Upsetting Checks and Balances: The Bush Administration's Efforts To Limit Human Rights Litigation

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INTRODUCTION

The administration of President George W. Bush has launched a concerted effort to overturn a groundbreaking line of cases, established under the *Filártiga* doctrine, permitting human rights litigation in U.S. courts. Relying on the Alien Tort Claims Act (ATCA),[1] the *Filártiga* doctrine[2] authorizes victims of egregious human rights abuses to seek damages in U.S. federal courts through civil lawsuits. These human rights lawsuits contribute to the worldwide movement for accountability by exposing abuses committed by private individuals, corporations and government officials, and by compensating victims. The cases also further the development of international human rights norms, helping to clarify and enforce the growing body of international law that prohibits abuses such as genocide, torture, extrajudicial execution, and crimes against humanity.

Both the Carter and Clinton Administrations supported the *Filártiga* doctrine. Despite concerns about the impact of the doctrine, President George Bush, Sr. also expressed support for its goals and signed legislation authorizing a significant expansion of human rights accountability. Under the current Bush Administration, however, the Department of Justice has strenuously opposed human rights litigation, intervening in a dozen cases to challenge both the modern interpretation of the ATCA and its application in particular cases. Common to each of these interventions is the claim that judicial review of allegations of gross human rights abuses constitutes an unconstitutional interference with executive branch foreign affairs powers. Even more disturbing, the Administration insists that the judiciary refrain from

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1. 28 U.S.C. § 1350 (ATCA). The provision is also known as the Alien Tort Statute (ATS).

2. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). The modern application of the ATCA dates to this Second Circuit decision, described in detail in Part II.

judicial review whenever the Administration asserts—however implausibly—that litigation would harm foreign policy.

The Bush Administration's opposition to human rights litigation coincides with the filing of lawsuits against politically powerful defendants: corporations, foreign government officials, and the U.S. government itself. Although couched in terms of separation of powers, the campaign seeks to protect allies from accountability for egregiously wrongful behavior. Uncritical acceptance of these politically charged interventions would undermine the constitutional balance of power. Justice Douglas warned over thirty years ago of the danger of allowing the executive branch unfettered power to determine when litigation must be dismissed on foreign policy grounds. Unquestioning deference to executive branch complaints about the foreign policy implications of litigation, he wrote, would render the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'."[3]

To provide a framework for my claim that the Administration's opposition to human rights litigation is not entitled to judicial deference, I begin in Part I with a brief review of the division of foreign affairs powers among the three branches of the federal government. The Constitution assigns the president and Congress the leading roles in foreign affairs, but does not prohibit judicial review of cases that implicate foreign affairs. In Part II, I summarize the history of the ATCA and the modern line of cases based upon it. Efforts to derail the litigation have intensified.

With these Parts as a foundation, I analyze in Part III the Bush Administration's oppositon to ATCA litigation. Two past administrations considered this litigation as consistent with the constitutional division of power, while reserving the right to object to specific cases when the facts so required. The Bush Administration, however, argues that the entire line of cases violates the Constitution. My review of the history of the statute and its modern application challenges this claim, demonstrating the reasonableness of the judiciary's interpretation of the underlying legal framework. I then analyze the Bush Administation's efforts to impede ATCA litigation in two specific instances—the *Exxonmobil* and Falun Gong cases. The Administration claims that courts should be prohibited from exercising judicial review given the foreign policy implications of their decisions. I conclude that the courts are constitutionally obligated to assess the credibility of such claims and to reject them where they are not supported by the facts. The Bush Administration's ill-founded views of the *Filártiga* doctrine are entitled to nothing more than respectful consideration and should not be followed by the courts. Finally, I locate the Bush Administration's opposition to human rights litigation within the context of multiple efforts to eliminate judicial review of executive branch actions since September 11, 2001,

3. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

including the Administration's claim that judicial review of certain criminal, civil, habeas corpus, and immigration proceedings poses a threat to national security. If accepted, these claims would lead to a dangerous aggregation of unreviewable executive branch power.

I. The Constitutional Allocation of the Foreign Affairs Powers

The Bush Administration's aggressive opposition to human rights litigation threatens to undermine the global campaign to punish and deter human rights violations. Combined with the broad assault on judicial review of executive branch actions, the Bush position also threatens to undermine the assigned role of the judicial branch. An abdication of judicial oversight would endanger the constitutionally mandated balance of powers, leading to the unchecked executive branch power that so concerned the framers of our Constitution.

The proper division of foreign affairs powers among the three branches of the federal government has long been controversial, a product of the Constitution's terse mention of only a handful of specific foreign affairs tasks.[4] It is hornbook law, to be sure, that the constitutional framework grants the foreign affairs powers to the two political branches. In the oft-repeated words of the Supreme Court: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."[5] This constitutional allocation includes the "entire control of international relations."[6] Moreover, the president clearly wields foreign affairs powers with far less constraint than in other areas of executive governance. Perhaps the strongest statement of this presidential power came in the *Curtiss-Wright* decision, in which Justice Sutherland asserted that "the President as the sole organ of the federal government in the field of international relations" has the "plenary and exclusive power" to decide "the important complicated, delicate and manifold problems" of foreign relations.[7] Although *Curtiss-Wright* has been criticized as overstating presidential powers, the judiciary has repeatedly invoked it to support a high degree of deference to the executive branch in the area of foreign affairs.[8]

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4. The Constitution grants Congress the authority to "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," and "repel Invasions," U.S. CONST. art. I, § 8, while the President is to serve as "Commander in Chief of the Army and Navy of the United States," *id.*, art. II, § 2, appoint ambassadors subject to Senate approval, *id.*, and "receive Ambassadors and other public Ministers," *id.* § 3.

5. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

6. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).

7. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

8. David Gray Adler describes the case as having achieved "oracle" status, cited by the Supreme Court in support of the principle of "great 'deference to executive judgment in this vast external realm' of foreign relations." David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 26 (David Gray Adler & Larry N. George eds.,

Despite these truisms, the courts nevertheless exercise their traditional role in enforcing the Constitution and interpreting statutes even when foreign affairs are implicated. Indeed, it is equally hornbook law that the judicial role does not cease merely because the president or Congress asserts its preeminence over foreign affairs. The Court in Banco, for example, states:

> Despite the broad statement in *Oetjen* that "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative . . . departments," 246 U.S. at 302, it cannot of course be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance."[9]

Similarly, the Supreme Court has emphasized that the courts cannot shirk their responsibility to apply statutes merely because a decision may have politically charged foreign policy overtones.[10]

When cases touch upon foreign affairs, the judiciary traces a path between two equally unconstitutional extremes: intrusion into powers assigned to other branches and abdication of judicial oversight. The result reflects varying shades of deference to executive branch prerogatives.[11] In some areas, executive branch positions are binding. For example, the courts consider executive statements recognizing an individual as a diplomat or a head of state to be final, along with recognition of governments. This extreme deference reflects the Constitution's assignment to the president of the power to "receive Ambassadors and other public Ministers,"[12] which has long been understood as including the power to recognize both foreign governments and those who represent them.[13] Similar deference is given when the president acts pursuant to constitutionally authorized lawmaking powers, as in the adoption of executive agreements.[14] At the opposite extreme, when the issue involves the structure of constitutional authority, the Supreme Court

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1996).

9. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

10. Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986).

11. Professor Curtis Bradley has suggested a continuum based on the notion of "*Chevron* deference," in which executive branch views on issues relating to foreign affairs are entitled to greater weight where Congress delegates interpretation of a statutory scheme to the executive, much like *Chevron* deference is accorded to the views of an administrative agency in an area delegated to it by Congress. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000), (adapting the doctrine developed in Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984)). "Under [the *Chevron*] doctrine, courts will defer to an agency's interpretation of an ambiguous statute if the agency has been charged with administering the statute and the agency's interpretation is based on a 'permissible' reading of the statute." Bradley, *supra* at 651, (citing *Chevron*, 467 U.S. at 843).

12. U.S. CONST. art. II, § 3.

13. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 43 (2d ed. 1996) ("It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government . . . .").

14. Bradley, *supra* note 11, at 661.

has firmly asserted the judiciary's power to render independent judgments.[15] Resolution of disputes about separation of powers or constitutional rights falls within the constitutionally assigned role of the judiciary, even when cases have significant foreign affairs implications.

In the past, the path between deference and abdication has fluctuated, with each of the three branches variously asserting and ceding powers. As our society and the world have become more complex and interconnected, executive power has grown, a trend that accelerates in times of crisis.[16] But even supporters of a strong executive acknowledge that judicial review is required both by the Constitution and by correct policy. A complete relinquishment of judicial review would be unconstitutional and unwise. The Bush Administration's opposition to ATCA litigation threatens to distort the constitutional balance of powers by demanding that the courts accept uncritically the executive branch's politicized views.

II. Human Rights Litigation

International human rights litigation in U.S. courts has been one focus of the Bush Administration's drive to expand executive branch powers. By curtailing judicial review of cases alleging human rights abuses, the Administration would gain the power to decide who should be held accountable for human rights violations.

The well-studied line of ATCA cases building upon the 1980 decision in *Filártiga v. Peña-Irala*[17] has been consistently challenged by the current Bush Administration. The cases permit non-citizens to sue in federal court to seek damages for certain egregious international law violations. Both the Carter and Clinton Administrations viewed the cases as supporting U.S. foreign policy, while reserving the right to challenge the justiciability of particular lawsuits. The current Administration, however, has opposed the ATCA, seeking to shield human rights abusers from accountability in U.S. courts and to grant the executive branch the sole power to pick and choose who should be held liable and in what forum.

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15. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968) (rejecting State Department's view that state statute did not interfere with federal foreign affairs powers); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (rejecting the State Department's application of the act of state doctrine where American foreign policy is not threatened). Similarly, the Court has applied the Constitution to protect individual rights even where the executive branch has disagreed. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957) (upholding right to civilian jury trial for U.S. citizen facing trial outside the United States). Moreover, executive branch positions taken only in support of litigation are entitled to no deference: "We have never applied the principle [of deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative positions . . . . Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988).

16. *See* Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, *in* Adler & George, *supra* note 8, at 158 (discussing the ways in which the institutional structure advantages presidential initiative over the other branches).

17. 630 F.2d 876 (2d Cir. 1980). A Westlaw search in October 2003 produced over 1600 references to Filártiga or to the ATCA.

A. Filártiga and Its Progeny

From 1980 until the mid-1990s, the courts applied the *Filártiga* doctrine with little dissent. The modern doctrine was born out of an atrocious human rights abuse: seventeen-year-old Joelito Filártiga was tortured to death in Paraguay by Americo Peña-Irala, a Paraguayan police officer. Three years later, his family discovered Peña-Irala living in Brooklyn. The Filártigas filed suit in federal court under the ATCA, which states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[18] In dismissing the complaint, the district court followed Second Circuit precedents that held that international law did not govern a state's treatment of its own citizens—here, the Paraguayan government's torture of Joel Filártiga, a Paraguayan citizen. The Second Circuit reversed, holding that the statute's reference to "the law of nations" incorporates evolving rules of international law. The court looked to both international law experts and the executive branch for guidance as to the content of international law; all agreed that the torture of a state's own citizens violated binding international legal norms.

The Departments of State and Justice submitted a joint amicus brief in which they detailed the evolving nature of international law and traced the development of both general human rights obligations binding on governments and the prohibition of torture:

> Before the turn of the century and even after, it was generally thought that a nation's treatment of its own citizens was beyond the purview of international law. But . . . Section 1350 encompasses international law as it has evolved over time. And whatever may have been true before the turn of the century, today a nation has an obligation under international law to respect the right of its citizens to be free of official torture.[19]

The U.S. government thus strongly supported the view that governments can be held liable under international law for their mistreatment of their own citizens, and that accountability for such abuses in U.S. courts is desirable.

