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CHAPTER 5

Foreign Relations

A. LITIGATION INVOLVING NATIONAL SECURITY AND FOREIGN POLICY ISSUES

1. *Al-Tamimi v. United States*

On January 27, 2017, the United States filed a brief in support of its motion to dismiss claims against defendant Elliott Abrams in a case brought by plaintiffs, a group of Palestinians seeking $1 billion in damages for alleged unlawful actions by members of the Israel Defense Forces ("IDF"); actions which they allege defendants conspired to enable. *Al-Tamimi v. United States*, No. 1:16-cv-00445 (D.D.C.). The United States substituted itself as defendant in place of Mr. Abrams, former Senior Director for Near East and North African Affairs on the National Security Council and Deputy National Security Adviser for Middle East Affairs. Excerpts below from the January 27 brief demonstrate that the plaintiffs' Federal Tort Claims Act ("FTCA") counts in their complaint are barred by sovereign immunity under explicit provisions of the FTCA. The sections of the brief discussing the Torture Victim Protection Act ("TVPA") and Alien Tort Statute ("ATS") and the political question doctrine are excerpted in this chapter, *infra*. The full text of the brief is available at http://www.state.gov/s/l/c8183.htm.

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The United States, as a sovereign, is immune from suit except to the extent it waives its immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *see also Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Such a waiver must be "unequivocally expressed" and "cannot be implied." *Mitchell*, 445 U.S. at 538 (citation and quotation omitted). For no less than four independent reasons, sovereign immunity bars Plaintiffs' FTCA claims against the United States: (1) Plaintiffs have failed to exhaust their administrative remedies; (2) the United States has not

waived sovereign immunity for claims based on customary international law or the law of nations; and the claims are precluded by both (3) the foreign-country exception and (4) the discretionary-function exception to the FTCA.

a. Plaintiffs have not exhausted their administrative remedies.

Plaintiffs' claims against the United States are barred because Plaintiffs failed to exhaust their administrative remedies, a necessary prerequisite to any FTCA claim. The FTCA requires that, before bringing a claim against the United States in district court, an individual must present his or her claim to the "appropriate Federal agency" and either receive a denial of the claim in writing, or wait six months since submitting the claim without receiving a response. 28 U.S.C. § 2675(a). *See also Simpkins v. D.C. Gov't*, 108 F.3d 366, 370 (D.C. Cir. 1997) (quoting§ 2675(a)). This requirement is "straightforward." *McNeil v. United States*, 508 U.S. 106, 112 (1993). It is also jurisdictional. *See Simpkins*, 108 F.3d at 371 (citation omitted). Plaintiffs have not alleged that they submitted their claims to the "appropriate Federal agency," as § 2675(a) requires, or indeed to any federal agency. Accordingly, this Court lacks jurisdiction over their claims against the United States and should dismiss Counts I through III on that basis.

b. The United States has not waived sovereign immunity for alleged violations of the law of nations.

Even if Plaintiffs had properly exhausted their administrative remedies—which they have not—their claims against the United States would still fail because those claims are based on alleged violations of customary international law, or "the law of nations." The ATS, a "strictly jurisdictional" statute, does not provide an independent basis for asserting a claim against the United States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004). Plaintiffs' claims against the United States are under the FTCA. Through the FTCA, as amended by the Westfall Act, the United States has waived its immunity for tort claims arising from the negligent or wrongful acts or omissions of federal employees that occurred within the scope of their employment. *See* 28 U.S.C. § 1346(b)(1). This waiver, however, is limited. It waives immunity only under circumstances where the United States, if a private person, would be liable "in accordance with the law of the place" where the act or omission occurred. *Id.*

Courts have repeatedly held that "the law of the place" refers to state law only. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 477 (1994) ("[W]e have consistently held that § 1346(b)'s reference to the "law of the place" means law of the State—the source of substantive liability under the FTCA) (citing cases); *see also Delta Savings Bank v. United States*, 265 F.3d 1017, 1024-25 (9th Cir. 2001) (barring FTCA claim brought under federal law because FTCA action must be based on violation of state law). *Cf. Sosa*, 542 U.S. at 707-08 (explaining that Congress exempted from the FTCA claims arising in foreign countries because it sought "to avoid application of substantive foreign law" in claims against the United States); *United States v. Spelar*, 338 U.S. 217, 221 (1949) (noting that Congress "was unwilling to subject the United States to liabilities depending upon the laws of a foreign power").

Accordingly, an FTCA claim cannot be based on alleged violations of customary international law. *See Al Janko v. Gates*, 831 F. Supp. 2d 272, 283 (D.D.C. 2011), *aff'd on other grounds*, 741 F.3d 136 (D.C. Cir. 2014); *Bansal v. Russ*, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007). In *Al Janko*, the court dismissed plaintiff's claims for violations of the ATS after substituting the United States as defendant. *Al Janko*, 831 F. Supp. 2d at 283. In doing so, the court emphasized that the United States had not waived its immunity for claims based on customary international law: "the United States has not waived sovereign immunity under the FTCA as it relates to the alleged conduct—such as violations of customary international law, the

Third and Fourth Geneva Conventions, and other international standards." *Id. See also Bansal*, 513 F. Supp. 2d at 280 ("[T]he United States has not waived its sovereign immunity with respect to [customary international law] claims." (quotation and citation omitted)).

All of Plaintiffs' claims against the United States are for alleged violations of customary international law or the law of nations. Indeed, Plaintiffs labelled Count II as a claim for "violation of the law of nations," Am. Compl. at p. 145, and explicitly refer in that claim to various international laws, treaties, and standards. *See id.* ¶ 184 (referring to "Nuremberg Principles," "Genocide Convention," and "Article 73 of the UN Charter"). Count III is for allegedly "aiding and abetting" the purported violations mentioned in Count II. *See id.* ¶ 228 ("This Count relies upon and specifically tracks the allegations made in Count II . . . ."). And the alleged conspiracy in Count I—"to expel all non-Jews" from East Jerusalem, the West Bank, and the Gaza Strip, *id.* at p. 103—also involves purported violations of customary international law. *See, e.g., id.* ¶¶ 119, 173, 180 (referring to "Customary International Law").

That Plaintiffs' conspiracy claim nominally involves a common-law tort does not alter this analysis. Although "civil conspiracy" is a domestic common-law tort, it provides no independent cause of action. *See Hall v. Clinton*, 285 F.3d 74, 82 (D.C. Cir. 2002). Rather, it is a vehicle through which "vicarious liability for the underlying wrong" may attach to all who are party to a conspiracy, "where the requisite agreement exists among them." *Id.* (quoting *Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1493 (D.C. Cir. 1989)). Because the "underlying wrong" alleged in Count I involves purported violations of customary international law—for which the United States has not waived its immunity—Count I, like Counts II and III, is barred. *See Daisley v. Riggs Bank, N.A.*, 372 F. Supp. 2d 61, 73 (D.D.C. 2005).

Nor does Plaintiffs' passing invocation of a federal statute or other federal sources alter the above analysis. *See, e.g.*, Am. Compl. ¶¶ 146 (invoking an unspecified "1995 Executive Order"); 184 (invoking "U.S. War Crimes Statute" and "America's 1863 Lieber Code"); 185 (invoking 18 U.S.C. § 2441). First, as noted above, the United States has not waived its immunity for claims for damages based on purported violations of federal law. *See Meyer*, 510 U.S. at 478; *Liranzo v. United States*, 690 F.3d 78, 86 (2d Cir. 2012) ("The FTCA does not waive sovereign immunity for claims based solely on alleged violations of federal law." (citing *Meyer*, 510 U.S. at 478)); *Delta Savings*, 265 F.3d at 1024-25. Second, the United States has waived its immunity only to the extent it would be liable if it were a private person. 28 U.S.C. § 1346(b)(1). None of these federal sources provides a private right of action or creates the requisite form of liability. *See, e.g., Jawad v. Gates*, 113 F. Supp. 3d 251, 259 (D.D.C. 2015) (noting that 18 U.S.C. § 2441 does not create a private cause of action), *aff'd*, 832 F.3d 364 (D.C. Cir. 2016). Therefore, they cannot form the basis for an FTCA claim. In short, Counts I through III are based on bodies of law for which the United States has not waived its immunity. Thus, those claims must be dismissed.

c. The foreign-country exception bars Plaintiffs' claims.

Furthermore, Plaintiffs' claims against the United States regarding alleged injuries in the Middle East are barred under the FTCA's exception for claims "arising in a foreign country." *See* 28 U.S.C. § 2680(k). Plaintiffs' claims regarding alleged wrongs committed against Palestinians in East Jerusalem, the West Bank, and the Gaza Strip indisputably arose abroad. Moreover, as the Supreme Court has made clear, the reason for this exception is to prevent subjecting the United States to the application of substantive foreign law. *See Sosa*, 542 U.S. at 707-08. Foreign sources of law apply in East Jerusalem, the West Bank, and the Gaza Strip—the areas in which Plaintiffs' claims arose. Those claims thus fall squarely within the foreign-country exception.

Furthermore, the foreign-country exception extends to claims arising in any territory over which the United States does not claim sovereignty. *See Smith v. United States*, 507 U.S. 197, 198 n.1, 204 (1993) (applying foreign-country exception to bar FTCA claims arising in Antarctica, a continent over which the United States "itself does not assert a sovereign interest" (citation omitted)). The United States certainly does not claim sovereignty over East Jerusalem, the West Bank, or the Gaza Strip. Therefore, the foreign-country exception also applies to Plaintiffs' claims on this basis.

Additionally, even to the minimal extent Plaintiffs allege events occurring in the United States, their claims still fall within the foreign-country exception. The foreign-country exception applies to claims whenever the alleged *injuries* occurred abroad, even if alleged planning that led to the injuries occurred within the United States. The Supreme Court made that clear in *Sosa*: "We therefore hold that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." 542 U.S. at 712. *See also Gross v. United States*, 771 F.3d 10, 12-13 (D.C. Cir. 2014). In sum, the foreign-country exception applies to Plaintiffs' claims. They must be dismissed.

d. The discretionary-function exception applies to Plaintiffs' claims.

Lastly, Plaintiffs' claims against the United States are barred because they involve the alleged exercise of a discretionary function by Mr. Abrams, a former government official, and in turn, the United States. Under 28 U.S.C. § 2680(a), the United States has not waived its immunity for claims based on "the exercise or performance or the failure to exercise or perform a discretionary function" on the part of a federal employee. *Id.* This exception, known as the discretionary-function exception, applies "whether or not the discretion involved be abused." *Id.* The Supreme Court has developed a two-part test to determine whether the discretionary-function exception applies to an FTCA claim. *See United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). First, a court assesses whether a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* at 322. Because the discretionary-function exception covers only acts that "involve an element of judgment or choice," *id.*, any such statute, regulation, or policy would preclude an employee from exercising his or her "judgment or choice."

Second, where an act involves "an element of judgment or choice," a court asks whether the "judgment or choice" is "of the kind that the discretionary-function exception was designed to shield." *Id.* As the Supreme Court explained, because Congress included the exception "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy" through an FTCA claim, the exception applies to "governmental actions and decisions based on considerations of public policy." *Id.* at 323. Indeed, "the most important modern policy basis for sovereign immunity is that under 'principles of separation of powers, courts should refrain from reviewing or judging the propriety of the policymaking acts of coordinate branches.'" *Wells v. United States*, 851 F.2d 1471, 1476 (D.C. Cir. 1988) (applying discretionary-function exception to FTCA claims) (citation and quotation omitted). *See also Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1156 (D.D.C. 1991) (noting the discretionary-function exception "embodies the separation of powers").

This exception plainly applies to Plaintiffs' claims against the United States. No federal statute, regulation, or policy precluded Mr. Abrams from exercising his "judgment or choice" in the course of his alleged actions in the manner Plaintiffs suggest. Moreover, Plaintiffs' complaint against the United States focuses on alleged communications and interactions between Mr. Abrams—in his role as a Deputy National Security Advisor in the White House—and former

Israeli Prime Minister Ariel Sharon, aides to Sharon, and aides to former Israeli Prime Ministers Ehud Olmert and Ehud Barak regarding Israeli settlements and the alleged treatment of Palestinians in the region. *See, e.g.*, Am. Compl. at p. 20, ¶¶ 41, 134, 142. In other words, Plaintiffs' claims challenge judgments and choices Mr. Abrams allegedly made regarding United States foreign policy in the Middle East, a highly geopolitically sensitive area of the world that long has and continues to present numerous foreign policy and national security challenges for the United States.

Litigating any such choices is precisely the sort of "second-guessing" that the discretionary-function exception is meant to prevent. It is beyond peradventure that Mr. Abrams's alleged communications and interactions with high-level Israeli officials regarding Israeli settlements in the region and purported policies regarding the Middle East would have involved "decisions grounded in . . . political policy." *Gaubert*, 499 U.S. at 323.

Indeed, such alleged decisions—which typically would involve weighing and considering their effect on national security and foreign affairs, including the reactions of Israelis, Palestinians, and nations throughout the Middle East, Europe, and Asia—require the quintessential sort of "judgment or choice" that the discretionary-function exception covers. *See, e.g.*, *Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86, 103 (1st Cir. 2012) (in applying discretionary-function exception to claims based on the Navy's allegedly negligent release of pollutants during military exercises, noting that "[t]he Navy's choices were . . . pursuant to its judgment as to how it conducted its military operations"); *Mirmehdi v. United States*, 689 F.3d 975, 984 (9th Cir. 2012) ("Because the decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General and implicates issues of foreign policy, . . . it falls within this exception."); *Loughlin v. United States*, 393 F.3d 155, 164 (D.C. Cir. 2004) (barring FTCA claims based on decision to bury World War I munitions because decision "required balancing competing concerns of secrecy, and safety, national security and public health" (citation omitted)); *Industria Panificadora*, 763 F. Supp. at 1158 (applying discretionary-function exception to tort claims arising from the U.S. invasion of Panama). Thus, this Court lacks jurisdiction over Plaintiffs' claims against the United States.

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On March 10, 2017, the United States filed a reply brief in support of its motion to dismiss in *Al-Tamimi*. Excerpts follow from the reply brief's discussion of the FTCA claims. The reply brief is available in full at http://www.state.gov/s/l/c8183.htm.

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The United States substituted itself under the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in relevant part at 28 U.S.C. § 2679), as the defendant for Mr. Elliott Abrams because the operative allegations of Plaintiffs' complaint related to actions he allegedly undertook while working at the White House for eight years, between 2001 and 2009, as a member of the National Security Council—first as Senior Director for Near East and North African Affairs, and then as Deputy National Security Advisory handling Middle East affairs. ...

