if the amount in controversy was less than $500, as long the suit was a tort claim for violation of the law of nations.

7. Of course, federal courts must still have personal jurisdiction over the defendant. This means that the defendant must reside in the state of the host federal court, have sufficient contact with the jurisdiction to meet the constitutional requirements of personal jurisdiction, or be served with the lawsuit while within the jurisdiction (known as "tag" jurisdiction). *See* Burnham v. Superior Ct., 495 U.S. 604, 628 (1990); Kulko v. Superior Ct., 436 U.S. 84, 101 (1978).

8. *See* discussion *infra* Section I.B (discussing the Marbois affair).

suits, thereby providing aliens with judicial remedies for actions by U.S. officials.[9] It is also important to note that by enacting the ATS, Congress gave federal courts the power to adjudicate such claims and provide remedies rather than reserving such powers for itself or assigning the claims to the executive branch.

This article does not suggest that the founders' original intent regarding remedies available to aliens for violations of international law should prevail regardless of changed international circumstances, changes in legal theory, or other developments. Instead, it suggests that their desires and "original intent" are important to understand when contemplating modern departures from original intent, as well as to ensure that the purpose of the ATS—a Congressional statute that is alive and well, after all—is not frustrated.

The founders' intent that aliens have judicial remedies for such violations is important to consider given two legal conundrums. The first is the growth over the last thirty years of both Congressional statutes and common law doctrines that limit the ability of individuals, and in particular aliens, to obtain a remedy when they suffer injuries caused by U.S. officials engaging in tortious behavior, including when such behavior violates international law and the U.S. Constitution.[10] This development contravenes not only the founders' desires and intentions, but the remedy-protection policies and practices of Congress and the judiciary throughout most of U.S. history. This commitment, and the legal paradigm that allowed it to be met, generally continued until the 1980s. At that time, Congress enacted a statute known as the Westfall Act of 1988 and the courts further developed common law doctrines that created serious roadblocks to such remedies.[11] The Westfall Act was perhaps the most significant barrier to remedies erected during the last thirty years because it gives the

9. *See* Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 19–22 (1985).

10. *See* Federal Employees Reform and Tort Compensation Act of 1988, Pub. L. No. 100-394, 102 Stat. 4563 (codified as amended at 28 U.S.C. § 2679 (2006)). The Federal Employees Reform and Tort Compensation Act ("FERTC") is known as the Westfall Act because it was enacted to overturn the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). *See, e.g.*, *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 110–11 (D.D.C. 2007).

11. *See* 28 U.S.C. § 2679 (2006).

United States the ability to substitute itself as the defendant in place of U.S. officials sued in their individual capacities as long as the United States certifies that those officials acted "within the scope" of employment.[12] Once this substitution occurs, the case then proceeds against the United States under the Federal Tort Claims Act[13] ("FTCA"), the statute by which the United States—which is otherwise entitled to sovereign immunity[14]—allows certain tort claims to be brought against it. The FTCA and its various exclusions and exemptions, however, operate to prevent such suits in ways that disparately impact aliens who have suffered violations of their rights under international law. For example, the United States has waived sovereign immunity for intentional torts perpetrated by U.S. law enforcement or investigative personnel only, but not for intentional torts committed by other officials or employees.[15] Moreover, the United States has not waived immunity for harms arising in a foreign country,[16] even where the United States has control over the geographic area where the harm arose,[17] and even if acts contributing to or causing the harm take place in the United States;[18] or for torts arising under customary international law.[19] These are only some of the limitations

12. *See id.*

13. Federal Tort Claims Act of 1946, 28 U.S.C. § 1346 (2006).

14. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821) ("[T]he universally received opinion is that no suit can be commenced or prosecuted against the United States.").

15. 28 U.S.C. § 2680(h) (2006).

16. *Id.* § 2680(k) (2006).

17. *See* Al Janko v. Gates, 831 F. Supp. 2d 272, 282, 284 (D.D.C. 2011); Hamad v. Gates, No. C10-591 MJP, 2011 WL 6130413, at *11 (W.D. Wash. Dec. 8, 2011); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 119 (D.D.C. 2010); *see also* Smith v. United States, 507 U.S. 197, 198–204 (1993) (finding that Antarctica was considered a foreign country for purposes of the FTCA, even though it did not have a government, was sovereignless, and had no tort law of its own).

18. The Supreme Court rejected this argument of FTCA cases, known as the "headquarters doctrine," in *Sosa v. Alvarez-Machain*. 542 U.S. 692, 702–04 (2004). The case is better known for its affirmance that federal courts can use their common law power to recognize claims for violation of the law of nations pursuant to the jurisdictional grant of the ATS. *Id.* at 712–37. Now, the foreign country exception applies to the location where the harm or injury occurred. *Id.* at 703–05.

19. *See* 28 U.S.C. § 1346 (2006) (describing the "law of the place" where the act occurred as the law under which the United States will be held liable); *see also* Feres v. United States, 340 U.S. 135, 142 (1950) (holding that "law of the place" meant state law). Courts have thus far rejected arguments that international law could be considered "law of place" under the FTCA. *See Al Janko*, 831 F. Supp. 2d at 283 (finding that customary international law is not state law and thus not within the FTCA); Bansal v. Russ, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007); Turkmen v. Ashcroft, No. 02 CV 2307(JG), 2006 WL

to claims that can be brought under the FTCA, but they are the ones that particularly affect aliens who have been harmed by U.S. officials.

Various common law doctrines developed by federal courts have also worked to preclude remedies for individuals injured through actions of U.S. officials, especially in combination with the Westfall Act and the FTCA limitations. Like the statutory changes, these developments have also had a disparate impact on aliens, all in contravention of the founders' and earlier generations' intentions. These developments include various immunity doctrines, such as officials' qualified immunity[20] claims of violation of the U.S. Constitution known as "*Bivens* claims";[21] the consideration of "special factors counselling hesitation" in recognizing a *Bivens* claim;[22] the political question doctrine;[23] and the more recent "case-specific deference" in cases potentially impacting foreign relations.[24]

These relatively recent roadblocks to remedies for aliens must also be viewed in context of the second legal conundrum: the double-standard which exists where, although federal courts typically hold foreign officials liable for torts in violation of customary international law in cases typically brought under the ATS or the

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1662663, at *50 (E.D.N.Y. June 14, 2006), *rev'd on other grounds*, 589 F.3d 542 (2d Cir. 2009).

20. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

21. Torts in violation of the U.S. Constitution are referred to as *Bivens* claims, given that the Supreme Court recognized such claims as a matter of federal common law in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. 403 U.S. 388, 397 (1971).

22. The term comes from *Bivens*, in which the Supreme Court explained that a claim in that case "involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396; *see also* Arar v. Ashcroft, 585 F.3d 559, 574–75 (2d Cir. 2009); Rasul v. Myers (*Rasul II*), 563 F.3d 527, 532 n.5 (D.C. Cir. 2009); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985).

23. The political question doctrine traces its roots to the early case of *Marbury v. Madison*. 5 U.S. (1 Cranch) 137, 170 (1803) ("[Q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). The modern political question doctrine was set forth in the 1962 case of *Baker v. Carr*. 369 U.S. 186, 210–11, 217 (1962).

24. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

Torture Victims Protection Act[25] ("TVPA"), U.S. officials are typically immune from such acts. This has resulted primarily from the different tests applied to U.S. officials and foreign officials in determining whether the official was acting "within the scope" of employment or authority when engaging in tortious actions.[26] In addition, courts' application of the political question doctrine typically results in claims against U.S. officials for violations of customary international law or other torts (if the case has not otherwise been dismissed on other grounds) as being nonjusticiable, whereas the doctrine has typically not precluded claims against foreign officials.[27]

Even the ability of aliens to hold U.S. corporations accountable for their roles in violations of customary international law—one area where aliens have had some, albeit limited, success[28]—is now at issue. In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court is currently considering whether corporations can even be held liable for such violations under the ATS.[29] Any decision limiting liability of corporations would be a further roadblock to an alien seeking a remedy against U.S. citizens or actors who violate international law.

These two developments—the rise and expansion of legislation and common law doctrines precluding claims against U.S. officials for violations of both customary international law and the U.S. Constitution, and the differing standards of immunity and liability for U.S. and foreign officials—have greatly contravened the founders' intention that aliens have the ability to seek a remedy for serious harms caused by U.S. citizens, including U.S. offi-

25. Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)). Such torts typically include torture, cruel, inhuman and degrading treatment ("CIDT"), extrajudicial killing, and prolonged arbitrary detention.

26. 28 U.S.C. § 2679 (2006); *see* Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, The Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL'Y 175, 190–96 (2008).

27. *See, e.g.*, Samantar v. Yousuf, 560 U.S. ___, 130 S. Ct. 2278 (2010); Hilao v. Marcos (*In re* Estate of Marcos Human Rights Litig.), 25 F.3d 1467 (9th Cir. 1994).

28. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

29. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, ___ U.S. ___, 132 S. Ct. 472 (2011). Given that this article is primarily discussing the liability of U.S. officials for their violations, a decision in *Kiobel* finding that corporations can be liable for their role in violations of customary international law should not affect the premise or ideas contained in this article.

cials, and have resulted in legal hypocrisy, which itself could have potential foreign policy implications.

Finally, it is important to explore the implications of these developments and the questions they raise. First, are the founders' intentions regarding the provision of remedies to aliens as applicable and relevant today, given that the United States is now a super power against whom other countries will likely not declare war simply for failing to provide a remedy for tort violations? Second, are there changes that Congress should make to ensure the realization of the founders' and earlier generations' desire that aliens have access to a remedies for tort violations, and if so, what should they be? Third, under what circumstances should courts interpret statutes and apply common law doctrines with the founders' intent in mind, and what canon of statutory interpretation should they use? These questions are explored toward the end of this article.

Section I of the article reviews the United States' early history, concluding that the founders' desire to ensure aliens had a remedy for torts in violation of customary international law included when such torts were perpetrated by U.S. citizens, including U.S. officials. As others have noted, the provision of this remedy in large part reflected a desire that the young country comply with international law and avoid diplomatic and foreign entanglements.[30] This is especially true given that 200 years ago, failing to provide a remedy for international law violations could lead to war or other diplomatic problems. Section I further describes that throughout the 1800s, courts routinely found that U.S. officials could be held liable for customary international law and constitutional violations, including for claims brought by aliens, a trend that continued well into the last century. Although scholars have largely overlooked this history, ensuring a remedy to aliens for tortious actions by U.S. citizens and officials was important to earlier generations not only for foreign policy reasons, but also because it was the right thing to do.

Section II briefly discusses the obligation under international law for countries to provide remedies to aliens whose rights are

30. *See* Ralph G. Steinhardt, *The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Claims Act and Its Discontents: A Reality check*, 16 ST. THOMAS L. REV. 585, 587–88 (2004).

violated under international law—law that existed both at the time of the country's founding and continues today.

Section III traces the development of official immunity, statutory enactments, and various common law doctrines that have resulted in barriers to aliens obtaining remedies for violations of their rights under customary international law and the U.S. Constitution, especially when perpetrated by U.S. officials. Certainly, such barriers often also affect U.S. citizens' ability to seek remedies. Section III, however, explains in detail how the combination of the various statutes and common law doctrines results in a complex web of barriers that restrains aliens' ability to seek remedies for harm caused by U.S. officials' tortious and illegal actions more than U.S. citizens' ability to seek remedies. The article also discusses whether courts are applying the various statutes and doctrines appropriately. In addition, Section III discusses how the differences in courts' applications of statutory and common law to tort claims for violation of customary international law against foreign officials results in a hypocritical and contradictory remedial paradigm between U.S. and foreign officials, and one that potentially has negative consequences for U.S. foreign policy.

Section IV acknowledges that the United States' role and status in the world is different today than they were at the country's founding. This section explores whether the United States' compliance with international law—including ensuring a remedy when its officials commit torts against aliens in violation of customary international law and the U.S. Constitution—is as important today as it was at time of the country's founding. The section concludes that although it may not be as salient of an issue for national security as it was at the time of the founding, complying with international law is still a critical part of U.S. foreign policy, noting various recent official pronouncements regarding the importance of international law and the United States' compliance with it.

Section V contains conclusory observations and proposes various changes to the Westfall Act and the FTCA. It also suggests a rule for courts in their interpretation of these statutes and in their application of common law doctrines that will allow for better compliance with the founders' original intent, with Congressional intent in enacting the FTCA and Westfall Act, and with

current international law obligations, which require access to judicial remedies for aliens who suffer harm from torts in violation of their rights under customary international law.

I. THE FOUNDERS WANTED TO ENSURE ALIENS HAD ACCESS TO CIVIL REMEDIES FOR TORTS IN VIOLATION OF THE LAW OF NATIONS PERPETRATED BY U.S. CITIZENS, INCLUDING U.S. OFFICIALS

A. *The Founders Wanted to Ensure that Aliens Who Suffered Harm Through International Law Violations Were Provided a Remedy*

There is little debate that the founders of the United States sought to ensure that the young country would comply with the law of nations. [31] It is not an exaggeration to say that this was a critical concern of theirs, and they knew it was crucial to being recognized as a legitimate sovereign by other nations and to avoid armed conflict.[32] This desired compliance with international law included addressing and remedying violations of the law of nations,[33] something the Continental Congress, which preceded the Constitutional Convention, had been unable to do.[34]

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31. *See, e.g.*, CASTO, *supra* note 6, at 45; Bradley, *supra* note 4, at 587; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 472 (1989); William Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 490 (1986); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63 (1988); William Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 705–08 (2002); David M. Golove & Daniel Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 932 (2010); Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 271–72 (2001); Randall, *supra* note 9, at 11–12; Steinhardt, *supra* note 30, at 585.

32. *See also* Casto, *supra* note 31, at 490 (citing 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 1137 (Gaillard Hunt ed., 1914)).

33. *Id.*; *see also* Bradley, *supra* note 4, at 630, 642.

34. *See* Bradley, *supra* note 4, at 642–43 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19, 25 (Max Farrand ed. 1911)). In his opening remarks to the Federal Convention, Edmund Randolph observed that one of the defects of the Articles of Confederation was that the national government "could not cause infractions of treaties or of the law of nations, to be punished," and that "[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender." *Id.* In a subsequent letter, Randolph noted that in "the constitutions, and laws of the several states . . . the law of nations is unprovided with sanctions in many cases, which deeply af-

There were several ways in which the young country sought to signal that it was committed to the law of nations and that it would hold violators accountable. One was giving Congress the power to define and prosecute crimes for violations of the law of nations.[35] However, it was not only important to the founders to hold violators accountable criminally, but also to ensure that those injured by violations of the law of nations, particularly aliens, were provided a civil remedy, and in particular, the ability to bring a damages claim in federal court.[36]

The effort to provide a civil judicial remedy began at least as early as 1781,[37] and was ultimately accomplished by the First Congress' enactment of the ATS[38] in 1789 as part of the First Ju-

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fect public dignity and public justice." *Id.* (quoting A Letter of His Excellency Edmund Randolph, Esq., on the Federal Constitution (Oct. 10, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 262, 263 (John P. Kaminski & Gaspare J. Saladino eds., 1988)). Randolph further observed that the Continental Congress did not have the express authority "to remedy these defects," and that, as a result, the confederacy might be "doomed to be plunged into war, from its wretched impotency to check offenses against this law." *Id.* James Madison remarked at the Federal Convention that, under the Articles of Confederation, the country was unable to "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars." *Id.* (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 316). In the Federalist Papers, Madison stated that the Articles of Confederation were deficient because they "contain no provision for the cases of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." *Id.* (quoting THE FEDERALIST NO. 42, at 330–31 (James Madison)). It should be noted, however, that Professor Bradley takes these comments to only refer to criminal accountability, and not for evidence of providing a cause of action. *Id.* at 642.

35. U.S. CONST. art. I, § 8, cl. 10 (conferring upon Congress the power "[t]o define and punish . . . Offences against the Law of Nations").

36. *See, e.g.*, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 224 (1996) (finding that the ATS "was designed to ensure that those who violated the law of nations could be held liable not just criminally but civilly as well"); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) (describing that the founders found it critical to ensure that the federal courts have jurisdiction over aliens' claims for torts in violation of the law of nations because they were the type of violations that potentially "threatened serious consequences in international affairs"); Casto, *supra* note 31, at 481 (noting that scholar William Blackstone, the Continental Congress, and the courts all indicated that "a judicial remedy was necessary in order to assuage the anger of foreign sovereigns"); *id.* at 491 (explaining the reasoning behind granting a civil remedy).

37. *See e.g.*, Dodge, *supra* note 31, at 692 ("Research has shown that the Alien Tort Statute was the culmination of an effort dating back to at least 1781 to ensure individual tort liability for violations of the law of nations, an effort that was made more urgent by the famous Marbois Affair of 1784.").

38. The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1350 (2006)). The First Judiciary Act originally read, "[the district courts] shall

diciary Act.[39] The ATS gives federal courts jurisdiction over tort claims brought by aliens for violations of the law of nations, a term now seen as synonymous with customary international law.[40]

According to several scholars, allowing aliens to bring tort claims for violations of the law of nations in federal court, as provided through the ATS, was a direct response to the founders' belief that it was the United States' responsibility under international law to remedy injuries to aliens when their international rights were violated and to do so in order to avoid foreign affairs consequences.[41] In developing the accountability and civil remedial scheme for violations of the law of nations, the founders also relied on influential international law commentators such as Emmerich de Vattel, perhaps the most famous international scholar at the time,[42] and William Blackstone, a well-known and respected English legal scholar.[43] Vattel wrote in his influential international law treatise in 1758 that "[a] sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it."[44] He also specifically referred to the "denial of justice" for aliens as a justification for wars of reprisal launched by the alien's country.[45]

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also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.*

39. *Id.*

40. *See, e.g.*, The Estrella, 17 U.S. (4 Wheat.) 298, 307–08 (1819) (referring to non-treaty-based law of nations as the "the customary and conventional law of nations"); Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 n.2 (2d Cir. 2003).

41. *See* Randall, *supra* note 31, at 20–21; *see also* John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47, 47 (1988) (arguing that the First Congress intended to limit the Alien Tort Statute to tortious acts "which, if unaddressed, would result in international legal responsibility on the part of the United States"); Slaughter, *supra* note 31, at 464 (noting that the ATS "was a straightforward response to what the framers understood to be their duty under the law of nations").

42. D'Amato, *supra* note 31, at 64.

43. Bradley, *supra* note 4, at 630–31.

44. EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW bk. III, § 77, 137 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

45. D'Amato, *supra* note 31, at 64 (citing VATTEL, *supra* note 44, bk. II, § 350, 230–31).

William Blackstone, who profoundly affected America's founding generation,[46] made similar pronouncements. For example, in discussing violations of the law of nations, Blackstone noted that a sovereign should ensure that injured "stranger[s]" receive restitution from those individuals who harmed them through violations of international law.[47]

Providing aliens with the ability to seek a remedy in federal court was especially important because under the Articles of Confederation, many states had failed to provide such remedies even though Congress had repeatedly requested them to enact legislation to do so, much to Congress' consternation.[48] For example, in 1781, the Continental Congress passed a resolution calling upon states to enact legislation providing for the vindication of rights under the law of nations because it felt "hamstrung" by its inability to "cause infractions of treaties, or of the law of nations to be punished."[49] The 1781 resolution not only addressed criminal punishment for violations of the law of nations, it included a recommendation that the states "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen."[50] The committee report attached to the 1781 resolution explains that the last part of this sentence referred to the fact that if damages were found to be an appropriate remedy, they should be paid by the perpetrator rather than by the United States.[51]

Although the legislative history of the ATS is notably sparse,[52] many scholars have documented that the drafters of the ATS

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46. *See* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 731 (1976).