The core holding of *Filártiga* has been followed by courts around the country: an alien may sue for violations of "universal, definable and obligatory" international law norms.[20] In a case against a former official of the

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18. 28 U.S.C. § 1350 (2003).

19. Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit, Filártiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 12 HASTINGS INT'L & COMP. L. REV. 34, 35–36 (1988) [hereinafter U.S. *Filártiga* Memorandum].

20. The standard was first elaborated in Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987). For cases following the *Filártiga* approach, see, for example, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383–84 (9th Cir. 1998); Hilao v.

Ethiopian military regime, for example, three Ethiopian women discovered their torturer living and working in Atlanta; they filed suit for torture under the ATCA.[21] A class action against Ferdinand Marcos, the former dictator of the Philippines, resulted in judgment for the plaintiffs, finding summary execution, torture, and disappearance.[22] A claim against the leader of the Bosnian-Serbs resulted in damages for genocide and war crimes, as well as summary execution and torture.[23] The courts have considered international as well as domestic sources in concluding that a universal international law norm prohibited each of these violations. Decisions have also recognized that the statute applies to commanders as well as to the actual torturer, to organizations and corporations as well as to individuals, and to private persons as well as to government actors.[24]

These cases building upon *Filártiga* were relatively uncontroversial until the last few years. Hundreds of law review articles analyzing the *Filártiga* doctrine were overwhelmingly favorable.[25] Although one opinion from a splintered panel of the District of Columbia Circuit largely rejected *Filártiga*, its views were not adopted by any other courts and were rejected by most commentators.[26] One reason for the general acceptance may be that the courts have applied the doctrine carefully and narrowly. The courts have dismissed most cases on the basis of a variety of doctrines that limit its reach. In *Tel-Oren*, for example, all three judges agreed that, even if they had accepted the *Filártiga* doctrine, they would have dismissed the complaint for failure to state a universal, definable violation of the law of nations. Many cases have been dismissed for a similar failure to state a universal interna-

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Estate of Marcos, 103 F.3d 789 (9th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996).

21. *Abebe-Jira*, 72 F.3d 844.

22. *Hilao*, 103 F.3d 789.

23. *Kadic*, 70 F.3d 232. More recently, a jury entered a judgment against two Salvadoran generals living in Florida on behalf of three Salvadorans who had been tortured by forces under the command of the generals. Romagoza v. Garcia, Civ. No. 99-8364 (Hurley) (Final Judgment, July 31, 2002) (appeal pending). Background on the case is available at http://www.cja.org/cases/romagozadocs.shtml (last visited Nov. 8, 2003). In another case growing out of the war in El Salvador, an ATCA complaint filed in September 2003 seeks damages for the 1980 assassination of Salvadoran Archbishop Oscar Romero, who was murdered in church while saying mass; the defendant is currently living in California. For more details, see http://www.cja.org/cases/romero.shtml (last visited Feb. 10, 2004).

24. *See, e.g.*, *Hilao*, 103 F.3d at 789 (commanding officer/former head of state); *Kadic*, 70 F.3d at 232 (head of de facto state, private individual); Jama v. U.S. Immigration & Naturalization Serv., 22 F. Supp. 2d 353 (D.N.J. 1998) (U.S. officials and private corporation); *Martinez*, 141 F.3d 1373 (local government officials); *Wiwa*, 226 F.3d at 88 (corporation).

25. For an overview of the literature on the ATCA, see the annotated bibliography in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 405–31 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999).

26. In Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), a three-judge panel rejected an ATCA claim with three separate opinions. One judge disagreed with the *Filártiga* holding, *id.* at 798–823 (Bork, J., concurring), while one agreed with it, *id.* at 775–98 (Edwards, J., concurring), and one would have dismissed the case on the basis of the political question doctrine, *id.* at 823–27 (Robb, J., concurring).

tional law violation,[27] and many more upon a finding that the defendant was immune, either as a foreign sovereign or a head of state.[28] A series of cases alleging abuses arising out of World War II were dismissed on the basis of the statute of limitations or as political questions.[29] The small number of successful cases (1) alleged an egregious human rights violation, (2) involved a defendant who was subject to the personal jurisdiction of the court and was not entitled to immunity from suit, and (3) satisfied the requirements of standing, the statute of limitations, and *forum non conveniens*.

In the late 1990s, the first cases were filed against corporations for human rights abuses committed over the previous decade. Two key holdings in a Second Circuit decision cleared the path for successful litigation against corporations. In *Kadic v. Karadzic*,[30] victims of egregious abuses during the war in Bosnia-Herzegovina sued the leader of the de facto regime governing the breakaway Bosnian-Serb enclave. The defendant argued that as a private actor he was not subject to international law norms, an argument accepted by the district court but overturned on appeal. The Second Circuit in *Kadic* first recognized that some international law norms apply equally to private actors and to government officials.[31] Genocide, for example, is prohibited whether committed by "public officials or private individuals."[32] Second, *Kadic* recognized that a private person can be held liable for an international violation that does require state action when acting in complicity with a state actor.[33] These holdings make clear that a private corporation can be held liable under the ATCA when it engages in one of the core international law violations

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27. *See, e.g.*, Flores v. S. Peru Copper, 343 F.3d 140, 159–72 (2d Cir. 2003) (rejecting environmental claim); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 166–67 (5th Cir. 1999) (same); Bigio v. Coca-Cola Co., 239 F.3d 440, 447–51 (2d Cir. 2000) (rejecting ATCA jurisdiction over claim that defendant acquired property that had previously been expropriated by Egyptian government on basis of the owners' religion); Wong-Opasi v. Tenn. State Univ., 229 F.3d 1155 (6th Cir. 2000) (rejecting ATCA jurisdiction over state law contract and tort claims); Hamid v. Price Waterhouse, 51 F.3d 1411, 1417–18 (9th Cir. 1995) (holding that claims of fraud, breach of fiduciary duty, and misappropriation of funds are not breaches of the "law of nations" for purposes of jurisdiction under the ATCA).

28. *See, e.g.*, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (foreign sovereign immunity); LaFontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (head-of-state immunity).

29. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp.2d 424, 483–89 (D.N.J. 1999) (dismissing slave labor claims against German corporations as raising nonjusticiable political questions). This claim was later settled and the pending appeal withdrawn. Claims against Japanese defendants have been dismissed, some on the basis of the peace treaties signed by Japan and others on the statute of limitations. *See* Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 26–29 (2002). A California statute attempting to extend the statute of limitations on insurance policy claims has been declared unconstitutional as an interference with the federal government's foreign policy powers. Am. Ins. Ass'n. v. Garamendi, 123 S. Ct. 2374 (2003).

30. 70 F.3d 232 (2d Cir. 1995).

31. *Id.* at 241–43. The court also held, in the alternative, that Karadzic could be held liable as a state actor because he was an official in a de facto government—the illegal, self-declared government of the Bosnian-Serbs.

32. The Convention on the Prevention and Punishment of the Crime of Genocide, art. IV, Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951, *for the United States* Feb. 23, 1989).

33. *Kadic*, 70 F.3d at 245. This holding built upon the recognition in an early case that ATCA claims can be analogized to claims under the U.S. civil rights statute, 42 U.S.C. § 1983, which also requires state action. *See* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987).

that do not require state action, such as genocide or slavery, or when it acts in complicity with a state actor committing any of the core violations.

These theories were first tested in a 1996 lawsuit against the Unocal Corporation, alleging that the company shared responsibility for abuses committed by the government of Burma in conjunction with their joint project in that country.[34] Several Burmese citizens had sued Unocal for forced labor and other abuses arising out of the construction of an oil pipeline across Burma. Although agents of the Burmese military government committed the abuses, Unocal's liability was premised on the allegation that the company provided assistance to the military with the knowledge that it was supporting the use of forced labor and other abusive tactics. The decision on the defendant's motion to dismiss produced the first ATCA decision recognizing that private corporations can be held liable for forced labor, as well as for other abuses committed in complicity with state actors.

As controversy builds over the correct interpretation of the ATCA, the modest impact of the statute is often lost in the hyperbole. Over the life of the statute, approximately 120 cases have raised ATCA claims; 20 of those—all but 2 unsuccessful—predated *Filártiga.* Most of the post-*Filártiga* cases have been dismissed, most often for failure to allege a violation of international recognized human rights, for *forum non conveniens*, or because of the immunity of the defendant. Despite this modest success, controversy over this line of litigation has exploded in the past few years.

B. The Backlash Against Human Rights Litigation

For many years, international human rights litigation triggered little controversy. Suits against individual foreigners affiliated with governments no longer in power or viewed with disfavor by the U.S. government raised few concerns. Suits against former officials of allied governments that addressed widely condemned human rights abuses were similarly noncontroversial. The Indonesian government, for example, was an ally of the United States at the time of a lawsuit challenging a massacre in East Timor,[35] as was the Guatemalan government at the time a general was sued for massacres and the torture of a U.S. nun.[36] Nevertheless, the executive branch took a hands-off position throughout the 1990s, apparently maintaining the view, formally expressed in the *Filártiga* litigation, that private litigation to vindicate international human rights does not harm U.S. foreign policy or other

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34. Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part by* Doe v. Unocal, 2002 WL 31063976, (9th Cir. Dec. 3, 2001), *vacated by* Doe v. Unocal Corp., 2003 WL 359787 (9th Cir. Feb 14, 2003).

35. Todd v. Panjaitan, No. 92-12255, 1994 WL 827111 (D. Mass. Oct. 26, 1994) (judgment for $14 million against an Indonesian general in suit by the mother of a man killed in a massacre by Indonesian troops in East Timor).

36. Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (judgment against Guatemalan general for widespread abuses, including the kidnapping and torture of U.S. nun Dianna Ortiz).

national interests.[37] The current Administration, however, has launched a campaign against such litigation, lending its support to politically powerful defendants targeted by recent lawsuits. The increasingly strident debate focuses on three subsets of the modern cases, all involving defendants with support from the current administration: cases filed against corporations, foreign government officials, or U.S. government officials or agents.

Corporate defendants: The application of ATCA claims to corporate defendants received its first judicial support in 1997, when the district court in *Doe v. Unocal* denied defendants' motion to dismiss and permitted the case to proceed to discovery on the claims of forced labor and torture.[38] Although that case received international attention, corporate opposition remained muted, a position that seemed vindicated three years later when another judge of the same court dismissed the case. Judge Lew granted a motion for summary judgment despite evidence that Unocal knew that the Burmese military was using forced labor, and that Unocal had benefited from the practice.[39] Judge Lew found that ATCA accomplice liability required that the corporate actor's conduct rise to the level of "active participation" in the human rights abuses.[40]

The tables turned once again in 2002, when a three-judge panel of the Ninth Circuit reversed the summary judgment and remanded the case for trial. The court held that the standard for accomplice liability under the ATCA derives from international law and requires that a defendant give "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime"; the panel found sufficient evidence of such assistance to survive a motion for summary judgment.[41] The Ninth Circuit decision mobilized corporate opposition to the ATCA, making headlines in virtually all of the major financial press.[42] Representatives of business associa-

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37. See discussion of the views of earlier administrations, *infra* note 109.

38. *Unocal*, 963 F. Supp. 880.

39. Doe v. Unocal Corp., 110 F. Supp.2d 1294, 1310 (C.D. Cal. 2000), *aff'd in part, rev'd in part by* Doe v. Unocal, 2002 WL 31063976, (9th Cir. Dec. 3, 2001), *vacated by* Doe v. Unocal Corp., 2003 WL 359787 (9th Cir. Feb. 14, 2003).