… Plaintiffs appear to concede that the Westfall Act covers Mr. Abrams's alleged actions during those eight years: "It is undisputed that Defendant Abrams worked in the White House under President Bush, and because he was a Federal employee at the time, the Westfall Act would have applicability to the activity he engaged in during those four [*sic*] years." Doc. 112, Pls.' Opp'n, at 6. They cannot credibly argue otherwise.

Under the Westfall Act, substitution of the United States as defendant is appropriate for claims based on alleged acts or omissions taken within the scope of a federal employee's employment. *See* 28 U.S.C. § 2679(b)(1). For events occurring abroad that involve a White House official, the District of Columbia provides the law for determining whether the official was acting within the scope of his or her employment. *Cf. Kashin v. Kent*, 457 F.3d 1033, 1037-38 (9th Cir. 2006) (applying District of Columbia law to determine whether State Department employee acted within scope of employment while driving in Russia). Given that jurisdiction's expansive view of the scope of employment, there is no question that Mr. Abrams was acting within scope when he allegedly met with senior officials of the Israeli government to discuss United States policy in the Middle East and allegedly took other actions regarding that policy. *See, e.g.*, *Harbury v. Hayden*, 522 F.3d 413, 422 (D.C. Cir. 2008); *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 8-9 (D.D.C. 2004); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 265 (D.D.C. 2004); *Weinberg v. Johnson*, 518 A.2d 985, 988 (D.C. 1986); *Howard Univ. v. Best*, 484 A.2d 958, 987 (D.C. 1984). Thus, to the extent Plaintiffs attempt to argue that Mr. Abrams acted outside the scope of his employment while at the White House, *see* Doc. 112, Pls.' Opp'n, at 7, their argument, which is based on nothing more than a blanket, conclusory assertion, must fail. Accordingly, the United States is the proper defendant for the operative allegations against Mr. Abrams.

The United States also demonstrated that three explicit provisions of the FTCA bar Plaintiffs' claims: (1) the requirement to exhaust administrative remedies, 28 U.S.C. § 2675(a); (2) the foreign-country exception, 28 U.S.C. § 2680(k); and (3) the discretionary-function exception, 28 U.S.C. § 2680(a). *See* Doc. 104, United States' Mot. to Dismiss, at 4-11. Plaintiffs offer no response to the United States' showing regarding the first two provisions. *See generally* Doc. 112, Pls.' Opp'n. They therefore effectively concede that those provisions apply. *See Kone v. District of Columbia*, 808 F. Supp. 2d 80, 83 (D.D.C. 2011) ("An argument in a dispositive motion that the opponent fails to address in an opposition may be deemed conceded." (quoting *Rosenblatt v. Fenty*, 734 F. Supp. 2d 21, 22 (D.D.C. 2010) (internal alterations omitted))).

And Plaintiffs' one-line statement opposing the United States' showing that the discretionary-function exception applies, *see* Doc. 112, Pls.' Opp'n, at 7, is wholly inadequate to rebut that showing. First, Plaintiffs did not accuse Mr. Abrams of "classic money laundering," *id.*, in their amended complaint. They alleged he was a "Settlement and IDF Advocate/ Promoter," and even separated him from other defendants who were alleged to have donated to certain causes related to purported events occurring abroad. *Compare* Am. Compl. ¶ 41 *with id.* ¶¶ 31-40, 42-54. Second, unsupported, conclusory allegations of criminal activity or the encouragement of such activity on the part of a federal employee cannot, under basic pleading standards, rebut a showing that the actual factual allegations fall within the discretionary-function exception. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Third, and most notably, Plaintiffs make no effort whatsoever to address—let alone grapple with—the substantial and relevant case law the United States cited in its motion to dismiss that demonstrates that Mr. Abrams's alleged actions regarding United States policy in the Middle East are precisely the sort of activity that the discretionary-function exception covers. *See* Doc. 104, United States' Mot. to

Dismiss, at 11 (citing cases from the First, Ninth, and D.C. Circuits). Accordingly, Plaintiffs' FTCA claims against the United States must be dismissed.

Plaintiffs' references to other allegations in their amended complaint regarding Mr. Abrams's alleged actions before and after his eight years at the White House are of no moment. As the United States explained in its motion to dismiss, (and as any reasonable construction of the amended complaint supports), it views those allegations as offering context to Mr. Abrams's alleged motivations while acting as Deputy National Security Advisor, not as the operative allegations of customary international law violations with respect to Mr. Abrams's conduct. *See* Doc. 104, United States' Mot. to Dismiss, at 22 n.8. The Attorney General's designee's certification "is conclusive unless challenged." *Gutierrez de Martinez v. Drug Enf't Admin.*, 111 F.3d 1148, 1153 (4th Cir. 1997). Plaintiffs' recitation of conclusory allegations that, in any event, do not state a plausible claim of Mr. Abrams's purported involvement in some ill-defined financial conspiracy, fails to rebut that conclusion. Moreover, Plaintiffs offer no response to the United States' showing that much of Mr. Abrams's alleged actions are core First Amendment-protected activities because they involve debate on public issues. *See* Doc. 104, United States' Mot. to Dismiss, at 22-23. Indeed, one of the cases Plaintiffs cite in their opposition relating to another issue indicates that where First Amendment protections apply, they would apply to limit claims for alleged violations of customary international law. *See Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 328 (D. Mass. 2013) (noting in case involving ATS claims that "Defendant is correct that the First Amendment places limits on the imposition of tort liability linked to offensive speech, and that the protection of free expression, including the protection of 'thought we hate,' is a centerpiece of our democracy." (citing and quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011))).

Furthermore, Plaintiffs' conclusory assertion in their opposition that Mr. Abrams is a "donor" who financed money laundering, Doc. 112, Pls.' Opp'n, at 7-8, is contrary to the allegations in their amended complaint, which, as explained above, paint Mr. Abrams as a "Settlement and IDF Advocate/Promoter," not as a donor to Israeli settlement causes. In any event, given that this Court has ordered briefing on subject-matter jurisdiction only, *see* Doc. 97, Dec. 15, 2016 Order, at 1, and given the United States' other dispositive jurisdictional arguments explained below, there is no need at this juncture to determine whether Plaintiffs' allegations regarding Mr. Abrams's supposed involvement in a conspiracy to finance Israeli settlements are operative and, even if so, whether they are sufficient to state a claim.

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2. *Detroit International Bridge Co. v. Canada*

On November 21, 2017, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Detroit International Bridge Co. v. Canada*, No. 16-5270. For discussion of the proceedings at the U.S. district court level, see *Digest 2013* at 104-10; for discussion of a claim based on the same set of facts, brought pursuant to NAFTA Chapter 11, see *Digest 2014* at 461-63. The Detroit International Bridge Company ("the Company") challenged the approval by Under Secretary of State for Economic Growth, Energy and the Environment Robert Hormats of the Crossing Agreement between Canada and the State of Michigan under the International Bridge Act ("IBA"), and the issuance of a Presidential Permit for the construction of a second bridge within two miles of the

Company's existing bridge (the Ambassador Bridge). The lower court dismissed as to most counts in the complaint and granted summary judgment on the remaining count. The Court of Appeals affirmed, noting that the determination of whether to issue the Presidential Permit was not subject to judicial review. Excerpts follow from the opinion.[*]

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Under IBA Section 4, no international bridge may be constructed without Presidential approval. 33 U.S.C. § 535b. By Executive Order in 1968, as amended in 2004, the President authorized the Secretary of State to issue permits approving bridges under Section 4 unless there is disagreement among consulted agencies, in which event the matter is returned to the President "for consideration and a final decision." Exec. Order 13,337, 69 Fed. Reg. 25,299, § 1(g)-(i). Challenging the dismissal of Count 6, the Company acknowledges that Presidential action is not subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704. Applt's Br. 51-52 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992)). Rather, it maintains that the issuance of a Presidential Permit by the Secretary of State is final agency action, regardless of whether this authority was delegated by the President, and thus it is reviewable pursuant to the APA. But even if the Presidential Permit issuance were agency action, it is unreviewable under the APA because it is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2).

The 1968 Executive Order on Presidential Permits stated that "the *proper conduct of the foreign relations* of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country." Exec. Order 11,423, 33 Fed. Reg. 11,741, pmble. (emphasis added). The 2004 Executive Order affirmed that the Secretary should issue a Presidential Permit if doing so "would serve the national interest." Exec. Order 13,337, 69 Fed. Reg. 25,299, § 1(g); *see* Exec. Order 11,423, 33 Fed. Reg. 11,741, § 1(d). In the foreign affairs arena, the court lacks a standard to review the agency action. As the court explained in *Dist. No. 1, Pac. Coast Dist., Marine Engineers' Beneficial Ass'n v. Marine Admin., et al.*, 215 F.3d 37, 42 (D.C. Cir. 2000), generally "judgments on questions of foreign policy and national interest …are not subjects fit for judicial involvement." "By long-standing tradition, courts have been wary of second-guessing executive branch decision[s] involving complicated foreign policy matters." *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997).

The Company offers no persuasive argument for adopting a different approach with respect to issuance of the Section 4 Presidential Permit here. Its reliance on *Dickson v. Sec'y of Def.*, 68 F.3d 1396 (D.C. Cir. 1995), and *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221 (D.C. Cir. 1993), is misplaced. The issue in those cases arose in the context of military discharge classifications and Medicare reimbursement, respectively. By contrast, the context surrounding issuance of a Section 4 Presidential Permit under the IBA involves a determination

[*] Editor's note: The opinion was corrected and reissued on March 6, 2018 by order of the U.S. Court of Appeals for the District of Columbia Circuit, en banc.

rife with executive discretion in an area that the U.S. Constitution principally vests in the political branches. *See e.g.*, *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Because the challenged issuance is not subject to judicial review, the court need not decide whether the issuance is presidential action under *Franklin*, 505 U.S. 788.

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3. *Sokolow*

As discussed in *Digest 2015* at 144-45, the United States filed a statement of interest in a case against the Palestinian Authority ("PA") and the Palestinian Liberation Organization ("PLO") urging the court to take into account national security and foreign policy interests in deciding whether to stay execution of a judgment against the PA and whether to impose a bond requirement pending appeal. On August 31, 2016, the U.S. Court of Appeals for the Second Circuit decided that the district court lacked general or specific personal jurisdiction over the PA and PLO in the case and vacated the judgment of the district court. *Waldman v. PLO*, 835 F.3d 317 (2d. Cir. 2016). Plaintiffs filed a petition for certiorari on March 3, 2017. On June 26, 2017, the Supreme Court invited the United State to file a brief expressing its views.[**]

B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Statute ("ATS"), sometimes referred to as the Alien Tort Claims Act ("ATCA"), was enacted as part of the First Judiciary Act in 1789 and is codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." In 2004 the Supreme Court held that the ATS is "in terms only jurisdictional" but that, in enacting the ATS in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals, including U.S. nationals, for torture and/or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2017 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

[**] Editor's note: The U.S. brief was filed on February 22, 2018 and will be discussed in *Digest 2018*. On April 2, 2018, the Supreme Court denied the petition for certiorari.

2. ATS and TVPA Cases Post-*Kiobel*

In 2013, the U.S. Supreme Court dismissed ATS claims in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2013* at 111-17 and *Digest 2011* at 129-36. The majority of the Court reasoned that the principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."

a. Al-Tamimi

As discussed in Section I, *supra*, the United States filed briefs in support of its motion to dismiss claims against a U.S. government official for allegedly enabling unlawful acts against Palestinians by Israel Defense Forces ("IDF"). The section of the January 27, 2017 U.S. brief regarding the TVPA and ATS is excerpted below. Other sections of the brief regarding the FTCA and the political question doctrine are excerpted *supra* and *infra*.

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Even without the above threshold barriers facing Plaintiffs' claims, this Court should dismiss their claims against the United States brought under the TVPA and the ATS because those statutes do not provide jurisdiction for those claims.

a. The Torture Victim Protection Act does not provide jurisdiction for Plaintiffs' claims against the United States.

Plaintiffs' claims related to alleged war crimes must be dismissed because the two statutes Plaintiffs invoke—the TVPA and the ATS, *see* Am. Compl. ¶¶ 1-3—do not provide jurisdiction over their claims against the United States. The TVPA does not provide jurisdiction because Mr. Abrams, a former United States government official, was not acting under the authority of a "foreign nation." *See Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C. Cir. 2009) ("In the TVPA . . . Congress exempted American government officers and private U.S. persons from the statute."); *Jerez v. Republic of Cuba*, 777 F. Supp. 2d 6, 18 (D.D.C. 2011) (explaining that a cause of action under the TVPA is available only against an individual acting "under actual or apparent authority, or color of law, of any *foreign nation*" (emphasis added)).

b. This Court does not have jurisdiction over Plaintiffs' Alien Tort Statute claims.

For the reasons stated above in Parts I and II, Plaintiffs' ATS claims must be dismissed because the United States has not waived its sovereign immunity and because those claims raise political questions. Additionally, those claims involve alleged events, including injuries occurring abroad, that do not "touch and concern" the territory of the United States "with sufficient force to displace the presumption against extraterritorial application" of federal statutes to claims brought under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). *Cf. Smith*, 507 U.S. at 203-04 (discussing the "presumption against extraterritorial application of United States statutes" in dismissing FTCA claim for events in Antarctica).

In *Kiobel*, the Supreme Court held that the presumption against the extraterritorial application of federal statutes applies to claims brought under the ATS. *See Kiobel*, 133 S. Ct. at 1669. There, the Court dismissed a case against foreign corporations based on foreign conduct and added that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* Since *Kiobel*, several circuit courts have struggled with developing a legal framework to determine precisely when claims "touch and concern" United States territory "with sufficient force to displace the presumption," largely in the context of claims against corporations. *See, e.g.*, *Adhikari v. Kellogg Brown & Root, Inc.*, No 15-20225, 2017 WL 33556, *4-5 (5th Cir. Jan. 3, 2017) (adopting framework based on *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010)); *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 586-93 (11th Cir. 2015) (surveying approaches of other circuits and adopting its own framework), *cert. denied*, 136 S. Ct. 1168 (2016); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 181-94 (2d Cir. 2014) (adopting framework based on *Morrison*); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528 (4th Cir. 2014) (adopting framework based on a fact-based inquiry).