47. 4 WILLIAM BLACKSTONE, COMMENTARIES 69–70 (noting that with violations of safe conduct "the injured stranger should have restitution out of [the violator's] effects . . . [and] the lord chancellor . . . may cause full restitution and amends to be made to the party injured").

48. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 147 n.49 (2d Cir. 2010); *see also* Ku, *supra* note 31, at 272–73.

49. Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004) (citing JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893); 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 32, at 1136–37).

50. Casto, *supra* note 31, at 491 (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 32, at 1137).

51. *Id.*

52. *See, e.g.*, *Sosa*, 542 U.S. at 718–19.

wanted to ensure compliance with the law of nations, given the states' failures to do so.[53] Regardless of the exact reasons for the statute's enactment, there was national consensus that the federal courts should be open to any alien who had suffered tortious injuries in violation of international law, and that the national interest in doing so was so obvious that Congress used broad, open-ended language to vest the federal courts with complete power over these kinds of cases.[54]

B. *Congress Intended that a Remedy Be Available for Violations by U.S. Citizens, Including U.S. Officials*

The commitment to provide a remedy to aliens for torts in violation of international law included ensuring restitution for injuries when aliens' rights were violated by U.S. citizens. With regard to the ATS, the statute does not specify who can be a defendant, and it is unclear what sort of defendants Congress had in mind when enacting the statute.[55] Many scholars have suggested that an incident known as the Marbois affair—where the defendant was an alien—likely precipitated the drafting and passage of ATS,[56] although noting that there had been earlier well-publicized incidents of criminal and tortious offenses against ambassadors and other foreign dignitaries which had occurred in the United States.[57] The Marbois affair involved an assault on a French diplomat by French adventurer De Longchamps on the streets of Philadelphia in 1784.[58] The international community was "outraged" and demanded that the Continental Congress take action, but Congress lacked the authority to do anything un-

53. *See, e.g., id.* at 716–18 (citing Randall, *supra* note 31, at 15–21); CASTO, *supra* note 6, at 43–44.

54. *See* CASTO, *supra* note 6, at 43–44 (analogizing the national consensus for the ATS with the national consensus for federal admiralty courts).

55. *Sosa*, 542 U.S. at 718–19 (describing the lack of consensus regarding congressional intent when enacting the ATS).

56. Scholars have linked the Marbois affair to the drafting of the ATS. *See* CASTO, *supra* note 6, at 7–8; Casto, *supra* note 31, at 491–94; Dodge, *supra* note 31, at 692, 695; Randall, *supra* note 31, at 24–27.

57. *See* Edwin Dickinson, *The Law of Nations as Part of the National Law of the United States–Part I*, 101 U. PA. L. REV. 26, 30–32 (1952); Randall, *supra* note 31, at 24, (citing 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 457–65 (1953)).

58. *See, e.g.*, CASTO, *supra* note 6, at 7–8; Dodge, *supra* note 31, at 694; Randall, *supra* note 31, at 24.

der the Articles of Confederation.[59] Although De Longchamps was successfully prosecuted by the Commonwealth of Pennsylvania,[60] the event demonstrated the Continental Congress' inability to remedy violations of the law of nations.[61]

Although it is possible that Congress had the Marbois affair in mind when drafting the ATS, there is no direct evidence that was the case.[62] In any event, virtually all of the other incidents likely contributing to the enactment of the ATS were violations perpetrated by U.S. citizens, suggesting, along with the 1781 Resolution discussed above, that in fact Congress likely had U.S. citizens and officials in mind when drafting the ATS.[63] One of these incidents was the arrest of the Dutch Ambassador's coachman by a New York State court officer in 1787.[64] The ambassador wanted the officer prosecuted for violating diplomatic immunity, even though Congress had determined by statute that a servant in the coachman's position did not qualify for diplomatic immunity.[65] However, the arrest was a still a violation of the law of nations,[66] and the Dutch Ambassador protested, wanting accountability.[67]

There is evidence that the drafters of the ATS also had in mind the continuing problem of American citizens' mounting private military expeditions against Spanish territories in Florida, as well as American citizens' attacks against aliens who, under U.S.

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59. *See, e.g.*, *Sosa*, 542 U.S. at 716–17; CASTO, *supra* note 6, at 7–8; Randall, *supra* note 31, at 24.

60. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 117–18 (Phila. O. & T. 1784).

61. After the Marbois incident, Congress called again for states to enact legislation addressing international law violations, and this concern over the inadequate vindication of the law of nations continued through the time of the Constitutional Convention. *Sosa*, 542 U.S. at 717 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 24–25).

62. *See* Randall, *supra* note 31, at 26.

63. *See id.* at 20–21 (stating their injuries to aliens may occur at the hands of the state).

64. Ku, *supra* note 31, at 281–82 (citing JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 310–11 (Paul A. Freund ed. 1971)); *see also* Casto, *supra* note 31, at 494.

65. Ku, *supra* note 31, at 282 (citing 1 GOEBEL, *supra* note 64; Act of April 30, 1790, ch. 9, 1 Stat. 112, 117–18).

66. *Id.* (citing VATTEL, *supra* note 44, bk. III, § 120, 396).

67. *See* Letter from P.J. Van Berkel to John Jay (Dec. 18, 1787), *in* 3 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA, FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER, 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1790, at 443 (Blair & Rives, 1837).

treaties, were entitled to the free exercise of religion and to safe passage through the country.[68] It is also possible that the drafters had in mind U.S. privateers in prize cases where the privateers may have caused damage to the other party (or the ship's inhabitants) in violation of the several treaties the United States had entered into before passage of the ATS.[69]

In addition, the first Attorney General opinion regarding the ATS concerned acts of an American who led a French fleet in attacking and plundering a British slave colony in Sierra Leone.[70] Attorney General William Bradford issued an opinion in 1795 making it clear that although the United States did not have criminal jurisdiction over the matter—which he acknowledged was a violation of the law of nations—the ATS provided federal jurisdiction for a civil remedy against Americans who had taken part in the acts.[71] Another attorney general made similar assumptions.[72] One of the primary drafters of the First Judiciary Act, Justice William Paterson, when explaining in a draft opinion that the law of nations would provide the rules of decision for domestic remedies of such violations, used an example of a U.S. citizen enlisting in the British Army to fight the French in violation of the United States' position of neutrality (and thus also in violation of the law of nations).[73] These latter two examples also demonstrate that the founders were not only concerned with remedying violations that occurred within the United States, but also with any

68. CASTO, *supra* note 6, at 43–44.

69. *See* Bradley, *supra* note 4, at 616–17 (citing Sweeney, *supra* note 4, at 469–70). Bradley, however, does not believe these cases were a reason for the ATS, given the admiralty grant of jurisdiction. *Id.* at 617. For a list of the treaties, see *id.* at 616 n.130 (citations omitted).

70. Breach of Neutrality, 1 Op. Att'y Gen. 57, 58 (1795); *see also* Casto, *supra* note 31, at 502–03.

71. Breach of Neutrality, 1 Op. Att'y Gen. at 58–59 ("But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States"); *see also* Curtis Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. OF INT'L L. 509, 510, 521 (2012) (noting that original documents associated with the opinion demonstrate that Attorney General Bradford contemplated that the ATS would apply extraterritorially with regard to U.S. citizens).

72. *See* Abduction & Restitution of Slaves, 1 Op. Att'y Gen. 29, 29–30 (1783) (stating that Georgia should institute a civil process with the approbation of the slave owners in a case in which a U.S. citizen carried away slaves from Martinque).

73. *See* Casto, *supra* note 31, at 480.

violation perpetrated against an alien by a U.S. citizen, even if occurring abroad.[74]

Furthermore, the 1781 Resolution discussed above specifically stated that aliens would have the ability to receive compensation for violations of their rights protected by international law when perpetrated "by a citizen."[75] In fact, Professor Curtis Bradley, citing a handwritten version of the resolution, has suggested that the phrase "authorise suits to be instituted for damages by the party injured" was meant to apply *only* to U.S. citizen perpetrators.[76] In addition, Emmerich de Vattel's commentary noted that a sovereign needed to ensure a remedy for an "evil done by one of his subjects."[77] Similarly, President George Washington stated in an address to Congress that "aggressions by our citizens on the territory of other nations" were violations of the law of nations.[78] Each of these suggests that the founders likely had violations by their own citizens in mind when contemplating possible civil remedies such as the ATS.

Professor Bradley argues that Congress meant the ATS to apply *only* to those cases in which at least one defendant was a U.S. citizen[79] given that Article III of the Constitution only provides the federal courts with jurisdiction over claims *between aliens and citizens*.[80] Professor Bradley argues that the ATS is unconstitutional when the defendant is not a U.S. citizen, given Article III's language.[81] In fact, between 1800 and 1810, the Supreme Court repeatedly found that Article III's alienage provision only provided for jurisdiction over claims between an alien and a citi-

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74. *See id.* at 483–84 (noting that the founders had not only violations within the United States on their minds, they also likely had transgressions by U.S. citizens abroad in their sights as well); *see also* Bradley, *supra* note 71, at 521.

75. *See* Dodge, *supra* note 31, at 692–93 (footnotes omitted).

76. *See* Bradley, *supra* note 4, at 632–33. *But see* Dodge, *supra* note 31, at 692–93 & n.31 (suggesting that Bradley's interpretation is incorrect and a suit is not limited to those "by a citizen").

77. VATTEL, *supra* note 44, bk. III, § 77, 137.

78. George Washington, Fourth Annual Address, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 125, 128 (James D. Richardson ed., 1911).

79. Bradley, *supra* note 4, at 591 (emphasis added).

80. Article III, Section 2 of the U.S. Constitution provides that federal judicial power shall extend to nine different categories, including "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.

81. *See* Bradley, *supra* note 4, at 591.

zen, and not between two aliens.[82] Professor Bradley argues that this makes sense given that at the time the ATS was enacted, nations were responsible under the law of nations to punish and compensate offenses committed by their citizens.[83]

After the founding period and throughout the 1800s and into the 1900s, the U.S. Supreme Court issued several decisions demonstrating the importance, in its view, of the "strictest fidelity" of the United States to its duties under international law, cognizant that not doing so would negatively impact the United States' foreign relations.[84] Most were prize cases, piracy cases, or cases involving the rights of belligerents and the obligations of neutrals.[85] Of these, many involved United States citizens as principal perpetrators or aiders and abettors[86] and, in one case, a U.S. customs official who unlawfully seized a French ship in Spanish waters.[87]

Furthermore, U.S. military officials were held liable for their violations of the law of nations. Although not brought pursuant to the ATS, but instead through admiralty jurisdiction, cases during the early 1800s involving violations of the law of neutrality through the wrongful capture of ships establish that federal courts held U.S. military officials civilly liable for their acts which

82. *See* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Montalet v. Murray, 8 U.S. (4 Cranch) 46, 47 (1807); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 13 (1800). Although the Supreme Court has not definitively found that the ATS is constitutional under Article III, the Court has appeared to rely on Section 2's provision that federal judicial power shall extend "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States," assuming that the law of nations is "law of the United States." U.S. CONST. art. III, § 2; *see* Gwynne Skinner, *When Customary International Law Violations Arise Under the Law of the United States*, 36 BROOK. J. INT'L L. 205, 233–34 (2010). It is worth noting that the court in the seminal ATS case, *Filartiga v. Pena-Irala*, found the ATS to be constitutional based on the "laws of the United States" provision of Article III. 630 F.2d 876, 885 (2d Cir. 1980). The Supreme Court allowed this to stand in *Sosa v. Alvarez-Machain*, where the defendants included Mexican citizens. 542 U.S. 692, 698, 724–25, 731–32 (2004).

83. Bradley, *supra* note 4, at 630.

84. *See* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 25, 565 (Little, Brown, & Co. 1922) (footnote omitted).

85. *See id.*

86. *See, e.g.*, The Prize Cases, 67 U.S. 635, 637–38 (1862); Jecker v. Montgomery, 59 U.S. (18 How.) 110, 112 (1855); The Joseph, 12 U.S. (8 Cranch) 451, 454 (1814); The Rapid, 12 U.S. (8 Cranch) 155, 159 (1814); *see also* 2 WARREN, *supra* note 84, at 40–46.

87. 2 WARREN, *supra* note 84, at 41–42 (citing The Apollon, 22 U.S. (9 Wheat.) 362 (1824)).

violated international law.[88] These cases include the 1804 companion cases of *Murray v. Charming Betsy*[89] and *Little v. Barreme*.[90] In both cases, U.S. naval officers were held liable for civil damages in cases brought by Danish citizens (the ships' owners) for violating neutrality laws.[91] Holding the officers liable and providing compensation to the ships' owners was seen as important in maintaining diplomatic relations with the Netherlands.[92] Holding true to the founders' desires, United States federal courts during this time continued to ensure that aliens who had their rights under international law violated by U.S. citizens, including military officers,[93] were provided a remedy.[94]

C. *Throughout Most of U.S. History, Immunity Did Not Prevent Suits for Injuries Caused by U.S. Officials*

Throughout the founding period and until the mid-1900s, it was assumed that individuals, including foreigners, could receive remedies for injuries caused by U.S. officials' misconduct and tortious behavior, either from the officials themselves or from Congress.[95] As stated in 1797,

> If a foreigner is injured by a general or special act of a state, and the law of nations; or establishing treaty with his nation, or sovereign, is

88. *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863, 1877–82 (2010).

89. 6 U.S. (2 Cranch) 64 (1804).

90. 6 U.S. (2 Cranch) 170 (1804).

91. However, with regard to both cases, Congress ultimately indemnified the defendants, as was the practice during that period of time. *See* Pfander & Hunt, *supra* note 88, at 1866.

92. *Id.*

93. *See* Pfander & Hunt, *supra* note 88, at 1897.

94. *See also* 1 WARREN, *supra* note 84, at 582 (quoting The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824)) ("[T]he Court can only look to the questions, whether the laws have been violated; and if they were, justice demands that the injured party should receive a suitable redress.").

95. Donald L. Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 443, 463 (2011) (providing a historical background of official and sovereign immunity, questioning current federal court precedent regarding official immunities in light of constitutional supremacy, arguing that many of the official immunities that currently exist are unsupportable under the Constitution).

> violated by the special or general act of a state, he has his remedy in the Court of the United States, against the person, from whose immediate doings the injuries arises.[96]

In the late 1700s and early 1800s, U.S. officials were not immune from being sued individually for their acts which violated the law, even when they were acting within the scope of their duties;[97] rather, as the cases discussed in the prior section demonstrate, they were typically held liable for paying civil damages if the courts found they had violated the law, regardless of whether they had intended to or not.[98] If found liable, the official was often indemnified through private bills enacted by Congress.[99] In those situations Congress would determine whether the official should be indemnified, and Congress typically would do so if it determined that the official was acting as an "honest agent" within his authority.[100] Indemnification almost became a legislative right,[101] and in the mid-1800s the federal courts also came to adopt this view, finding that officials acting under instruction were entitled to indemnification.[102]

It is important to note that during this time, even where the act of an official was authorized and, thus, seen as an act of the United States, sovereign immunity (by which the United States itself could not be sued)[103] did not operate to prevent an injured

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96. *A True Federalist, Independent Chronicle,* Mar. 2 & 6, 1797, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 629, 630 (Maeva Marcus ed., 1994).

97. Pfander & Hunt, *supra* note 88, at 1868, 1871 (providing a detailed history and analysis of the development of official and sovereign immunity in the early period of the United States, contrasting it with today's conception of both sovereign and official immunity).

98. *Id.* at 1882–83; *see also* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 112 (1804).

99. Pfander & Hunt, *supra* note 88, at 1876, 1904, 1918–19; *see, e.g.*, Act for the Relief of Richard Kidd and Benjamin Kidd, ch. 185, 9 Stat. 677 (1846); Act for the Relief of Paolo Paoly, ch. 27, 6 Stat. 47 (1802).

100. Doernberg, *supra* note 95, at 464 (footnotes omitted); *see also* Pfander & Hunt, *supra* note 88, at 1868.

101. *See* Pfander & Hunt, *supra* note 88, at 1911–12.

102. *Id.*; *see also* Cary v. Curtis, 44 U.S. (3 How.) 236, 263 (1845) (McLean, J., dissenting) (finding that when an official incurs liability while acting under instructions, the government is bound to indemnify the official); Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 98–99 (1836) (indicating that indemnity of federal officials was a matter of right).

103. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821) ("[T]he universally received opinion is, that no suit can be commenced or prosecuted against the United States.").

party from being compensated.[104] Rather, as just described, the claim could be brought against the official, and then Congress would determine whether to indemnify the official.[105] Alternatively, the injured party could seek a remedy directly from Congress, which, in turn, would decide what the remedy would be.[106]

In the mid-1800s, this regime for compensating those injured by U.S. officials' conduct began to change, but in such a way that still allowed parties to be compensated for their injuries. First, beginning around 1845, the Supreme Court began developing common law immunity doctrines for officials based on the notion of sovereign immunity,[107] finding that officials could only be sued where they acted outside of authority or with malice or cruelty, and not where their acts were simply based on an error in judgment.[108] In the 1896 case of *Spalding v. Vilas* the Supreme Court extended absolute immunity, which had previously been applied to legislators, to cabinet-level executive officers, and to heads of

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104. Pfander & Hunt, *supra* note 88, at 1868, 1876.

105. *Id.*

106. *See generally* Floyd Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 627, 653, 664 (1985) (discussing the "legislative model" of claims adjudication). Although the issue of sovereign immunity of the United States is complicated, the Supreme Court in *Cohens v. Virginia* acknowledged in dicta that it was unable to determine claims against the United States in court, stating that "the universally received opinion is that no suit can be commenced or prosecuted against the United States." 19 U.S. (6 Wheat.) at 411–12. After the Civil War the courts affirmed the doctrine of sovereign immunity. *See* United States v. Lee, 106 U.S. 196, 204–08 (1882); Briggs v. Light-Boat, 93 Mass. (11 Allen) 157, 166–77 (1865). The Supreme Court first applied the concept of sovereign immunity in *United States v. McLemore*, but without explanation or analysis. 45 U.S. (4 How.) 286, 287–88 (1846). The doctrine of sovereign immunity was criticized from the founding throughout the 1800s, but it was particularly challenged after World War I. *See* Shimomura, *supra*, at 678–82. Congress continued to waive its immunity and allowed itself to be sued in a variety of instances, culminating in waiver of immunity for certain torts in the Federal Tort Claim Act of 1946. *Id.*; *see* Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (1947) (codified as amended at 28 U.S.C. §§ 1346, 2671 (1983)). In the 1962 case of *Glidden Co. v. Zdanok*, the Supreme Court found it had Article III jurisdiction over claims against the United States as long as Congress waived sovereign immunity over such claims. 370 U.S. 530, 572 (1962).