40. *Id.*

41. Doe v. Unocal, 2002 WL 31063976 (9th Cir. Dec. 3, 2001) at 10, *vacated by* Doe v. Unocal Corp., 2003 WL 359787 (9th Cir. Feb 14, 2003). A concurring opinion argued that ATCA accomplice liability should be governed by federal common law. As discussed *infra*, the Ninth Circuit granted a petition for rehearing en banc, apparently to consider the split on the panel over what law governs ATCA accomplice liability. They have stayed consideration of the case pending the Supreme Court's decision in Alvarez-Machain v. United States, 331 F.3d 604, 615 n.7 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 821 (2003).

A more recent district court case also applied an international law standard, concluding that a corporation could be held liable for abuses including genocide and slavery if it provided "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 303 (S.D.N.Y. 2003).

42. *See, e.g.*, Cait Murphy, *Is This The Next Tort Trap? Using an Ancient Statute, Lawyers Make Business Quake*, FORTUNE, June 23, 2003, at § 1, p. 30; Robert H. Bork, *Judicial Imperialism*, WALL ST. J., June 17, 2003, at 2 ; *Corporate Ethics: Big Oil's Dirty Secrets*, ECONOMIST, May 10, 2003, at 53; Patti Waldmeir, *US Courts Should Not Punish Companies for Human Rights Violations Committed Overseas*, FIN. TIMES, Mar. 14, 2003.

tions charge that ATCA litigation permits litigation against companies that merely choose to invest in countries where the government commits human rights abuses.[43] A recently published book claims that the ATCA litigation is a "monster" that "could seriously damage the world economy, threatening economic growth and development" and costing hundreds of billions of dollars in lost investment.[44] Fears were fueled by a series of class action lawsuits filed against corporations that did business in South Africa under apartheid.[45] Critics charge that all three cases rely on the theory that corporations are liable for profits obtained while operating under the apartheid legal regime.[46] This theory, which has yet to be tested in a judicial ruling, would be broader than that approved by courts that have considered standards of accomplice liability under the ATCA.

Overall, approximately thirty-eight cases against corporate defendants and involving abuses committed in foreign countries have been filed since *Filártiga*. Aside from *Unocal*, only four have survived motions to dismiss. Of these, two allege oil company involvement in abusive security procedures in Nigeria, one involves violent abuse of labor leaders in Colombia, and one addresses allegations of genocide and slavery against Christians in southern Sudan.[47] Eight more are pending decisions on motions to dismiss, including

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43. *See, e.g.*, Brief for the National Foreign Trade Council, USA*Engage, the National Association of Manufacturers, the Chamber of Commerce of the United States of America & the U.S. Council for International Business as Amici Curiae in Support of Petition for Certiorari in Sosa v. Alvarez Machain, S. Ct. No. 03-339 (filed Oct. 6, 2003), at 1 ("[I]ncreasingly[,] U.S. and multinational companies investing in developing nations are being made the target of ATS litigation. Often, such suits seek to hold private companies indirectly liable for human rights abuses by foreign governments, on the theory that by deciding to invest abroad, the companies aided and abetted or otherwise facilitated the acts of the host governments.").

44. Press Release, USA*Engage, USA*Engage Hails IIE Study Finding that Alien Tort Lawsuits Pose Real Threat to Global Economy (July 24, 2003), hailing publication of INSTITUTE FOR INTERNATIONAL ECONOMICS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (2003). The press release and a link to the book are available at http://www.usaengage.org/legislative/2003/alientort/index.html (last visited Nov. 8, 2003).

45. Ntzebesa. v. Citigroup, Inc., 02 Civ 4712 (S.D.N.Y. 2002); Khulumani v. Barclays National Bank, Case No. 02-CV5952 (S.D.N.Y. 2002); Digwamaje v. Bank of America, Case No. 02-CV-6218 (S.D.N.Y. 2002). Descriptions of the cases are available at http://www.laborrights.org/ (last visited Nov. 8, 2003). For an analysis of the aiding and abetting theories applicable to these and other corporate cases, see Anthony Sebok, *Enforcing Human Rights in American Courts When the Injury is Indirect: Will the Lawsuit Based on South African Apartheid Prevail? (Parts 1 & 2)* (July 15 and July 29, 2002), *available at* http://writ.news.findlaw.com/sebok/20020715.html and http://writ.news.findlaw.com/sebok/20020729.html (last visited Nov. 8, 2003).

46. For example, Paul Rosenzweig, a fellow at the Heritage Foundation, claims that ATCA lawsuits against corporate defendants are based on the theory that because "U.S. companies were there, paid taxes and profited from police protection," they are liable for abuses committed by the South African government. He calls this "guilt by association," which would hold corporations liable for "acts they never committed." Paul Rosenzweig, *Trial Lawyers Could Stymie Rebuilding of Iraq* (Apr. 28, 2003), *available at* http://www.heritage.org/Press/Commentary/ed062003b.cfm (last visited Nov. 8, 2003). *See also* USA*Engage, *The Alien Tort Provision: Correcting the Abuse of an Early Federalist Statute* (June 11, 2003) (the ATCA seeks to hold corporations liable for abuses committed by foreign governments against their own citizens, merely because the corporations seek protection from the local police or military), *available at* http://www.usaengage.org/legislative/2003/alientort/alientorttpcases.html (last visited Nov. 8, 2003).

47. Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (Columbia); Pres-

the three arising out of apartheid South Africa. The other cases—a total of twenty-three—have been dismissed for a variety of reasons, most commonly for failure to state a core international human rights violation or for *forum non conveniens*.[48] One has been dismissed under the act of state doctrine, at the suggestion of the State Department.[49]

Foreign government officials: A second cluster of cases has also triggered controversy: lawsuits against current and former officials of the government of China. Most of these cases have been filed by practitioners of Falun Gong, the banned spiritual movement that has come under relentless attack by the Chinese government. Cases charging responsibility for the torture, arbitrary detention and execution of Falun Gong members have been filed against several Chinese officials, including then-President Jiang Zemin.[50] The Chinese government reacted with fury to the lawsuits, and called upon the U.S. executive branch to intercede to stop the litigation. In a submission in a case filed against then Mayor of Beijing, Liu Qi, the Chinese government charged that the litigation would cause "immeasurable" harm to relations between the United States and China.[51]

U.S. government officials and agents: Although sovereign immunity makes it very difficult to sue the U.S. government for violations of international law,[52] a handful of suits have had some success.[53] Controversy focuses on one ongoing case, a civil lawsuit filed by Humberto Alvarez-Machain, a Mexican doctor who was kidnapped from Mexico by U.S. government agents and

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byterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp.2d 289 (Sudan); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), (S.D.N.Y. 2002) (Nigeria); Bowoto v. Chevron, No. C99-2506 (N.D. Cal. 2000) (Nigeria).

Two additional cases involve abuses committed in the United States: DaSilva v. Esmor Correctional Services Inc., 215 F.R.D. 477 (D.N.J. 2003), *aff'd*, Jama v. Immigration and Naturalization Serv., 22 F. Supp. 2d 353 (D.N.J. 1998) and Burnett v. Al Baraka Inv. & Dev. Corp., Civ No. A02-1616, 2003 WL 21730530 (D.D.C. 2003).

48. The World War II cases included on this list were dismissed on the basis of the statute of limitations and/or the political question doctrine. *See* Bazyler, *supra* note 29.

49. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (appeal pending).

50. Cases are listed in Jacques Delisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 473–76 (2002), and include six complaints against individual current or former Chinese government officials. The complaint against Jiang Zemin was dismissed in September 2003 based upon head-of-state immunity. A, B, C, et al. v. Jiang Zemin, No. 02 C 7530, 2003 WL22118924 (N.D. Ill. 2003) (appeal pending).

51. Statement of the Government of the People's Republic of China on "Falun Gong" Unwarranted Lawsuits (Sept. 2002) (unpaginated), filed as an attachment to Notice of Filing of Original Statement by the Chinese Government, Jane Doe I v. Liu Qi, No. C 02-0672 (EMC) (N.D. Cal. Oct. 2, 2002) [hereinafter Chinese Government Statement, Doe v. Liu Qi].

52. The U.S. government is authorized to substitute itself in place of government officials who are sued for conduct that falls within the scope of their duties, unless the suit is for a violation of the Constitution or a specific authorizing statute. 28 U.S.C. § 2679. The government is then protected from suit by a series of exclusions codified in the Federal Tort Claims Act, including immunity for acts committed abroad, for those related to military actions, and for discretionary acts. 28 U.S.C. § 2680.

53. *See* Papa v. U.S. Immigration & Naturalization Serv., 281 F.3d 1004 (9th Cir. 2002); Jama v. U.S. Immigration and Naturalization Serv., 22 F. Supp. 2d 353 (D.N.J. 1998).

brought to the United States to face a criminal trial.[54] After he was acquitted of the criminal charges, Alvarez-Machain filed a civil lawsuit, eventually winning a $25,000 judgment against one of the Mexican citizens who had kidnapped him, a judgment that was affirmed on appeal in the Ninth Circuit by a three-judge panel.[55] The Ninth Circuit granted a petition for hearing en banc and affirmed the judgment in a 6-5 vote.[56] Four of the five dissenters argued that the arrest was not "arbitrary," since U.S. officials had approved it in advance. The fifth considered the entire case to be barred by the political question doctrine. A petition for certiorari was granted on December 1, 2003.

The Department of Justice under the Clinton Administration opposed the use of the ATCA to challenge the actions of the government and its employees in this case, arguing that the government and its employees and agents were immune from suit under the Federal Tort Claims Act, and that the treatment of Alvarez-Machain did not violate international law.[57] Clinton's Administration, however, did not challenge the ATCA itself.[58] The tenor of the opposition changed dramatically under the Bush Administration, which vigorously opposed the modern application of the ATCA in general, and argued that the litigation hindered the war on terrorism.[59]

The Bush Administration raised similar objections to a claim filed on behalf of detainees currently imprisoned at the U.S. military base at Guantanamo Bay, Cuba. Petitioners included an ATCA claim of arbitrary detention in addition to their petition for habeas corpus. The District of Columbia Circuit dismissed all of the claims, holding that the courts have no jurisdiction over claims by aliens detained outside the territorial limits of the

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54. The Drug Enforcement Agency (DEA) claimed that Alvarez-Machain had been involved in the torture and murder of a DEA agent in Mexico; DEA officials hired Mexican citizens to kidnap Alvarez-Machain and bring him to the United States. Lower courts ordered his release because he had been brought to the United States in violation of the extradition treaty between the United States and Mexico. The Supreme Court reversed, holding that although the extradition treaty provided one means of obtaining custody of an individual in Mexican territory, it did not preclude resort to other measures such as an international abduction. U.S. v. Alvarez-Machain, 504 U.S. 655 (1992).

55. The complaint included claims against the United States government, several U.S. government officials, and Francisco Sosa, the Mexican man hired by the U.S. government to kidnap him. The claims against every defendant except Sosa were dismissed on various immunity grounds; all claims against Sosa arising out of the plaintiff's treatment in the United States were also dismissed, leaving only a claim for damages for the time Alvarez-Machain was held in Mexico before being taken across the border. Alvarez-Machain v. United States, 266 F.3d 1045 (9th Cir. 2001). One claim against the U.S. government was reinstated on appeal. *Id.*

56. Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 821 (2003).

57. Brief of United States of America as Amicus Curiae in Support of Appellees, Alvarez-Machain v. United States, 107 F.3d 696 (9th Cir. 1996) (No. 95-56121).

58. "Tort actions for torture may also be available to an alien under the Alien Tort Statute, 28 U.S.C. § 1350, that dates back to 1789." *Id.* at 27.