That debate, however, is irrelevant here. In addition to the United States' sovereign immunity and the political question doctrine, which provide ample grounds to dismiss Plaintiffs' claims against the United States, those claims as pled here do not "touch and concern" the territory of the United States with "sufficient force." Plaintiffs' complaint against the United States alleges that Palestinians suffered various injuries abroad at the hands of Israeli soldiers and citizens, who were somehow encouraged by a United States official. On its face, and absent any other United States interest sufficient to support jurisdiction here, such a claim does not displace the presumption against extraterritorial application of federal statutes to claims brought under the ATS. This is so because most of the allegations against Mr. Abrams are either conclusory or irrelevant to the purported ATS claims; the nexus between Mr. Abrams and the alleged torts is highly attenuated; the specific acts pled against Mr. Abrams primarily occurred abroad; the alleged torts by the IDF and by Israeli settlers—including the purported injuries and the commission of the tortious acts—occurred abroad; acceptance of Plaintiffs' theory of liability here risks rendering the Supreme Court's holding in *Kiobel* academic, at least at the pleadings stage; and no United States interest is sufficient to support jurisdiction over Plaintiffs' claims against the United States.

At the outset, the vast majority of Plaintiffs' allegations against Mr. Abrams are either conclusory or have no bearing on their claims. *See, e.g.*, Am. Compl. pp. 19 (conclusory allegation that Abrams "encouraged . . . wholesale violence"); 27 (conclusory allegation that Abrams "encouraged and justified" settlement expansions and ethnic cleansing); ¶¶ 1 (conclusory allegation that Abrams "formulated" his plan to conspire while in the United States); 17 (allegation that Abrams has been a featured speaker at AIPAC conferences, which has no bearing on claim); 41 (conclusory allegation that Abrams has been unofficial paid spokesman of settlements); 86 (conclusory allegation that Abrams "encouraged" illegal land seizures by Israeli settlers); 186 (conclusory allegation that Abrams "encouraged" war crimes). Such conclusory or irrelevant allegations are insufficient to displace the presumption against extraterritorial application of the ATS. *See Mastafa*, 770 F.3d at 190 ("[O]ur jurisdictional analysis need not take into account allegations that, on their face, do not satisfy basic pleading requirements.").

As for Plaintiffs' allegations regarding Mr. Abrams's purported testimony to Congress and articles in news publications, *see, e.g.*, Am. Compl. p. 20, ¶¶ 24, 125, 123, those allegations do not form the basis of Plaintiffs' claims against the United States, and instead simply offer

context to Plaintiffs' claims in terms of Mr. Abrams's alleged motivations during his purported interactions with Israeli officials, discussed below. Moreover, Mr. Abrams's testimony to Congress and authorship of opinion pieces regarding prominent issues and policies in international affairs are core First Amendment-protected activities that do not constitute an actionable tort. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982) (emotional speech supporting civil rights boycott and threatening "discipline" to boycott violators protected by First Amendment and could not form basis for tort claim). Indeed, testimony to Congress and authorship of opinion pieces presenting a perspective on political issues "is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("debate on public issues should be uninhibited, robust, and wide-open").

The remaining allegations regarding purported interactions between Mr. Abrams and Israeli officials are insufficient to displace the presumption against extraterritorial application of federal statutes to claims brought under the ATS. Those allegations involve alleged events occurring abroad that are far too attenuated and removed from the supposed war crimes to be relevant to Plaintiffs' claims. For example, Plaintiffs' allegation that Mr. Abrams met abroad with former Prime Minister Sharon in Rome and with aides to Israeli Prime Ministers in Europe, Am. Compl. p. 20, do not displace the presumption. In any event, Mr. Abrams's alleged interactions with Israeli government officials regarding Israeli settlement policy, wherever they occurred, are too attenuated from the purported actions of Israeli settlers themselves or from Plaintiffs' allegations of injury, and are, as a general matter, insufficient to displace the presumption. *See, e.g.*, *Drummond Co.*, 782 F.3d at 598 (holding that allegations regarding decision-making, funding, and policy choices occurring in the United States insufficient to displace presumption where agreement, planning, and execution of purported crimes occurred abroad).

Moreover, the injuries Plaintiffs allege clearly occurred abroad. In conjunction with the other factors discussed above regarding Plaintiffs' claims against the United States, this weighs against displacing the presumption in this case. At bottom, Plaintiffs allege that a United States official was in some highly attenuated and ill-defined manner involved in the conduct of foreign agents who allegedly caused harm abroad. Under basic tort principles, those foreign agents' alleged torts occurred abroad, the location of the alleged injuries is abroad, and the jurisdiction with the more substantial interest in the resolution of this litigation is abroad. *Cf. Sosa*, 542 U.S. at 711 (holding that for purposes of the foreign-country exception to the FTCA, 28 U.S.C. § 2680(k), a tort "aris[es]" where the injury occurs); *Jaffe v. Pallotta Teamsworks*, 374 F.3d 1223, 1227 (D.C. Cir. 2004) (noting that in tort cases, D.C. courts apply "the law of the jurisdiction with the more substantial interest in the resolution of the issue," which considers "(1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship is centered" (internal citations and quotations omitted)); *see also Adhikari*, 2017 WL 33556, at *7-8. Indeed, the substantial implications of the resolution of Plaintiffs' claims for the conduct of United States foreign relations buttresses the fact that those claims raise non-justiciable political questions. …

Furthermore, to the extent Plaintiffs' claims are based on the alleged conspiracy between Mr. Abrams and other defendants, such a claim does not automatically rebut the presumption against extraterritorial application of federal statutes to claims brought under the ATS. In effect, that claim echoes the "headquarters doctrine" that the *Sosa* Court rejected in the context of tort

claims brought under the FTCA. *See* 542 U.S. at 702-03. As with the foreign-country exception, allowing such claims automatically to overcome the presumption against extraterritoriality would "swallow" that presumption whole, "certainly at the pleadings stage." *Id.* at 703.

Lastly, there is no United States interest sufficient to support exercising jurisdiction over Plaintiffs' claims. *See supra*, note 6. In sum, regardless of which legal framework applies to determining when claims brought under the ATS "touch and concern" the United States with sufficient force to rebut the presumption against extraterritorial application of federal statutes, Plaintiffs' claims certainly do not. Their claims against the United States should be dismissed.

* * * *

Excerpts below come from the section of the March 10 reply brief of the United States discussing the TVPA and ATS.

* * * *

Lastly, Plaintiffs have failed to rebut the United States' showing that neither of the statutes Plaintiffs invoke provides jurisdiction for their claims against the United States. Plaintiffs fail to address at all the United States' showing regarding the Torture Victim Protection Act, *see* Doc. 104, United States' Mot. to Dismiss, at 19. They therefore have conceded that point. *See Kone*, 808 F. Supp. 2d at 83.

And their efforts to grapple with the United States' showing regarding the ATS and its extraterritorial scope as to the alleged actions of the United States through Mr. Abrams are insufficient. In response to that showing, Plaintiffs cite outdated or irrelevant case law. For example, Plaintiffs' heavy reliance on *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), a case involving ATS claims for events in South Africa, is of no moment. *See* Doc. 112, Pls.' Opp'n, at 16, 18-20. That case preceded *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Indeed, *In re South African* rejected the defendants' extraterritoriality argument in large part because of "the inapplicability of the presumption against extraterritorial application of statutes" to the plaintiffs' ATS claims. *In re South African*, 617 F. Supp. 2d at 247. That portion of the opinion is no longer good law. *See Kiobel*, 133 S. Ct. at 1669. And that is the portion that Plaintiffs effectively rely on when they refer to *In re South African*. Similarly, the discussion in *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), regarding extraterritoriality on which Plaintiffs rely, *see* Doc. 112, Pls.' Opp'n, at 18, preceded *Kiobel*. Moreover, both *Marcos* and *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), involved claims against former foreign officials who had committed torture and were enjoying safe haven in the United States. *See Marcos*, 978 F.2d at 496; *Filártiga*, 630 F.2d at 878. Those officials had "become . . . an enemy of all mankind." *Sosa*, 542 U.S. at 732 (quoting *Filártiga*, 630 F.2d at 890). Those cases are readily distinguishable from this one. Plaintiffs make no suggestion, let alone a plausible one, that the United States official whose alleged actions underlie their claims against the United States committed torture.

Furthermore, Plaintiffs' reliance on *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), is misplaced. *See* Doc. 112, Pls.' Opp'n, at 19. That case supports the United States' position—not that of Plaintiffs. In *Simon*, Holocaust survivors from Hungary brought claims under the ATS and under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604-05 (FSIA),

against the Hungarian government and Hungarian companies for events of the Holocaust. *See Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 386 (D.D.C. 2014), *rev'd in part*, 812 F.3d 127. The district court dismissed plaintiffs' ATS claims under *Kiobel* because they did not "touch and concern" the United States with sufficient force to rebut the presumption against extraterritoriality. *See Simon*, 37 F. Supp. 3d at 442-43. The *Simon* plaintiffs did not appeal that ruling. *See* 812 F.3d 127. Accordingly, *Simon* supports the United States' showing that under *Kiobel*, Plaintiffs' claims against it must be dismissed.

Lastly, and contrary to Plaintiffs' suggestion, *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75 (D.D.C. 2014), did not decide whether the plaintiffs' allegations overcame the presumption against extraterritoriality that applies to claims brought under the ATS. Instead, that court granted plaintiffs leave to amend their complaint in light of *Kiobel*. *See id.* at 97 ("For this reason, the Court is of the view that plaintiffs should have the opportunity to file for leave to amend their complaint in light of the intervening change in the law created by *Kiobel*."). Based on a review of the docket in *Doe*, it appears that the plaintiffs did not file an amended complaint within the time prescribed by the court. *See id.* at 106; *id.*, No. 1:07-cv-1022, ECF Nos. 83-87. Accordingly, that lone district court case does not conclusively address the question of whether the claims there "touched and concerned" the United States with sufficient force to rebut the presumption against extraterritoriality. In sum, none of the cases Plaintiffs cite rebuts the United States' showing that neither the TVPA nor the ATS provides jurisdiction for Plaintiffs' claims against it. This Court should dismiss those claims.

* * * *

b. Saleh v. Bush

On February 10, 2017, the U.S. Court of Appeals for the Ninth Circuit filed its opinion in *Saleh v. Bush*, No. 15-15098. The Court of Appeals affirmed the district court's dismissal of an action brought against former U.S. government officials alleging that the war against Iraq during the administration of President George W. Bush was in violation of the Alien Tort Statute. Excerpts follow from the court's opinion (with most footnotes omitted).

_____

* * * *

The Alien Tort Statute grants "district courts . . . original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Not every violation of the law of nations gives rise to a claim that can be brought under the ATS. Rather, "any claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that the drafters of the ATS had in mind—"violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004). The set of "ATS torts"—violations of norms of international law giving rise to claims cognizable under the ATS—is, therefore, not frozen in time, but the Supreme Court has instructed us to be wary of adding to

that set. See *id*. at 729 ("[T]he door to further independent judicial recognition of actionable international norms . . . is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."). Perhaps not surprisingly, only a few new ATS torts have been recognized by federal appellate courts since Sosa was decided. See, *e.g.*, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) (holding that a violation of the "prohibition against slavery" gives rise to a claim under the ATS); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009) (concluding that a violation of the "prohibition . . . against nonconsensual human medical experimentation" is an ATS tort).

Plaintiff asks us to recognize a violation of the norm against aggression as an ATS tort. We need not decide that issue. Assuming, without deciding, that engaging in aggression constitutes an ATS tort, Plaintiff's claims against Defendants nonetheless fail, because Congress has granted Defendants official immunity from those claims. The only proper defendant in this case is therefore the United States, and Plaintiff's claims against the United States are barred because Plaintiff failed to exhaust administrative remedies as required by the FTCA.

We first address the question whether Defendants are entitled to immunity under the terms of the Westfall Act. We then address Plaintiff's argument that, even if the Westfall Act purports to confer immunity on Defendants, immunity cannot attach because Plaintiff has alleged that Defendants violated a *jus cogens* norm of international law.

A. Defendants' Official Immunity Under the Westfall Act

"The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the 'King can do no wrong'—did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "[T]he scope of absolute official immunity afforded federal employees is a matter of federal law, to be formulated by the courts in the absence of legislative action by Congress." *Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (internal quotation marks omitted), *superseded on other grounds by* Pub. L. No. 100-694, 102 Stat. 4563 (1988), codified at 28 U.S.C. § 2679(d). "The purpose of such official immunity is not to protect an erring official, but to insulate the decision-making process from the harassment of prospective litigation." *Id.*

The Westfall Act, which was enacted in response to the Supreme Court's decision in *Westfall*, "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). The immunity extends to both "negligent" and "wrongful" "act[s] or omission[s] of any employee . . . acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). The Act does not set out a test to determine whether an employee was "acting within the scope of his office or employment"; rather, Congress intended that courts would apply "the principles of *respondeat superior* of the state in which the alleged tort occurred" in analyzing the scope-of-employment issue. *Pelletier v. Fed. Home Loan Bank of S.F.*, 968 F.2d 865, 876 (9th Cir. 1992). The same analysis was employed before passage of the Westfall Act to determine whether the United States could be liable for an employee's torts under the FTCA. *Id*. at 875–76.

The Westfall Act provides a procedure by which the federal government determines whether an employee is entitled to immunity. When a current or former federal employee is sued and the employee believes that he is entitled to official immunity, he is instructed to "deliver . . . all process served upon him . . . to his immediate supervisor" or other designated official, who

then "furnish[es] copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency." 28 U.S.C. § 2679(c). The Attorney General then determines whether "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Id.* § 2679(d)(1). If so, the Attorney General issues a "scope certification," which "transforms an action against an individual federal employee into one against the United States." *Hui v. Castaneda*, 559 U.S. 799, 810 (2010). The "United States shall be substituted as the party defendant," 28 U.S.C. § 2679(d)(1), and the employee is released from any liability: "The remedy against the United States . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." Id. § 2679(b)(1).

The Westfall Act does not provide immunity to an official from a suit "brought for a violation of the Constitution of the United States." Id. § 2679(b)(2)(A). That preserves claims against federal officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Hui*, 559 U.S. at 807. The Act also does not provide immunity from a suit "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). Neither exception applies here.

But Plaintiff argues that Defendants' actions were not taken within the scope of their employment and that, therefore, they are not entitled to immunity under the Westfall Act in the first place. Plaintiff's argument embraces two distinct theories. The first theory is that Defendants in this case acted outside the scope of their employment because they (1) started planning the attack on Iraq before they ever took office, (2) attacked Iraq out of personal motives, and (3) were not employed to instigate an unlawful war. The second theory is that the scope-of-employment inquiry under the Westfall Act must be conducted with an eye toward the United States' treaty obligations. That is, the statute should not be construed to allow an act to be deemed "official" when the United States has entered into treaties condemning that same act. We will address those two theories in turn, and we will then address Plaintiff's challenge to the district court's denial of her request for an evidentiary hearing concerning the scope certification.