107. Doernberg, *supra* note 95, at 443 (noting that official immunity is derived from sovereign immunity).

108. *See id.* at 457–58 (citing Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849); Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845)). As Professor Doernberg points out, the court in *Kendall v. Stokes* relied on an English case, *Gidley v. Palmerston*, which held that although an official doing work on the government's behalf should not be sued, the crown would still provide "ample justice" to a plaintiff if his demands were well-founded. (1822) 129 Eng. Rep. 1290, 1294–95 (C.P.).

executive departments under certain conditions.[109] After *Spalding*, a high-level executive received immunity even if he acted out of a personal or malicious motive, as long as he acted "within his authority," a concept referred to as absolute immunity.[110] However, importantly, Congress continued to allow individuals to petition it directly for compensation where the harm was caused by an official who was authorized to act as he did and was thus entitled to immunity.[111]

Second, as claims against the United States increased,[112] an overwhelmed Congress, which was not doing a very good job providing timely or sufficient remedies, struggled to provide avenues for prompt and adequate compensation.[113] Congress first addressed the problem by creating a Committee on Claims,[114] which morphed in 1855 into the Court of Claims,[115] although its jurisdiction was mostly over contracts.[116]

D. *United States Begins Waiving Sovereign Immunity*

The problem of adequate and timely remedies for official misconduct came to a head in the 1870s in the wake of a large increase in claims arising from both the expansion of federal power and the Civil War.[117] At the urging of President Lincoln, who noted it was the duty of the government to render "prompt justice,"[118] Congress began to waive sovereign immunity for some claims by increasingly allowing both the Court of Claims and the federal district courts to adjudicate claims against the United States for

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109. 161 U.S. 483, 498 (1896); Wilson, *supra* note 26, at 207.

110. 161 U.S. at 498–99; Wilson, *supra* note 26, at 207 (footnote omitted).

111. *See generally*, Shimomura, *supra* note 106, at 650–52 (discussing the creation of the Court of Claims).

112. *Id.* at 648 (citing H.R. REP. NO. 730, at 4 (2d sess. 1838)).

113. *See id.* at 649–52.

114. *Id.* at 644 (citing 4 ANNALS OF CONG. 883 (1849)).

115. *Id.* at 652 (citing CONG. GLOBE, 33D CONG., 2D SESS. 105–06 (1855)).

116. *Id.* at 655 (citing CONG. GLOBE, 37TH CONG., 3D SESS. 304 (1863)). In addition to limiting the Court of Claim's jurisdiction, Congress initially treated the Court of Claims' decisions as advisory, which hampered the new court and resulted in most claims, including tort claims, still having to proceed before Congress. *Id.* at 652–53 (citing CONG. GLOBE, 34TH CONG., 1ST SESS. 1245 (1856)).

117. *Id.* at 398.

118. CONG. GLOBE, 37TH CONG., 2D SESS. app. 2 (1861).

official and authorized acts of its employees.[119] These waivers included the Tucker Act of 1887,[120] which waived sovereign immunity for claims involving contracts, admiralty, takings, and tax refunds, among others, but not for tort claims.[121] Pursuant to the Tucker Act, individuals could seek a remedy for violations of the law of nations in the area of prize directly from the United States for acts of its military officials (as opposed to only against officials themselves). For example, in the 1913 case of *MacLeod v. United States*, the U.S. Supreme Court, reversing a Court of Claims decision, held that a citizen of Great Britain was allowed a remedy from the United States when U.S. military officials unlawfully seized duties from him during U.S. occupation of the Philippines.[122]

Congress retained jurisdiction to consider other tort claims against the United States.[123] However, those harmed could still sue individual officials in court, and courts would not grant the officers any sort of immunity if they were acting either outside of authority or with malice.[124] For example, in the well-known 1900 case of *The Paquete Habana*, typically cited for its proposition that "[i]nternational law is part of our law,"[125] the Court found that the Cuban owners of civilian fishing boats (sailing under the flag of Spain) were entitled to restitution and damages from the defendant U.S. admiral after the Court found that the defendant's actions were illegal under the law of nations.[126]

With regard to the limited availability of court claims against the United States, especially for torts, the criticism of sovereign immunity, which had been occurring since the country's founding, intensified after World War I and throughout the 1920s and

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119. *See* Shimomura, *supra* note 106, at 653.

120. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (2006 & Supp. V 2011)). The Tucker Act gave jurisdiction to the Court of Claims for claims (excluding tort) over $10,000, and concurrent jurisdiction to the Court of Claims and federal district courts for claims under $10,000. *Id.* at 505.

121. Shimomura, *supra* note 106, at 664 (citing 18 CONG. REC. 2166, 2175–76 (1887)).

122. 229 U.S. 416, 432, 435 (1913).

123. Shimomura, *supra* note 106, at 664 (citing Tucker Act, ch. 359, 24 Stat. 505, 505 (1887)).

124. *See, e.g.*, The Paquette Habana, 175 U.S. 677 (1900).

125. *Id.* at 700.

126. *Id.* at 714.

1930s.[127] This, along with the increasing number of tort claims in private bills before Congress,[128] led to calls for abolishing sovereign immunity for torts and the transfer of jurisdiction to hear such cases to the federal courts.[129] Just like Lincoln had done, President Roosevelt urged Congress in 1942 to relieve itself of the duty to consider claims against it—now mostly tort claims—by waiving sovereign immunity and allowing federal courts to consider tort claims against the United States.[130]

E. *Enactment of the Federal Tort Claims Act of 1946*

As part of a reorganization in 1946,[131] Congress enacted the FTCA,[132] waiving sovereign immunity for most torts, and in particular, for damages to property or injury to persons caused by the

> negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, in jury, or death, in accordance with the law of the place where the act or omission occurred.[133]

Congress did not waive immunity for certain intentional acts, such as assault, false arrest or imprisonment, or for discretionary acts.[134] The FTCA also lists other acts for which the United States

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127. Shimomura, *supra* note 106, at 679–80.

128. *See* Feres v. United States, 340 U.S. 135, 139–40 (1950).

129. *Id.* at 140; Shimomura, *supra* note 106, at 679.

130. Shimomura, *supra* note 106, at 682–83.

131. *Id.* at 683–84.

132. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (1947) (codified as amended at 28 U.S.C. § 1346 (2006 & Supp. V 2011)). Importantly, Congress also banned the introduction of private bills to Congress for those claims which could be brought under the FTCA, thus making the FTCA remedy exclusive for those torts for which Congress waived immunity. Shimomura, *supra* note 106, at 684 (citing Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812, 831).

133. Federal Tort Claims Act, ch. 753, 60 Stat. at 843.

134. The FTCA expressly excluded "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* at 846. The Act also excluded "[a]ny claim . . . based upon the exercise . . . or the failure to exercise . . . a discretionary function . . . whether or not the discretion involved be abused." *Id.* at 845. As discussed *infra*, Congress amended this part of the FTCA in 1974 by waiving its sovereign immunity for such intentional torts when committed by federal investigative and law enforcement personnel, largely in response to *Bivens v. Six Unknown Named Agents of Federal Bureau*

cannot be held liable, including, among other things, claims arising out of combat activities during a time of war,[135] and claims "arising in a foreign country."[136]

The FTCA, however, did not provide that it was the exclusive remedy,[137] but simply allowed a person to sue the United States in order to be assured of a remedy, given the deep pockets of the government. Thus, even though the United States excluded its own liability for discretionary acts and most intentional acts (arguably signaling that such cannot be within an official's authority), nothing prevented victims from suing an individual officer for such acts.[138] Individual officers found liable could approach Congress for indemnification just like they had for over a century, with Congress retaining the ability to decide when and under what circumstances to indemnify the officials.[139] Similarly, victims ostensibly could still approach Congress for redress in the event a court likely would find an officer immune because such acts were either within his authority (in the case of head of a department), or resulted from a simple error in judgment (a discretionary act).[140]

Each of these acts that Congress took—the retention of tort claims, the creation of the committee to hear claims, the creation of the Court of Claims, the passage of the Tucker Act, and ultimately the passage of the FTCA—was done with the intent to ensure adequate and prompt relief to victims of harm, not to avoid compensating individuals for harm. In this way, Congress stayed true to the founders' intent to compensate individuals, including aliens, for harm done to them by U.S. officials. Unfortunately, roadblocks soon arose, frustrating the ability to compensate those injured by U.S. officials, especially injured aliens—a group the founders had been so adamant about having redress for injuries caused by torts in violation of the law of nations.

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of Narcotics. Shimomura, *supra* note 106, at 693 (citing 28 U.S.C. § 2680(h) (1982)).

135. 28 U.S.C. § 2680(j) (2006).

136. *Id.* § 2680(k) (2006).

137. In addition to the statute itself omitting such language, see Wilson, *supra* note 26, at 208.

138. *See id.*

139. *See* Pfander & Hunt, *supra* note 88, at 1868.

140. *See* David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 ST. THOMAS L. REV. 375, 385 (2011).

II. THE RIGHT TO A REMEDY UNDER INTERNATIONAL LAW

As outlined above, the founders of the United States understood that the country had a legal obligation under international law to provide remedies to those who suffered injuries when their rights under international law were violated. In fact, as discussed above, many scholars have noted that Congress created federal jurisdiction over aliens' suits for violation of the law of nations in order to meet this obligation.[141] This was because the denial of justice—such as failure to provide a judicial remedy—was seen as a separate injury.[142]

The obligation to ensure a remedy was reaffirmed in the mid-twentieth century through various United Nations resolutions and treaties, including treaties the United States has ratified.[143] Not only does the Universal Declaration of Human Rights state that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law,"[144] but also several of the treaties the United States has ratified also contain a provision guaranteeing a remedy to an alien whose rights under international law have been violated, such as the International Covenant on Civil and Political Rights[145] and the Convention Against Torture.[146] Moreover, it has become increasingly recog-

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141. Randall, *supra* note 31, at 20–21 (citing L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 685–87 (1980)); *cf.* Myres McDougal, Harold D. Lasswell & Lung-chu Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900 (1974) (discussing United States jurisdiction over nationality issues).

142. Randall, *supra* note 31, at 20–21.

143. *See, e.g.*, Universal Declaration of Human Rights, art. 8, G.A. Res. 217 (III)A, U.N. Doc. A/RES/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 2(3)(a), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85.

144. G.A. Res. 217(III)A, *supra* note 144, art. 8.

145. "Each state party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." International Covenant on Civil and Political Rights art. 2(3)(a), *opened for signature*, Dec. 19, 1966, 999 U.N.T.S. 171.

146. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possi-

nized that customary international law requires that nations provide a remedy to aliens for injuries arising from that nation's violation of international law, as evidenced by our own Restatement of the Law,[147] by scholars,[148] and by the United Nations.[149]

III. MODERN ROADBLOCKS TO PROVIDING REMEDIES TO ALIENS INJURED BY U.S. OFFICIALS

Notwithstanding the requirement of a remedy under international law and the founders' desire that aliens be provided a remedy for violations of their rights, in the last few decades both Congress and the courts have erected roadblocks that have greatly limited aliens' ability to receive compensation for injuries caused by U.S. officials' violations of both customary international law and domestic law. Such roadblocks are inconsistent with the desires of the country's founders and with obligations under international law. They are also problematic and hypocritical because the roadblocks usually do not prevent aliens (or citizens) from seeking remedies for similar violations perpetrated by *for-*

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ble. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.").

147. The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES article 14, section 711 (1987) reads:

> State Responsibility for Injury To Nationals of Other States
>
> A state is responsible under international law for injury to a national of another state caused by an official act or omission that violates
>
> (a) a human right that, under § 701, a state is obligated to respect for all persons subject to its authority;
>
> (b) a personal right that, under international law, a state is obligated to respect for individuals of foreign nationality; or
>
> (c) a right to property or another economic interest that, under international law, a state is obligated to respect for persons, natural or juridical, of foreign nationality, as provided in § 712.

Id.

148. *See* Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L. 359, 361–71 (2009).

149. In 2005, the United Nations issued the Basic Principles and Guidelines on the Right to a Remedy and Reparation. Basic Principles and Guidelines on the Right to a Remedy and Reparation, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005). The U.N. noted the right to "equal and effective access to justice." *See id.* annex. pt. II, ¶ 3(c), pt. VII, ¶ 11(c). It also noted the right to an effective judicial remedy for victims of violations of human rights. *Id.* annex. pt. VII, ¶ 12. It further noted the right to "[a]dequate, effective and prompt reparation" and "compensation, rehabilitation, [and] satisfaction" required by international law. *Id.* annex. pt. IX, ¶¶ 15–22.

eign officials.[150] These relatively recent doctrinal and statutory roadblocks almost always result in courts' dismissals of aliens' tort claims against U.S. officials for violations of the law of nations, typically brought under the ATS, and claims for violations of the U.S. Constitution, typically brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* ("*Bivens* claims").[151]

There are several roadblocks. Some have arisen haphazardly as Congress first moved toward waiving more of the United States' sovereign immunity, then created exceptions and restrictions which the courts have often narrowly interpreted to insulate the United States from liability.[152] At the same time, others have arisen as courts have created or broadened common law immunities for U.S. officials who violate constitutional and international legal standards.[153] Rather than interpreting such congressional statutes and common law doctrines to ensure that aliens are provided with redress, the opposite has taken place, with courts often interpreting such statutes and doctrines to preclude aliens from receiving remedies, even when the most severe deprivations take place, such as torture and prolonged arbitrary detention.[154] Moreover, when one looks at the development of the various doctrines since the mid-1900s, one questions whether courts and Congress really understood what each was doing, or how their own and combined actions resulted in such restriction of remedies.[155]

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150. *See* discussion, *infra* Section III.A.5.

151. 403 U.S. 388, 389–90 (1971) (providing a cause of action to recover for damages resulting from a constitutional violation by a federal agent).

152. *See supra* Section I.D (discussing Congress' shift toward waiving sovereign immunity); *supra* Section I.E (the enactment of the FTCA and its impact on the United States' approach to sovereign immunity).

153. *See* Sosa v. Albvarez-Machair, 542 U.S. 692, 783 n.21 (2003) ("case specific deference" prudential doctrine for cases that implicate foreign relations); Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) (government official qualified immunity); *supra* notes 20–24 and accompanying text.

154. *See, e.g.*, Rasul v. Myers (*Rasul I*), 512 F.3d 644, 658–59 (D.C. Cir. 2008), *vacated by* 555 U.S. 1083 (2008), *remanded to* 563 F.3d 527 (D.C. Cir. 2009) (holding U.S. officials acted within the scope of their employment even if they allegedly committed human rights violations such as torture or prolonged detention).

155. *See, e.g.*, Dalehite v. United States, 346 U.S. 15, 30-33 (1953); Vicki Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 564 (2003) ("In the first case considering the discretionary function exemption, *Dalehite v. United States*, the Supreme Court gave it an expansive read-

The roadblocks that Congress or the courts have erected include the Westfall Act, which allows the United States to substitute itself as a defendant for a U.S. official it finds was "acting within the scope" of her or his employment, and then provides that a suit under the FTCA is the exclusive remedy; various statutory exceptions written into the FTCA, and courts' interpretation of them; the political question doctrine; and the "case-specific deference" doctrine.[156] Roadblocks specific to *Bivens* claims include the increasing difficulty of defeating the courts' common law doctrine of qualified immunity unless there is a "clearly established" constitutional or statutory right, and the increasing difficulty of stating a *Bivens* claim given the doctrine of "special factors counselling hesitation."[157]

A. *Individual Officer Immunity, the Westfall Act of 1988, and FTCA Exclusions*

As mentioned earlier, Congress increasingly waived more and more of its sovereign immunity as it became increasingly overwhelmed with claims filed with it and with the Court of Claims, but it did not waive sovereign immunity over tort claims until 1946, when it enacted the FTCA.[158] This waiver did not mean that the FTCA was the *exclusive* method for an individual who sought redress: he or she could still often sue an individual officer, even if the wrongful or negligent act was covered by the FTCA.[159] In addition, a citizen or alien could still sue an officer for those acts that were intentional or for those that took place outside the

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ing, one that imposes significant limitations on the FTCA as a basis for tort liability of the government in circumstances where private parties would be liable."); *see also* Williams v. United States, 250 U.S. 857 (1955); Wilson, *supra* note 26, at 211 (analyzing the Court's decision and its repercussions when it made the decision to change the statute and favor *respondeat superior* to federal common law to determine the scope of employment).

156. Federal Employees Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. § 2679 (2006)); *Sosa*, 542 U.S. at 733 n.21 (discussing "case-specific deference" doctrine); *see supra* note 134 and accompanying text (discussion of the various statutory exceptions in the FTCA); *supra* note 23 and accompanying text (discussion of political question doctrine).

157. *Harlow*, 457 U.S. at 817–18; Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

158. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (1947) (codified as amended at 28 U.S.C. § 1346 (2006 & Supp. V 2011)); *see* Shimomura, *supra* note 106, at 682–92.

159. *See* Wilson, *supra* note 26, at 208.

United States.[160] To understand the limitations of remedies for torts against aliens by U.S. officials, one cannot review the FTCA and its development and the development of individual officer liability in silos. Rather, they must be viewed in conjunction with each other.

Recall that in the mid-1800s, federal courts became reluctant to hold U.S. officials individually liable for mere "errors in judgment," but found officials could be sued for acts outside of their authority or where they had malicious or wrongful intent.[161] If found individually liable, a defendant could seek indemnification from Congress.[162] In 1896, the Supreme Court extended the absolute immunity previously enjoyed by members of Congress to cabinet-level officers and heads of executive departments, granting them immunity for all acts within their authority, regardless of whether they had wrongful motives.[163] In those situations where officers received immunity either because the acts causing harm were discretionary acts (mere errors in judgment) or, in the case of a high-level executive, for all acts within the scope of his employment, a victim could petition Congress for remedy through mechanisms Congress had in place at the time.[164]

After the passage of the FTCA, a victim of wrongful conduct by a U.S. official could sue the United States for many negligent and wrongful acts, but not for intentional or discretionary acts.[165] With regard to intentional acts, individuals could still sue the individual officer for such acts.[166] The only real limitation at this point was that executive level individuals might be found to be immune from suit if a court determined that such acts were within the scope of authority, but it was unlikely at the time that such intentional acts would be found to be within the scope of authori-

160. *See generally supra* Section I.E (providing background discussion about what claims were still available to individual parties after the FTCA was passed).

161. *See* Wilson, *supra* note 26, at 207 (citing Spalding v. Viles, 161 U.S. 483, 498 (1896)).

162. *See* Tracy v. Swartwourt, 35 U.S. 80, 98–99 (1836); Pfander & Hunt, *supra* note 88, at 1868, 1876.

163. *See* discussion *supra* notes 109–11 and accompanying text.

164. *See* discussion *supra* note 108; *see also* Feres v. United States, 340 U.S. 135, 139–40 (1950) (noting that when otherwise actionable wrongs were committed by agents of the federal government, relief was often sought through private bills in Congress).

165. *See* discussion *supra* notes 132–34.