59. Brief for the United States in Support of Petition for Writ of Certiorari at 8, Sosa v. Alvarez-Machain (No. 03-339) (challenging the constitutionality of the use of the ATCA to permit human rights litigation and noting, at 8: "The potential impact of this case on the actions of the Executive abroad is great and further heightened by the Nation's ongoing war against terrorism.").

United States.[60] The Department of Justice nevertheless has used the fact that ATCA claims were filed against the United States for actions allegedly taken as part of the war on terrorism as further evidence of the "dangers" of the modern application of the ATCA.[61]

III. The Current Debate

The Bush Administration contends that modern human rights litigation interferes with executive branch foreign policy powers. Its opposition is two-fold. First, the Administration challenges the modern application of the ATCA, arguing that the judiciary has unconstitutionally misinterpreted the ATCA, thereby exceeding the first Congress' mandate and trespassing upon the executive branch's constitutionally assigned control over foreign affairs. Second, the Administration asserts that particular ATCA cases pose a threat to foreign policy and must be dismissed pursuant to the act of state or the political question doctrines. Although prior administrations reserved the right to challenge individual cases, the current Bush Administration has aggressively fought for dismissal of cases even where the litigation appears to be completely consistent with U.S. foreign policy.

Both of these positions are far more extreme than those put forth by prior administrations and mask an interest in shielding favored defendants from accountability for egregious human rights abuses.

In Section A, I discuss both the previous and current Administrations' position on the proper interpretation of the ATCA, focusing on Congressional intent and the separation of powers. In Section B, I argue that the Bush Administration's position that ATCA suits interfere with and damage its foreign policy powers should not receive absolute deference by the courts. In Section C, I discuss the judicial role more generally (Subsection 1), then examine it in the context of the Bush Administration's actions in the *Exxonmobil* and Falun Gong cases (Subsection 2), and urge adherence to a respectful, but not uncritical, deference standard.

A. The Proper Interpretation of the ATCA

Filártiga and subsequent decisions are based in one sense on a simple reading of the plain words of the ATCA: the federal courts have jurisdiction over claims by aliens for torts in violation of the law of nations. The *Filártiga* court read the statute not as "creating" new rights, but rather as opening the federal courts for litigation of torts in violation of international

60. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003).

61. Brief for the United States of America as Amicus Curiae, Doe v. Unocal Corp. at 3 (No. 00-56603) [hereinafter U.S. Amicus, Doe v. Unocal] ("This Court's approach to the ATS bears serious implications for our current war against terrorism, and permits ATS claims to be easily brought against the United States itself in connection with its efforts to combat terrorism. *See Al Odah v. United States*, 321 F.3d 1134, 1144–45 (D.C. Cir. 2003), [*cert. granted*, 124 S. Ct. 534 (2003)] ").

law.[62] While international law defines the cause of action, the ATCA established the right to sue for such violations in federal court.

In an amicus brief submitted to the Second Circuit as part of the *Filártiga* litigation, the Department of Justice and the Department of State endorsed this interpretation of the statute. The brief first determined that the ATCA refers to international law as it evolves, not to its meaning in 1789. Second, the executive branch noted that there is an international consensus that torture violates international law. Finally, the brief concludes that the ATCA authorized a "private cause of action" for torts in violation of international law, including torture.[63]

Under the Reagan Administration, the Department of Justice urged a more limited interpretation of the statute, arguing that authorization for the cause of action must be found in some other statutory provision.[64] The Ninth Circuit roundly rejected this interpretation, stating, "We start with the face of the statute. It requires a claim by an alien, a tort, and a violation of international law."[65] Every court that has reached decision on the matter has agreed that the ATCA authorizes a cause of action as well as federal jurisdiction over such claims.[66] The Bush Administration, however, took up the argument fourteen years later in a brief filed in *Doe v. Unocal*.[67]

As described above, *Doe v. Unocal* has been through several legal twists and turns. A panel of the Ninth Circuit agreed that the district court's summary judgment dismissal should be reversed, but disagreed on whether international or domestic law governs accessory liability under the ATCA.[68]

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62. Filártiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

63. U.S. *Filártiga* Memorandum, *supra* note 19, at 46. "[O]fficial torture is both clearly defined and universally condemned. Therefore, private enforcement is entirely appropriate." *Id.*

64. Mem. for the United States as Amicus Curiae, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (table disposition) (text in Westlaw, 1989 WL 76894) [hereinafter U.S. Amicus, Trajano v. Marcos]. The brief was filed in the consolidated appeal of two district court decisions dismissing several lawsuits against Marcos on act of state grounds. In an unpublished decision, the Ninth Circuit reversed and remanded, without addressing the jurisdictional issues raised by the government brief. This was the first of several appeals of different aspects of the *Marcos* litigation; in an opinion in one of the subsequent *Marcos* appeals, the Ninth Circuit addressed and rejected the arguments raised by the government's earlier brief. Trajano v. Marcos, 978 F.2d 493, 495 n.1 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

65. Trajano v. Marcos, 978 F.2d at 499.

66. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 847–48 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996) (statute "provid[es] both a private cause of action and a federal forum where aliens may seek redress for violations of international law"); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (rejecting argument that ATCA is merely jurisdictional); *In re* Estate of Marcos, 25 F.3d 1467, 1474–75 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (ATCA "creates a cause of action for violations of specific, universal and obligatory international human rights standards"); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995) ("§ 1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . without recourse to other law as a source of the cause of action."); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993) ("The plain language of the statute and the use of the words 'committed in violation' strongly implies that a well pled tort[,] if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action]."); Handel v. Artukovic, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985) ("the 'violation' language of section 1350 may be interpreted as explicitly granting a cause of action").

67. U.S. Amicus, Doe v. Unocal, *supra* note 61.

68. Doe v. Unocal Corp., 2002 WL 31063976 (9th Cir. Dec. 3, 2001), *vacated by* Doe v. Unocal Corp.,

The Ninth Circuit then voted to re-hear the case en banc, apparently to resolve this choice-of-law dispute; an order preceding oral argument stated that "the primary issue" the parties should address at oral argument was whether the federal courts should apply international law or federal common law to determine aiding-and-abetting liability.[69] Although the Circuit gave no indication that it intended to reexamine the Ninth Circuit's longstanding interpretation of the ATCA, the Department of Justice took the opportunity of the en banc review to submit an amicus brief challenging the *Filártiga* line of litigation as a violation of the constitutional system of separation of powers.[70]

The Justice Department challenge has two prongs. First, the Administration argues that *Filártiga* and its progeny misinterpret the ATCA because the Congress in 1789 did not intend to create a cause of action. "[B]y its terms, the ATCA vests federal courts with 'original jurisdiction' over a particular type of action; it does not purport to *create* any private cause of action."[71] "When Congress wants the courts to play such a role, it enacts specific and carefully crafted rules . . . ."[72] Second, the Administration argues that to imply such a cause of action on the basis of the ATCA would impermissibly intrude upon executive branch authority over foreign affairs because such a cause of action "implicate[s] matters that by their nature should be left to the political Branches . . . ."[73]

> Permitting such implied causes of action under the ATS infringes upon the right of the political Branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents.[74]

As interpreted, the ATCA "places the courts in the wholly inappropriate role of arbiters of foreign conduct."[75] Judgments in these cases "implicate our Nation's foreign affairs."

> [T]he assumption of this role by the courts under the ATS . . . raises significant potential for interference with the important for-

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2003 WL 359787 (9th Cir. Feb. 14, 2003).

69. Doe v. Unocal Corp., No. 00-56603, Order (Apr. 9, 2003).

70. U.S. Amicus, Doe v. Unocal, *supra* note 61. The Department of Justice filed its brief as a matter of right, pursuant to 28 U.S.C. § 517. The Circuit refused all requests to file amicus briefs on the broad issue of ATCA interpretation.

71. *Id.* at 8 (emphasis in original).

72. *Id.* at 4.

73. *Id.* at 20.

74. *Id.*

75. *Id.* at 23.

> eign policy interests of the United States and is contrary to our constitutional framework and democratic principles.[76]

In sum, "it is the function of the political Branches, not the courts, to respond" to human rights abuses abroad.[77]

There are two possible interpretations of this argument. First, the Administration could be arguing that *all* human rights litigation in federal courts violates the Constitution because it intrudes upon executive branch foreign affairs powers. Or, the Administration could be making a second, more narrow argument: Congress in the ATCA has not authorized the litigation of human rights claims.

The first argument has been explicitly rejected by past executive branches: in *Filártiga* and *Kadic* the Departments of State and Justice filed joint briefs stating that the cases posed no separation-of-powers problems. Even while disagreeing with the *Filártiga* interpretation of the ATCA, the Reagan Administration stated that litigation of the claims against former dictator Ferdinand Marcos "would not embarrass the relations between the United States and the Government of the Philippines."[78] Ironically, in the *Doe v. Unocal* case in which the Department of Justice filed its attack upon the modern application of the ATCA, the Department of State is similarly on record as stating that adjudication of the plaintiffs' claims would trigger no foreign policy concerns.[79] The recent submission by the Justice Department made no attempt to argue that adjudication of the claims against Unocal would pose political or foreign policy problems.

Moreover, the Justice Department specifically cites the Torture Victim Protection Act (TVPA) as a constitutional authorization of claims for two specific international law violations—torture and extrajudicial execution.[80] By recognizing the constitutionality of the TVPA, the Administration acknowledges that Congress has the constitutional authority to enact a statute that would permit suit in federal court for violations of international law. A statute that explicitly codified the *Filártiga* doctrine would thus be constitutional as well.

The Administration's constitutional objection to the ATCA, therefore, must be based on a second, more limited ground: not that Congress could not authorize a private right of action for violations of international law, but rather that *this particular statute* does not do so, and that the federal courts

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76. *Id.* at 4.

77. *Id.*

78. U.S. Amicus, Trajano v. Marcos, *supra* note 64, at 32.

79. In a letter sent to the district court, the Department of State advised that "adjudication of the claims based on the allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma." Letter of Michael J. Matheson, Acting Legal Advisor (July 8, 1997), *reprinted in* Nat'l Coalition Gov. of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 362 (C.D. Cal. 1997).

80. U.S. Amicus, Doe v. Unocal, *supra* note 61, at 4, 23, discussing the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350.

overstep their constitutional bounds when they interpret the ATCA as permitting such claims. The dispute involves both a historical debate over the intent of the statute and a modern debate over the proper roles of the judiciary and the executive in interpreting the current meaning of the statute.

What did Congress intend? Dozens of articles on the history of the ATCA have failed to produce a definitive legislative history.[81] Although I have detailed my strong support for the *Filártiga* interpretation of the statute in other publications,[82] my purpose here is more limited. Rather than reconstruct the already well-chronicled disagreements, I aim to show that there is reasonable support for the view that the first Congress intended to authorize private suits for violations of the evolving body of international law. This has been the conclusion of *Filártiga* and its progeny, along with almost every judge to consider the matter and dozens of legal scholars.

The limited available historical record supports the view that the ATCA was enacted as part of an effort to provide both criminal and civil remedies for violations of international law. Evidence for this view includes a number of notorious incidents during the period before the ratification of the Constitution that had provoked crises between the Continental Congress and foreign governments.[83] Congress repeatedly enacted resolutions urging the states to provide both criminal and civil remedies for such offenses against the law of nations.[84] Oliver Ellsworth, the author of those resolutions, also authored the First Judiciary Act, which included the ATCA.[85]

There is evidence that lawyers and government officials from the generation that enacted the ATCA understood the statute to authorize civil claims without the need for additional legislation. For example, Attorney General Bradford issued a formal opinion stating that aliens injured by a violation of

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81. *See, e.g.*, Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002) [hereinafter Dodge, *Constitutionality of the ATS*]; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996) [hereinafter Dodge, *Historical Origins*]; Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

82. *See, e.g.*, Beth Stephens, *Translating* Filártiga: *A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000) [hereinafter Stephens, *Federalism and Foreign Affairs*].