1. The Scope-of-Employment Test

* * * *

Plaintiff claims that Defendants (particularly Wolfowitz and Rumsfeld) were not acting within the scope of their employment in carrying out the Iraq War because they started planning the war before taking office. There are at least two problems with this argument. First, the alleged tortious acts of aggression—the invasion of Iraq—took place after Defendants occupied public office, and what took place in the late 1990s was not planning, but only advocacy. During most of that time, neither Wolfowitz nor Rumsfeld could have known that he would soon be in a position to help implement his policy preferences. Second, pre-employment statements of intent or belief do not take the later acts of public officials outside the scope of their employment. …

* * * *

In summary, reading the Westfall Act in a straightforward manner and applying District of Columbia respondeat superior law to the facts alleged in the operative complaint, we hold that Defendants' alleged actions fell within the scope of their employment.

2. Construing the Westfall Act With an Eye Toward Treaty Obligations

Plaintiff next argues that the Westfall Act should not be interpreted so as to regard as "official" an act condemned by treaty. Plaintiff cites as support for this proposition the United Kingdom case of *Regina v. Bartle & the Commissioner of Police for the Metropolis & Others ex parte Pinochet* (No. 3), [2000] 1 A.C. 147 (H.L.) (appeal taken from Q.B. Div'l Ct.) (U.K.), *reprinted in* 38 I.L.M. 581 (1999), in which the House of Lords ruled that former Chilean leader Augusto Pinochet was not entitled to official immunity for the role that he played in ordering acts of torture and other violations of international law. Many of the Law Lords reasoned that Pinochet's acts could not be considered official because the Convention Against Torture[7] forbade such acts, and Chile was a party to that treaty. 38 I.L.M. at 595 (opinion of Lord Browne-Wilkinson); *id*. at 626–27 (opinion of Lord Hope); *id*. at 638–39 (opinion of Lord Hutton); *id*. at 642–43 (opinion of Lord Saville). The United States has signed several treaties and other international agreements condemning aggressive war, and Plaintiff argues that interpreting the Westfall Act to allow for immunity in this case would conflict with those agreements.

This argument suffers from at least two fatal flaws. First, the equivalent of the "scope of employment" test in the Pinochet case was a creature of international law, not a test set out by a domestic statute. The Law Lords were tasked with determining whether Pinochet's actions could be considered "official" as a matter of international law. The effect of a treaty on that international-law analysis has little bearing on that same treaty's effect on the scope-of-employment analysis under domestic law.

Second, although we have suggested that ambiguous statutes should be interpreted to avoid conflicts even with non-self-executing treaties, *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001), the Westfall Act is not, in any relevant way, ambiguous. With the Westfall Act—which was enacted after the passage of each of the treaties and agreements to which Plaintiff cites—Congress clearly intended to grant federal officers immunity to the same extent that the United States would have been liable for those employees' tortious acts under the FTCA (subject to exceptions that are not relevant to today's analysis). *Pelletier*, 968 F.2d at 876. When the Westfall Act was passed, it was clear that this immunity covered even heinous acts. See, *e.g.*, *Hoston v. Silbert*, 681 F.2d 876, 877–80 (D.C. Cir. 1982) (per curiam) (holding that United States Marshals were acting in the scope of their employment when they allegedly beat an unarmed, shackled prisoner and left him to die in a holding cell).

In short, the treaties and charters cited by Plaintiff do not alter our conclusion that the Westfall Act, by its plain terms, immunizes Defendants from suit.

* * * *

B. Jus Cogens Violations and Domestic Official Immunity

Finally, Plaintiff argues that Defendants cannot be immune under the Westfall Act because she alleges violations of a *jus cogens* norm of international law. "[A] *jus cogens* norm, also known as a 'peremptory norm' of international law, 'is a norm accepted and recognized by

[7] United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" *Siderman de Blake v. Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332). "Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent." *Id*. at 715. "Because *jus cogens* norms do not depend solely on the consent of states for their binding force, they enjoy the highest status within international law." *Id*. (internal quotation marks omitted). "International law does not recognize an act that violates *jus cogens* as a sovereign act." *Id*. at 718.

Plaintiff contends that Congress simply cannot immunize a federal official from liability for a *jus cogens* violation. In effect, Plaintiff argues that (1) there is a *jus cogens* norm prohibiting the provision of immunity to officials alleged to have committed *jus cogens* violations and, (2) insofar as the Westfall Act violates that norm, it is invalid. The argument is premised on the idea that "[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act," so that an official who is alleged to have engaged in such an act cannot cloak himself in the immunity of the sovereign. *Siderman de Blake*, 965 F.2d at 718.

We assume, without deciding, that the prohibition against aggression is a *jus cogens* norm. But even assuming that the prohibition against aggression is a *jus cogens* norm, Plaintiff's argument that Congress cannot provide immunity to federal officers in courts of the United States for violations of that norm is in serious tension with our case law. In *Siderman de Blake*, we held that Congress could grant a foreign government immunity from suit for alleged violations of the *jus cogens* norm against torture. *Id*. at 718–19. After recognizing that immunity might not be available as a matter of customary international law, we noted that we were dealing "not only with customary international law, but with an affirmative Act of Congress"—in that case, the Foreign Sovereign Immunities Act. *Id*. at 718.

Siderman de Blake dealt with foreign sovereign immunity, whereas this case concerns the official immunity of domestic officers. But, if anything, that difference cuts against Plaintiff. The immunity of foreign officials in our courts flows from different considerations than does the immunity of domestic officials. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.5 (D.C. Cir. 1985); accord *Universal Consol. Cos. v. Bank of China*, 35 F.3d 243, 245 (6th Cir. 1994) ("[D]omestic sovereign immunity and foreign sovereign immunity are two separate concepts, the first based in constitutional law and the second in customary international law."). Given those different origins, it should be easier for the violation of a *jus cogens* norm to override foreign sovereign immunity than domestic official immunity. Therefore, our holding in *Siderman de Blake*—that Congress can provide immunity to a foreign government for its *jus cogens* violations, even when such immunity is inconsistent with principles of international law—compels the conclusion that Congress also can provide immunity for federal officers for *jus cogens* violations.

* * * *

c. Jesner v. Arab Bank

On June 27, 2017, the United States filed a brief in the U.S. Supreme Court as *amicus curiae* supporting neither party in *Jesner v. Arab Bank*, No. 16-499. The question presented to the Supreme Court was whether a corporation can be a defendant in an

action under the ATS. Petitioners in the case are victims of terrorism in Israel, Gaza, and the West Bank. Respondent is a multinational bank, which petitioners alleged financed and facilitated terrorist attacks. The district court dismissed the case based on the 2010 decision of the U.S. Court of Appeals for the Second Circuit in *Kiobel*, categorically precluding claims against corporations under the ATS. But, as discussed *supra*, the Supreme Court later decided *Kiobel* without reaching the issue of whether a corporation can be a defendant under the ATS. The court of appeals affirmed the dismissal in *Jesner* based upon circuit precedent and denied rehearing en banc. Excerpts follow (with footnote omitted) from the brief of the United States before the U.S. Supreme Court, which argues that a corporation can be a defendant in an action under the ATS. The U.S. brief also urges that the Supreme Court remand to the court of appeals to address extraterritoriality and other threshold issues.[***]

* * * *

Enacted by the First Congress in 1789, the Alien Tort Statute, 28 U.S.C. 1350, grants federal district courts "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." See Act of Sept. 24, 1789 (1789 Judiciary Act), ch. 20, § 9, 1 Stat. 77 (providing that federal district courts "shall * * * have cognizance * * * of all causes where an alien sues for a tort only in violation of the law of nations"). In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court construed the ATS to permit district courts, in appropriate circumstances, to "recognize private claims under federal common law" for the violation of sufficiently universal and specific international-law standards of conduct. *Id.* at 732. Claims under federal common law traditionally include claims against corporations, and respondent's corporate status is therefore not a basis for dismissing petitioners' claims here. Those claims, however, may be subject to dismissal on remand, in whole or in part, on the alternative ground that they fail to satisfy the extraterritoriality standard identified by this Court in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

I. A CORPORATION CAN BE A DEFENDANT IN A FEDERAL COMMON-LAW ACTION UNDER THE ALIEN TORT STATUTE FOR THE VIOLATION OF A WELL-ESTABLISHED INTERNATIONAL-LAW NORM

The ATS permits a federal district court, in appropriate circumstances, to hear a "civil action" for a "tort * * * in violation of the law of nations." 28 U.S.C. 1350. A corporation is capable of being named as a defendant in a common-law "civil action," and such an action may involve a "tort," including a "tort * * * in violation of the law of nations" committed by the corporation or its agent. A corporation can therefore be a proper defendant in a civil action based on an otherwise-valid claim under the ATS.

A. A Federal Common-Law "Civil Action" May Name A Corporation As A Defendant

A "civil action" under the ATS, 28 U.S.C. 1350, arises under federal common law. Since the time of the ATS's enactment, the common law has authorized actions against corporations.

[***] Editor's note: The Supreme Court decided the case on April 24, 2018, affirming the decision of the Court of Appeals. The Supreme Court's opinion will be discussed in *Digest 2018*.

1. A claim under the ATS is a "cause of action under U.S. law to enforce a norm of international law." *Kiobel*, 133 S. Ct. at 1666. The task of "defining a cause of action" includes, *inter alia*, "specifying who may be liable," *id.* at 1665—*i.e.*, the set of permissible defendants. See, *e.g.*, *United States* v. *Bormes*, 568 U.S. 6, 15 (2012) (describing definition of the defendant class as part of the statute's "remedial scheme").

For some types of actions based on international-law violations, Congress has directly spoken to that question. The Torture Victim Protection Act of 1991 allows damages suits for certain acts of torture and extrajudicial killing only against an "individual"—*i.e.*, a natural person. Pub. L. No. 102-256, 106 Stat. 73; see *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 451-452 (2012); see also *Kiobel*, 133 S. Ct. at 1665.

The text of the ATS, in contrast, "does not distinguish among classes of defendants." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). Rather, in enacting the ATS, the First Congress understood that "the common law would provide a cause of action" in appropriate cases. *Sosa*, 542 U.S. at 724, 732; see *Kiobel*, 133 S. Ct. at 1663.

2. It has long been "unquestionable" under domestic law that corporations are "deemed persons" for "civil purposes" and can be held civilly liable. *United States* v. *Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); see *Beaston* v. *Farmers' Bank*, 37 U.S. (12 Pet.) 102, 134 (1838). Both at the time of the ATS's enactment and now, corporations have been capable of "suing and being sued." …

As particularly relevant here, corporations have long been capable of being sued in tort. "At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety." *Philadelphia, Wilmington, & Balt. R.R.* v. *Quigley*, 62 U.S. (21 How.) 202, 210 (1859); see *Chestnut Hill & Spring House Tpk. Co.* v. *Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) ("[F]rom the earliest times to the present, corporations have been held liable for torts."). In 1774, for example, Lord Mansfield's opinion for the Court of King's Bench held that a corporation could be held liable in damages for failing to repair a creek that its actions had rendered unnavigable. See *Mayor of Lynn* v. *Turner*, (1774) 98 Eng. Rep. 980. Early American courts followed suit. See, *e.g.*, *Chestnut Hill*, 4 Serg. & Rawle at 17; *Riddle* v. *Proprietors of Locks & Canals on Merrimack River*, 7 Mass. (6 Tyng) 168 (1810); *Gray* v. *Portland Bank*, 3 Mass. (2 Tyng) 363 (1807); *Townsend* v. *Susquehannah Tpk. Road*, 6 Johns. 90 (N.Y. Sup. Ct. 1810).

3. A rule excluding corporations as defendants in actions under the ATS would not only be inconsistent with the common law, but would also be in considerable tension with the understanding that corporations can be party to such actions as plaintiffs. In 1795, Attorney General William Bradford addressed a situation in which "U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone." *Kiobel*, 133 S. Ct. at 1667. "In response to a protest from the British Ambassador," Bradford expressed the view that "'there can be no doubt that *the company* or individuals who have been injured * * * have a remedy by a civil suit' " under the ATS. *Id.* at 1668 (quoting 1 Op. Att'y Gen. 57, 59 (1795)) (emphasis added); see *Sosa*, 542 U.S. at 721.

If the set of potential plaintiffs under the ATS— which is textually limited to "alien[s]," 1789 Judiciary Act § 9, 1 Stat. 77—was understood to include corporations, then the set of potential defendants—which is not textually limited at all, see *Argentine Republic*, 488 U.S. at 438—would naturally have been as well. Indeed, a later Attorney General, opining on a boundary dispute over the diversion of waters from the Rio Grande, stated that citizens of

Mexico would have a claim under the ATS against the "Irrigation Company." 26 Op. Att'y Gen. 250, 251 (1907).

B. A "Civil Action" Against A Corporation Under The Alien Tort Statute May Be Premised On A "Tort In Violation Of The Law Of Nations"

A "tort * * * in violation of the law of nations," 28 U.S.C. 1350, can provide a valid basis for an action against a corporate defendant under the ATS. Such a tort is a type of injury or wrong. The phrase does not impose a limitation on who may be held responsible for the wrongdoing. And a common-law claim against a corporation may involve such a tort.

1. Both in 1789 and now, the term "tort" has been defined as an "injury or wrong." …

Under *Sosa*, a tort is "in violation of the law of nations," 28 U.S.C. 1350, for purposes of the ATS when a certain kind of international-law "norm"—*i.e.*, a particular kind of "standard for right or wrong behavior," *Black's Law Dictionary* 1223—is transgressed. See *Sosa*, 542 U.S. at 725, 728-732, 738; see also *Kiobel*, 133 S. Ct. at 1664-1666, 1668. *Sosa* explained that, in enacting the ATS, Congress "understood that the district courts would recognize * * * torts corresponding to * * * three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 724; see *id.* at 715, 720. *Sosa* further explained that a modern court might construe the relevant "law of nations," 28 U.S.C. 1350, also to include a standard of conduct defined by "present-day" international law. *Sosa*, 542 U.S. at 725. Any such standard, however, must be a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th- century paradigms." *Ibid.*

2. Both corporations and their agents are capable of committing a "tort * * * in violation of the law of nations," 28 U.S.C. 1350. A tort by either type of actor could thus support a federal common-law cause of action against a corporation under the ATS.