166. *See* discussion *supra* note 137.

ty.[167] The other limitation at this point was that officials could not be sued for simple errors in judgment—in other words, discretionary acts.[168] When Congress enacted the FTCA in 1946 and waived liability for torts, it did not waive immunity for torts arising from "discretionary" acts within an official's authority.[169]

The first major development after the enactment of the FTCA that limited remedies was a 1953 case in which the Supreme Court read this FTCA discretionary function exception very broadly. In *Dalehite v. United States*, the Court interpreted the discretionary function exception to include all situations involving the formulation or execution of plans drafted at a high level of government which entailed the exercise of judgment.[170] Arguably, this reading effectively ruled out many substantive tort actions against the government.[171]

Another Supreme Court decision that would have significant future repercussions with the passage of the Westfall Act in 1988, came in 1955, when the Court issued a one sentence ruling in *Williams v. United States* finding that state *respondeat superior* law should be used to determine the "scope of [an employee's] office or employment" in determining when the United States would waive immunity for a tort committed by a U.S. employee.[172] In so doing, as Professor Elizabeth Wilson describes, the Court effectively changed the statute from one where the United States would be liable as if it were a private person under the law of the place, to one under which the United States would be liable as if it were an employer of the private person under law of the place.[173] Although the *Williams* case was without analysis, it is

167. *See* discussion *supra* note 137.

168. *See* discussion *supra* note 108 and accompanying text.

169. 28 U.S.C. § 2680(a) (2006). Specifically, Congress did not waive immunity for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.*

170. 346 U.S. 15, 35–36 (1953).

171. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 564 (2003) (citation omitted) ("In the first case considering the discretionary function exemption, *Dalehite v. United States*, the Supreme Court gave it an expansive reading, one that imposes significant limitations on the FTCA as a basis for tort liability of the government in circumstances where private parties would be liable.").

172. 350 U.S. 857, 857 (1955) (per curiam).

173. Wilson, *supra* note 26, at 212.

likely that the Court was relying both on the language "in accordance with the law of the place," and its 1950 case of *Feres v. United States*, in which it held that "law of the place" meant state law, given that the United States meant to waive liability for garden variety torts, which are traditionally governed by state law.[174] This also has implications for tort claims under international law, as discussed in Section IV,[175] because subsequent cases have excluded customary international law as "law of the place" for purposes of liability under the FTCA.[176]

In any event, the *Williams* decision meant that in determining the scope of employment and thus the United States' waiver of liability, courts would look to state *respondeat superior* law.[177] State courts have typically interpreted "scope of employment" very broadly in order to ensure victims have "deep pocket" remedies.[178] Given this broad interpretation, the *Williams* decision was a positive one for individuals harmed by acts of a government official, since many tortious actions are found to be "within the scope of authority," and thus a suit for damages can proceed under the FTCA. Unfortunately, as discussed later, this originally positive formulation has operated to greatly limit remedies—especially for aliens injured by U.S. officials—during the last decade after enactment of the Westfall Act.

The next significant development came in 1959 in the case of *Barr v. Matteo,* in which the Supreme Court extended absolute official immunity (immunity within the scope of authority, regardless of intent) to lower level officials for all acts, discretionary or not, including those acts within the "outer perimeter" of such authority.[179] The extension was still arguably limited to those of "policy-making rank," given that the Court noted higher-level officials would likely get broader immunity because they typically have greater discretionary authority.[180] However, because this decision limited the types of cases in which a victim of a tort could

174. 28 U.S.C. § 1346(b) (2006); Feres v. United States, 340 U.S. 135, 142 (1950) (internal quotation marks omitted).

175. *See* discussion *infra* and notes 292–93.

176. *Id.*

177. Wilson, *supra* note 26, at 177, 212 (citing *Williams*, 350 U.S. at 857).

178. *See* Wilson, *supra* note 26, at 212.

179. 360 U.S. 564, 573–75 (1959).

180. *Id.*

sue an individual directly, and because "discretionary acts" were exempted from the FTCA, the ability to receive a remedy was restricted.[181] The Court understood this, but found that it was better to have some cases go uncompensated than to impede on officials' actions.[182]

Of course, under the FTCA, a victim could still sue the United States for an executive official's *non-discretionary* acts, even if he would be individually immune from suit under *Barr*.

In cases involving non-discretionary acts, an official could only get immunity if the official acted within the scope of authority.[183] Importantly, whether or not he was acting within the scope of his authority was *not* determined by broadly interpreted state *respondeat superior* law applicable under the FTCA, but instead by federal common law.[184] This was partly because the FTCA was not yet the exclusive remedy for government employee torts, and individual employee liability determinations were analyzed outside the statutory regime of the FTCA, which only discusses *government liability* for actions within scope of employment.[185] This later changed with the enactment of the Westfall Act.[186]

In 1971, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that federal law enforcement officers could be sued personally for violating a person's federal constitutional rights, without the need for statutory authorization from Congress.[187] The decision was partially in response to the fact that the federal government could not be held liable under the FTCA for intentional acts like assault and false arrest, given that Congress had excluded intentional acts from its waiver of sovereign immunity.[188] Following the decision in *Bivens*, victims not only could sue a federal officer under state tort law for

181. *See id.* at 575.

182. *Id.* at 571, 576.

183. Moreover, in *Butz v. Economou*, the Supreme Court clarified that the *Barr* doctrine only applied when the official was acting within the scope of his authority as defined by statutes. 438 U.S. 478, 489 (1978).

184. Professor Wilson discusses this in detail. Wilson, *supra* note 26, at 215–16 (quoting Howard v. Lyons, 360 U.S. 593, 597 (1959)).

185. *Id.* at 216–17.

186. *See id.* at 217.

187. 403 U.S. 388, 397 (1971).

188. *See id.* at 410 (Harlan, J., concurring); *see also Butz*, 438 U.S. at 504 n.31.

these sorts of acts, but also could sue officers individually for torts arising under the U.S. Constitution.[189] *Bivens*, however, did not specifically address the issue of immunity.[190]

Subsequently, in the 1974 case of *Scheuer v. Rhodes*, the Supreme Court rejected absolute immunity for state officials' discretionary acts in a Section 1983 action alleging a violation of the U.S. Constitution.[191] Rather, the Court found an official could only claim official immunity for such acts if he acted in good faith and with a reasonable belief that his actions were lawful and valid.[192]

Another notable development occurred in 1974. In response to *Bivens* and the perceived unfairness of federal officials bearing the cost of their unlawful acts, Congress amended the FTCA waiver exception for intentional torts (assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution) to allow suits against the United States for such claims when they were against "investigative or law enforcement officers of the United States Government."[193] However, this amendment did not make the FTCA the exclusive remedy for such acts, and thus, the personal liability of the officers themselves remained under the qualified immunity doctrines in place at the time, regardless of whether the torts were general state law torts or constitutional torts.[194]

In 1978, the Court extended the qualified immunity outlined in *Scheuer* to include *Bivens* claims in *Butz v. Economou*.[195] The Court was largely motivated by the fact that the FTCA excluded the United States' liability for such discretionary acts, whether or

189. *Bivens*, 403 U.S. at 390–91.

190. *Id.* at 397–98.

191. 42 U.S.C. § 1983 (2006); 416 U.S. 232, 247 (1974).

192. *Scheuer*, 416 U.S. at 247–48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in course of official conduct.")

193. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (codified as amended at 28 U.S.C. § 2680(h) (1982)); *see also* S. REP. NO. 93–588, § 2 (1974), *reprinted in* U.S.C.C.A.N. 2789, 2791.

194. *See* 88 Stat. at 50.

195. 438 U.S. 478, 500–01, (1978) (citing Scheur v. Rhodes, 416 U.S. 232, 247–48 (1974); *Bivens*, 403 U.S. at 397).

not such discretion was abused, and if there continued to be absolute immunity, victims would receive no compensation as a remedy.[196]

The Supreme Court decisions during this era resulted in the expansion of personal liability of individual officers (even though the government in 1974 also accepted liability for at least intentional acts by federal law enforcement officers) by finding federal officials were liable for federal constitutional torts and by limiting the scope of their immunity.[197] Through the decisions limiting officer immunity, the Court was perhaps reconciling prior immunity decisions with the enactment of the FTCA, with which the United States had changed the regime of private claims before Congress (and later, the Court of Claims) to the courts, and in doing so, excluded discretionary and intentional acts.[198] These decisions for the most part all worked either to retain or to ensure victims harmed by U.S. officials' actions were remedied, staying true to the founders' intentions.

This all changed, however, in the 1980s. First came the 1982 case of *Harlow v. Fitzgerald*, in which the Supreme Court narrowed the standard for individual liability of U.S. officials by eliminating any consideration of whether the officer was acting in bad faith; this consideration had, for some time, been part of the analysis in determining liability.[199] No longer was acting in bad faith a way to defeat immunity; rather, the Court set forth the new standard that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statu-

196. *Butz*, 438 U.S. at 505. The Court held

> If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs. Moreover, no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused.

Id.

197. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (codified as amended at 28 U.S.C. § 2680(h) (1982)); *Butz*, 438 U.S. at 500–01; *Scheuer* 416 U.S. at 247–48.

198. *Compare* Federal Tort Claims Act, ch. 646, 62 Stat. 982, 983, 984, 985 (codified as amended at 28 U.S.C. §§ 2674, 2680(a)(b) (1952)), *with Butz*, 438 U.S. at 500–01, *and Scheuer*, 416 U.S. at 247–48.

199. *See* 457 U.S. 800, 817–18 (1982).

tory or constitutional rights of which a reasonable person would have known."[200]

In 1988, Congress quickly took action to reverse the Supreme Court[201] after the Court expanded individual officer liability in state tort lawsuits by limiting the doctrine of absolute immunity in such suits against federal officials in *Westfall v. Erwin*.[202] In *Westfall*, the Court ruled that officials were only immune if their actions were within the scope of their employment (even if on the outer perimeter of such scope) and discretionary in nature.[203] Recall that under *Barr*, federal officials received immunity for any act within their authority—even for acts within the outer limit of authority—whether or not the acts were discretionary in nature.[204] Under *Westfall*, the individual official could now be individually liable for non-discretionary acts even if they were within the scope of his employment.[205] The Court found that "absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity."[206] The Court explained that the purpose behind absolute immunity was to allow government officials to exercise their discretionary authority without fear or trepidation, and such reasoning did not apply to non-discretionary acts that harm someone.[207] The Court recognized that absolute immunity comes with great costs, stating, "[a]n injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct."[208]

The FTCA excludes discretionary acts, but suits can still go forward against the United States for most non-discretionary acts of an employee acting within the scope of his employment, the on-

200. *Id.* at 817–18.

201. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563.

202. 484 U.S. 292, 296–98 (1988).

203. *Id.* at 298–99.

204. *See* 360 U.S. 564, 574–75.

205. 484 U.S. at 297.

206. *Id.*

207. *Id.* at 296–97 (citing Barr v. Matleo, 360 U.S. 564, 571 (1959)).

208. *Id.* at 295.

ly exception being intentional acts by non-law enforcement or investigative officers.[209] Because "within the scope of employment" for purposes of government liability under the FTCA is interpreted broadly, individuals can typically find relief in suits against the government for wrongful or negligent non-discretionary acts of government employees.[210] Until this point, though, victims could still sue U.S. employees for intentional torts, including law enforcement officers because the FTCA was not the exclusive procedure for obtaining a remedy.[211] Injured individuals could get relief if the court found the officer was not acting within the scope of his or her authority under the federal common law test.[212] *Westfall*'s effect was that, even if an official was acting within the scope of her authority, victims could bring a suit directly against the officer, as long as the acts were not discretionary in nature.[213] For constitutional violations, there was also limited liability for discretionary acts that violated the Constitution.[214]

Even though discretionary acts had been interpreted quite broadly since 1953, this seemed a somewhat fair regime, as it protected both the United States and government employees, individually, for discretionary actions within the scope of employment, as determined by federal common law.[215] The Court struck this balance, though it did not last long. Congress moved immediately to reverse *Westfall* in legislation that would have grave future impacts on the ability of aliens, and others, to secure a remedy when injured through tortious acts of government employees.[216]

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209. 28 U.S.C. §§ 1346(b), 2680(h) (1982).

210. *See id.* § 1346(b); Wilson, *supra* note 26, at 186.

211. *See* Wilson, *supra* note 26, at 186.

212. *Id.*

213. *See, e.g.*, Scott v. Demenna, 840 F.2d 8, 9 (D.C. Cir. 1988).

214. *See, e.g.*, Brian Shea, *The Parent Trap: Constitutional Violations and the Federal Tort Claims Act's Discretionary Function Execution*, 52 B.C. L. REV. 57, 58 (2011) (citing Castro v. United States (*Castro II*), 560 P.3d 381 (5th Cir. 2009)).

215. *See* 28 U.S.C. §§ 1346, 2080; *see, e.g.*, William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Torts Claims* Act, 7 ADMIN. L.J. AM. U. 1, 2–3 (1993); Wilson, *supra* note 26, at 176.

216. *See* Act of Nov. 18, 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. § 2679 (1988)); James D. Doster, Note, *The Westfall Act Before and After Gutierrez de Martinez v. Lamagno: Reviewability, Remand, and Article III—One Down, One to Go, and One that Should Be Left Alone*, 32 GA. L. REV. 181, 1885–86 (1997).

1. Enactment of the Westfall Act of 1988

As described above, the FTCA itself did not affect an alien's right to seek a remedy directly against U.S. officials in their individual capacities for human rights abuses, either for acts covered by the FTCA or those that were excluded, because the FTCA was not the exclusive remedy.[217] This changed, however, with the enactment of the Federal Employees Reform and Tort Compensation Act ("FERTC") of 1988, also known as the Westfall Act.[218] The primary motivation of Congress in enacting the Act was to overturn the *Westfall* decision and ensure that all employees acting within the scope of employment received immunity from suit, not just those higher-level employees who exercise a high degree of discretion.[219]

The FERTC made two changes that greatly affected the ability of individuals, including aliens, to seek and acquire a remedy. First, it allows the substitution of the United States for the individual defendant when the Attorney General certifies that the employee was acting within the scope of employment when he engaged in the tortious conduct.[220] Second, it makes such actions, when the certification occurs, exclusive;[221] in other words, no longer can a victim also sue an individual officer for such actions deemed "within the scope of . . . employment."[222] As discussed above, the Supreme Court had previously interpreted the "scope of employment" provision of the FTCA using state *respondeat superior* law, which interprets scope of employment broadly, rather than using federal common law, as it had previously.[223] Lower courts have since found that *respondeat superior* state law governs the "scope of employment" provision under the Westfall Act, rather than federal common law that previously governed com-

217. 28 U.S.C. §§ 1296(h), 1346(b) (2006).

218. *See* Pub. L. No. 100-694, § 2(a)(7)(b), *reprinted in* 1988 U.S.C.C.A.N. 4563, 4563–64.

219. *See id.*; Wilson, *supra* note 26, at 176.

220. 28 U.S.C. § 2679(a), (d)(1); Wilson, *supra* note 26, at 176.

221. The Westfall Act amended the FTCA to make its remedy against the United States the exclusive remedy for most claims against Government employees arising out of their official conduct, stating that the remedy against the United States is "exclusive of any other civil action or proceeding." 28 U.S.C. § 2679(b)(1).

222. *See* 28 U.S.C. § 2679(a), (d)(1).

223. *See* Wilson, *supra* note 26, at 176–77.

mon law official immunity.[224] This means federal courts almost always find officials to be acting within the scope of employment.[225] When this occurs, the United States is substituted, and victims are left with only those remedies the FTCA allows them.[226] Such remedies are excluded for intentional acts of non-federal law enforcement officers,[227] discretionary acts,[228] and actions that arise in a foreign country.[229]

The Westfall Act did provide for two exceptions where substitution would not be allowed: suits for constitutional violations[230] and suits for violations of a U.S. statute which otherwise authorizes an action against an individual employee.[231] There is no exception for claims brought under customary international law for federal common law. Moreover, because the Supreme Court has deemed the ATS to be only a jurisdictional statute only with federal common law providing the cause of action under the ATS,[232] courts have held that the ATS does not qualify as a statutory exception to the Westfall Act.[233]

a. Scope of Employment and Substitution Under the Westfall Act

The substitution provision of the Westfall Act provides that

> [u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action . . . upon such a claim. . .shall be deemed an action against the United

224. *See, e.g.*, Wilson v. Libby, 535 F.3d 697, 711 (D.C. Cir. 2008).

225. *See* Wilson, *supra* note 26, at 176–78, 204; *see, e.g.*, Rasul v. Rumsfeld, 419 F. Supp. 26, 33 (D.C. Cir. 2006).

226. 28 U.S.C. § 2679(d)(1).

227. *Id.* § 2680(h).

228. *Id.* § 2680(a).

229. *Id.* § 2680(k).

230. *Id.* § 2679(b)(11)–(12). Pursuant to section 2679(b)(2), the immunity granted by section 2679(b)(1) "does not extend or apply to a civil action against an employee of the Government . . . brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(A).

231. *Id.* § 2679(b)(2)(B).

232. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714, 724 (2004).

233. *See, e.g.*, Hamad v. Gates, No. C10-591 MJP, 2011 WL 6130413, at *9 (W.D. Wash., Dec. 8, 2011); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 115 (D.D.C., 2010); *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 112 (D.D.C. 2007); Harbury v. Hayden, 444 F. Supp. 2d 19, 37–38 (D.D.C., 2006), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 881 (2008); Bancoult v. McNamara, 370 F. Supp. 2d 1, 9–10 (D.D.C. 2004).

> States . . . and the United States shall be substituted as the party defendant.[234]

Under the Westfall Act, if the U.S. Attorney General certifies that a U.S. official was acting within the scope of his employment when committing a "negligent or wrongful act or omission" and a court agrees after having reviewed a plaintiff's rebuttal to the presumption this certification creates, the United States can substitute itself for the U.S. official as the defendant, thereby limiting claims and remedies to those allowed against the United States under the FTCA.[235] Thus, a court's finding as to whether or not a U.S. official acted "within the scope of his employment" can make all the difference between an alien having, or not having, a remedy for human rights abuses he or she experiences at the hands of a U.S. official.[236]

In cases involving U.S. officials' alleged tort violations of international human rights law, courts have unanimously found the officials to be acting within the scope of their employment, applying state *respondeat superior* law, even where the acts alleged are clear or egregious violations of international law.[237] As long as the acts were tied in some way to the officials' employment, courts have generally found the officials were acting within the scope of their employment, and plaintiffs have been left to proceed under the limited waiver of the FTCA, which provides little, if any, relief for violations of customary international law.[238] These findings and the subsequent substitution of the United States as defendant results in an immunity of sorts and in the consequent barrier

234. 28 U.S.C. § 2679(d)(1).

235. *Id.* § 2679(b), (d)(1) (2006). Certification by the Attorney General "does not conclusively establish as correct the substitution of the United States as defendant in place of the employee." Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995) (stating that certification shifts the burden to the plaintiff to challenge the Attorney General's actions by "coming forward with specific facts rebutting the certification"); *see also* Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 662 (D.C. Cir. 2006) (citing Stokes v. Cross, 327 F.3d 1210, 1214 (D.C. Cir. 2003)) (finding that an Attorney General's certification that a Congressman was acting within his scope of employment was correct under District of Columbia law).