83. See a discussion of these incidents in Casto, *supra* note 81, at 491–94, and Dodge, *Historical Origins, supra* note 81, at 229–30. Bradley disputes the widely held view that there was a connection between these incidents and the ATCA, Bradley, *supra* note 81, at 637–45; in reply, Dodge offers yet more documentation of the apparent link, Dodge, *Constitutionality of the ATS*, *supra* note 81, at 692–96. The Department of Justice agrees that the statute was enacted in response to these events. *See* U.S. Amicus, *Doe v. Unocal*, *supra* note 61, at 9. An alternative theory of the origins of the statute has been offered by Sweeney, *supra* note 81, and countered by Dodge, *Historical Origins*, *supra* note 81.

84. *See* Stephens, *Federalism and Foreign Affairs*, *supra* note 82, at 469–71.

85. *Id.* at 491.

the international laws of neutrality could sue for damages pursuant to the ATCA.[86] A second late eighteenth-century opinion of the attorney general reached a similar conclusion,[87] as did the first case to uphold an ATCA claim, *Bolchos v. Darrel*.[88] Even cases rejecting ATCA claims did so on the basis of other doctrines, while assuming that the statute authorized damage claims for violations of international law.[89]

Two related theories of the ATCA have acquired support among both scholars and the courts. One holds that the ATCA is a straightforward creation of a cause of action for claims of tortious violations of international law.[90] Authorized by the Constitution to "define and punish . . . offenses against the law of nations," Congress did so both by creating federal crimes for certain violations and by authorizing civil suits pursuant to the ATCA.[91] Second, when the statute was enacted, jurists understood that both civil claims and criminal prosecutions could be based upon the common law, including customary international law. Federal prosecutions for common law crimes, including violations of customary international law, were well-accepted until found unconstitutional in 1812.[92] Civil claims for common law torts, of course, raise no such constitutional problems. A tort in violation of the law of nations was a claim upon which an individual could sue without the necessity of any additional legislative authorization.[93]

It is thus ahistorical to argue that Congress intended that the ATCA create a category of jurisdiction that would remain empty until filled with legislatively enacted claims. The Congress sitting in 1789 would not have understood that modern practice. Contemporary congressional intent—the intent of the body that enacted the statute—is the key to statutory interpretation. In the language appropriate for such an action at the time it was written, the first Congress enacted a statute by which it intended to authorize private claims for torts in violation of the law of nations. In sum, the conclusion that the Congress intended to authorize aliens to sue in federal

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86. 1 OP. ATT'Y GEN. 57, 59 (1795).

87. 1 OP. ATT'Y GEN. 29, 29–30 (1792).

88. 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) (concerning "property" rights to three slaves who were aboard a Spanish ship when it was captured as prize).

89. *See* Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895) (rejecting ATCA claim because suit sought restitution and so was not for "a tort only").

90. *See, e.g.*, cases cited *supra* note 66.

91. *See* Stephens, *Federalism and Foreign Affairs*, *supra* note 82, at 523–24.

92. *See* United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416–17 (1816); United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812). Until that time, common law prosecutions for violations of the law of nations were widely assumed to be constitutional. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825–26, 842–43 (1989) (explaining controversy over federal common law crimes); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1042–53 (1985) (same).

93. *See* Dodge, *Constitutionality of the ATS*, *supra* note 81. *See also* Davis v. Passman, 442 U.S. 228, 237 (1978) (explaining that until the mid-nineteenth century, the U.S. legal system did not even recognize the modern concept of a "cause of action").

court for violations of the law of nations, and did so by enacting the ATCA, is eminently reasonable.

Has the judiciary overstepped its role? The claim that the interpretation of the ATCA by modern courts violates separation of powers rests on the argument that it constitutes an interference with executive branch foreign affairs powers. Yet Congress has the power to authorize human rights litigation; if Congress has done so in the ATCA, there is no separation of powers issue. The courts have interpreted the ATCA as such an authorization, as summarized recently by the Ninth Circuit sitting en banc:

> The crux of the claim here rests on legislative delegation, not foreign relations. We see a critical distinction between, on the one hand, second guessing the foreign policy judgments of the political branches to whom such judgments have been constitutionally assigned and, on the other hand, reviewing claims based in tort and brought under federal statutes instructing the judiciary to adjudicate such claims.[94]

So interpreted, the judiciary does no more than consider tort claims pursuant to a congressional authorization. Far from raising separation of powers problems, "[t]he department to whom this [task] has been constitutionally committed is none other than our own—the Judiciary."[95] "The mere fact that this case raises politically sensitive issues connected to our foreign relations does not preclude us from carrying out the legislative mandate of Congress under § 1350."[96]

The separation of powers argument is actually circular. The argument is that the judicial interpretation is completely without merit and that the courts are therefore inventing a cause of action that has not been authorized by Congress. But the judiciary performs its constitutionally assigned role when it interprets legislation. Thoughtful decisions examining the historical record have interpreted the ATCA as authorizing private claims. Since this interpretation is reasonable, any complaint should be addressed to Congress, which has the power to amend or repeal the statute.

Further evidence that this interpretation is reasonable lies in its support by both the Carter and Clinton Administrations and the legislative history accompanying the TVPA. In a memorandum submitted to the Second Circuit in the *Filártiga* case, the Departments of Justice and State recognized that ATCA cases "unquestionably implicate foreign policy considerations."[97] At the same time, the memorandum stressed the important role of the judi-

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94. Alvarez-Machain v. United States, 331 F.3d 604, 615 n.7 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 821 (2003).

95. Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (internal quotation marks and citation omitted), *cert. denied*, 518 U.S. 1005 (1996).

96. *Alvarez-Machain*, 331 F.3d at 615 n.7.

97. U.S. *Filártiga* Memorandum, *supra* note 19, at 45.

ciary: "Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government."[98] ATCA cases therefore pose no separation of powers problems when the judiciary properly confines ATCA litigation to violations as to which "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."[99] The executive branch memorandum then notes that this analysis is consistent with the Supreme Court's view of the foreign affairs implications of judicial applications of international law, as expressed in *Sabbatino*:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[100]

In a later submission to the Second Circuit, the Departments of Justice and State concluded after a lengthy analysis that the ATCA applies to international law violations by private actors as well as public officials. The executive branch stated succinctly, "Although there may be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them."[101] Thus, fifteen years after its *Filártiga* submission, the executive branch once again concluded that the *Filártiga* doctrine is not an unconstitutional intrusion into the foreign affairs powers of the political branches of the federal government.

President George Bush, Sr. signed the TVPA in 1992 even though his Administration opposed its enactment and expressed concerns about its impact. He endorsed "the fundamental goals" that underlie both the TVPA and the ATCA, stating: "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."[102] Congress also expressed strong support for the

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98. *Id.*

99. *Id.* at 46.

100. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).

101. Statement of Interest of the United States, Jane Doe I v. Karadzic, No. 94-9035 (2d Cir. Sept. 13, 1995) [hereinafter U.S. *Karadzic* brief].

102. Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992, *reprinted in* 28 WEEKLY COMP. PRES. DOC. 465, 466 (Mar. 16, 1992). Enacted in 1992, the TVPA, 28 U.S.C. § 1350, authorizes a civil suit by any individual—citizen or noncitizen—for extrajudicial execution and torture, when committed by "[a]n individual" acting "under actual or apparent authority, or color of law, of any foreign nation." *Id.* § 2(a).

ATCA and the *Filártiga* doctrine in legislative history accompanying the TVPA:

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, . . . the Alien Tort Claims Act . . . . [The ATCA] has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.[103]

Furthermore, Congress has revisited the area twice since enacting the TVPA. Both times the new legislation extended the reach of civil suits for human rights violations.[104] Neither time did Congress make any effort to restrict the ATCA.

Although the current Administration considers ATCA litigation as facially objectionable, this view is not binding on the judiciary. Rather, the Department of Justice is merely advising the judiciary as to the possible interpretation of a statute. The executive branch's views are entitled to nothing more than respectful consideration.[105]

> [I]t would not be proper . . . to accord deference . . . to the executive branch's views regarding the meaning of the Alien Tort Statute ("ATS") . . . . The executive branch . . . is not charged with administering the ATS. Rather, the statute is a direct congressional regulation of federal court jurisdiction. As a result, there is no basis in the statute for presuming a delegation of lawmaking power to the executive branch . . . . [A]s with many issues concerning federal policy, "persuasiveness deference" may be proper. But these forms of deference are not *Chevron* deference, that is, binding deference concerning the meaning of the law itself.[106]

Given the contradictory history of executive branch opinions as to the ATCA's correct interpretation and its impact on foreign affairs, the current views are entitled to even less than the ordinary level of deference.

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103. H.R. Rep. No. 102-367, at 3 (1992).

104. As part of an anti-terrorism initiative, Congress has authorized civil suits for victims of terrorism. 18 U.S.C. § 2333 (1994) authorizes a U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism" to sue for treble damages. A 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) permits civil suits for torture, extrajudicial killing, and other abuses against a small group of foreign governments. The FSIA is codified at 28 U.S.C. §§ 1330, 1602–11 (2001); this exception is codified at § 1605(a)(7) (introduced in 1994).

105. Bradley, *supra* note 11, at 680–81.

106. *Id.*, referring to Chevron U.S.A. v. Nat. Resources Def. Council, 467 U.S. 837 (1984). Even under *Chevron* deference, the courts only defer to an agency's interpretation of an "ambiguous" statute if the agency proffers "a 'permissible' reading of the statute." *Id.* See the description of Professor Bradley's *Chevron* analysis, *supra* note 11.

To summarize, the judiciary's current approach is a reasonable interpretation of the authority vested in the courts by Congress. As such, it does not exceed the judiciary's proper role and does not violate the constitutionally mandated division of powers.

C. *Executive Branch Claims that Litigation Interferes with Foreign Policy Are Not Entitled to Uncritical Deference*

Even if the judiciary's application of the Alien Tort Claims Act is constitutional in general, litigation of particular cases might infringe upon the executive branch's foreign affairs powers.[107] Both the Carter and Clinton Administrations specifically reserved the right to object to adjudication of individual cases on this basis.[108] The Clinton Administration made such claims in several cases arising out of World War II, and, after careful review of the factual and legal arguments, the courts dismissed the cases pursuant to the political question doctrine.[109] In contrast, in just the first three years of the Bush Administration, the Departments of Justice and State have repeatedly asked the courts to dismiss modern human rights lawsuits on separation of powers grounds.

In this Section, I first discuss the legal framework governing executive branch claims that a case should be dismissed as nonjusticiable because of its impact on foreign policy. Despite the executive branch's leadership role in foreign affairs, the judiciary is constitutionally required to assess the credibility of executive branch assertions about justiciability, and to refuse to rely on those assertions that are not well-grounded. I then analyze the foreign policy objections raised by the Bush Administration in two cases, one recent case *Exxonmobil*, and in a set of cases involving the Falun Gong, demonstrating that they are based on speculation and unwarranted acceptance of complaints from foreign governments. An uncritical acceptance of the Administration's weakly supported allegations would endanger the constitutionally assigned role of the judiciary in our federal system.

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107. Professor Koh suggested over ten years ago that case-by-case application of filters such as the political question doctrine, immunities and forum non conveniens would respond to concerns about foreign policy and separation of powers: "Rather than applying overbroad rules that treat all transnational public law cases as inherently unfit for domestic adjudication, courts should target their concerns by applying those doctrines that have been specifically tailored to address them." Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2382 (1991).