No principle of international law precludes the existence of a norm for the conduct of private actors that applies to the conduct of corporations. "In the past it was sometimes assumed that individuals and corporations, companies or other juridical persons created by the laws of a state, were not persons under (or subjects of) international law. In principle, however, individuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement, and increasingly individuals and private entities have been accorded such aspects of personality in varying measures." 1 Restatement (Third) of Foreign Relations Law pt. II intro. note (1986) (footnote omitted). A U.S. Military Tribunal at Nuremberg, for example, observed that certain action by "private individuals, including juristic persons," would be "in violation of international law." 10 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals: The I.G. Farben and Krupp Trials* 44 (1949). Other international-law norms likewise neither require nor necessarily contemplate a distinction between natural and juridical actors. See, *e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), art. 1, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 1, 19 (1988), 1465 U.N.T.S. 85, 113, 114 (defining "torture" to include "*any* act by which severe pain or suffering * * * is intentionally inflicted on a person" for certain reasons, "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity") (emphasis added); Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (defining genocide to include "any of the following acts" committed with intent to destroy a group, without regard to the type of perpetrator); Geneva Convention Relative to the Treatment of

Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 (Common Article 3) (prohibiting "the following acts," without regard to the type of perpetrator).

A distinction between natural and juridical actors for purposes of common-law actions under the ATS would also be at odds with the longstanding treatment of common-law actions based on piracy, "a violation of the law of nations familiar to the Congress that enacted the ATS," *Kiobel*, 133 S. Ct. at 1667. It was historically "not an uncommon course in the admiralty, acting under the law of nations," including in piracy cases, "to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof." *Harmony* v. *United States* (*The Malek Adhel*), 43 U.S. (2 How.) 210, 233 (1844). "[T]his [wa]s done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *Ibid.* The principle that a juridical person (a ship) may be held liable for piracy in violation of the law of nations, and the logic underlying that principle, cannot readily be squared with a categorical bar against juridical corporate defendants under the ATS.

That is particularly so because vicarious liability for corporations is itself a well-pedigreed feature of the common law. As Blackstone explained, "the master is answerable for the act of his servant, if done by his command, either expressly given, or implied." Blackstone 417; see Tucker 429-430 (same). That "maxim of '*respondeat superior* ' " has long applied to corporate and noncorporate defendants alike. *Philadelphia & Reading R.R.* v. *Derby*, 55 U.S. (14 How.) 468, 487 (1853); see *id.* at 485-487 (applying principle to railroad company).

Accordingly, even if a particular norm were not understood to apply directly to the actions of a corporation as such, a corporation could still be named as a defendant in a common-law action based on a violation of that norm by a natural person acting as the corporation's agent or employee.

3. The history of the ATS reinforces that it permits courts, in appropriate cases, to recognize common-law claims against corporations for law-of-nations violations.

The First Congress enacted the ATS following the well-documented inability of the Continental Congress to provide redress for law-of-nations and treaty violations for which the United States might be held accountable. See *Sosa*, 542 U.S. at 715-717. That deficiency was exposed by events like the "so-called Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Leg[ation] in Philadelphia." *Id.* at 716-717; see William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed In Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-492 & n.136 (1986) (Casto); see also *Kiobel*, 133 S. Ct. 1666. "The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided." *Kiobel*, 133 S. Ct. 1666.

A "reprise of the Marbois affair," *Sosa*, 542 U.S. at 717, occurred in 1787, during the Constitutional Convention, when a New York City constable entered the residence of a Dutch diplomat with a warrant for the arrest of one of his domestic servants. Casto 494; see *Kiobel*, 133 S. Ct. at 1666-1667. Again, the "national government was powerless to act." Casto 494. The United States was "embarrassed by its potential inability to provide judicial relief to foreign officials injured" within its borders. *Kiobel*, 133 S. Ct. at 1668. "Such offenses against ambassadors violated the law of nations, 'and if not adequately redressed could rise to an issue of war.' " *Ibid.* (quoting *Sosa*, 542 U.S. at 715). The First Congress addressed that concern both by criminalizing certain law-of-nations violations (piracy, violation of safe conducts, and

infringements on the rights of ambassadors), see Act of Apr. 30, 1790 (1790 Act), ch. 9, §§ 8, 28, 1 Stat. 113-114, 118, and by providing jurisdiction under the ATS over actions by aliens seeking civil remedies. Not only a public remedy, but also "a private remedy," was "thought necessary for diplomatic offenses under the law of nations," *Sosa*, 542 U.S. at 724, and "[t]he ATS ensured that the United States could provide a forum for adjudicating such incidents," *Kiobel*, 133 S. Ct. at 1668.

In undertaking to provide that forum, Congress did not have a good reason to distinguish between foreign entanglements for which natural persons were responsible and foreign entanglements for which organizations of natural persons, such as corporations, were responsible. Nor did Congress have a good reason to allow a suit to proceed only against a potentially judgment-proof individual actor while barring recovery against the corporation on whose behalf he was acting. Take, for example, the 1787 incident involving the Dutch diplomat. If entry were made into his residence by the agent of a private process-service company for the purpose of serving a summons, the international affront could perhaps best be vindicated (and compensation paid) through a private suit against that company. Cf. 1790 Act §§ 25-26, 1 Stat. 117-118 (providing that "any writ or process" that is "sued forth or prosecuted by any person" against an ambassador or "domestic servant" of an ambassador shall be punished criminally and would constitute a violation of "the laws of nations").

C. A Common-Law Action Against A Corporation Under The Alien Tort Statute For Violation Of A Well-Established Norm Is Consistent With International Law

The ATS permits a common-law "civil action" against a corporate defendant for a qualifying "tort * * * in violation of the law of nations," 28 U.S.C. 1350, irrespective of whether international law would itself provide a remedy against a corporation in such circumstances. An individual nation's recognition of such a claim accords with international law, which establishes substantive standards of conduct but generally leaves each nation with substantial discretion as to the means of enforcement within its own jurisdiction. See *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) ("[I]nternational law defines norms and determines their scope, but delegates to domestic law the task of determining the civil consequences of any given violation of these norms."), cert. denied, 136 S. Ct. 798 (2016); *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring only in the judgment) ("[I]nternational law says little or nothing about how those norms should be enforced. It leaves the manner of enforcement * * * almost entirely to individual nations."), aff'd on other grounds, 133 S. Ct. 1659 (2013); Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) ("International law itself * * * does not require any particular reaction to violations of law.")

1. In creating its corporate-defendant bar, the court of appeals construed the ATS to "leave[] the question of the nature and scope of liability—who is liable for what—to customary international law." *Kiobel*, 621 F.3d at 122. It thus surveyed whether "corporate liability for a 'violation of the law of nations' is a norm 'accepted by the civilized world and defined with a specificity.' " *Id.* at 130 (citations omitted). That inquiry was misconceived.

The phrase "of the law of nations" in the ATS modifies "violation," not "civil action." 28 U.S.C. 1350. The "norm" analysis under *Sosa* thus focuses on whether the international community specifically and universally condemns the underlying *conduct*, not whether the international community specifically and universally imposes civil *liability*. See, *e.g.*, *Sosa*, 542 U.S. at 738 (concluding that particular "*illegal detention* * * * violate[d] no norm of customary international law") (emphasis added); see also, *e.g.*, *Kiobel*, 133 S. Ct. at 1665

(describing claims under the ATS as premised on "alleged violations of international law norms"); *Sosa*, 542 U.S. at 732 (favorably citing description of ATS as limited to "heinous *actions*" that "violate[] definable, universal, and obligatory norms ") (citation omitted; emphasis added). "The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law." *Kiobel*, 133 S. Ct. at 1666. It is "instead whether the court has authority to recognize a cause of action *under U.S. law* to enforce a norm of international law." *Ibid.* (emphasis added); see, *e.g.*, *id.* at 1663 (citing *Sosa*, 542 U.S. at 714, 724).

The court of appeals' confusion stemmed in large part from its misreading of footnote 20 in the *Sosa* opinion. See, *e.g.*, *Kiobel*, 621 F.3d at 127; see also Pet. App. 52a-54a (Pooler, J., dissenting from the denial of rehearing en banc). In that footnote, this Court explained that a "consideration" that is "related" to "the determination whether a norm is sufficiently definite to support a cause of action" is "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 & n.20. That footnote references international law's state-action doctrine, under which "the distinction between conduct that does and conduct that does not violate the law of nations can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a State." *Kiobel*, 621 F.3d at 177 (Leval, J., concurring only in the judgment). Under the Torture Convention, for example, conduct qualifies as "torture," and thus violates the international-law norm against "torture," only when done "by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Torture Convention art. 1, S. Treaty Doc. No. 20, at 19; 1465 U.N.T.S. 114; compare, *e.g.*, Genocide Convention art. II, 102 Stat. 3045, 78 U.N.T.S. 280 (no requirement of state involvement); Common Article 3, 6 U.S.T. 3318, 75 U.N.T.S. 136 (same). Such a distinction between state and private action in international law can be analogized to the similar distinction in domestic constitutional law, under which a private party is subject to constitutional norms only when it can "fairly be said to be a state actor," *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The state-action footnote in *Sosa* does not support transposition of the *Sosa* requirements of specificity and universality from the question of conduct to the question of corporate liability. Although the footnote uses the phrase "scope of liability" to describe the state-action inquiry, it subsequently clarifies through examples that the inquiry turns on the existence of a "sufficient consensus" that particular *conduct—e.g.*, "torture" or "genocide"—"violates international law" when undertaken "by private actors." *Sosa*, 542 U.S. at 732 n.20; see *ibid.* (discussing *Kadic* v. *Karadžić*, 70 F.3d 232, 239-241 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), and *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985)). Reliance on the footnote to support a distinction between natural and corporate defendants is particularly misplaced in light of its reference to "a private actor *such as a corporation or individual*," which expressly affiliates corporations and natural persons for ATS purposes. *Ibid.* (emphasis added).

Respondent defends the court of appeals' approach on the alternative ground that "[u]nder normal choice-of-law rules, the types of defendants who may be held liable for violating a legal rule is a question of substance, not procedure." Br. in Opp. 29 (emphasis omitted). But the distinction drawn by the ATS is not between substance and procedure; it is between the "civil action" (which is defined by federal common law) and the underlying "violation of the law of nations" (which is defined by international law). 28 U.S.C. 1350; see

Kiobel, 133 S. Ct. at 1665-1666. As this Court has explained, "identifying" an "international law norm[] that [is] specific, universal, and obligatory * * * is only the beginning of defining a cause of action," which encompasses additional decisions such as "specifying who may be liable." *Kiobel*, 133 S. Ct. at 1665 (citations and internal quotation marks omitted). The application of domestic law to those decisions may result in a cause of action either narrower or broader in certain respects than it might be if international law controlled. See *ibid.* It also gives federal courts the tools—and the obligation—to apply uniquely domestic considerations in determining whether a claim against any kind of defendant is warranted in the circumstances of a particular case.

2. Although international law does not control nations' domestic means of enforcing international-law norms within its jurisdiction, it may nevertheless be relevant to enforcement questions. Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (explaining that although "the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders," it is, "of course, true that United States courts apply international law as a part of our own in appropriate circumstances"). There are, for example, internationally accepted rules on jurisdiction and immunities. See, *e.g.*, 1 Restatement (Third) of Foreign Relations Law §§ 421, 423 (1986) (international law on jurisdiction to adjudicate); *id.* §§ 451-456 (international law on foreign sovereign immunity); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), Judgment, I.C.J. 3, 20-21 (Feb. 14) (head-of-state immunity).

International law may also inform a U.S. court's exercise of its domestic common-law authority under the ATS. The limitation of the strict *Sosa* test to the question of the standard of conduct, rather than the question of liability for that conduct, does not prevent federal courts from taking international law into account in the development of federal common law on issues to which international law relates. If, for example, international law were clearly to discountenance the imposition of liability on corporations for violating the law of nations, or a particular norm under the law of nations, federal courts might be well-served by declining to recognize a federal common-law claim against corporations under the ATS, even though common-law claims against corporations have a long historical pedigree. But no such situation is presented here.

The fact that no international tribunal has been created for the purpose of holding corporations civilly liable for violations of international law does not counsel against federal common-law actions against corporations under the ATS. Each international tribunal is specially negotiated, and limitations are placed on the jurisdiction of such tribunals that may be unrelated to whether such limitations are required by or reflective of customary international law. See, *e.g.*, Rome Statute of the International Criminal Court (Rome Treaty), art. 10, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 98 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). That is why, even though no international tribunal has been created for the purpose of holding natural persons civilly liable, it is nevertheless well-accepted that natural persons can be defendants in civil actions under the ATS. See, *e.g.*, *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011) ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the [ATS] could ever be successful, even claims against individuals.").

Limitations on the jurisdiction of international *criminal* tribunals to natural persons (see *Kiobel*, 621 F.3d at 132-137) appear to be based on reasons unique to criminal punishment—*e.g.*, the view under some legal regimes that "criminal intent cannot exist in an artificial entity" or that "criminal punishment does not achieve its principal objectives when it is imposed on an abstract entity." *Kiobel*, 621 F.3d at 167 (Leval, J., concurring only in the judgment) (emphasis omitted). In any event, international tribunals are not intended to be the sole (or even the primary) means of enforcing international-law norms. At least until the twentieth century, domestic law and domestic courts were the primary means of implementing customary international law. And, notably, several countries (including the United Kingdom and the Netherlands) that have incorporated the three crimes punishable by the International Criminal Court (genocide, crimes against humanity, and war crimes) into their domestic jurisprudence themselves impose criminal liability on corporations and other legal persons for such offenses. See, *e.g.*, Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law—A Survey of Sixteen Countries—Executive Summary* 13-16, 30 (2006), http://www.biicl.org/files/ 4364_536.pdf.

Furthermore, a number of current international agreements (including some that the United States has ratified) affirmatively require signatory nations to impose liability on corporations for certain actions. See, *e.g.*, United Nations Convention Against Transnational Organized Crime, art. 10(1), *adopted* Nov. 15, 2000, S. Treaty Doc. No. 16, 108th Cong., 2d Sess. 1, 7 (2004), 2225 U.N.T.S. 209, 279; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, *adopted* Nov. 21, 1997, S. Treaty Doc. No. 43, 105th Cong., 2d Sess. 1, 4 (1998), 37 I.L.M. 1, 3. As a noted scholar has explained, "all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages * * * and other remedies such as seizure and forfeiture of assets." M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 379 (2d rev. ed. 1999).

II. THE COURT OF APPEALS SHOULD ADDRESS EXTRATERRITORIALITY AND OTHER THRESHOLD ISSUES DIRECTLY ON REMAND

Although the court of appeals' erroneous application of a corporate-defendant bar requires vacatur of the judgment below, it does not require that petitioners' claims be allowed to proceed in district court. Respondent has raised a number of alternative arguments for dismissing those claims, at least one of which— extraterritoriality—has been fully briefed and presented by both parties for the court of appeals' decision. See, *e.g.*, Br. in Opp. 20-26; p. 4, *supra*. Because petitioners' claims raise serious extraterritoriality questions, and because prompt appellate resolution of those questions would further foreign-policy and judicial-efficiency interests, the court of appeals should address those questions directly upon remand.