236. *See, e.g.*, *Al-Zahrani*, 684 F. Supp. at 105–06, 108.

237. *See, e.g.*, *Harbury*, 522 F.3d 422; Schneider v. Kissinger, 310 F. Supp. 2d 251, 265 (D.D.C. 2004). In both *Harbury* and *Schneider*, the court ruled the state law claims were preempted under the political question doctrine. 684 F. Supp. 2d at 421; 310 F. Supp. 2d at 261.

238. *See Harbury*, 522 F.3d at 422; *Schneider*, 310 F. Supp. 2d at 265–66; *see also Al-Zahrani*, 684 F. Supp. 2d at 105–06.

to a remedy for harm, even for the most egregious human rights abuses.[239]

Perhaps nowhere have courts' findings that U.S officials' alleged egregious human rights violations were within the scope of employment for purposes of the Westfall Act been more troublesome than the recent dismissals of claims brought by former Guantanamo Bay detainees against a variety of U.S. officials, such as Donald Rumsfeld and several military officials, for tort violations of the law of nations, including torture, extrajudicial killing, prolonged arbitrary detention, and cruel, inhuman and degrading treatment.[240] The Court of Appeals for the District of Columbia in *Rasul v. Myers* issued the first circuit opinion regarding this subject, affirming a D.C. federal district court's ruling that U.S. officials acted within the scope of their employment even if they did engage in egregious human rights abuses such as torture, CIDT, and prolonged arbitrary detention.[241] In *Rasul*, the court applied the "law of the place" to determine the scope of employment, which was tort law within the District of Columbia law.[242] Applying that law, which considered whether conduct was "incidental" and "foreseeable," and whether the perpetrator's intent was to serve the master, the court found even egregious acts such as torture were within the scope of employment, thereby resulting in the substitution of the United States as the defendant and leaving the FTCA as the sole remaining remedy.[243]

239. *See* 28 U.S.C. § 2679(d)(1); *Harbury*, 522 F. 3d at 422 .

240. *See, e.g.*, *Al-Zahrani*, 684 F. Supp. 2d at 106.

241. 512 F.3d 644, 649 (D.C. Cir. 2008), *vacated by* ___ U.S. ___, 129 S. Ct. 763 (2008), *reinstated in rel. part by* 563 F.3d 527 (D.C. Cir. 2009).

242. *Id.* at 655 (quoting Majano v. United States, 469 F.3d 138, 141 (D.C. Cir. 2006)) (internal quotation marks omitted).

243. *See id.* at 658–60 (citing Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 662 (D.C. Cir. 2003)).

Similar cases have met similar outcomes.[244] The D.C. court, which has been the court to decide most of these cases, has rejected plaintiffs' arguments that *jus cogens* violations of international law should be per se evidence of an official having acted outside the scope of employment.[245] As discussed in more detail below, this is contrary to other courts' decisions that foreign officials have acted outside the scope of their employment for purposes of foreign sovereign immunity when engaging in such severe violations, because in those cases, courts apply federal common law to the "scope of authority" question.[246]

b. FTCA Becomes the Exclusive Remedy After the Westfall Act

After substitution of the United States as defendant, the Westfall Act becomes the exclusive remedy for all acts within the scope of employment, with the exception of *Bivens* claims and statutory provisions that otherwise provide a remedy for tortious acts.[247] With regard to statutory provisions, the Supreme Court in 2004 found that the ATS was a jurisdictional statute only and thus did not provide for a cause of action, but that the cause of action was provided by federal common law.[248] Lower courts have unanimously found claims for violations of customary international law through the ATS do not fit within the statutory exception of the Westfall Act.[249] Given the exclusivity provision of the Westfall Act, this has left aliens whose rights under international human

244. *See, e.g.*, Ali v. Rumsfeld, 649 F.3d 762, 765, 770 (D.C. Cir. 2011); Al Janko v. Gates, 831 F. Supp. 2d 272, 281–82 (D.D.C. 2011); Hamad v. Gates, No. C10-591MJP, 2011 WL 6130413, at *10 (W.D. Wash. Dec. 8, 2011) (citations omitted) ("[Under Virginia law] an act is within the scope of employment if it was 'fairly and naturally incident to the business' and if it was done 'while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisably, . . . to further the master's interests' and did not arise 'wholly from some external, independent, and personal motive on the part of the servant.'"); *Al-Zahrani*, 684 F. Supp. 2d at 113 (finding that scope of employment may include torture and serious criminal conduct); *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 114 (D.D.C. 2007).

245. *See, e.g.*, *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 113–14.

246. *See infra* notes 280–85 and accompanying text.

247. *See* 28 U.S.C. § 2679(b)(2) (2006).

248. Sosa v. Alvarez-Machain, 542 U.S. 692, 714, 724 (2004).

249. *See supra* notes 232–33 and accompanying text. The Torture Victim Protection Act only applies to torture and extrajudicial killing by individuals "acting in an official capacity for any foreign nation," not by U.S. officials. Act of Mar. 12, 1992, Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350); *see, e.g.*, *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 112.

rights law have been violated by U.S. officials unable to seek remedies from the individuals harming them.

2. No Remedy for Intentional Acts

When the employee has been deemed to be acting within the scope of authority and the United States is substituted as a defendant, victims' claims must proceed under the FTCA due to the exclusivity of the Westfall Act; this is their only option. Thus, victims can then only seek a remedy for those acts for which the United States has waived immunity.[250] In addition to excluding discretionary acts, the FTCA also excludes intentional acts by non-federal law-enforcement officers, such as assault and false imprisonment.[251] When the "intentional tort" exception to the waiver was enacted as part of the original act in 1946, victims could still seek a remedy against the individual officers.[252] Thus, the effect of the enactment of the FTCA was to provide *more remedies* for victims of U.S. officials' wrongful actions, not restrict them. But once the Westfall Act was enacted, this changed.[253] One wonders if this result was what Congress had in mind when it enacted the Westfall Act in 1988.

In fact, according to the legislative history of the Westfall Act, Congress never intended to make intentional, egregious tort violations, such as torture, subject to the Westfall Act's exclusive remedy provision. The House Report on the Westfall Act clearly states that "[i]f an employee is accused of egregious misconduct rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable."[254] Additionally, when discussing what actions would be covered by the Westfall Act, Representative Barney Frank, who drafted the bill, stated, "we are not talking about intentional acts of harming people."[255] Also, the purpose

250. 28 U.S.C. § 2674 (2006).
251. *Id.* § 2680(a)(h) (2006).
252. *See id.* § 1346(b) (1952).
253. Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at 28 U.S.C. § 2679).
254. H.R. REP. NO. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949.
255. 134 CONG. REC. 15963 (daily ed. June 27, 1988) (statement of Rep. Frank).

of the Westfall Act was simply to overturn *Westfall* and return the law to what it was before in *Barr v. Matteo*.[256]

Moreover, the Westfall Act was never meant to provide immunity for torture. In an amicus brief submitted to the Court of Appeals for the District of Columbia, Representative Frank wrote of the Act's reach that "[a]n official engaged in torture . . . was to stand alone in facing the legal consequences of his or her actions."[257] The bill's original sponsor, Representative Dante Fascell, agreed: "Torture is an insidious practice of brutality which is the most egregious example of man's inhumanity toward man. Torture is antithetical to our respect for the rights and dignity of the individual—it is violent; it is abhorrent; and it is illegal."[258]

Unfortunately, however, Congress' intent was not realized in the statute due to incompetence, misunderstanding, or some other reason. Courts interpreted the scope of employment under the FTCA very broadly under state *respondeat superior* law at the time of the Westfall Act in 1988, but the Act did not specify a different test for scope of employment.[259] Nothing suggests Congress really understood the implications of the scope of employment provision of the Westfall Act.

Given the legislative history, one could argue that Congress only intended substitution for those acts for which the United States had already waived its immunity and not for intentional acts. But this is not how the Westfall Act was written, nor is it how the courts have interpreted it. Congress could easily clarify this inconsistency through additional legislation.

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256. H.R. REP. NO. 100-700, at 4, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5947; *see* Westfall v. Erwin, 484 U.S. 292 (1988); Barr v. Matteo, 360 U.S. 564 (1959); *see also* Jamison v. Willey, 14 F.3d 222, 227 (4th Cir. 1994).

257. Brief for United States Representative Barney Frank as Amicus Curiae Supporting Appellant at 7, Harbury v. Hayden, 522 F.3d 413 (1988) (No. 06-cv-5282); *see also* 134 CONG. REC. 15963 (daily ed. June 27, 1988) (statement of Rep. Frank) ("[W]e are not talking about intentional acts of harming people.").

258. 130 CONG. REC. 24858 (1984); *see also* 130 CONG. REC. 24861 (1984) (statement of Rep. Brown) ("[A] fair and just legal system . . . has no room for torture."); 130 CONG. REC. 24860 (1984) (statement of Rep. Broomfield) ("[T]he U.S. Government has always taken a strong stand against the practice of torture.").

259. Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. § 26 (2006)).

3. Those Who Suffer Claims "Arising in a Foreign Country" Are Not Entitled to a Remedy

As mentioned above, the FTCA contains a foreign country exception whereby the United States has not waived its immunity for abuses by U.S. officials in a "foreign country."[260] The foreign country exception was included in the FTCA to ensure that the United States would not be subject to a foreign country's laws, given the "in accordance with the law of the place" language in the Act.[261] As discussed below, the Supreme Court has read this exception broadly, leaving no possibility of a judicial remedy for those aliens (and citizens) who suffer injury outside the geographic borders of the United States. This exception applies even when no other sovereign's law is at issue and even when the injury results from acts occurring within the United States.[262]

The seminal case involving the foreign country exception is the 1993 case of *Smith v. United States*.[263] In *Smith*, the Supreme Court held that Antarctica was considered a foreign country for purposes of the FTCA, even though it had no government, was sovereignless, and as such, had no tort law of its own.[264] The Court made this finding notwithstanding the fact that the main purpose of the foreign country exception was to prevent the United States being subject to another country's laws.[265] The Court noted that other parts of the FTCA indicated "foreign country" would include a country such as Antarctica.[266] First, the Court pointed to the language of 28 U.S.C. §1346(b), wherein the United States waived sovereign immunity for acts committed by certain federal officials "under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*"[267]

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260. 28 U.S.C. § 2680(k) (2006).

261. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 707 (2004); United States v. Spelar, 338 U.S. 217, 221 (1949).

262. *See, e.g.*, Al Janko v. Gates, 831 F. Supp. 2d 272, 284 (D.D.C. 2011); Hamad v. Gates, No. C10-591 MJP, 2011 WL 6130413, at *11 (W.D. Wash. Dec. 8, 2011); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 119 (D.D.C. 2010).

263. 507 U.S. 197 (1993).

264. *Id.* at 198, 201–02.

265. *Id.* at 200–01.

266. *Id.* at 201–02.

267. *Id.* at 201 (emphasis added) (quoting 28 U.S.C. § 1346(b) (1988)).

The Court noted that the provision required application of the "law of the place" where the tort occurred, and because Antarctica had no law, application of this provision in the context of injury occurring there would not make sense.[268] Thus, the Court found that only injuries occurring within the United States were subjected to the FTCA.[269]

In addition, the Court noted that the venue provision of the FTCA required that the lawsuit be filed in the federal district court where the act or omission complained of occurred or where the plaintiff resides.[270] In support of its reasoning, the Court noted that if the plaintiff did not reside in the United States, there would be no place for the lawsuit to be filed.[271]

This particular exception has had grave consequences by way of lack of a remedy for those who suffer injury at the hands of U.S. officials abroad.[272] Although the consequences have been seen in several cases involving U.S. officials' alleged violations of international human rights over the last twenty years,[273] such consequences have been recently felt by those who have suffered severe human rights abuses in places such as Guantanamo Bay

268. *Id.* at 201–02.

269. *Id.* at 202. Interestingly, earlier drafts of the foreign country exception that Congress ultimately rejected distinguished between citizens' and aliens' claims by including language exempting those claims "arising in a foreign country *on behalf of an alien*." *Id.* at 202 n.4 (emphasis added) (citing S. 2690, 76th Cong., § 303(12) (1939); H.R. 7236, 76th Cong. § 303(12) (1939)). As the Court noted, the last five words of the proposed bills were dropped at the suggestion of the Attorney General. *Id.* (citing *Before the House Comm. on the Judiciary Hearings on H.R. 5373 and H.R. 6463*, 77th Cong. 29, 35, 66 (1942)). This earlier draft would have made the foreign country exception dependent on the citizenship of the individual harmed; in other words, it would not have exempted claims by U.S. citizens arising in a foreign country, only those by aliens. By refusing to accept the draft making this differentiation, Congress signaled that it felt it was important that claims by aliens be compensated in the same manner as those by citizens.

270. *Id.* at 202 (citing 28 U.S.C. § 1402(b) (1988)).

271. *Id.*

272. *See* Kelly McCracken, *Away from Justice and Fairness: The Foreign Country Exception to the Federal Tort Claims Act*, 22 LOY. L.A. L. REV. 603, 622–23 (1989).

273. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 700–01 (2004) (applying the foreign country exception to a Mexican national's claims against a Drug Enforcement Administration's officer's alleged violation of his rights protected by international law); Harbury v. Hayden, 522 F.3d 413, 422–32 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 881 (2008) (applying the exception to FTCA's waiver of sovereign immunity for suits based on injuries suffered in a foreign country to bar tort claims of a widow of a rebel fighter allegedly tortured and killed by members of Guatemalan army who were allegedly gathering information for the CIA during Guatemala's civil war).

Naval Base.[274] Every lower federal court that has considered the issue has found that the FTCA does not apply to violations of international law that occurred at Guantanamo Bay,[275] notwithstanding that the Supreme Court found that although the Guantanamo Bay Naval Base is located within Cuba, the United States exercises de facto sovereignty.[276] In fact, the Supreme Court stated that, "in every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."[277]

Although one might consider arguing, that "law of the place" could include customary international law, courts have thus far rejected this argument,[278] given that the Supreme Court has found that the "law of the place" for purposes of the FTCA is state law.[279]

Prior to 2004, the foreign country exception did not bar injured parties' suits for harm or injuries occurring outside of the United States, as long as the U.S. officials' actions that led to the injury took place within the United States, a theory dubbed the "headquarters doctrine."[280] This is because the courts could apply the

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274. Laura N. Pennelle, *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 304, 316 (2006).

275. *See* Al Janko v. Gates, 831 F. Supp. 2d 272, 284 (D.D.C. 2011); Hamad v. Gates, No. C10-591MJP, 2011 WL 6130413, at *11 (W.D. Wash. Dec. 8, 2011); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 119 (D.D.C. 2010).

276. Boumediene v. Bush, 553 U.S. 723, 755, 769 (2008) (citing Rasul v. Bush, 542 U.S. 466, 480, 487 (2009)).

277. *Id.* at 769 (citing *Rasul*, 542 U.S. at 480; *id.* at 487 (Kennedy, J., concurring in judgment)).

278. *Al Janko*, 831 F. Supp. 2d at 283 (finding that customary international law is not state law, and thus not within the FTCA); Bansal v. Russ, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007); Turkmen v. Ashcroft, No. 02 CV 2307(JG) 2006 WL 1662663, at *50 (E.D.N.Y. 2006), *rev'd on other grounds*, 589 F.3d 542 (2d Cir. 2009).

279. FDIC v. Meyer, 510 U.S. 471, 477–78 (1994).

280. *See* Alvarez-Machain v. United States, 331 F.3d 604, 638–39 (9th Cir. 2003) (finding the headquarters doctrine applied because DEA officials in Los Angeles decided to kidnap the plaintiff and gave instructions from there, and such acts proximately caused the injuries), *rev'd*, 542 U.S. 692, 699 (2004); Couzado v. United States, 105 F.3d 1389, 1395 (11th Cir. 1997) (quoting Donahue v. U.S. Dep't of Justice, 751 F. Supp. 45, 48 (S.D.N.Y. 1990)) ("'[A] claim is not barred by section 2680(k) where the tortious conduct occurs in the United States, but the injury is sustained in a foreign country.'"); Eaglin v. U.S. Dep't of Army, 794 F.2d 981, 983 (5th Cir. 1986) (assuming, *arguendo*, that the headquarters doctrine is valid); Sami v. United States, 617 F.2d 755, 761–62 (D.D.C. 1979) (concluding that the foreign country exception does not exempt the United States from suit for acts and omissions in United States having operative effect abroad and refusing to apply the exception where a communique sent from the United States by a federal law en-

law of the state where the acts or omissions occurred leading to the injury, thereby not subjecting the United States to foreign laws.[281]

However, the Supreme Court rejected this argument in 2004 in *Sosa v. Alvarez-Machain.*[282] The Court criticized the doctrine's reliance on "proximate cause," and noted that at the time the FTCA was enacted, choice of law doctrines dictated that courts apply the law of the place *where the harm occurred.*[283] Given this, the Court ruled that the FTCA's "arising in a foreign country" exception applied if the harm or injury occurred outside the United States.[284] Lower federal courts have followed *Sosa* and found that those who suffered harm abroad from human rights violations at the hands of U.S. officials, even as a result of decisions made within the United States, cannot bring a suit in U.S. courts for damages.[285]

The rejection of the headquarters doctrine in combination with the foreign country exception is just another roadblock to those who have suffered harm at the hands of U.S. officials abroad.

4. The Combination of the FTCA, Westfall Act, and Court Decisions Has Resulted in a Lack of Remedy for Aliens

The complex combination of the FTCA, its exclusions and exceptions, developing official immunity doctrines, and the Westfall Act's substitution and exclusivity provisions has led to a signifi-

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forcement officer resulted in plaintiff's wrongful detention in Germany); Leaf v. United States, 588 F.2d 733, 736 (9th Cir. 1978) ("A claim 'arises', as that term is used in . . . 2680(k), where the acts or omissions that proximately cause the loss take place.").

281. *See, e.g., Alvarez-Machain,* 331 F.3d at 638 (where the court did not explicitly give the applicability of California law as reasoning, but so insinuated by applying California law); *Couzado,* 105 F.3d at 1395 (finding that "law of the place" is where the acts causing the harm occurred, not where the acts had their operative effect, and thus applying Florida law); *Sami,* 617 F.2d at 762 (noting specifically that because the applicable law is that where the act causing the injury occurred, the intent of the foreign country exception is met).

282. 542 U.S. at 703–04. The case is better known for its affirmance that federal courts can use their common law power to recognize claims for violations of the law of nations pursuant to the jurisdictional grant known as the ATS. *Id.* at 712–37.

283. *Id.* at 703–05.

284. *Id.* at 705–06.