108. In the brief submitted to the Second Circuit in *Filártiga*, the Carter administration noted "that there is little danger that judicial enforcement will impair our foreign policy efforts" where the courts limit claims to those in which "there is a consensus in the international community that the right is protected" and "a widely shared understanding of the scope of this protection." U.S. *Filártiga* Memorandum, *supra* note 19, at 46. Similarly, the Clinton Administration brief filed in *Kadic v. Karadzic* states, "Although there may be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." U.S. *Karadzic* brief, *supra* note 101, at 3.

109. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 483–89 (D.N.J. 1999) (dismissing slave labor claims against German corporations as raising nonjusticiable political questions). See the discussion of World War II cases in Bazyler, *supra* note 29.

1. The Legal Framework: Limited Deference

The federal courts do not generally have the authority to refuse to adjudicate cases properly brought before them. As Justice Scalia stated for a unanimous Court, "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."[110]

Two narrow doctrines have been asserted as a justification for dismissal of human rights litigation because of the alleged impact on foreign policy: the act of state doctrine and the political question doctrine. Each poses limits on the justiciability of claims that touch upon foreign affairs, limits that are often evaluated after the courts consider the views of the executive branch. Recent Bush Administration interventions have raised the question as to what deference should be given to executive claims by the executive branch that foreign policy concerns require dismissal of an otherwise viable lawsuit.

The act of state doctrine instructs the courts to dismiss cases that intrude into the legal authority of a foreign sovereign under certain narrow circumstances. The doctrine holds that the courts should refrain "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory," in "the absence of a treaty or other unambiguous agreement regarding controlling legal principles."[111] Although not mandated by the Constitution, the doctrine has a "'constitutional' underpinning,"[112] in that it recognizes the limited role of the judicial branch in foreign affairs, reflecting "the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[113]

> The doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[114]

The act of state doctrine applies, however, "only . . . when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."[115] As the Court stated emphatically in *Kirk-*

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110. Envtl. Tectonics v. W.S. Kirkpatrick, Inc., 493 U.S. 400, 409 (1990).

111. *Id.* at 401, 428 (1964). In the classic example of the application of the doctrine, the Court dismissed a dispute that turned upon the validity of the Cuban government's expropriation of private property. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

112. "The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state. The act of state doctrine does, however, have 'constitutional' underpinnings." *Sabbatino*, 376 U.S. at 423.

113. *Id.*

114. *Id.*

115. *Kirkpatrick*, 493 U.S. at 406 (emphasis in original). Moreover, it only applies when there is no clear, governing international law. *Sabbatino*, 376 U.S. at 428 (doctrine applies only "in the absence of a

patrick, the doctrine does not apply when a dispute between private parties might expose wrongdoing that would embarrass a foreign sovereign.[116] In adopting this rule, the Court in *Kirkpatrick* specifically rejected the executive branch's request that the doctrine be applied case by case to dismiss claims that the Administration viewed as interfering with foreign policy.[117] Rather, the issue that the court must decide is first, whether the outcome of the case turns upon the effect of the challenged act, and second, whether that act can be considered "valid," "public" or "official."

The political question doctrine directs the courts to decline to decide a case otherwise properly presented for resolution because the dispute presents issues constitutionally assigned to the political branches of the government.[118] The use of the doctrine has been limited recently, particularly in the Supreme Court, although the lower courts still occasionally dismiss cases on this basis.[119] The standard formulation for what constitutes a political question was set forth in *Baker*:

> [A] political question [involves] 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.[120]

Human rights cases as a rule do not trigger this test. As explained by the Second Circuit in *Kadic v. Karadzic*, since the lawsuits involve tort claims, "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary."[121] Moreover, the application of

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treaty or other unambiguous agreement regarding controlling legal principles").

116. In *Kirkpatrick*, plaintiff brought a suit for damages alleging that the defendant had obtained a contract with the Nigerian government through illegal acts of bribery. The Court held that despite the allegation of illegality by Nigerian government officials, the act of state doctrine did not apply because the lawsuit did not require the judiciary to declare invalid any official act of the Nigerian government. 493 U.S. at 406.

117. *Id.* at 409.

118. Baker v. Carr, 369 U.S. 186, 217 (1962).

119. *See* Bradley, *supra* note 11, at 660. Dismissals citing to this doctrine are often in fact based upon a more narrow holding "that the President's decision was within his authority and therefore law for the courts." Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 612 (1976).

120. *Baker*, 369 U.S. at 217.

121. Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (citation omitted), *cert. denied*, 518 U.S. 1005 (1996).

universally recognized norms obviates any problem as to discerning the applicable standards or resolving policy concerns.[122]

The final three *Baker* factors concern the need for uniformity in the formulation of foreign policy. These factors are by definition quite limited. For example, "independent resolution" must be an *impossibility* and there must be "an *unusual* need for *unquestioning* adherence" to a political decision. The Second Circuit recognized these narrow criteria in concluding that "judicial resolution of a question would contradict prior decisions taken by a political branch [only] in those limited contexts where such contradiction would seriously interfere with important governmental interests."[123] The fact that a case "present[s] issues that arise in a politically charged context" does not trigger the political question doctrine: the doctrine "is one of 'political questions,' not one of 'political cases.'"[124]

Through its interpretation of the act of state and political question doctrines, the Supreme Court has moved away from reliance on the executive branch's case-by-case evaluations of the foreign policy implications of litigation. Instead, both doctrines are increasingly decided by a more "rule-based" approach, in which judicially developed rules determine justiciability rather than the views of the executive branch.[125] Professor Bradley describes this as a shift away from "ad hoc Executive control of pending cases . . . ."[126] Moreover, he notes, the Constitution requires that the courts be the arbiters of their constitutional powers. Since these are rules concerning "judicial competence," it would be "inconsistent with separation of powers and the 'rule of law' to allow the Executive to control the application of the doctrine."[127]

The Supreme Court articulated the danger of excessive deference to the executive branch in rejecting the administration's position as to the justiciability of a claim involving Cuba at the height of the Cold War.[128] Separate opinions written on behalf of six of the justices rejected the position that executive branch views were dispositive. Justice Powell described the troubling separation of powers problem raised by excessive judicial deference to the executive branch: "I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before in-

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122. *Id.*

123. *Id.* at 249–50 (citing Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229–30 (1986) (quoting *Baker*, 369 U.S. at 211)).

124. *Id.* (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (quoting *Baker*, 369 U.S. at 217)).

125. Professors Bradley and Goldsmith have both documented this shift. Bradley, *supra* note 11, at 720, 725; Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999) (identifying trend toward a more rules-based, formalistic approach in three areas: the political question doctrine, the act of state doctrine, and foreign affairs preemption).

126. Bradley, *supra* note 11, at 725. He notes that the executive branch has historically fought this move, preferring the flexibility that comes with the power to determine whether or not the courts will decline jurisdiction over a particular case. *Id.*

127. *Id.* at 719.

128. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

voking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine."[129] Justice Brennan noted the limitations on executive branch authority over issues that go to the heart of the constitutionally assigned judicial power, recognizing that "[t]he Executive Branch . . . cannot by simple stipulation change a political question into a cognizable claim."[130] Noting that six members of the Court shared his view on this point, he added, "[T]he representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative."[131]

Similar concerns have also been raised in a related context, the question of whether state government actions intrude upon the federal governments foreign policy powers. In *Zschernig v. Miller*,[132] for instance, a 1968 case alleging that a state government had interfered with foreign relations, the Court refused to follow the executive branch's views that the state statute did not unduly interfere with federal powers.[133]

Even when ultimately deferring to executive branch predictions of foreign policy concerns, the courts have assessed both the logic of the Administration's position and its factual support. In *Regan v. Wald*,[134] for example, the Supreme Court upheld a ban on spending money in Cuba based upon the executive branch's statement that permitting U.S. citizens to provide foreign currency to the Cuban government would undermine U.S. foreign policy. While noting that the Administration's views were entitled to deference, the Court nevertheless reviewed the underlying facts and concluded that the restrictions were justified based on "the evidence presented to both the District Court and the Court of Appeals."[135] The Court also considered it significant that the same views had been maintained for decades under successive U.S. presidencies.[136]

This is not to suggest that the courts second-guess the wisdom of a particular foreign policy, a task clearly assigned to the executive branch. But the courts should review the evidence as to the substance of that policy and assess whether the evidence presented by the executive branch supports the result it requests. In the recent decision in *American Insurance Association v.*

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129. *Id.* at 773 (Powell, J., concurring).
130. *Id.* at 789 (Brennan, J., dissenting).
131. *Id.* at 790 (Brennan, J., dissenting).
132. 389 U.S. 429 (1968).
133. *Id.* at 443 (Stewart, J., concurring).
134. Regan v. Wald, 468 U.S. 222 (1984).
135. *Id.* at 243.
136. The Court noted that:

> The Cuban Assets Control Regulations were first promulgated during the administration of President Kennedy. They have been retained, though alternately loosened and tightened in response to specific circumstances, ever since. In every year since the enactment of [the emergency statute] in 1977, first President Carter and then President Reagan have determined that the continued exercise of [the currency restrictions] against Cuba is in the national interest.

Id.

Garamendi,[137] for example, the court reviewed executive branch evidence of national policy governing resolution of Holocaust-era insurance claims and concluded that "[t]he approach taken [by the executive branch] serves to resolve . . . several competing matters of national concern" at issue in the dispute.[138]

Lower court opinions in cases involving Administration claims of nonjusticiability reflect the need to evaluate executive branch's allegations rather than to take them as controlling per se.[139] Similarly, the act of state doctrine "demands a case-by-case analysis of the extent to which in the context of a particular dispute separation of powers concerns are implicated[,] . . . always . . . tempered by common sense."[140] In general, despite the deference owed to executive branch statements about foreign policy, factual allegations will not be credited unless credible and supported by the available evidence.[141] Several lower courts have reiterated the conclusion that the views of the executive branch are entitled to "respectful consideration," but cannot be given conclusive weight.[142]

Courts do not suspend all independent judgment when evaluating executive branch claims that a lawsuit should be dismissed because litigation would intrude upon foreign affairs powers. Uncritical deference to executive branch views would be in tension with the judiciary's obligation to set the limits of its own constitutional powers. As a result, courts have refrained from automatically adopting executive branch statements of policy and fact so as to ensure an independent assessment of justiciability. When executive branch predictions of dire consequences appear implausible, the judiciary is on firm ground in evaluating those allegations with care.

2. The Foreign Policy Concerns Raised by the Bush Administration

Two examples demonstrate the weakness of the Bush Administration's claims that private human rights litigation threatens U.S. national interests: a lawsuit against an oil company operating in the midst of a civil war in Aceh, Indonesia, and a series of lawsuits against Chinese government officials. In

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137. 123 S. Ct. 2374 (2003).

138. *Id.* at 2391.

139. Koohi v. United States, 976 F.2d 1328, 1331 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993) (quoting Baker v. Carr, 369 U.S. 186, 211–12 (1962)).

140. Bigio v. Coca-Cola Co., 239 F.3d 440, 452 (2d Cir. 2000), quoting Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir. 1985), *cert. denied*, 473 U.S. 934 (1985).

141. Washington Post Co. v. U.S. Dep't of State, 840 F.2d 26, 36–37 (1988), *vacated on other grounds*, 898 F.2d 793 (D.C. Cir. 1990).

142. Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *see Allied Bank Int'l*, 757 F.2d at 521 n.2 (decision to invoke the act of state doctrine "may be guided but not controlled by the position, if any, articulated by the executive as to the applicability *vel non* of the doctrine to a particular set of facts. Whether to invoke the act of state doctrine is ultimately and always a judicial question."); Belgrade v. Sidex Int'l Furniture Corp., 2 F. Supp.2d 407, 416 (S.D.N.Y. 1998) ("the views of the executive branch often will have an important bearing on a court's determination, especially where the concern is possible conflict with a coordinate branch of government, [but] they are not conclusive").

both situations, the Administration's concerns are insufficient to justify dismissal of the lawsuits.