A. The Automated Clearance Of Dollar-Denominated Transactions In The United States Would Not Alone Provide A Sufficient Domestic Nexus Under *Kiobel*

1. The "presumption against extraterritoriality" requires courts to construe federal statutes to "have only domestic application," unless Congress has "clearly expressed" a contrary intent. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2097, 2100 (2016). Applying that presumption helps to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664.

In *Kiobel*, this Court held that the "principles underlying the presumption against extraterritoriality * * * constrain courts exercising their power under the ATS." 133 S. Ct. at 1665. The Court emphasized that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do" in recognizing causes of action under federal common law. *Id.* at 1664. The Court explained that concerns about judicial intrusion into the realm of foreign policy "are implicated in any case arising under the ATS," and that courts asked to recognize claims under the ATS should be " 'particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.' " *Id.* at 1664, 1665 (quoting *Sosa*, 542 U.S. at 727).

The Court stated that "even where" claims asserted under the ATS "touch and concern the territory of the United States," they will be actionable only if they "do so with sufficient force to displace the presumption against extraterritorial application" of U.S. law. *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 266-273 (2010)). The requisite claim-specific inquiry necessarily takes place against the backdrop of the ATS's function of providing redress in situations where the international community might consider the United States accountable. See *RJR Nabisco*, 136 S. Ct. at 2101; *Kiobel*, 133 S. Ct. at 1668-1669; *Sosa*, 542 U.S. at 714-718, 722-724 & n.15; pp. 15-17, *supra*.

2. The claims in this case all involve foreign plaintiffs seeking recovery from a foreign defendant based on injuries incurred at the hands of foreign terrorist organizations acting on foreign soil. See Pet. App. 1a, 4a, 9a. The court of appeals viewed the argument for application of U.S. law to those claims as centering on respondent's alleged "clearing of foreign dollar-denominated payments" related to the terrorist activities "through [its] branch in New York." ... Petitioners contend (Pet. 6, 7 n.1) that dollars are "the preferred currency" for terrorist-related payments and that banking standards incentivize the routing of "international U.S. dollar fund transfers" through a bank's U.S. branch or affiliate. See Pet. Br. 5, 8.

In some non-ATS contexts, automated clearance activity in the United States would alone be sufficient to support the application of U.S. law that is not explicitly extraterritorial. For example, the government could potentially rely on such activity as the basis for a criminal indictment or a civil enforcement action. Cf., *e.g.*, *United States* v. *Prevezon Holdings, Ltd.*, No. 13-cv-6326, 2017 WL 1951142, at *1 (S.D.N.Y. May 10, 2017) (civil forfeiture action for laundering proceeds of foreign fraud); *United States* v. *Zarrab*, No. 15-cr-287, 2016 WL 6820737, at *5 (S.D.N.Y. Oct. 17, 2016) (federal prosecution for evading U.S. sanctions against Iran). A domestic statute that focuses, in whole or in part, on foreign misuse of domestic instrumentalities may properly be invoked to defend the integrity of the U.S. financial system. See *RJR Nabisco*, 136 S. Ct. at 2101; cf., *e.g.*, *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796-797 & n.24 (1993) (recognizing antitrust claims arising from foreign conduct that produces a substantial intended effect in the United States). And given "the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government," *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 171 (2004) (parenthetically quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999)), Congress may be presumed not to require as substantial a domestic nexus in a statute enforced by the government as it might require in one enforced through private civil actions. See *RJR Nabisco*, 136 S. Ct. at 2110.

In the context of the ATS, however, the automated domestic clearance of dollar-denominated transactions in isolation does not in itself constitute a sufficient domestic nexus for

recognizing a common-law claim. The "need for judicial caution" about "foreign policy concerns" when "considering which claims c[an] be brought under the ATS" may counsel forbearance even in circumstances where an express statutory cause of action under domestic law, reflecting the considered judgment of Congress and the Executive, might be found applicable. *Kiobel*, 133 S. Ct. at 1664; see *id.* at 1664-1665; see also *Sosa*, 542 U.S. at 727-728. Courts must therefore consider whether, in light of the particularized role of the ATS, a proposed common-law claim exhibits a domestic connection of "sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266-273); see *RJR Nabisco*, 136 S. Ct. at 2101. A foreign actor's preference for dollar-denominated transactions, and the consequent likelihood that a transaction will be automatically routed through a bank's U.S. branch or affiliate, are not generally circumstances for which the international community might validly deem the United States to be responsible. Congress did not intend the ATS to "make the United States a uniquely hospitable forum for the enforcement of international norms." *Kiobel*, 133 S. Ct. at 1668. That limitation is difficult to reconcile with an approach under which a claim under the ATS may be premised on the popularity of the dollar as a currency for remunerating foreign illegal activity. Such an expansive remedial scheme for law-of-nations violations would undermine the ATS's goal of "avoiding diplomatic strife," and instead "could * * * generate[] it." *Id.* at 1669.

3. Although automated clearance activities alone would not support claims under the ATS, petitioners have made other allegations that might affect the extraterritoriality inquiry in this case. They have alleged, for example, that respondent "knowingly laundered" money, using its New York Branch, for an organization in Texas that raised funds within the United States for Hamas. C.A. App. 207-208. It is not clear that such allegations, even in combination with clearance activities, would support any, let alone all, of petitioners' claims seeking recovery for injuries suffered in particular foreign terrorist activity. But particularly because a portion of the record and briefs in this case are under seal, the government is not currently in a position to assess whether, or to what extent, such allegations might provide a sufficient domestic connection for some of petitioners' claims. The court of appeals, however, would be able on remand to review the relevant filings and address that question.

B. Diplomatic And Efficiency Concerns Warrant Direct Consideration Of Threshold Issues By The Court Of Appeals On Remand

Claims by petitioners and others, which have been in litigation for well over a decade, have already caused significant diplomatic tensions. Should respondent, the major financial institution in Jordan, have to stand trial before the remaining threshold issues are decided by the court of appeals, the adverse foreign-policy consequences would be considerable.

1. The underlying actions are subject to an order, entered when they were consolidated with other actions for pretrial purposes, that was imposed as a sanction for respondent's insistence on adhering to foreign bank-secrecy laws by withholding certain documents from discovery. See *Linde* v. *Arab Bank, PLC*, 269 F.R.D. 186 (E.D.N.Y. 2010), appeal dismissed, 706 F.3d 92 (2d Cir. 2013), cert. denied, 134 S. Ct. 2869 (2014). Under that order, the jury would be instructed that it would be free to infer that respondent provided financial services to terrorist organizations and that it did so "knowingly and purposefully." *Id.* at 205. The order also precludes respondent from "making any argument or offering any evidence regarding its state of mind or any other issue that would find proof or refutation in withheld documents." *Ibid.* The sanctions order has previously been the subject of an unsuccessful petition for a writ of certiorari, which followed the court of appeals' denial of respondent's request for mandamus relief from the

order in a related case involving statutory claims by U.S. citizens under the Antiterrorism Act of 1990, 18 U.S.C. 2331 *et seq.*, that are similar in substance to petitioners' claims here. See *Arab Bank PLC* v. *Linde*, 134 S. Ct. 2869 (2014). At the Court's invitation, the United States filed a certiorari-stage amicus brief in that matter. The United States recommended that, notwithstanding the "several significant" errors committed by the lower courts with respect to the order, the Court should decline to review it in that posture at that time. U.S. Amicus Br. (U.S. *Linde* Br.) at 8, *Linde*, *supra* (No. 12-1485). The United States explained, however, that Jordan viewed the order "as a 'direct affront' to its sovereignty." *Id.* at 19 (quoting Hashemite Kingdom of Jordan Amicus Br. at 14, *Linde*, *supra*) (No. 12-1485)). And it further explained that the order "could undermine the United States' vital interest in maintaining close cooperative relationships with Jordan and other key regional partners in the fight against terrorism." *Ibid.*

2. Since that filing, the United States' cooperation with Jordan has strengthened. According to the Department of State, Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria (ISIS). The Department of State has informed this Office that, in furtherance of that campaign, Jordan regularly conducts air missions over Iraq and Syria, cooperates with measures to thwart the financing of terrorist activities, and plays a critical role in international efforts to stem the flow of foreign terrorist fighters. Jordan is also an important partner in advancing a range of broad U.S. interests in the region, including efforts to forge a lasting peace between Israelis and Palestinians. The President has recently reiterated Jordan's longstanding status as "a valued partner, an advocate for the values of civilization, and a source of stability and hope." Remarks by President Trump and His Majesty King Abdullah II of Jordan in Joint Press Conference (Apr. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/04/05/ remarks-president-trump-and-his-majesty-king-abdullah- ii-jordan-joint.

The sanctions order has already affected litigation of the U.S. citizens' related statutory claims, see Br. in Opp. 25-26 & n.5, and its effect here could be even greater. There are "roughly 6000" alien petitioners in this case, Pet. ii, whose combined damages claims threaten to have an overwhelming impact on respondent's financial condition. Because respondent is "Jordan's leading financial institution," "plays a significant role in the Jordanian and surrounding regional economies," and is "a constructive partner with the United States in working to prevent terrorist financing," U.S. *Linde* Br. 1, 20 (citation and internal quotation marks omitted), unwarranted continuation of petitioners' claims would undercut U.S. foreign policy interests in both direct and indirect ways. Cf. *Sosa*, 542 U.S. at 733 n.21 (noting "a strong argument that federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy" in ATS contexts).

Such effects could be avoided by ensuring appellate consideration of potentially dispositive issues, including the viability of petitioners' claims under *Kiobel*, at the earliest possible opportunity. Remanding the claims for a potential trial, at which respondent's chances of prevailing would be impeded by the sanctions order, would prolong the uncertainty and attendant diplomatic tensions, and could therefore produce significant and undesirable consequences even if the court of appeals were ultimately to reverse on extraterritoriality grounds. Given that both parties viewed the extraterritoriality issue to have been properly before the court of appeals for decision, sound considerations of diplomatic comity and judicial economy favor its resolution by that court at the first possible opportunity following a remand.

* * * *

d. Warfaa v. Ali

As discussed in *Digest 2016* at 162-63, the United States did not express a view on defendant's entitlement to immunity in either the district court or court of appeals in *Warfaa v. Ali*. However, after Ali petitioned for certiorari and Warfaa filed a conditional cross-petition, the Supreme Court asked for the views of the United States. The United States filed its briefs as *amicus curiae* on May 23, 2017, recommending certiorari be denied. The Supreme Court denied certiorari on June 26, 2017. Excerpts follow from the U.S. brief filed in *Warfaa v. Ali*, No. 15-1464.

* * * *

In *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), this Court left open the possibility that ATS claims involving conduct occurring outside the United States may "touch and concern the territory of the United States * * * with sufficient force" to "displace the presumption against extraterritorial application." *Id.* at 1669. The court of appeals found that cross-petitioner Warfaa's ATS claims do not satisfy that standard, because they involve conduct in a foreign country by a foreign national. In the court's view, the fact that Ali later moved to this country does not mean that Warfaa's claims sufficiently touch and concern the territory of the United States to displace the presumption against extraterritoriality.

That ruling does not warrant further review for several reasons. The cross-petition is conditional on a grant of certiorari in No. 15-1345, and the United States is filing, simultaneously with this brief, an amicus brief at the Court's invitation recommending that the petition in No. 15-1345 be denied. In addition, the decision below does not conflict with any decision of this Court or of any other court of appeals, and this case would be a poor vehicle for consideration of the question presented in any event. In the view of the United States, the cross-petition should be denied.

A. The Cross-Petition Is Conditional In Nature And Is Not The Subject Of Any Conflict In Authority

1. As a threshold matter, the cross-petition is expressly "conditional in nature," and Warfaa seeks this Court's review of the question presented "only if the Court is disposed to grant the initial petition" in No. 15-1345. Cross-Pet. 1. For the reasons set forth in the brief filed by the United States, the Court should deny that petition. Accordingly, the Court should deny the cross-petition as well.

2. Contrary to Warfaa's assertion (Cross-Pet. 11-21), the decision below does not conflict with any decision of this Court or of another court of appeals. First, Warfaa incorrectly contends (Cross-Pet. 11-15) that the decision below conflicts with this Court's decision in *Kiobel* and is in tension with the decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Kiobel* did indicate that a claim involving foreign conduct could "touch and concern the territory of the United States" with "sufficient force" to displace the presumption against extraterritoriality. 133 S. Ct. at 1669. But the Court did not elaborate on that possibility in concluding that no cause of action was available under federal common law in the circumstances of that case, which involved foreign corporations having a U.S. presence. See *id.* at 1662, 1664, 1669. The court of appeals' decision here, in a case involving an individual defendant and conduct abroad, is not inconsistent with anything in the opinion in *Kiobel*. And *Sosa* resolved a question about what *categories* of

common-law claims may be asserted under the ATS, not any question about whether and under what circumstances the presumption against extraterritoriality may bar a claim of the requisite type. See *Sosa*, 542 U.S. at 732; see also *Kiobel*, 133 S. Ct. at 1666-1668 (stating that the "principal offenses against the law of nations" recognized when the ATS was enacted could occur entirely within the United States or "beyond the territorial jurisdiction" of any country). Accordingly, nothing in the decision below is inconsistent with *Sosa* either.

Second, Warfaa incorrectly contends (Cross-Pet. 15-21) that the decision below conflicts with *Mujica* v. *AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014), cert. denied, 136 S. Ct. 690 (2015), and *Doe* v. *Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), cert. denied, 136 S. Ct. 1168 (2016). Those cases differ from this one in a number of important respects. In *Mujica*, Colombian citizens brought suit under the ATS against U.S. corporations for alleged complicity in the bombing of a Colombian village. See 771 F.3d at 584. The Ninth Circuit concluded that "the fact that [d]efendants are both U.S. corporations" was "not enough," standing alone, "to establish that the ATS claims here 'touch and concern' the United States with sufficient force." *Id.* at 594; see *ibid.* (explaining that "a defendant's U.S. citizenship or corporate status is one factor that, *in conjunction with other factors*, can establish a sufficient connection between an ATS claim and the territory of the United States") (emphasis added). In *Drummond*, Colombian citizens brought suit under the ATS against a U.S. corporation and its officers for alleged use of paramilitaries in Colombia. See 782 F.3d at 579. The Eleventh Circuit stated that "[a]lthough the U.S. citizenship of Defendants is relevant to our inquiry, this factor is insufficient to permit jurisdiction on its own." *Id.* at 596.