285. *See* Harbury v. Hayden, 522 F.3d 413, 423 (D.C. Cir. 2008); Al Janko v. Gates, 831 F. Supp. 2d 272, 284 n.23 (D.D.C. 2011).

cant narrowing of remedies for all victims of U.S. officials' torts. However, the foreign country exception, the intentional act exclusion, the Westfall Act, and the findings that the ATS does not fit within the statutory exclusion of the FTCA, have had a disparate impact on aliens, and especially aliens subjected to violations of customary international law, such as torture, CIDT, forced disappearance, prolonged arbitrary detention, and intentional assault and abuse. The combination of these various statutory provisions and courts' interpretations of them, have left aliens subjected to such abuses without a remedy. This is in contradiction to international law's requirement that a country provide a remedy to aliens whose rights under international law are violated and is contrary to the founders' and earlier generations' intent.

5. Foreign Officials Committing Human Rights Violations Are Held Accountable

Foreign officials who commit torts against aliens in violation international law are usually held liable in U.S. courts, typically under the ATS or TVPA. This is appropriate and consistent with both international law and the desires of the founders and earlier generations. The liability of foreign officials makes the fact that U.S. officials are typically not held liable even more troubling.

Recently, in the 2010 case of *Samantar v. Yousef*,[286] the Supreme Court affirmed what some circuit courts had already been holding for some time—that the Foreign Sovereign Immunity Act[287] ("FSIA") did not apply to individual foreign officials (even those acting or sued in their official capacity), but instead applied only to foreign states.[288] Thus, unlike U.S. officials given immunity of sorts through the Westfall Act, foreign officials, even those acting within the scope of their employment, are not statutorily granted immunity in tort suits brought against them in U.S.

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286. 560 U.S. ___, 130 S. Ct. 2278 (2010).

287. 28 U.S.C. § 1604 (2006).

288. *Samantar*, 560 U.S. at ___, 130 S. Ct. at 2286–87 (citing 28 U.S.C. § 1603(a) (2006)) (discussing immunity of a foreign state, which "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state").

courts.[289] The Court found, however, that *common law* foreign sovereign immunity might still apply to those individuals.[290]

Yet, many courts addressing official immunity for violations of the law of nations by foreign officials, whether under the FSIA prior to *Samantar* or under federal common law, have found the foreign officials were not immunized for their torts because they exceeded the scope of their employment or authority, especially where they committed *jus cogens* violations of customary international law.[291] In fact, a violation of customary international law is typically considered per se outside the scope of authority when determining foreign official immunity.[292] Rather than applying the state *respondeat superior* liability that courts typically apply in determining whether U.S. officials are acting within the scope of their employment for purposes of substitution under the Westfall Act and its resulting immunity, courts apply a different, more narrow standard to determine scope of employment to claims against foreign officers, focusing on the legality of the officers' acts.[293] This almost always results in a finding that the officer was

289. *Id.* at ___, 130 S. Ct. at 2289.

290. *Id.* at ___, 130 S. Ct. at 2292 (emphasis added).

291. *See* Enahoro v. Abubakar, 408 F.3d 877, 893 (7th Cir. 2005) (footnotes omitted) (citations omitted) (finding that even if the FSIA applied to individuals, it would not apply to the defendant given that the allegations were that he committed *jus cogens* violations, which "by definition are not legally authorized acts"); Nuru v. Gonzalez, 404 F.3d 1207, 1222–23 (9th Cir. 2005) (finding that torture of a Eritrean asylum seeker by Eritrean government officials violated *jus cogens* norms and can never be authorized by a government or be lawful); Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1472 (9th Cir. 1994) (finding acts of torture, execution, and disappearance were clearly outside of Ferdinand Marcos' authority as president, and thus he was not immunized under the FSIA); Trajano v. Marcos (*In re* Estate of Marcos), 978 F.2d 493, 497–98 (9th Cir. 1992) (footnote omitted) (citation omitted) (finding that FSIA immunity extended to individual officials would not bar claims for human rights abuses because such claims were "beyond the scope" of the official's authority and involved acts "the sovereign has not empowered the official to do"); Doe I v. Qui, 349 F. Supp. 2d 1258, 1282, 1286–87 (N.D. Cal. 2004) (refusing to afford immunity to a Chinese government official for abuses including torture and arbitrary detention against Falung Gong followers, although noting such acts were prohibited by Chinese law). *But see* Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009); Belhas v. Ya'alon, 515 F.3d 1279, 1287 (D.C. Cir. 2008) (finding the Israeli government took the position that the defendants were acting in their official capacity when taking action for which they were sued); Giraldo v. Drummond Co., 808 F. Supp. 2d 247, 250 (D.D.C. 2011) (finding that allegations of *jus cogens* violations by former president of Colombia was not per se outside the scope of authority, and thus did not defeat common law immunity, following prior District of Columbia federal court cases).

292. *See Enahoro*, 408 F.3d at 893; *In re Estate of Marcos*, 25 F.3d at 1472; *Doe I*, 349 F. Supp. 2d at 1286–87.

293. *See Enahoro*, 408 F.3d at 893; *In re Estate of Marcos*, 25 F.3d at 1472; *Doe I*, 349

acting outside of the scope of his employment, and thus is liable in his or her individual capacity.[294] The hypocrisy is troubling.

B. *Barriers to* Bivens *Claims*

As mentioned above, the Westfall Act excludes *Bivens* claims,[295] meaning that claims against individual federal officials for violations of rights under the U.S. Constitution can proceed outside of the context and limitations of the FTCA.[296] Given the barriers of the Westfall Act and the definition of scope of employment, and given that there has yet to be a claim meeting the statutory exception of the Westfall Act for violations of international law, aliens suffering human rights violations are typically left only with bringing *Bivens* claims for violations of rights protected by the U.S. Constitution in order to achieve a remedy.[297] However, *Bivens* has rarely provided a remedy for aliens over the last two decades, especially those who have suffered abuse at the hands of U.S. officials in response to the war on terror.[298] This is usually because a court either grants the official qualified immunity after finding that the victim's rights were not "clearly established" constitutional rights[299] or refuses to recognize a *Bivens* action based on the doctrine of "special factors counselling hesitation,"[300] typically involving national security.[301] These doctrines of qualified immunity and "special factors counselling hesitation," just like the Westfall Act and the FTCA, have worked to prevent aliens

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F. Supp. 2d at 1286–87; *see also* Wilson, *supra* note 26, at 227–33.

294. *See Enahoro*, 408 F.3d at 893; *In re Estate of Marcos*, 25 F.3d at 1472; *Doe I*, 349 F. Supp. 2d at 1286–87; *see also* discussion *supra* note 244.

295. 28 U.S.C. § 2679(b)(2)(A) (2006).

296. *See id.*

297. Aliens harmed by U.S. officials abroad can seek administrative relief through the Foreign Claims Act ("FCA"), but only if they are injured through actions neither directly nor indirectly related to combat, and only if they are deemed to be "friendly" to the United States. *See* 10 U.S.C. §§ 2734 to 2736 (2006). Claims must be filed within two years of accruing, and there is a $100,000 damages limit. *Id.* § 2734. For a variety of reasons, relief under the FCA is difficult to ascertain. Importantly, it is a discretionary administrative remedy, and there is no right to such a remedy under the Act. *See id.*

298. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001); Schweiker v. Chilicky, 487 U.S. 412, 421 (1988); Arar v. Ashcroft, 585 F.3d 559, 571 (2d Cir. 2009); Dotson v. Griesa, 398 F.3d 156, 166 (2d Cir. 2005).

299. Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

300. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

301. *See, e.g.*, Beattie v. Boeing Co., 43 F.3d 559, 563 (10th Cir. 1994).

whose rights have been violated and who have suffered injury from obtaining a remedy.

1. Qualified Immunity

In 1971, the Supreme Court recognized private claims for violations of U.S. constitutional rights by federal officials in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[302] Subsequently, in 1974, the Supreme Court rejected absolute immunity for *state* officials' discretionary acts in violation of the U.S. Constitution in actions brought under 42 U.S.C. § 1983,[303] finding that a state official could only claim official immunity for such acts if he acted in good faith *and* with a reasonable belief that his actions were lawful and valid.[304] In 1978, the Court extended this limited, qualified immunity to *federal* officials in *Butz v. Economou.*[305] In extending limited, qualified immunity to federal officers, the Court wanted to ensure individuals harmed by federal officials violating their constitutional rights received a remedy, albeit even from the federal officers themselves (who could always seek indemnification), given the FTCA's exclusion for discretionary acts, whether or not such discretion was abused.[306]

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302. 403 U.S. at 397.

303. The Civil Action for Deprivation of Rights reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper, proceeding for redress . . . .

42 U.S.C. § 1983 (2006).

304. Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.").

305. 438 U.S. 478, 507 (1978).

306. *Id.* at 505 (footnote omitted) ("If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs. Moreover, no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused.").

During the 1970s, the Supreme Court expanded the personal liability of individual federal officials by finding they could be civilly liable for federal constitutional torts and by limiting the scope of immunity.[307] But during the 1980s—the same decade that saw the enactment of Westfall Act—this changed with the 1982 case of *Harlow v. Fitzgerald*.[308] In *Harlow*, the Court found that whether the officer was acting in bad faith was irrelevant for liability purposes.[309] The Court set forth the new standard that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[310]

In all but one case involving abuse of aliens by federal officials after 2001 where a *Bivens* claim was asserted, including those held in Guantanamo Bay, courts have granted qualified immunity to the federal officials, finding that they did not violate clearly established "constitutional rights."[311] The lone recent case rejecting a qualified immunity defense for abuses at Guantanamo Bay, *Hamad v. Gates*, was ultimately dismissed on other grounds.[312]

In dismissing *Bivens* claims on the basis of qualified immunity, courts have relied on the fact that the alien plaintiffs (including those held at Guantanamo Bay) were outside of the United States

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307. *See Bivens*, 403 U.S. at 397; *see also Butz*, 438 U.S. at 50; *Scheuer*, 416 U.S. at 247.

308. 457 U.S. 800 (1982).

309. *Id.*; Wood v. Strickland, 420 U.S. 308, 322 (1975); *Scheuer*, 416 U.S. at 247–48.

310. *Harlow*, 457 U.S. at 818.

311. *See* Ali v. Rumsfeld, 649 F.3d 762, 770 (D.C. Cir. 2011); Rasul v. Myers (*Rasul II*), 563 F.3d 527, 529–30, 532 (D.C. Cir. 2009); Al Janko v. Gates, 831 F. Supp. 2d 272, 280 n.13 (D.D.C. 2011); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 112 n.5 (D.D.C. 2010).

312. *See* No. C10-591MJP, 2011 WL 1253167, at *1 (W.D. Wash. Dec. 8, 2011). Applying the heightened standards of *Iqbal v. Ashcroft*, the Court dismissed the case against Secretary of Defense Robert Gates on the basis that the complaint did not adequately allege his personal involvement in the constitutional violations; the fact that he continued the policies of unlawful arbitrary and prolonged detention was not enough. *Id.* at *5 (applying Iqbal v. Ashcroft, 556 U.S. 662 (2009)). In addition, in an earlier decision, the Court dismissed numerous additional defendants on the basis that the Court lacked personal jurisdiction over them, rejecting Plaintiff's arguments that it could assert personal jurisdiction over all defendants on several different bases. Hamad v. Gates, No. C10-591MJP, 2010 WL 4511142, at *2–4 (W.D. Wash. Nov. 2, 2010). The fact that an alien would have to file dozens of cases against officials, albeit sued in their individual capacity, but for constitutional violations under color of law, rather than one case in one jurisdiction, is yet another practical barrier to justice in these cases.

when their rights were violated, and thus it was not clearly established that they possessed rights under the United States Constitution.[313] Unfortunately, the exact perimeter of constitutional rights an alien possesses is still developing, and when and under what circumstances an alien outside the geographic borders of the United States is afforded constitutional rights vis-à-vis federal officials, is somewhat unclear.[314] Prior Supreme Court cases have indicated that aliens likely have no constitutional rights outside of U.S. territories, but within such territories, do have rights under the Constitution.[315] In the 2008 landmark case of *Boumediene v. Bush*, however, the Supreme Court found that aliens held at Guantanamo Bay at a minimum had a constitutional right to challenge their detention under the Constitution's nonderogation provision of habeas, given that the United States had de facto sovereignty over the base.[316] But the Court left open the question of exactly what constitutional rights might otherwise attach to these men.[317] In addition, given that the decision came in 2008, years after the United States began detaining men at

313. *See Ali*, 649 F.3d at 770; *Rasul II*, 563 F.3d at 528–30; *Al Janko*, 831 F. Supp. 2d at 280; *Al-Zahrani*, 684 F. Supp. 2d at 112–13 n.5.

314. *See infra* notes 320–27 and accompanying text.

315. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."); Johnson v. Eisentrager, 339 U.S. 763, 784–85 (1950) (stating that "[n]o decision of this Court" supported the extension of Fifth Amendment rights to aliens overseas and the "practice of every modern government is opposed to it"); Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."). However, starting in 1901, the Court in a series of opinions known as the Insular Cases held that the Constitution extended *ex proprio vigore* to the territories. *See* BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCY OF AMERICAN EMPIRE 5–6 (2006). In these cases, the Court also established the doctrine of territorial incorporation. *Id.* Under the same, the Constitution applied fully only in incorporated territories such as Alaska and Hawaii, and it partially applied in the new unincorporated territories of Puerto Rico, Guam, and the Philippines. *See id.* at 5; De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & Porto Rico Steamship Co., 182 U.S. 392 (1901).

316. 553 U.S. 723, 755, 771 (2008).

317. In addition, in *Boumediene*, the Court rejected the government's argument that the Constitution never applied extra-territorially. *Id.* at 755. It further discussed applying a "functional test" for constitutional application extraterritorially in future cases. *Id.* at 756–59, 763–64. Thus, it is possible that *Boumediene* could change the landscape somewhat in future cases involving aliens abused by federal officials.

Guantanamo Bay, the primary issue in these cases has been whether the men's rights, even if they did have them, were "clearly established" for purposes of qualified immunity.[318]

Until very recently, courts first needed to determine whether a constitutional right existed before determining whether the right was "clearly established" for purposes of qualified immunity.[319] That changed in 2009, when the Supreme Court ruled that courts are no longer required to first determine whether rights existed, but can move first to the question of whether such rights were "clearly established," thereby relieving the courts of an obligation to determine whether a constitutional right in fact existed and was violated.[320] In cases involving aliens since that decision, courts for the most part have only decided the issue of whether the rights were clearly established, not reaching the issue of whether such constitutional rights existed.[321]

Although it is possible that cases involving abuses of aliens taking place after the 2008 *Boumediene* decision might have somewhat different results depending on the situation, qualified immunity, at least for now, is one doctrine that severely limits aliens' rights to seek a remedy under the Constitution.

2. "Special Factors Counselling Hesitation"

Another relatively recent barrier to aliens obtaining a remedy for violations of their rights has been the doctrine of "special factors counselling hesitation" under which courts have been reluctant to recognize *Bivens* claims for constitutional violations in the first place, regardless of whether such rights might be clearly es-

318. *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1602, 1624–25 (2011).

319. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

320. Pearson v. Callahan, 555 U.S. 223, 236–37 (2009). As one might imagine, because courts no longer have to first determine whether a right existed, there is less case law to assist in determining whether a right is or was in fact clearly established.

321. *See supra* note 314. In one case prior to 2009, the D.C. Circuit found that the Constitution did not confer rights to detainees at Guantanamo Bay. Rasul v. Myers (*Rasul I*), 512 F.3d 644, 664–65 (D.C. Cir. 2008). However, in *Hamad v. Gates*, a district court in Washington State, in what is so far the only case involving a former Guantanamo Bay detainee rejecting qualified immunity for constitutional right violations at Guantanamo Bay, found detainees had such rights, relying on *Boumediene*. No. C10-591 MJP 2012 WL 1253167, at *3 (W.D. Wash. Apr. 13, 2012).

tablished.[322] In *Bivens* cases brought by aliens for injuries arising out of U.S. officials' acts ostensibly carrying out some sort of foreign policy goal—including the cases involving the war on terror—in all but one case, *Hamad v. Gates*,[323] courts have cited "special factors counselling hesitation" related to national security in refusing to recognize a *Bivens* remedy—even if the plaintiffs would have otherwise met the requirements for such a claim.[324] Yet, in two of three analogous cases involving U.S. citizens alleging injuries involving foreign policy or military actions related to the war on terror, courts have rejected defense arguments that "special factors counselling hesitation" should preclude such remedies.[325] The courts have specifically stated that cases involving aliens and are distinguishable from those involving U.S. citizens in rejecting *Bivens* claims based on special factors.[326] Such distinc-

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322. The phrase comes from *Bivens*, in which the Supreme Court explained that such a remedy could be afforded because that "case involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971). The Court has recognized special factors counselling hesitation in precluding *Bivens* actions for U.S. soldiers injured while serving, concluding that "the unique disciplinary structure of the Military Establishment" precluded a Bivens action for harm to military personnel through activity incident to service. United States v. Stanley, 483 U.S. 669, 679 (1987) (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983)).

323. *See* 2011 WL 6130413, at *3. The case was brought by a former Guantanamo Bay detainee and is the only case brought by an alien involving the war on terror where a federal court has rejected the "special factors counselling hesitation" doctrine, finding that such factors did not preclude a *Bivens* claim. *Id.*

324. *See* Ali v. Rumsfeld, 649 F.3d 762, 774 (D.C. Cir. 2011); Arar v. Ashcroft, 585 F.3d 559, 574–75 (2d Cir. 2009); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985) (citing *Chappell*, 462 U.S. at 298); Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (citing *Rasul I*, 512 F.3d at 672–73 (Brown, J., concurring)); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 112 (D.D.C. 2010); *In re* Iraq & Afg. Detainee Litig., 479 F. Supp. 2d 85, 103 (D.D.C 2007) (quoting *Bivens*, 403 U.S., at 396).

325. *See* Vance v. Rumsfeld, 694 F. Supp. 2d 957, 974 (N.D. Ill. 2010) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004); Padilla v. Yoo, 633 F. Supp. 2d 1005, 1020 (N.D. Cal. 2009)) (rejecting arguments that "special factors counselling hesitation" precluded *Bivens* claims brought by U.S. citizens), *reh'g granted*, Vance v. Rumsfeld, Nos. 10-1687 & 10-2442, 2011 U.S. App. LEXIS 22083, at *1 (7th Cir. Oct. 28, 2011); *Padilla*, 633 F. Supp. 2d at 1025 (same), *rev'd on other grounds*, 678 F.3d 748 (9th Cir. 2012). However, in *Lebron v. Rumsfeld*, the district court and appellate court found that "special factors counselling hesitation" precluded a *Bivens* claim brought by Mr. Padilla's mother. 764 F. Supp. 2d 787, 800 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012). Given this case, as well as the fact that Padilla, in his own case, was ultimately found to be without a remedy due to the Ninth Circuit dismissing on qualified immunity grounds, the double standard for U.S. citizens and foreign citizens with regard to *Bivens* claims might not be as stark as was suggested by the district court cases. *See Padilla*, 678 F.3d at 761–62, 768.

326. *See Vance*, 694 F. Supp. 2d at 974 (citing *Hamdi*, 542 U.S. at 532; *Padilla*, 633 F. Supp. 2d at 1020); *Padilla*, 633 F. Supp. 2d at 1025.

tions are difficult to defend when one examines the analyses more closely; when doing so, a double-standard becomes apparent.