Exxonmobil case: The island of Aceh, in eastern Indonesia, has been the site of an independence war for over twenty-five years. The conflict worsened after the fall of President Suharto in 1998, at least in part because of the failure of the new government to investigate human rights abuses committed by his forces.[143] In a 2001 lawsuit filed against ExxonMobil under the ATCA and the TVPA, eleven plaintiffs charged the oil company with legal responsibility for human rights abuses committed by the Indonesian military. The complaint alleges that ExxonMobil contracted to provide logistical and material support to the Indonesian military in exchange for protection for its operations, with the knowledge that the military employed genocide, murder, torture and other abuses to maintain order in the midst of the growing civil war in Aceh.[144]

The judge assigned to the case wrote to the Department of State "out of an abundance of caution," asking whether the Department "has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on the interests of the United States."[145] In response, William Taft, the State Department legal advisor, offered three reasons why the lawsuit might have such an adverse effect. First, the Indonesian government viewed the lawsuit as interfering with its sovereignty, and, in response to the perceived disrespect for its sovereign interests, might curtail cooperation with U.S. counter-terrorism initiatives.[146] Second, if such litigation deterred foreign investment in Indonesia, the government's stability could be undermined, and an unstable Indonesia could interfere with the war on terrorism.[147] Lastly, if U.S. corporations pulled out in response to litigation, business competitors from other nations might take their place.[148] Taft acknowledged that his views were speculative, based upon problems that might develop during the course of the lawsuit: "Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation."[149]

The plaintiffs objected to this characterization of U.S. interests and the potential impact of the litigation on those interests.[150] First, they argued,

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143. HUMAN RIGHTS WATCH, INDONESIA, THE WAR IN ACEH (2001), *available at* http://www.hrw.org/reports/2001/aceh/ (last visited Nov. 25, 2003).

144. Doe v. ExxonMobil, No. 01-CV-1357 (D.D.C. filed June 19, 2001).

145. Letter of William H. Taft, Legal Advisor, Department of State, to Honorable Louis F. Oberdorfer, submitted in Doe v. ExxonMobil, No. 01-CV-1357 (D.D.C. July, 29, 2002) [hereinafter Taft letter, Doe v. ExxonMobil], at 1, *available at* http://www.laborrights.org/ (last visited Nov. 8, 2003).

146. *Id.* at 2–3.

147. *Id.* at 3.

148. *Id.* at 3–5.

149. *Id.* at 2 n.1.

150. Plaintiffs offered this alternative view through an affidavit from Harold Hongju Koh, the Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton Administration. Affidavit of Harold Hongju Koh, submitted in Doe v. ExxonMobil, No. 01-CV-1357 (LFO) (D.D.C. Aug. 28, 2002) [hereinafter Koh ExxonMobil Affidavit].

Indonesia cooperates with the United States in fighting terrorism "because it is in its own national interest to do so."[151] This cooperation has not been curtailed in the past despite repeated criticism of human rights violations in Aceh.[152] This "honest assessment" has included severe criticism of Indonesia's human rights record in Aceh by the executive branch, including under the Bush Administration and by Congress.[153] Repeated criticism has not led the Indonesian government to cease cooperation with the U.S. government, nor is it plausible to predict that Indonesia will do so in the future because of a lawsuit filed by private parties in a U.S. federal court.

In challenging the policy priorities underlying the economic arguments asserted by the Taft letter, plaintiffs also noted the U.S. interest in "ensuring that U.S. corporate entities comply with international human rights obligations in their conduct abroad."[154] The Department of State's Assistant Secretary for Economic and Business Affairs, who has served both President Clinton and the current President Bush, stressed the relationship between the rule of law and respect for human rights and economic progress: "These principles are vital to our own economic security here at home and are the only sustainable way for United States companies to engage abroad . . . . [I]t is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible."[155]

Finally, plaintiffs insisted that the court should await developments in the litigation and then respond to potential problems as they arise, rather than dismiss the lawsuit at the outset in response to problems that may never develop.[156]

The Falun Gong: Similar issues arise regarding the State Department's involvement in a series of cases challenging China's violent repression of the Falun Gong spiritual movement. At least six lawsuits have been filed against Chinese government officials in the United States, along with others around

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151. *Id.*

152. "[A]n honest assessment of Indonesia's human rights records by American governmental institutions has always been an *integral part* of United States foreign policy toward Indonesia." *Id.* at 5, ¶ 14.

153. For example, a Department of State report issued shortly before the Taft letter condemned the "numerous serious human rights abuses" committed by Indonesian government security forces in areas of conflict, including in Aceh. *Id.* at 6, ¶ 14, citing U.S. Department of State, *Country Reports on Human Rights Practices, 2001: Indonesia* (Mar. 2002), *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8314.htm (last visited Nov. 25, 2003). Congress has condemned human rights abuses in Indonesia and urged the Indonesian government to end "the climate of impunity" that shields members of the military. *Id.* at 6, ¶ 15, citing S. Res. 91, 107th Cong., 1st Sess. (2001), at 4. All branches of the U.S. government have "consistently maintained that an honest and public scrutiny of Indonesia's human rights record that truthfully chronicles military and police abuses does not inappropriately intrude into Indonesian sovereignty or interfere with U.S. foreign policy toward Indonesia." *Id.*

154. *Id.*

155. *Id.* at 8–9, ¶ 19, quoting E. Anthony Wayne, Assistant Secretary of State for Economic and Business Affairs, Announcement of "Voluntary Principles on Security and Human Rights," U.S. Department of State, Dec. 20, 2000, *available at* http:/www.state.gov/www/policy_remarks/2000/001220_wayne_principles.html (last visited Nov. 8, 2003).

156. Koh ExxonMobil Affidavit, *supra* note 150, at 4–5, ¶ 11.

the world.[157] The Chinese government has repeatedly protested the lawsuits as a violation of its sovereignty, insisting that its treatment of the Falun Gong practitioners is a matter of domestic law. In a submission in a case filed against then Mayor of Beijing, Liu Qi, the Chinese government attacked Falun Gong as a criminal movement dangerous to public order, denied any human rights violations in its response to the movement, claimed the protection of sovereign immunity, and charged that the litigation is "detrimental to China-U.S. relations."[158] If the cases proceed in U.S. courts, the submission concludes, "it would cause immeasurable interference[ ]" to "normal exchanges and cooperation between China and the United States . . . ."[159]

The U.S. government has been remarkably supportive of this position despite harsh executive and legislative branch condemnations of China's treatment of Falun Gong. When asked about the foreign policy implications of the lawsuit against Liu Qi, the State Department submitted a letter arguing that the case threatened U.S. foreign policy because it asked the courts "to sit in judgment on the acts of foreign officials taken with their countries pursuant to their government's policy."[160] The letter warns of "the potentially serious adverse foreign policy consequences that such litigation can generate," concluding that it "can serve to detract from, or interfere with, the Executive Branch's conduct of foreign policy."[161]

The Department of State's 2002 report on human rights around the world—issued by the Bush Administration—included scathing criticism of China's "harsh and comprehensive campaign against the Falun Gong."[162] Congress has been equally harsh. In 2002, the House of Representatives unanimously passed a concurrent resolution criticizing the Chinese government's persecution of Falun Gong members "through organized brainwashing, torture and murder."[163] The resolution called upon the Chinese government to "cease its persecution of Falun Gong practitioners."[164] In addition, the House of Rep-

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157. *See* Delisle, *supra* note 50, at 473–76 (listing cases).

158. Chinese Government Statement, Doe v. Liu Qi, *supra* note 51.

159. *Id.* A Magistrate Judge has recommended dismissal of some of the claims against Liu Qi, but recommended that claims for declaratory relief go forward; plaintiffs have filed objections to the recommendations with the district court judge. Report and Recommendation re: Plaintiffs' Motion for Entry of Default Judgment, Doe v. Liu Qi, No. C-02-0672 CW (EMC) (N.D. Cal. June 11, 2003).

160. Statement of Interest of the United States, filed in Doe v. Liu Qi, No. C 02-0672 CW (EMC) (Sept. 26, 2002), at 7 [hereinafter U.S. Statement of Interest, Liu Qi].

161. *Id.* at 8. In an unrelated case involving the Tiananmen Square massacre, despite the near-universal criticism of the atrocity, the State Department asserted that the litigation "severely hampers the ability of the United States to implement a robust foreign policy at a time when matters of war and peace are in the balance." U.S. Statement of Interest filed in Zhou v. Li Peng, 00 Civ. 6446 (S.D.N.Y.) (WHP), at 2–3.

162. U.S. Department of State, Country Reports on Human Rights Practices, 2002: China (Mar. 31, 2003), at 23, *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18239pf.htm (last visited Nov. 8, 2003).

163. Concurrent Resolution, H. Con. Res. 188, 107 Congress (July 24, 2002); *see* House Measure Calls on China to Stop Persecuting Falun Gong (H. Con. Res. 188 passes House in 420-0 vote), *available at* http://usinfo.state.gov/regional/ea/uschina/falun188.htm (last visited Nov. 8, 2003).

164. *Id.*

resentatives called upon the government of the United States to "use every appropriate public and private forum to urge the Government of the People's Republic of China" to end the detention, torture and other abuse of practitioners.[165] In a final twist, in 2003 several members of Congress submitted an amicus brief to the district court in one of the Falun Gong cases, urging the court to hear the lawsuit.[166] The Chinese case reveals that the battle over the political question doctrine is at least in part a battle *between* the two political branches.

3. *Applying the "Respectful Deference" Standard*

For the first twenty years of *Filártiga* litigation, the growing body of case law indicated that neither the act of state doctrine nor the political question doctrine would apply to human rights cases. The act of state doctrine applies only if the case addresses the "valid," "public" acts of a sovereign nation. Since no defendants have claimed that egregious human rights violations were committed pursuant to official state policy, no claims of violations such as genocide and torture have been dismissed as acts of state. As the Second Circuit noted in a case arising out of the genocide in Bosnia-Herzegovina, "[T]he appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state."

Similarly, only the most unusual human rights claim would trigger the political question doctrine. Review of private tort suits falls within the constitutionally delegated powers of the judicial branch. Cases can be dismissed because of the danger of contradicting a prior executive branch decision when there is "an *unusual* need for *unquestioning* adherence to a political decision already made."[167] Two courts found such an unusual need when evaluating claims arising out of World War II based upon reparations agreements signed at the close of the war. In *Sarei v. Rio Tinto*, the district court also dismissed ATCA claims based on the political question doctrine.[168] The court accepted the Administration's views that litigation of claims arising out of the government's conduct during a ten-year civil war would undermine promising efforts at reconciliation. Most modern human rights cases, however, involve egregious human rights abuses that the executive branch

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165. *Id.*

166. Brief of Amicus Curiae Relating to Issues Raised by the United States in its Motion to Vacate, submitted in A, B, C, et al., v. Jiang Zemin, Civ. No. 02-C-7530 (June, 9, 2003) (filed on behalf of 23 members of the House of Representatives), *available at* http://www.clearharmony.net/articles/200306/13083.html (last visited Nov. 30, 2003). The lawsuit against Jiang Zemin was dismissed in September 2003, on the basis of head-of-state immunity. A, B, C, et al. v. Jiang Zemin, 282 F. Supp.2d 875 (N.D. Ill. 2003).

167. Baker v. Carr, 369 U.S. 186, 217 (1962) (emphasis added).

168. In Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116 (C.D. Cal. 2002), citizens of Papua New Guinea filed a class action against a multinational mining corporation. The complaint alleged liability for war crimes and crimes against humanity arising out of a civil war on the island of Bougainville, an island in the South Pacific located just off the main island of Papua New Guinea.

has already condemned and are raised by plaintiffs who have been unable to obtain redress in any other forum.