Both *Mujica* and *Drummond* involved corporations or corporate agents as defendants rather than (as here) an individual actor. In both cases the court held that a cause of action was not available under the ATS even though the defendant was a U.S. person at the time of the alleged conduct, and not (as here) a defendant who took up residence in the United States only after the conduct occurred. And neither court accepted the proposition that an action would lie under the ATS based solely on a defendant's U.S. citizenship, and not (as here) U.S. residency.

B. The Cross-Petition Would Be A Poor Vehicle For Considering When A Claim Can Displace The Presumption Against Extraterritoriality Under The ATS

1. In urging the Court to grant certiorari, Warfaa relies on the Second Circuit's decision in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), contending that recognition of a cause of action would advance the goal of preventing the United States from becoming (or being seen as) a safe haven for individuals who commit human rights violations abroad. *Filartiga* involved allegations that a former Paraguayan police inspector had tortured and killed a Paraguayan citizen in Paraguay. When the victim's sister learned that the alleged perpetrator was living in New York, she and her father brought suit, asserting that jurisdiction over their claims was proper under the ATS. See *id.* at 878-879. The district court dismissed the suit, holding that the ATS excludes claims concerning a foreign state's treatment of its own citizens. See *id.* at 880. On appeal, the Second Circuit reversed and remanded for further proceedings. *Filartiga*, 630 F.2d at 889. Its ruling was consistent with the argument, advanced in an amicus brief filed by the United States, that the ATS encompasses claimed violations of human rights norms that are "clearly defined" and the violation of which is "universally condemned," U.S. Amicus Mem. at 23, *Filartiga*, *supra* (No. 79- 6090), and that the failure to recognize a claim for torture and extrajudicial killing "in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights," *id.* at 22-23.

After *Filartiga*, federal courts generally assumed —and, in at least one case, expressly held—that claims asserting violation of certain specifically defined and universally accepted human rights norms could be brought in U.S. courts under the ATS, even if the violation took place in a foreign country. See *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 499-501 (9th Cir. 1992) (holding that action under the ATS was appropriate "even though the actions" of the foreign defendant "which caused" the foreign plaintiff "to be the victim of official torture and murder occurred" in the Philippines), cert. denied, 508 U.S. 972 (1993). But there was uncertainty on the question. Compare *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 788 (D.C. Cir. 1984) (Edwards, J., concurring) (interpreting the ATS to encompass claims concerning "universal crimes" wherever perpetrated), cert. denied, 470 U.S. 1003 (1985), with *id.* at 816 (Bork, J., concurring) (construing the ATS to exclude claims founded on "disputes over international violence occurring abroad").

Congress concluded that the interests of the United States would be served by allowing a private right of action for extraterritorial violations of the norms at issue in *Filartiga*. Accordingly, it enacted an express but carefully circumscribed cause of action, available only against an individual acting under color of foreign law, for acts of "torture" or "extrajudicial killing." TVPA § 2(a), 106 Stat. 73. The TVPA thus provides a statutory basis for claims like the ones in *Filartiga*.

But for claims that fall outside the scope of the TVPA, courts may recognize such claims under the ATS only if they involve the violation of specifically defined and universally accepted human rights norms, see *Sosa*, 542 U.S. at 728, 732-733, and if they have a sufficient connection to the United States to displace the presumption against extraterritoriality, see *Kiobel*, 133 S. Ct. at 1669.

2. In this case, Warfaa attempted to bring claims under the ATS for violation of international-law norms in addition to the norms against torture and extrajudicial killings. As explained above, there is no post-*Kiobel* circuit conflict on whether claims against individual foreign nationals who subsequently came to reside in the United States are cognizable under the ATS. In addition, this case would be a poor vehicle for the Court to address when ATS claims have a sufficient connection to the United States to displace the presumption against extraterritoriality. Some of Warfaa's ATS claims are not cognizable because they have been displaced by the TVPA, and all of his ATS claims arise out of the same set of facts and injuries as his TVPA claims. Because Warfaa has filed only a conditional cross-petition, he is content to proceed in the district court solely on his TVPA claims, which would afford him an adequate remedy for the conduct that he has alleged.

a. Warfaa's amended complaint asserts six claims. It includes two claims alleged to be actionable under both the TVPA and the ATS: attempted extrajudicial killing and torture. See D. Ct. Doc. 89, at 11-18.7 The court of appeals affirmed the district court's determination that Warfaa had adequately pleaded claims against Ali under the TVPA and that those claims could proceed because Ali is not immune from suit. See Pet. App. 40a-42a, 47a-49a, 78a-79a. Because Warfaa may bring those claims under the TVPA, he may not bring them under the ATS as a matter of federal common law. As this Court explained in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), if "Congress addresses a question previously governed by a decision rested on federal common law," then "the need for such an unusual exercise of law-making by federal courts disappears." *Id.* at 423 (citation omitted). "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speak[s] directly to [the] question at issue." *Id.* at 424 (brackets in original; citation and

internal quotation marks omitted). Because Congress has the principal responsibility to "prescribe national policy in areas of special federal interest," evidence of a "clear and manifest" congressional purpose to supplant judicial fashioning of federal common law is not required. *Id.* at 423-424.

In enacting the TVPA, which establishes a federal cause of action for torture or extrajudicial killing by an individual acting "under actual or apparent authority, or color of law, of any foreign nation," § 2(a), 106 Stat. 73, Congress spoke "directly" to the question of a remedy for certain conduct that violates universally accepted and specifically defined human rights norms, *American Elec. Power Co.*, 564 U.S. at 424. The TVPA thus "excludes" the possibility, *ibid.*, of bringing a claim for the same conduct under the ATS as a matter of federal common law. See *ibid.*; see also *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) ("Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the [TVPA], and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted.").

Under that analysis, the TVPA has rendered non-cognizable under the ATS Warfaa's common-law claims for torture and attempted extrajudicial killing. Those claims allege conduct that, if proven, would give rise to TVPA liability. See *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Accordingly, there is no reason for the Court to grant review to consider whether Warfaa's claims based on allegations of torture and attempted extrajudicial killing touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application of federal common law causes of action under the ATS.

b. Warfaa's complaint also includes four claims alleged to be actionable only under the ATS: arbitrary detention, crimes against humanity, war crimes, and cruel, inhuman, or degrading treatment. See D. Ct. Doc. 89, at 11-18. The TVPA does not provide a cause of action for those claims. But it is not clear whether Warfaa has adequately pleaded a claim for arbitrary detention that would be actionable under the ATS. Compare *id.* at 5-7, 15 (alleging that Warfaa was detained for three months), with *Sosa*, 542 U.S. at 737 (observing that to be cognizable under the ATS, a claim for arbitrary detention would at a minimum have to allege prolonged detention, but not defining the requisite period of time). And Warfaa's claims for crimes against humanity, war crimes, and cruel, inhuman, or degrading treatment appear to be largely derivative of his claims for torture and attempted extrajudicial killing. See D. Ct. Doc. 89, at 14-15, 16- 18. All of those claims arise out of the same alleged period of detention and rest on the same alleged injuries.

Pursuant to the court of appeals' judgment, only Warfaa's TVPA claims remain live—and so by choosing to file only a conditional cross-petition, Warfaa has indicated his willingness to proceed in the trial court only on his TVPA claims. The availability of those claims under the TVPA will further the purpose he invokes in this case of preventing the United States from being viewed as harboring or providing a safe haven for human-rights abusers. Under these circumstances, it appears that a decision by this Court as to whether any of his ATS claims adequately touches and concerns the United States would, as a practical matter, be of little significance with respect to this case.

* * * *

The U.S. brief in *Ali v. Warfaa*, No. 15-1435, addresses foreign official immunity and is excerpted in Chapter 10.

e. Doğan v. Barak

See Chapter 10 for discussion of the U.S. amicus brief filed in the Court of Appeals for the Ninth Circuit on July 26, 2017 in this case involving claims under the TVPA and ATS.

C. POLITICAL QUESTION DOCTRINE, COMITY, AND *FORUM NON CONVENIENS*

1. Political Question: *Al-Tamimi*

As discussed, *supra*, in sections A and B, the United States filed two briefs in 2017 in support of its motion to dismiss claims against a former U.S. government official (Elliott Abrams) for allegedly conspiring to enable unlawful actions by Israel Defense Forces against plaintiffs. Excerpts below come from the section on the political question doctrine in the January 27, 2017 U.S. brief.

_____

* * * *

…Plaintiffs' claims at their core ask this Court to weigh in on numerous issues surrounding the Israeli-Palestinian conflict. Those include whether alleged actions taken or statements made by a United States official with respect to United States policy in the Middle East prompted purportedly unlawful conduct by Israeli security forces and settlers against Palestinians; as well as the determination by a domestic United States court of the ownership of lands in East Jerusalem, the West Bank, and the Gaza Strip. *See, e.g.*, Am. Compl. ¶¶ 41, 124, 150, 223, 230. Such issues are "quintessential[]" sources of non-justiciable political questions. *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111-12 (D.D.C. 2005) (dismissing on political question grounds tort claims by Palestinians that asked the court to determine, *inter alia*, "to whom the land in the West Bank actually belongs").

a. The standard for determining whether a case raises political questions.

The Supreme Court has long noted that certain controversies, "in their nature political," are not fit for adjudication. *Marbury v. Madison*, 1 Cranch 137, 170 (1803). "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The political question doctrine "recognizes the limits that Article III imposes upon courts and accords appropriate respect to the other branches' exercise of their own constitutional powers." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring). Such questions arise in "controversies which revolve around policy choices and value determinations" that are constitutionally committed to the Executive or Legislative Branches of our tripartite system of government. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). As such, the political question doctrine "is inherently jurisdictional." *Corrie v. Caterpillar*, 503 F.3d 974, 981 (9th Cir. 2007). *See also Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) ("The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the

exclusion of the judiciary is as old as the fundamental principle of judicial review." (citation omitted)).

In determining whether a plaintiff's claims raise political questions, "a court must first identify with precision the issue it is being asked to decide." *Zivotofsky*, 132 S. Ct. at 1434 (Sotomayor, J., concurring). Once the court has identified the specific issue or issues a plaintiff's complaint raises, the court evaluates whether any of the six factors the Supreme Court listed in *Baker v. Carr* apply. The *Baker* Court explained that courts should refrain from adjudicating suits raising issues that: (1) have a "textually demonstrable constitutional commitment" to the political branches; (2) lack "judicially discoverable and manageable standards" for resolution; (3) require "an initial policy determination of a kind clearly for nonjudicial discretion" for resolution; (4) require the court to express "lack of the respect due coordinate branches of government" through their resolution; (5) present "an unusual need for unquestioning adherence to a political decision already made"; or (6) risk embarrassing the government through "multifarious pronouncements by various departments on one question." 369 U.S. at 217. The first two factors are the "most important." *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). To dismiss a case on political question grounds, however, a court "need only conclude that one factor is present, not all." *Schneider*, 412 F.3d at 194.

Plaintiffs' complaint against the United States is a clear example of a case that seeks to second-guess United States foreign policy decisions and is rife with issues raising political questions. Indeed, in a similar case brought over a decade ago, a judge of this Court noted, "[i]t is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for decades." *Doe I*, 400 F. Supp. 2d at 111-13 (dismissing as non-justiciable claims brought by Palestinians against United States officials, Israeli officials, and private United States and Israeli citizens for alleged violations of the ATS, the TVPA, customary international law, and the tort laws of various states arising from purported Israeli policies in the West Bank and the Gaza Strip). Like the complaint in *Doe*, Plaintiffs' complaint against the United States raises issues implicating all the *Baker* factors.

b. Plaintiffs' complaint raises issues that have a "textually demonstrable commitment" to the political branches.

A decision by a court on any of the issues raised by Plaintiffs' claims against the United States would directly interfere with the United States' "conduct of the foreign relations of our government," which is "committed by the Constitution to the Executive and the Legislative—'the political'—Departments of the Government." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). *See also Schneider*, 412 F.3d at 195 ("It cannot then be denied that decision-making in the areas of foreign policy and national security is textually committed to the political branches."). Article II of the Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors," and also "shall receive Ambassadors and other public Ministers." *Id.* art. II, §§ 2-3. Article I gives Congress the power to "regulate Commerce with foreign Nations" and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* art. I, § 8. As such, the "propriety of what may be done" in the exercise of the foreign relations power "is not subject to judicial inquiry or decision." *Oetjen*, 246 U.S. at 302. *See also Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

Here, Plaintiffs' complaint urges this Court to insert itself directly into the ongoing Israeli-Palestinian conflict. It asks this Court to hold the United States liable, through the purported actions of Mr. Abrams, for the alleged theft of Palestinian land by Israeli settlers in East Jerusalem, the West Bank, and the Gaza Strip. *See, e.g.*, Am. Compl. at p. 11 & n.2 (defining "Occupied Palestinian Territories" as East Jerusalem, the West Bank, the Gaza Strip, and unspecified "other Palestinian territory"); ¶¶ 41 (alleging that Abrams, while Deputy National Security Advisor, "urged senior aides to former Prime Ministers Sharon, Barack [*sic*], and Olmert …to continue annexing privately-owned Palestinian property"); 124 (listing "malicious theft and property destruction" and "illegal property confiscation" as acts underlying their civil conspiracy claim against the United States). Resolution of such a request "would have this Court adjudicate the rights and liabilities of the Palestinian and Israeli people." *Doe I*, 400 F. Supp. 2d at 112.3

Their complaint also asks this Court to determine whether alleged actions taken by the Israeli military—including IDF soldiers—and settlers that Mr. Abrams purportedly supported constituted self-defense or genocide. *See, e.g.*, Am. Compl. ¶¶ 210, 221 (alleging that Abrams promoted the "false premise" that "peaceful settlers raising their families are constantly being attacked by violent Palestinian famers [*sic*] armed with baskets to collect olives"); 124, 182-83 (alleging "criminal conduct," including the funding, promoting, encouragement, assistance, and facilitation of "wholesale violence, ethnic cleansing, arms trafficking, [and] malicious wounding of [Israeli settlers'] Palestinian neighbors," by Abrams, and alleging that "Israeli army soldiers" are included as "war criminals").

Indeed, Plaintiffs ask this Court to order compensation for damages that allegedly arose from acts of war between Israel and other non-state actors. Many of the damages listed in Plaintiffs' "Initial Damages Database" are based on purported strikes by Israeli Air Force (IAF) fighter jets against targets in the Gaza Strip during Israel's Operation Protective Edge in 2014. *See, e.g.*, Doc. 77-3, Pls.' Ex. C., at 6-10, 12-15, 17, 18, 20 (referring to alleged damages caused by "a series of Israeli bombardments by the IAF . . . during the 2014 invasion of Gaza"). Some of the damages are even based on alleged events that occurred nearly seventy years ago involving non-state militias that existed before the establishment of the State of Israel in 1948. *See id.* at 2, 4, 11 (referring to alleged damages caused by "Haganah/Palmach/Irgun/Lehi"—all groups that existed before Israel's establishment as a state—in 1948). Whatever specific role Mr. Abrams might or might not have had in such events—and none is plausibly alleged—it would be of the sort that squarely implicates the first *Baker* factor.