The first case brought by an alien where a court found special factors counseled hesitation in recognizing a *Bivens* claim for injuries arising out of national security or foreign policy decisions was *Sanchez-Espinoza v. Reagan*,[327] a 1985 opinion from the Court of Appeals for the D.C. Circuit. That case involved, among other things, Nicaraguan citizens who suffered injuries at the hands of U.S.-supported "contra" rebels bringing civil tort actions against certain U.S. officials for their covert vicarious involvement in the injuries.[328] In that case, the court found that Congress was to determine whether a remedy should exist and not the courts, noting that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."[329] In so deciding, the court also cited the danger of foreign citizens using the courts to obstruct U.S. foreign policy as one reason it should leave to Congress the judgment whether a damage remedy should exist.[330]

The 2007 case *In re Iraq & Afghanistan Detainees Litigation* was the first to consider whether special factors counseled hesitation in recognizing a *Bivens* remedy for aliens arrested in the wake of the wars in Afghanistan and Iraq.[331] The plaintiffs alleged they were innocent civilians illegally detained and subjected to torture and abuse by the U.S. military in Iraq and Afghanistan.[332] After first finding that rights under the Constitution did not extend to the plaintiffs because the events occurred in foreign territories,[333] the court found that special factors counselling hesitation also precluded the recognition of a *Bivens* claim, citing *Sanchez-Espinoza*.[334] Under the "special factors counselling hesi-

327. 770 F.2d at 208 (citing *Chappell*, 462 U.S. at 298).

328. *Id.* at 205.

329. *Id.* at 209.

330. *Id.* Of course, that danger also exists with U.S. citizens, albeit there is an argument that there is less risk of this occurring.

331. 479 F. Supp. 2d 85, 88 (D.D.C. 2007).

332. *Id.*

333. *Id.* at 95 (citing Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Zadvydas v. Davis, 533 U.S. 678 (2001); Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007)).

334. *Id.* at 103–04 (citing Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics,

tation" analysis, the court first indicated that such a decision regarding whether a remedy existed in the first place might be constitutionally within the legislature's power and not its own.[335] The court noted the doctrine did not go to the merits of a particular remedy, but to who should decide whether a remedy should be provided.[336] However, it also found that even if it was within its constitutional power, those same special factors favored allowing Congress to decide the scope of the remedy.[337]

The plaintiffs argued that nothing precluded claims against the military for abuses, but the court rejected that argument in the context of the Afghanistan and Iraq wars.[338] It noted that "authorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation in defense of our liberty and national interests."[339] The court opined that the use of discovery could hamper national security, that such cases would cause morale problems, and even might cause lower-level soldiers to question their superiors' authority, and that commanders might hesitate in taking actions if they were at risk for personal liability.[340]

Similar decisions in cases brought by alien plaintiffs alleging mistreatment in either Afghanistan, Iraq, or at Guantanamo Bay were issued in fairly quick succession.[341] In *Rasul v. Myers*, after finding that the officials would be entitled to qualified immunity in the *Bivens* claim, the court indicated that it would also find that special factors counselling hesitation would preclude a *Bivens* claim for aliens who had been held and allegedly tortured at Guantanamo Bay, citing the danger of obstructing U.S. national security policy.[342] The court relied on the *Sanchez-Espinoza*

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403 U.S. 388, 396 (1971); *Sanchez-Espinoza*, 770 F.2d at 208).

335. *Id.* at 103–04 (citing *Bivens*, 403 U.S. at 396; Chappell v. Wallace, 462 U.S. 296, 304 (1983); *Sanchez-Espinoza*, 770 F.2d at 208).

336. *Id.* at 103 (quoting *Sanchez-Espinoza*, 770 F.2d at 208).

337. *Id.* at 103–04 (citing Schweiker v. Chilicky, 487 U.S. 412, 423 (1988); Bush v. Lucas, 462 U.S. 367, 380–90 (1983)).

338. *Id.* at 105.

339. *Id.*

340. *Id.*

341. *See* Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011); Rasul v. Meyers (*Rasul II*), 563 F.3d 527 (D.C. Cir. 2009); Rasul v. Meyers (*Rasul I*), 512 F.3d 644 (D.C. Cir. 2008).

342. *Rasul II*, 563 F.3d at 532 n.5 (citing *Rasul I*, 512 F.3d at 672–73 (Brown, J., con-

holding that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."[343]

Ali v. Rumsfeld also involved a civil suit by Afghanis and Iraqis unlawfully held and abused in Afghanistan and Iraq.[344] In refusing to even consider a *Bivens* claim, the court cited previous decisions and *Sanchez-Espinoza* for the proposition that "the danger of foreign citizens' using the courts in [such situation] to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist."[345]

Arar v. Ashcroft is an important case in the *Bivens* context because unlike other plaintiffs who also had to overcome the hurdle of whether the Constitution applied to them outside of the United States' geographical borders, part of Mr. Arar's claim was that U.S. officials violated his rights while holding him at JFK airport in New York before sending him back to Syria where he was tortured.[346] In 2009, the Second Circuit declined to extend a *Bivens* cause of action for Mr. Arar, finding that "rendition" was a "new context" in which the court was reluctant to extend *Bivens* citing "special factors counselling hesitation," and finding it was up to Congress to clarify whether any remedy was available in the context of rendition.[347]

These cases involving aliens stand in direct contrast to those of *Vance v. Rumsfeld*[348] and *Padilla v. Yoo*,[349] each involving a U.S.

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curring); *Sanchez-Espinoza*, 770 F.2d at 209).

343. *Id.* In *Rasul I*, Judge Brown's concurrence opined that he would have relied on special factors counselling hesitation in refusing to grant a *Bivens* remedy, something the majority opinion in that case did not address. 512 F.3d at 672. He noted that allowing *Bivens* claims would allow enemies to obstruct our foreign policy, and he clearly viewed the allowance of a *Bivens* remedy for detainees held and tortured at Guantanamo Bay as an intrusion into executive and congressional powers. *Id.* at 672–73.

344. 649 F.3d at 764.

345. *Id.* at 774 (quoting *Sanchez-Espinoza*, 770 F.2d at 209).

346. *See* 585 F.3d 559, 565–67 (2d Cir. 2009).

347. *Id.* at 572–73, 577 (citing Wilkie v. Robbins, 551 U.S. 538, 550 (2007)).

348. 694 F. Supp. 2d 957 (N.D. Ill. 2010). This case, along with the ruling that special factors counselling hesitation did not preclude a *Bivens* claim, was reversed by the Seventh Circuit. Vance v. Rumsfeld, Nos. 10-1687 & 10-2442, 2012 WL 5416500, at *8 (7th Cir. Nov. 7, 2012).

349. 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *rev'd on other grounds*, 678 F.3d 748 (9th

citizen bringing a civil action for damages against U.S. officials arising from actions related to the War on Terror.

In *Padilla*, U.S. citizen Jose Padilla, brought a civil action against John Yoo, a former deputy attorney general, which included a *Bivens* action for both his detention and his treatment while detained.[350] The court found there were no special factors counselling hesitation in allowing a *Bivens* remedy, distinguishing it from other cases where courts have found special factors existed, noting, among other things, that it did not involve detention and interrogation of aliens abroad.[351] But the court did not explain exactly how that was a distinguishing factor or why it made any difference.

The same is true of *Vance v. Rumsfeld*.[352] In that 2010 decision, the court found that special factors did not counsel hesitation in recognizing a *Bivens* remedy for a U.S. citizen who was subjected to detention by U.S. agents while working for a private Iraqi security firm.[353] The court heavily relied on *In re Iraq & Afghanistan Detainees Litigation* in noting that the court's primary concerns in extending *Bivens* in the context of the wars in Iraq and Afghanistan was limited to non-citizens[354] due to the prospect of a judicial remedy for aliens engaged in battle against the United States.[355] At the same time, the court noted its reluctance to give high-ranking officials a "blank check" to do as they pleased with regard to American citizens, citing the Supreme Court for the proposition that "[e]ven the war power does not remove constitutional limitations safeguarding essential liberties."[356] Yet, the

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Cir. 2012).

350. *Id.* at 1014.

351. *Id.* at 1025. The case was reversed by the Ninth Circuit on other grounds—finding the defendant was entitled to qualified immunity and never reaching the *Bivens* issue. *Padilla*, 678 F.3d at 768.

352. 694 F. Supp. 2d 957.

353. *Id.* at 975.

354. *Id.* at 974–75; *see In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007).

355. 694 F. Supp. 2d at 974–75 (citing *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 105–06). The court relied exclusively on precedent concerning "enemy aliens" to support the aversion to a judicial remedy against military officials.

356. *Id.* at 975 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)) (internal quotation marks omitted).

Vance court does not explain sufficiently why this statement should not also apply to aliens.[357]

The growth and expansion of "special factors counselling hesitation" in these *Bivens* claims is yet another barrier for those injured by U.S. officials and seeking relief, especially for aliens. It is an especially troubling development. The use of "special factors counselling hesitation" has precluded claims of torture, CIDT, and prolonged arbitrary detention in the context of the War on Terror, even though courts are simply being asked to exercise their "time-honored and constitutionally mandated roles of reviewing and resolving claims."[358] The Supreme Court has on numerous occasions indicated that the courts have a role in reviewing and remedying the acts of the executive and our country's military, especially when individual liberties are at stake.[359] Yet, for aliens, this history is being eclipsed.

C. *Political Question Doctrine*

If an alien seeks a judicial remedy from a U.S official and is somehow able to survive the Westfall Act, the FTCA, or *Bivens*, or if the alien seeks a remedy from a U.S. citizen or corporation, another potential roadblock will face is the political question doctrine. The political question doctrine traces its roots to the early case of *Marbury v. Madison*,[360] decided just fourteen years after the enactment of the Alien Tort Statute.[361] In *Marbury*, the Supreme Court articulated what we now refer to as the "political

357. Of course, it was the court's role to distinguish the case before it from other cases, not to explain the rationale of the other cases. However, not even a footnote suggests any discontent with the cases involving alien plaintiffs.

358. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004).

359. *See, e.g., id.* at 536 ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); Mitchell v. Forsyth, 472 U.S. 511, 523 (1985) ("[D]espite our recognition of the importance of [the Attorney General's activities in the name of national security] to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary."); *Home Bldg. & Loan*, 290 U.S. at 426 ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.").

360. 5 U.S. (1 Cranch) 137, 170 (1803). The case is best known for establishing the Supreme Court's power of judicial review of acts of Congress. *Id.* at 177–78.

361. *See* Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

question doctrine" by stating the oft-quoted admonition: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[362]

The modern political question doctrine was set forth in the 1962 case of *Baker v. Carr*.[363] In *Baker*, the Supreme Court attempted to give meaning to the issue of what constituted a political question.[364] In so doing, it set forth six factors, or situations, the presence of which could suggest that a political question might exist ("*Baker* factors").[365] The Court explained that a political question likely exists if one of the following prominently exists on the surface of a case:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[366]

The Court further held that one of the above factors, or situations, must be "inextricable from the case at bar" for the case to be nonjusticiable on political question grounds.[367] The Court also noted that the analysis of whether a political question exists in each case requires "a discriminating analysis of the particular question posed," including the history of its management by the political branches, its susceptibility to judicial handling, and the possible consequences of judicial action.[368]

Eventually, the political question doctrine emerged in human rights litigation, with the doctrine having been raised in approximately thirty-three cases typically brought under ATS or the

362. 5 U.S. (1 Cranch) at 170.
363. 369 U.S. 186, 209–11 (1962).
364. *Id.*
365. *Id.* at 217.
366. *Id.*
367. *Id.*
368. *Id.* at 211–12.

TVPA.[369] Of these cases, courts have dismissed approximately twelve based on the political question doctrine, nearly one-third of those brought.[370] In nearly every case involving a defendant who was a foreign official or organization where the political question doctrine was raised, courts have systematically refused to reject these cases on political question grounds, allowing them to proceed against the foreign defendant.[371] Yet, in all five cases brought against U.S. officials where the political question doctrine was raised, the courts dismissed the cases as nonjusticiable under the doctrine, leaving injured aliens without a remedy.[372] In other words, courts are willing to adjudicate cases on behalf of aliens where foreign officials or groups are accused of human right abuses, but refuse to do so when the claims involve U.S. officials who are committing human rights abuses.[373]

The first case, *Schneider v. Kissinger*, involved claims brought by the children of a Chilean general allegedly killed during the course of his kidnapping by plotters during the Chilean coup in 1970, for violation of customary international law under the TVPA and the ATS against former national security advisor Henry Kissinger, and for torts under the FTCA against the United

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369. Thirty-three cases were located where the political question doctrine was raised against claims for international human rights law violations under the ATS, the TVPA, or in some cases, the FTCA. It is possible there are more cases that eluded the thorough search.

370. *See infra* notes 371–395 and accompanying text.

371. There are four human rights cases where the political question doctrine was raised that involved foreign defendants (or defendants who were foreign officials at the time of the alleged abuse), but all were allowed to proceed against the individuals. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 845–46 (11th Cir. 1996) (involving a former Ethiopian official accused of torture and cruel, inhuman, and degrading treatment); Kadic v. Karadzic, 70 F.3d 232, 236–37 (2d Cir. 1995) (discussing war crimes and other human rights abuses by the self-proclaimed president of Serbia); Lizarbe v. Rondon, 642 F. Supp. 2d 473, 477–79 (D. Md. 2009) (involving a former Peruvian army lieutenant accused of torture and other abuses arising out of a massacre on a village); Linder v. Calero-Portocarrero, 251 F.3d 178, 183 (D.D.C. 2001) (involving claims against a Nicaraguan contra leader). *But see* Matar v. Dichter, 563 F.3d 9, 10 (2d Cir. 2009) (involving one exception in which the case was against an official of the Israeli government which was a close ally to the United States).

372. *See* Harbury v. Hayden, 522 F.3d 413, 415 (D.C. Cir.), *cert. denied*, 555 U.S. 881 (2008); Gonzalez-Vera v. Kissinger, 449 F.3d 1260, 1261 (D.C. Cir. 2006); Bancoult v. McNamara, 445 F.3d 427, 429 (D.C. Cir. 2006); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8–9, 40–41 (D.D.C. 2010); Schneider v. Kissinger, 310 F. Supp. 2d 251, 254 (D.D.C. 2004), *aff'd* 412 F.3d 190 (D.C. Cir. 2005).

373. *See Harbury*, 522 F.3d at 415; *Gonzalez-Vera*, 449 F.3d at 1261; *Bancoult*, 445 F.3d at 429; *Al-Aulaqi*, 727 F. Supp. 2d at 9; *Schneider*, 310 F. Supp. 2d at 254.

States.[374] The court found that the claims intruded upon the executive's ability to conduct foreign relations and were thus not reviewable by the court because the acts at issue constituted foreign policy activity.[375]

Similarly, *Gonzalez-Vera v. Kissinger* involved claims that then-U.S. Secretary of State Henry Kissinger was actively involved in oppressing and eliminating individuals opposed to Chile's Pinochet regime.[376] The court dismissed the case on political question grounds, finding it would have to delve into questions of policy that were textually committed to the executive branch in order to adjudicate the case.[377]

A third case, *Bancoult v. McNamara*, involved the decision by former Defense Secretary Robert McNamara to forcibly remove residents from Chagos Archipelago in the Indian Ocean in order to construct a U.S. military base.[378] Although the plaintiffs conceded that the decision to establish a naval base was a foreign policy decision, they argued that the manner in which the establishment of the base was carried out, which involved alleged human rights abuses, was reviewable.[379] The court found that the measures taken to depopulate the area were inextricably intertwined with the underlying strategy of creating a military presence, and thus the claims were non-reviewable political questions.[380]

Similarly, in the more recent case of *Harbury v. Hayden*, the Court of Appeals for the District of Columbia dismissed a case brought by the widow of a Guatemalan rebel fighter against various CIA officials for state common law torts under the FTCA.[381] She claimed that the CIA officials, acting in concert with the Guatemalan government to suppress rebellion, were legally re-

374. 310 F. Supp. 2d at 254–57, 266–67.
375. *Id.* at 267.
376. 449 F.3d at 1261, 1264.
377. *Id.* at 1263.
378. 445 F.3d 427, 429 (D.C. Cir. 2006).
379. *Id.* at 436.
380. *Id.* at 436.
381. 522 F.3d 413, 416 (D.C. Cir. 2008). The case did not bring claims for violation of international law, but is included in this discussion due to the fact that the common law claim was one of torture. *Id.*

sponsible for her husband's torture and death in 1992.[382] The court dismissed the case as nonjusticiable under the political question doctrine, relying on the three above-mentioned cases.[383] Although the plaintiff challenged specific acts and not general executive foreign policy decisions, the court rejected the argument, finding the case indistinguishable from the prior cases.[384]

Another recent case has also been dismissed by a federal court on grounds of nonjusticability under the political question doctrine. In *Al-Aulaqi v. Obama,* a District of Columbia district court ruled that President Obama's decision to engage in a targeted killing on foreign soil was not judicially reviewable.[385]

The political question doctrine has been raised only in two of the recent cases against former or current U.S. officials in cases arising out of the wars in Iraq and Afghanistan, but in both of those cases, the courts did not address the doctrine, since they had dismissed the cases on other grounds.[386] In these cases, the same concerns raised by the political question doctrine were raised in the context of "special factors counselling hesitation" as part of their *Bivens* claim.[387]

As mentioned above, cases against foreign officials have nearly unanimously been allowed to go forward without being dismissed on political question grounds as they have against U.S. officials. Any argument that the cases involving U.S. officials, especially cases that challenge decision-making in the foreign affairs context, fit more traditionally within the political question doctrine than do cases against foreign defendants[388] is questionable given

382. *Id.* at 415.

383. *Id.* at 420 (citing Schneider v. Kissinger, 310 F. Supp. 2d 251 (D.D.C. 2004); Gozalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006); *Bancoult*, 445 F.2d 427).

384. *Id.* at 421.

385. 727 F. Supp. 2d 1, 46 (D.D.C. 2010).

386. Ali v. Rumsfeld, 649 F.3d 762, 767 n.2 (D.C. Cir. 2011); *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 119 (D.D.C. 2007).

387. *Ali*, 649 F.3d at 774; *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 103.

388. *See* Kimberly Breedon, *Remedial Problems at the Intersection of the Political Question Doctrine, the Standing Doctrine, and the Doctrine of Equitable Discretion*, 34 OHIO N.U. L. REV. 523, 550–51 (2008). However, that is not to say that the manner in which decisions are carried out, including military actions, violate international law and fit more squarely within the political question doctrine. *See* Gwynne Skinner, *The Nonjusticiability of Palestine: Human Rights Litigation and the (Mis)application of the Political Question Doctrine*, 35 HASTINGS INT'L & COMP. L. REV. 99 (2012).

that the Supreme Court has clarified that claims arising out of ongoing conflicts in which the United States takes an interest, including challenges to U.S. military actions, do not render them nonjusticiable.[389] Moreover, the dismissal of what should otherwise be justiciable cases is in direct contradiction to what the founders of the United States so strongly desired for what was then their new, young country: that the United States provide a forum and remedy for civil tort cases alleging violation of the law of nations,[390] a desire accomplished through the enactment of the ATS in 1789.[391]

It should be noted that although a few cases against U.S. corporations have also been dismissed based on the political question doctrine,[392] others against corporations for their complicity in human rights abuses have been allowed to proceed.[393] This is one area that shows some promise for aliens whose rights have been vi-

389. *See* Hamdi v. Rumsfeld 542 U.S. 507, 527 (2004) (rejecting separation of powers argument proffered to limit judicial review of "military decision-making in connection with an ongoing conflict"); *see also* Paquete Habana, 175 U.S. 677, 679–86 (1900); Koohi v. United States, 976 F.2d 1328, 1331 (9th Cir. 1992).