Careful application of the act of state and political question doctrines, with the input of the executive branch, may weed out the small number of cases that should not be adjudicated in U.S. courts. Proper application of these doctrines is skewed, however, when the executive branch routinely asserts that adjudication of human rights claims would interfere with foreign policy. The courts are ill-prepared to respond to the possibility that an administration might use these doctrines as a means of attacking a line of litigation of which it disapproves.

In fact, despite the repeated holding that executive branch views are entitled only to "respectful deference," executive branch statements appear in practice to have a conclusive effect. As noted in a recent opinion:

> [P]laintiffs have not cited, and the court has not found, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here. This is probably because to do so would have the potential to embarrass the executive branch in the conduct of its foreign relations . . . .[169]

The strong implication is that the executive branch's assessment that litigation would interfere with foreign policy is itself a decision to which the judicial branch should adhere. This, of course, would afford the executive branch's views a conclusive effect to which they clearly are not entitled. Such interventions must be carefully evaluated to avoid turning "respectful deference" into uncritical deference. Although that line is understandably difficult to maintain, separation of powers and the protection of individual rights demand it.

The statements of interest in the Aceh and Falun Gong cases, for example, based their claims of interference with "important governmental interests" on unexamined expressions of concern from the Indonesian and Chinese governments.[170]

In an exhaustive law review article, Professor Jacques Delisle challenged the Chinese government's claim—championed by the State Department—that human rights litigation poses a particularly egregious affront to U.S.-Chinese relations.[171] He argues that "a degree of skepticism is in order" in the face of complaints about the litigation.[172] "Official China is not so un-

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169. *Id.* at 1192.

170. *See* Brian C. Free, *Comment: Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y J. 467, 477 (2003) (pointing out that the Bush administration interventions relied on concerns about "foreign policy consequences," rather than claiming that the suits interfere with U.S. international obligations or the executive's constitutional powers).

171. Delisle, *supra* note 50.

172. *Id.* at 491.

comprehending of the United States system of separation of powers as it claims to be," and does not "view judicial opinions as on par with legislative or presidential pronouncements."

> In these circumstances, it is unwarranted and unwise—and would unnecessarily constrain and undermine the political branches' conduct of foreign policy—to accept at face value statements from foreign governments (including notably China) that exaggerate opportunistically their incomprehension of U.S. separation of powers law, and that express shock and offense at judicial decisions . . . [and] purport to construe them as expressions of the foreign policy positions of the American government.[173]

Private litigation does not undermine U.S. foreign policy toward either of these regimes. "At least where the executive branch or the political branches endorse a critical view of a foreign regime's practices, the addition of a judicial voice through litigation may extend and reinforce the political branches' foreign policy."[174] Finally, given the disputes between executive and legislative branches, and even apparently within the executive branch, it is clear that the federal government does not speak with one voice on these issues, so there is no unusual need for deference or unanimity.

These predictions about the impact of the litigation appear far more subjective than factual, more designed to protect powerful defendants than to protect U.S. foreign policy. The Supreme Court has recognized that the executive branch is capable of falling into politicized judgments in an effort to favor one litigant or another—the danger Justice Douglas warned of when he expressed his concern that that a rule of obligatory deference to the views of the executive branch would render the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'."[175]

Similarly, the courts should be skeptical of this administration's opposition to human rights litigation seeking damages for egregious, internationally condemned human rights abuses. Although the State Department argues that U.S. courts "should be cautious when asked to sit in judgment on the acts of foreign officials taken with their countries pursuant to their government's policy,"[176] both the executive and legislative branches have already "sat in judgment" of the foreign government policies at issue in these cases. Indeed, the world community as a whole has pre-judged the human rights abuses at issue in these cases, and has concluded that they are never permitted.

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173. *Id.* at 545–46.

174. *Id.* at 555.

175. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

176. U.S. Statement of Interest, Liu Qi, *supra* note 161, at 7.

Conclusion: The Domestic Context and Post–September 11 Litigation

The Bush Administration challenges human rights litigation by claiming an expansive field of unreviewable executive power. The Administration has asserted similar claims in a series of legal conflicts arising since September 11 in which it has repeatedly demanded unquestioned deference to executive branch factual and legal opinions.[177] On both the international and domestic fronts, the demand should be resisted.

One consequence of the assertion of unreviewable executive power has been the indefinite detention of so-called "enemy combatants." The Administration claims that combatants captured while fighting with groups that do not abide by the laws of war are entitled neither to prisoner of war status nor to any military or civilian legal process. As a result of this policy, approximately 660 men and boys have been imprisoned at the U.S. naval facility at Guantanamo Bay, some for over two years.[178] Several international bodies have disagreed with the Administration's legal analysis; they insist that international law requires that detainees be classified either as prisoners of war or as civilians, and that they may be punished for violations of the laws of war, but only after a military or civilian prosecution that follows minimal rules of due process.[179] The executive branch has rejected the authority of every body that has attempted to review their legal status, including the InterAmerican Human Rights Commission. By arguing that the federal courts have no jurisdiction over non-citizens detained outside the sovereign limits of U.S. territory, the executive branch has also successfully obtained dismissal of a habeas corpus petition filed on behalf of the detainees.[180] In short, the Bush Administration has asserted the unreviewable authority to classify these detainees as it sees fit.

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177. For an overview of related cases, see Nancy Chang & Alan Kabat, *A Summary of Recent Court Rulings on Terrorism-Related Matters Having Civil Liberties Implications*, *available at* http://www.ccr-ny.org/v2/reports/report.asp?ObjID=a10UjCnvrH&Content=288(Sept. 11, 2003) (last visited Nov. 8, 2003).

178. News Release No. 524-03, U.S. Department of Defense (July 18, 2003), *available at* http://usinfo.state.gov/dhr/Archive/2003/Oct/09-443040.html (last visited Feb. 2, 2004) (listing total number of detainees at Guantanamo Bay as approximately 660).

179. *See, e.g.*, Report of the Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, Commission on Human Rights, 59th Sess., E/CN.4/2003/8 (Dec. 16, 2002) (Louis Joinet, Rapporteur), at 19–21, ¶¶ 61–64, *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf (last visited Nov. 8, 2003); Inter-American Commission on Human Rights, Decision to Adopt Precautionary Measures in Relation to Detainees in Guantanamo Bay (Mar. 13, 2002), *available at* http://www1.umn.edu/humanrts/cases/guantanamo-2003.html (last visited Nov. 8, 2003). *See also* International Committee of the Red Cross, Commentary: Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 51 (1958) ("Every person in enemy hands must have some status under international law: he is either a prisoner of war . . . or a civilian . . . . *There is no* intermediate status; nobody in enemy hands can be outside the law.").

180. *See* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (dismissing for lack of jurisdiction petition for habeas corpus filed on behalf of Guantanamo Bay detainees), *cert. granted*, 124 S. Ct. 534 (2003).

Just as startling are cases involving U.S. citizens detained as "enemy combatants." Yaser Esam Hamdi was apparently captured in Afghanistan, fighting with the Taliban.[181] Jose Padilla was arrested in Chicago, held as a material witness, and then declared an enemy combatant.[182] The government is holding them both incommunicado, with no access to legal counsel. The executive branch has been forced to recognize that the federal courts have jurisdiction to consider habeas petitions on their behalf, but has argued that the petitions must be dismissed based on the unreviewable factual allegation that each is an enemy combatant. The Fourth Circuit upheld Hamdi's detention, accepting the Administration's legal conclusion that enemy combatants are not entitled to due process. It upheld his classification as an enemy combatant on the basis of the unreviewable statement of a mid-ranking defense department official who stated that Hamdi had been captured while fighting with the Taliban.[183]

Similar arguments for near-total deference to conclusory statements of executive branch officials have been advanced in a series of cases involving prolonged detentions of material witnesses[184] and secret immigration detentions.[185] Although the courts have generally sided with the government in challenges to these policies, a handful of judges have registered their objections. Judge Tatel dissented from the District of Columbia's upholding of

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181. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

182. Padilla v. Rumsfeld, 243 F. Supp.2d 42 (S.D.N.Y. 2003), *petition for cert. filed*, 72 USLW 3486 (U.S. Jan. 23, 2004) (No. 03-1027). A third U.S. citizen, Ali Saleh Kahlah Al-Marri, is apparently being held as an enemy combatant; a district court in Illinois denied his petition for habeas corpus on the grounds that he had been transferred to South Carolina, out of the jurisdiction of the Illinois court. *See* R. A. Serrano, *Combatant Loses Bid for Freedom*, L.A. TIMES, July 29, 2003, § 1, at 1.

183. *Hamdi*, 316 F.3d at 461. In dissenting from the denial of Hamdi's petition for rehearing en banc, Judge Motz warned that "the panel embarks on a perilous new course—approving the Executive's designation of enemy combatant status not on the basis of facts stipulated or proven, but solely on the basis of an unknown Executive advisor's declaration, which the panel itself concedes is subject to challenge as 'incomplete[ ]' and 'inconsistent' hearsay." Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *reh'g denied*, 337 F.3d 335, 371 (4th Cir. 2003) (en banc) (dissenting opinion of Judge Motz), *cert. granted*, 124 S. Ct. 981 (2004).

Jose Padilla has had minimally more success in the federal court. The district court judge in his case also accepted the legal premise that detainees can be classified as enemy combatants if the government shows "some evidence" to support the classification, and that once so classified, enemy combatants are entitled to virtually no process at all. *Padilla*, 243 F. Supp. 2d 42. But the judge insisted that Padilla has the right to consult with his attorney so that she can assist him in a challenge to the government's showing of "some evidence." *Id.* This decision is on appeal to the Second Circuit.

184. *Compare* United States v. Awadallah, 202 F. Supp.2d 55 (S.D.N.Y. 2002) (rejecting government position that issuance of material witness warrant could be based on FBI agent affidavit and rejecting detention based on unreviewable executive averments of materiality of grand jury testimony) *with In re* Application of the United States for a Material Witness Warrant, 213 F. Supp.2d 287 (S.D.N.Y. 2002) (upholding use of material witness warrant to hold a witness called before a grand jury).

185. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (rejecting government's assertion of definitive effect of FBI agents' declarations in establishing compelling interest in closure of deportation hearings to press); North Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp.2d 288, 301 (D.N.J. 2002) (same), *rev'd*, 303 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003) (in a split panel, the majority assigned conclusive effect to FBI agent's declaration); 8 C.F.R. § 3.46 (May 21, 2002) (immigration judges, in deciding whether to seal evidence, "shall give appropriate deference to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit").

the Administration's refusal to release the names of the post–September 11 immigration detainees, harshly criticizing "the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case."[186] The executive branch in these cases has employed extreme interpretations of the foreign affairs and war powers as a justification to argue against judicial review of decisions that have fundamental implications for our Constitution and international human rights. The result is a dangerous aggregation of unreviewable executive branch power.

Similarly ill-founded arguments about judicial misinterpretation of the ATCA and the need to defer to executive branch foreign policy decisions have been asserted as pretexts to oppose judicial review of the human rights abuses of corporations and foreign governments. Although the Constitution clearly assigns the executive branch the leading role in foreign affairs, it also requires that the judicial branch review and decide questions properly brought before it. Where the Administration offers strained readings of federal statutes and implausible predictions about foreign relations, its views are not entitled to deference. Indeed, to defer to such views would be to permit the current administration to distort the proper balance of powers between the executive and judicial branches of our government.

186. Center for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 937 (D.C. Cir. 2003) (Tatel, J., dissenting), *cert. denied*, 124 S. Ct. 1041 (U.S. Jan. 12, 2004).