390. There is significant consensus among scholars that at the time of our country's founding, the founders sought to ensure that the young country would comply with the law of nations, which included providing a remedy for violations of the law of nations. *See, e.g.*, CASTO, *supra* note 6, at 135–36; Casto, *supra* note 31, at 490; D'Amato, *supra* note 31, at 63; Randall, *supra* note 9, at 11–12; Slaughter, *supra* note 31, at 15..

391. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, HASTINGS INT'L & COMP. L. REV. 221, 224 (1996).

392. Corrie v. Caterpillar Inc., 503 F.3d 974, 979–80, 983–84 (9th Cir. 2007); Saldaña v. Occidental Petroleum Corp., No. CV 11-8957 PA, at *2–4 (C.D. Cal. Feb. 13, 2012); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1164, 1171 (C.D. Cal. 2005). Four earlier cases against corporations were also dismissed under the political question doctrine because they involved World War II reparations that were the subject of negotiations and treaties between countries. *See* Alperin v. Vatican Bank, 410 F.3d 532, 562 (9th Cir. 2005); *In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370, 372 (D.N.J. 2001); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 484–85 (D.N.J. 1999); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 282 (D.N.J. 1999).

393. *See, e.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d. 736, 757 (9th Cir. 2011); Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1208 (9th Cir. 2007); Doe v. Exxon Mobil Corp., 473 F.3d 345, 346 (D.C. Cir. 2007); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 715 (D. Md. 2010), *rev'd and remanded sub nom. on other grounds*, Al-Shimari v. CACI Intern., Inc., 679 F.3d 205, 224 (4th Cir. 2012); *In re* XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 602 (E.D. Va. 2009); *In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 283–84 (S.D.N.Y. 2009); Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700, 708 (E.D. Va. 2009), *rev'd and remanded on other grounds*, 658 F.3d 413 (4th Cir. 2011); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 15 (D.D.C. 2005); *In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7, 64 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 347, 347 (S.D.N.Y. 2003), *dismissed on other grounds*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

olated through aiding and abetting by U.S. corporations. However, the future of these cases is unclear, given that the Supreme Court is considering whether corporations can even be sued under international law.[394] In addition, although courts have thus far refused to dismiss recent cases on political question grounds involving federal contractor abuses, the future of those cases based on other doctrines remains murky.[395]

D. *Case-Specific Deference*

Another doctrine grounded in the separation of powers that also has the potential to prevent aliens from seeking and acquiring a remedy for violation of their rights is "case specific deference," a relatively new, prudential doctrine the Supreme Court set forth in *Sosa v. Alvarez-Machain*.[396] In *Sosa*, the Court pointed to an ATS case involving corporate complicity in South Africa's earlier apartheid policy as an example of a case where the doctrine might preclude the courts from adjudicating a case otherwise properly before them.[397] In the case, the South African government told the federal district court that it had made a deliberate choice to have a Truth and Reconciliation process address the human rights violations of the South African apartheid regime, and indicated to the court that the ATS case interfered with that policy choice.[398] The United States executive branch agreed.[399] The Court said that in such cases, "courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[400]

Although this policy has been discussed in some human rights cases and used as basis of dismissal for several, usually along with the political question doctrine, it has not developed enough

394. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010), *cert. granted*, ___ U.S. ___, 132 S. Ct. 472 (2011).

395. *Al Shimari*, 657 F. Supp. 2d at 720, *rev'd and remanded on other grounds*, 658 F.3d 413 (4th Cir. 2011); *Al-Quraishi*, 728 F. Supp. 2d at 715, *rev'd and remanded sub nom. on other grounds*, Shimari v. CACI Intern., Inc., 679 F.3d 205, 224 (4th Cir. 2012). One issue that may result in the prevention of relief is a doctrine that will require federal preemption of the state tort claims brought in the cases and require that they proceed under the FTCA, which is currently at issue in the cases.

396. 542 U.S. 692, 733 n.21 (2004).

397. *Id.* (citing *In re S. Afr. Apartheid Litig.*, 238 F. Supp. 2d at 1380–81).

398. *Id.*

399. *Id.*

400. *Id.*

to ascertain whether or not it will have a significant impact on cases brought by aliens separate from the political question doctrine.[401]

IV. FOUNDERS' CONCERNS REMAIN RELEVANT TODAY

It seems fairly clear that the founders of the United States and the early generations of lawmakers believed it was important, if not critical, to ensure that the United States provide access to judicial remedies to aliens whose rights under international law are violated, including when they are violated by U.S. officials and citizens. The ability of aliens to seek a remedy for such acts continued fairly unabated for most of the 1800s and well into the latter part of the twentieth century.

The reasons for this commitment to provide a remedy existed in order to comply with international law, to demonstrate legitimacy in the eyes of the rest of the world, and to avoid embroiling the young country in unnecessary international and foreign conflicts.[402] This was important to the early generations, given that at the time, the treatment of another country's citizens while they were abroad and denials of justice to them was often the justification for the home country to engage in armed conflict or even to declare war.[403]

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401. *See, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 58–62, 71 (D.C. Cir. 2011) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)) (rejecting case specific deference as a basis for dismissal, and looking to *Baker* factors); *In re S. Afri. Apartheid Litig.*, 617 F. Supp. 2d at 281, 286 (citing Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004)) (rejecting dismissal on the basis of case-specific deference and political question doctrines); Khulumani v. Barclay Nat. Bank, 504 F.3d 254, 261–62 (2d Cir. 2007) (discussing doctrine, but not determining whether dismissal on such basis was warranted); Whiteman v. Dorotheum GMBH & COKG, 431 F.3d 57, 74 (2d Cir. 2005) (dismissing Nazi-era case against Austrian company to recover property on basis of both political question and case-specific deference doctrines); Hwang Geum Joo v. Japan, 413 F.3d 45, 49–52 (D.C. Cir. 2005) (dismissing claims of "comfort women" against Japan on grounds of political question and case-specific deference doctrines); Beaty v. Iraq, 480 F. Supp. 2d 60, 78–79 (D.D.C.) (rejecting dismissal on the grounds of case specific deference), *rev'd on other grounds*, 556 U.S. 848 (2007); Almog v. Arab Bank, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007) (rejecting dismissal based on case-specific deference); Taveras v. Taveras, 397 F. Supp. 2d 908, 915 (S.D. Ohio 2005) (dismissing claims in a child abduction case partly on the basis of case-specific deference).

402. *See* D'Amato, *supra* note 31, at 64–65.

403. *See* discussion, *supra*, at Section I.A; *see also* D'Amato, *supra* note 31, at 64.

In fact, allowing claims under the ATS helped the U.S. government in the early years avoid foreign policy entanglements.[404] This was illustrated quite well by the 1795 opinion by Attorney General Bradford indicating that the British could sue an American slave trader under the ATS for violations of the law of nations.[405] In 1794, the slave trader, assisted by several other U.S. citizens, led a French fleet in an attack upon the British Colony of Sierra Leone, plundering it for two weeks.[406] The British Ambassador protested.[407] As Professor Anthony D'Amato has explained, if the United States chose not to respond to Great Britain, Great Britain would have viewed this as a denial of justice—a cause for war.[408] Had the United States chosen to pay reparations to Britain due to its citizens' conduct, France would have been angered and possibly provoked into military hostilities.[409] The government turned over the issue to Attorney General Bradford, who wrote the opinion, which suggested that the British citizens injured could sue to recover damages under the ATS.[410] As Professor D'Amato describes,

> Here, then, was the remedy. By providing for an impartial system of federal courts that had jurisdiction over such controversies, the new Government could shun political entanglements and no-win situations. The "law of nations" would serve as an impartial standard, acceptable to all nations, and torts committed by American citizens in violation of that law would be redressed through its application by federal courts.[411]

Of course, the reality is that the status of the United States and its role in the world have greatly changed from the time of the founding and the 1800s. It is unlikely that today, for example, the failure to compensate an alien for a tort in violation of the law of nations will lead directly to a country attacking the United States. This may support an argument that providing aliens a

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404. *See* D'Amato, *supra* note 31, at 66.

405. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795); D'Amato, *supra* note 31, at 66.

406. D'Amato, *supra* note 31, at 66.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* (quoting Breach of Neutrality, 1 Op. Att'y Gen. at 59); *see also* Bradley, *supra* note 4, at 635 (describing the diplomatic correspondence at issue).

411. D'Amato, *supra* note 31, at 66.

remedy for a violation of their rights under international law just is not as critical or as important as it once was. Moreover, one could argue that given the growth of extraterritorial activity in the world and the threat modern terrorism presents to the United States, allowing officials of the military or executive branch to take actions that might violate international law without the threat of a lawsuit is imperative to the security of United States.

Certainly, the role of the United States has changed, and large-scale threats against our country have increased. However, notwithstanding these realities, it continues to be in the interest of our country's long-term national security and standing in the world to comply with international law and to provide remedies when executive and military officials violate the internationally protected human rights of aliens. Failure to do so, as well as allowing a hypocritical paradigm to exist wherein our own officials are not held civilly accountable but foreign officials are, arguably affects the long-term foreign policy interest of the United States. Our founders understood the relationship between complying with international law and foreign policy, and as Professor Casto has concluded, "[T]he wisdom of their thoughts . . . has not diminished with the passage of time."[412]

The effects of the United States' noncompliance with international law, which continues to require a remedy for violations of international law, include the United States losing credibility in its commitment to human rights and the loss of goodwill amongst other nations and their peoples that could cause foreign policy problems and entanglements. As the noted legal scholar and historian Charles Warren stated in 1922,

> In the maintenance of the foreign relations of the United States on a high and honorable level, and in the preservation of peace, no decisions of the Court have played a more important part than have those in which, from the outset of its history, it has upheld with the utmost scrupulousness the sanctity of treaties and their strict construction, regardless of the contentions of the Administration which happened to be in power.[413]

As recently as 1980, our own executive branch, in a memorandum to the Second Circuit in a seminal ATS human rights case,

412. Casto, *supra* note 31, at 510.

413. *See* 2 WARREN, *supra* note 84, at 40.

made this same argument.[414] In that memorandum, the executive branch argued that not adjudicating ATS claims for customary international law violations would compromise the foreign relations of the United States. It stated,

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. . . . When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.[415]

The importance of respecting human rights has been articulated repeatedly by U.S. administrations and is ostensibly part of the United States' current foreign policy considerations.[416] Even Congress has enacted a statute which provides that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[417]

This commitment has remained true even with the advent of the war on terror. As President George W. Bush stated in 2002 during his State of the Union address: "[W]e have a great opportunity during this time of war [against terrorism] to lead the world toward the values that will bring lasting peace . . . America will always stand firm for the nonnegotiable demands of human

414. Memorandum for the United States as Amicus Curiae, Filortiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585 (1980).

415. *Id.* at 20, *reprinted in* 19 I.L.M. at 604 (internal citation omitted).

416. There are numerous examples. In signing the Torture Victim Protection Act in 1991, President George H.W. Bush stated, "In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." Presidential Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465, 466 (Mar. 12, 1992). Moreover, numerous U.S. laws condition foreign development, security, and investment assistance and trade benefits on compliance with internationally recognized human rights. *See, e.g.*, 22 U.S.C. § 2151(n)(a) (2006) (addressing development assistance); *Id.* § 2304(a)(2) (2006) (addressing security assistance); 7 U.S.C. § 1733(j)(1) (2006) (addressing agricultural commodities).

417. 22 U.S.C. § 2304(a)(1) (2006).

dignity: [including] the rule of law [and] limits on the power of the state. . . ."[418]

Moreover, as career former diplomats stated in an amicus brief in 2006,

> [T]he U.S. government has always maintained that an effective war against terrorism depends in part on building international respect for human rights standards and the rule of law. We cannot effectively demonstrate our commitment to these principles . . .if we afford those complicit in genocide, torture or murder more favorable treatment than those who assist acts of terrorism. If we expect others to cooperate with us, the United States must demonstrate its own commitment to holding accountable those complicit in the violation of universally recognized human rights.[419]

Thus, it appears that it continues to be in the interest of the foreign policy of the United States to ensure that the United States comply with international law, by not only ensuring its officials comply with such law in respecting the human rights of individuals, but ensuring that when they are violated, those aliens have access to a remedy.

That remedy could, arguably, be diplomatic or even created by Congress, but the remedy should be a judicial one for two reasons. First, a judicial remedy was the original intent of the founders, which they demonstrated by enacting the ATS. They believed it wise to take the remedy out of the hands of the diplomats, where remedies were not guaranteed and subjected to political whims and weaknesses (either that was the reality, or perhaps they were worried about perception of objectivity and fairness), and put the remedy in the hands of the neutral judiciary. They believed it wise for foreign policy reasons to ensure remedies in this way, and this reasoning continues to be persuasive today. Professor D'Amato brings this point home in his discussion out-

418. State of the Union, 38 WEEKLY COMP. PRES. DOC. 125, 138 (Feb. 4, 2002); *see also* Remarks of Lorne W. Craner, Assistant Secretary for Democracy, Human Rights, and Labor to the Heritage Foundation (Oct. 31, 2001), *available at* http://2001-2009.state.gov/g/drl/rls/rm/2001/6378.htm ("[M]aintaining the focus on human rights and democracy world worldwide is an integral part of our response to the attack and is even more essential today than before September 11th. They remain in our interest in promoting a stable and democratic world.").

419. Brief of Amici Curiae Career Foreign Service Diplomats in Support of Neither Party at 22–23, Corrie v. Caterpillar Inc., 503 F.3d 974 (9th Cir. 2007) (No. 05-36210), 2006 WL 2952508.

lined above, stating, "[B]y providing for an impartial system of federal courts that had jurisdiction over such controversies, the new Government could shun political entanglements and no-win situations."[420]

Second, although there is no reason Congress could not create the remedy, Congress itself has indicated that it prefers the Courts to adjudicate such claims rather than be burdened with such, as the historical description of the evolution of the FTCA indicates.

V. CONCLUSION

After nearly 200 years of ensuring that remedies were provided to aliens whose legal rights under international law were violated by U.S. officials, a dramatic change occurred over the last thirty years. Both courts and Congress have erected barriers to aliens seeking such remedies against U.S. officials, even when such officials' conduct toward them violates international human rights norms as well as the U.S. Constitution. These new barriers are not only contrary to international law requirements that each nation ensure a remedy for such injuries, they are contrary to the clearly articulated and well-documented desires of the United States' founders and numerous earlier generations, including members of Congress and the judiciary. Moreover, the earlier concerns regarding the effects on the country of noncompliance with international law are still alive and well today. It is probable that these barriers create long-term foreign policy concerns and potential problems. This problem is exacerbated given that foreign officials are usually held liable for similar violations for which U.S. officials are not held liable.

It is unclear if some of these barriers, such as the Westfall Act, were intentionally or negligently erected. Regardless, there are some actions that Congress and the courts can take to better ensure that the United States is in compliance with the founders' intent and with international law's requirement of ensuring a remedy for aliens whose rights are violated by the actions of U.S.

420. *See* D'Amato, *supra* note 31, at 66.

officials, especially those engaging in violations of the customary international law and the U.S. Constitution.

First, Congress should amend the Westfall Act to exclude claims for violation of customary international law under the ATS in the same way in which it excludes *Bivens* and statutory claims. Congress should also define "scope of employment" used under the Westfall Act as excluding egregious, intentional acts, and should specify that federal common law rather than state *respondeat superior* liability should be used to determine scope of employment.

Alternatively, Congress could waive sovereign immunity for all intentional acts by U.S. officials (at least intentional acts found not to be within the scope of employment), not just those by law enforcement or investigative personnel. Congress should also limit the foreign country exception by excluding those areas under de facto U.S. control, and/or limit claims where conflict of law determinations would require the application of other countries' laws.[421] Congress should also specify that the "law of the place" in FTCA actions can include claims for customary international law, not just "state" law.

Until Congress makes the above statutory changes, wherever the courts need to interpret ambiguous provisions in the FTCA, courts should take into consideration the founders' desires and Congress' intent, both in 1946 when it enacted the FTCA, and in 1988 when it enacted the Westfall Act. Courts should also look to the *Charming Betsy*[422] doctrine when interpreting the statute to ensure their interpretations of ambiguous parts of the statute are consistent with international law which requires a remedy when aliens rights are violated by a country's citizens and officials. The *Charming Betsy* doctrine provides that national statutes should always be interpreted as consistent with international law, where possible.[423]

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421. Alternatively, Congress could provide a waiver for those torts that take place anywhere in the world by a U.S. official, specifying what law to apply in order to eradicate the problem of a foreign country's law supplying the choice of law in the case.

422. Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

423. *Id.*

Congress' intent in enacting the FTCA was to ensure sufficiently prompt and adequate remedies for U.S. officials' violations of the law, not to erect barriers to such remedies. In enacting the Westfall Act, Congress meant to return the law to what it was prior to *Westfall v. Erwin*. It did not intend a regime wherein no liability remained for egregious and intentional violations by U.S. non-law enforcement personnel, or to limit personal liability in such cases. Thus, courts should reconsider their application of state *respondeat superior* liability for purposes of "scope of employment" under the Westfall Act, and instead apply federal common law to the question of scope of employment.

Courts should also re-think their application of "special factors counselling hesitation," the political question doctrine, and case-specific deference to cases involving allegations of serious human rights abuses by U.S. officials in light of the founders' and earlier generations' intent to ensure a remedy to aliens harmed by actions of U.S. officials, consistent with the current requirements of international law. In particular, the courts should recognize that the political question doctrine under *Baker*, as well as *Bivens* "special factors counselling hesitation" doctrine are vague and have been misapplied in a manner that not only implicates the courts' own constitutional obligations to adjudicate claims, but also have unfairly resulted in barriers to remedies. The courts should view the political question doctrine as a jurisdictional doctrine and not a prudential one, and should recognize that the factors outlined in *Baker* are simply types of situations that might indicate when a political question exists, not a list of conditions that automatically signal a "political question" exists. Moreover, the court should be very cautious with the "special factors counselling hesitation" and "case-specific deference" prudential common law doctrines, and should significantly narrow these doctrines to ensure that the courts are complying with their Article III constitutional obligations to adjudicate claims involving violations of law—whether or not such violations are by U.S. officials and whether or not they involve the manner in which federal foreign policies or military decisions are being carried out. Moreover, courts should be as cautious applying common law doctrines, such as official immunity and the political question doctrine, as they are in applying other common law doctrines in the absence of Congressional direction.

Only with these changes will the United States comport with the deep desires of the founders to ensure compliance with international law and to provide remedies to aliens for violations thereof—desires that continue to have relevance in our world today.

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