As the court in *Doe I* succinctly put it: "The Court can do none of this." *Doe I*, 400 F. Supp. 2d at 112. "[C]ourts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010). In sum, Plaintiffs' complaint against the United States raises numerous issues that have a "textually demonstrable commitment" to the political branches and must be dismissed.

c. Plaintiffs' complaint raises issues that "lack judicially discoverable and manageable standards."

Moreover, the issues raised by Plaintiffs' claims against the United States lack "judicially discoverable and manageable standards." As but one example, Plaintiffs invite this Court to opine on "the root cause of violence in the Middle East." Am. Compl. ¶ 221. Plaintiffs allege that in 2005, Mr. Abrams, while a federal employee, "sabotaged" an agreement regarding freedom of movement for the inhabitants of the Gaza Strip so as to "heighten tension in the area," and

thereby "convince Congress and the American people that Palestinian farmers are terrorists, not the violence-prone settlers intent on stealing their neighbors' property." *Id.* ¶ 223. Adjudicating such a claim would require this Court to assess Mr. Abrams's alleged motives in purported foreign policy engagement on behalf of the United States government, and the appropriateness of any exchanges he had. Such a judgment is precisely what the political question doctrine precludes. And the Judiciary simply lacks the standards to assess and determine the "root cause of violence in the Middle East."

Furthermore, "discoverable and manageable standards" do not exist that would enable this Court to determine adequately the status and proper ownership of land in East Jerusalem, the West Bank, and the Gaza Strip. *Cf. Zivotofsky*, 132 S. Ct. at 1428 (stating that were the issue raised by the case "whether the Judiciary may decide the political status of Jerusalem," concerns regarding "judicially discoverable and manageable standards" would arise). For starters, resolving such issues likely would require obtaining documents from foreign governments, including the government of Israel and the Palestinian Authority, as well as deposing Israeli and Palestinian officials, along with Israelis and Palestinians living in those areas (including, but not limited to, Plaintiffs). Setting aside the comity and other politically charged issues presented in such a scenario, Plaintiffs' claims with respect to the Gaza Strip involve an area currently under the *de facto* control of Hamas—a designated Foreign Terrorist Organization, *see* 62 Fed. Reg. 52,650 (Oct. 8, 1997)—which would make any discovery regarding damages or property in that area wholly impractical if not impossible. These very same issues arise regarding Plaintiffs' claims that Israeli soldiers and settlers assaulted Palestinian farmers in those areas.

The presence of the first two, "most important," *Baker* factors would require a court to dismiss a claim raised in far more routine contexts. *See, e.g.*, *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 408-09 (4th Cir. 2011) (barring, based on presence of first, second, and fourth *Baker* factors, negligence claim of Marine against contractor for injuries sustained during maintenance of tank in Iraq). They certainly require the Court to do so in *this* context, in which, given the sensitivities of and the deep interest in the matters at stake, pronouncements and judgments by Israelis, Palestinians, and other governments including that of the United States (be it by the Executive, Legislature, or Judiciary), could have immediate, significant, and far-reaching ramifications not only throughout the Middle East, but throughout the world.

d. Plaintiffs' complaint raises the other *Baker* factors.

In addition to raising issues that implicate the "most important" *Baker* factors, Plaintiffs' complaint implicates the other *Baker* factors as well. Determining the equities of both sides in the Israeli-Palestinian conflict would require an "initial policy determination of a kind clearly for nonjudicial discretion." *See Doe I*, 400 F. Supp. 2d at 111. Similarly, any pronouncements by this Court in this case about the legality of purported IDF and Israeli settler actions against Palestinians, and the involvement of any United States officials in such alleged events, would express a "lack of the respect due" to the Executive and its efforts to address this ongoing conflict. In this respect, the context and substance of Plaintiffs' claims also implicate the last two *Baker* factors. They present an "unusual need for unquestioning adherence to a political decision already made"—that is, the ongoing efforts to resolve the Israeli-Palestinian conflict. And, were this Court to delve into this arena, it could risk embarrassing the United States government through "multifarious pronouncements" on the nature and equities of the conflict. Given the presence of all the *Baker* factors, this Court should dismiss Plaintiffs' complaint and allow the political branches to continue to address the Israeli-Palestinian conflict.

* * * *

Excerpts below come from the section on the political question doctrine in the March 10, 2017 U.S. brief.

* * * *

As the United States demonstrated in its motion to dismiss, Plaintiffs' amended complaint raises issues that implicate all six of the factors the Supreme Court enumerated in *Baker v. Carr*, 369 U.S. 186 (1962). *See* Doc. 104, United States' Mot. to Dismiss, at 12-19. The United States also noted that Plaintiffs' claims were similar to those in *Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005), in which another judge of this Court held that the claims raised political questions. *See id.* at 111-12; Doc, 104, United States' Mot. to Dismiss, at 13-14.

Plaintiffs' response cites inapposite and distinguishable case law. Namely, Plaintiffs rely on cases either that were brought under a federal statute specifically enacted to provide a remedy for acts of international terrorism, that did not challenge the alleged actions of the United States government with respect to foreign nations, or that did not involve a statement by the United States regarding whether the case raises non-justiciable political questions. Plaintiffs primarily rely on a string of cases in which district courts found to be justiciable claims brought under the Antiterrorism Act of 1991, 18 U.S.C. § 2333 (ATA), a federal statute enacted specifically to provide civil remedies for acts of international terrorism against United States citizens. *See Sokolow v. Palestine Liberation Org.*, 583 F. Supp. 2d 451, 456 (S.D.N.Y. 2008) (finding justiciable claims brought under the ATA); *Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 161-62 (D.D.C. 2006) (same); *Gilmore v. The Palestinian Interim Self-Gov't Auth.*, 422 F. Supp. 2d 96, 99-100 (D.D.C. 2006) (same); *Biton v. The Palestinian Interim Self-Gov't Auth.*, 412 F. Supp. 2d 1, 6 (D.D.C. 2005) (same); *Estates of Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 165, 174 (D.R.I. 2004) (same). *Cf. Klingoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (finding justiciable claims brought under the Antiterrorism Act of 1987, 22 U.S.C.§§ 5201-03).

The courts in those cases stated clearly that the jurisdiction Congress provided and that the Executive endorsed through the ATA was a critical factor in finding the plaintiffs' claims justiciable. *See, e.g.*, *Gilmore*, 422 F. Supp. 2d at 99 ("Enactment of the ATA makes it clear that both Congress and the Executive have 'expressly endorsed the concept of suing terrorist organizations in federal court,' and therefore this Court need not delve into an in-depth political question analysis here." (quoting *Klingoffer*, 937 F.2d at 49)); *Biton*, 412 F. Supp. 2d at 6 ("This is a tort suit brought under a legislative scheme that Congress enacted for the express purpose of providing a legal remedy of injuries or death occasioned by acts of international terrorism." (quoting *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 280 (1st Cir. 2005))). Indeed, the ATA, passed in 1991, specifically provides jurisdiction for civil claims by United States citizens "injured …by reason of an act of international terrorism." 18 U.S.C. § 2333; *see also id.* § 2331 (defining "international terrorism").

But here, Plaintiffs are bringing their claims under the Alien Tort Statute (ATS)—not the ATA. That statute was passed by Congress in 1789, largely lay dormant until the late-20th century, and provides jurisdiction for only clearly defined, universally accepted violations of

customary international law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 732 (2004). It is by no means imbued with the specificity of purpose and scope, as announced by Congress and endorsed by the Executive, through which courts exercised jurisdiction in the ATA cases discussed above. *See id.* at 712 ("Judge Friendly called the ATS a 'legal Lohengrin . . . no one seems to know whence it came.'" (internal citation omitted)). Accordingly, the ATA line of cases mentioned above is inapposite.

Moreover, the cases cited above simply did not involve challenges to the alleged foreign policy of the United States government. *See, e.g.*, *Biton*, 412 F. Supp. 2d at 2 (ATA claims against the Palestinian Authority). In contrast, here, with respect to Plaintiffs' claims against Mr. Abrams, they directly challenge the alleged actions of a former Deputy National Security Advisor and his interactions with high-level Israeli officials regarding United States policy in the Middle East in the course of his role as a White House official. *See* Am. Compl. ¶¶ 41, 221, 223.

Lastly, in none of the cases on which Plaintiffs rely did the United States submit a statement urging the respective court to dismiss the claims on political question grounds. Not so here. The United States has moved this Court to dismiss Plaintiffs' claims on those very grounds. Although such a statement by the Executive Branch is not dispositive *per se*—the Judiciary determines its own jurisdiction—such a statement is a relevant factor in the Judiciary's analysis. *See Sosa*, 542 U.S. at 733 n.21 (noting that in cases where the Government has expressed foreign policy concerns regarding the litigation, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy" (citation omitted)); *see also Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 n.17 (2d Cir. 2005) ("In applying this fourth *Baker* test, courts have been particularly attentive to the views of the United States Government about the consequences of proceeding with litigation." (citing *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995))). Although other United States officials have made general statements about Israeli settlements, *see* Doc. 111, Pls.' Opp'n, at 8, the United States' statement in *this litigation* is what is relevant to the jurisdictional inquiry here. In sum, the *Biton* line of cases is inapposite.

Similarly, the *Arab Bank* line of cases on which Plaintiffs rely, *see* Doc. 112, Pls.' Opp'n at 14-15, is readily distinguishable from this case. The plaintiffs in *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005), brought their claims under the ATA and under state common law. *See id.* at 575. Defendants apparently did not raise a political question argument in that case, as the *Linde* opinion makes no reference to the political question doctrine. In *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007), which involved claims under both the ATA and the ATS, defendants raised the political question doctrine for the first time at oral argument, which the court found to be untimely. *See id.* at 295 n.45. The court dismissed the argument with minimal analysis. *Id.*

And in *Lev v. Arab Bank, PLC*, No. 08-cv-3251, 2010 WL 623636 (E.D.N.Y. Jan. 29, 2010), which involved claims brought under the ATS, the court found the plaintiffs' claims justiciable mainly because those claims did not involve the factors mentioned above. Specifically, the court highlighted that "no action by a coordinate branch of the United States government" was involved—a point that, oddly, Plaintiffs include in their opposition, *see* Doc. 112, Pls.' Opp'n, at 15—and that "the United States government ha[d] chosen not to submit a statement of interest" in the case. *Lev*, 2010 WL 623636 at *4.4 Here, both of the above factors are clearly present. With respect to the conduct for which the United States has substituted itself, Plaintiffs challenge the action by a coordinate branch of the United States government—the alleged actions of a Deputy National Security Advisor. And the United States has moved this

Court to dismiss Plaintiffs' claims against it on political question grounds. Accordingly, the *Arab Bank* cases are of no moment.

Rather, as the United States explained in its opening motion, Plaintiffs' claims are strikingly similar to those in *Doe I*, where the court held the political question doctrine barred the claims. Contrary to Plaintiffs' assertion that *Doe I* is an "entirely different case[]," Doc. 112, Pls.' Opp'n, at 14, in *Doe I*, the plaintiffs sued United States officials under the ATS and other federal statutes for their financial support of the Israeli government. *See Doe I*, No. 1:02-cv-1431, Slip. Op. at 1-3, ECF No. 42 (D.D.C. Oct. 3, 2003). Those claims are clearly more similar to Plaintiffs' claims here than to the claims in any of the cases that Plaintiffs cite, and the United States' actions before the court in *Doe I* are similar to those here—it moved to dismiss the claims against its officials because they raised political questions. *See id.* at 3, 9-14. In sum, the cases Plaintiffs cite were brought under a statute specifically designed for the sorts of claims in those cases, did not challenge United States foreign policy, and did not involve a statement by the United States on the foreign affairs repercussions of adjudicating those cases. Here, Plaintiffs' claims against the United States for the alleged actions of a former Deputy National Security Advisor raise non-justiciable political questions. This Court should dismiss those claims.

* * * *

2. Political Question: *Center for Biological Diversity*

As discussed in *Digest 2016* at 172-80, the United States filed a brief on appeal to the U.S. Court of Appeals for the Ninth Circuit in *Center for Biological Diversity ("CBD"), et al. v. Hagel*, *et al.*, No. 15-15695, arguing that the court should affirm the district court's dismissal of plaintiffs' claims based on lack of standing and the political question doctrine. For further background on the case, see *Digest 2015* at 158-63. Individuals and environmental groups challenged a decision by the U.S. government and the Government of Japan to build a new military base on Okinawa (the Futenma Replacement Facility or "FRF"). Plaintiffs asserted that construction of the new base would destroy critical habitat for the Okinawa dugong, a marine mammal similar to the manatee, which is critically endangered. The U.S. government considered effects on the dugong in accordance with a previous decision by the district court relying on the National Historic Preservation Act ("NHPA"). *Okinawa Dugong, et al. v. Gates, et al.*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008). The U.S. government completed its report pursuant to Section 402 of the NHPA in 2014 and took steps to begin construction of the base, prompting plaintiffs to move to reopen the case, claiming violations of the Administrative Procedure Act ("APA"). In 2017, the Ninth Circuit issued its decision, holding that the environmental organizations had standing and the political question did not bar claims for declaratory and injunctive relief. *Center for Biological Diversity v. Mattis*, 868 F.3d 803 (9th Cir. 2017). The Ninth Circuit remanded to the district court for further proceedings.

3. Political Question: *Lin v. United States*

See *Digest 2016* at 180-84 and *Digest 2015* at 154-57 for background on *Lin v. United States.* In 2017, the U.S. Court of Appeals for the D.C. Circuit issued its decision affirming the district court's dismissal of the case. *Lin v. United States*, No. 16-5149, 690 Fed.Appx. 7 (Mem) (D.C. 2017). Residents of Taiwan alleged they were unlawfully denied their Japanese nationality at the conclusion of World War II. The district court dismissed based on lack of standing, lack of redressability, and the political question doctrine. *Lin v. United States*, 177 F.Supp.3d 242, 249-55 (D.D.C. 2016). The Court of Appeals affirmed on the basis of redressability and the alternative ground that the case was untimely. The per curiam opinion does not discuss the political question doctrine.

4. Comity, *Forum Non Conveniens*, and Political Question: *Cooper v.*

As discussed in *Digest 2016* at 186-91, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit in *Cooper v. TEPCO*, No. 15-56424, a case brought by U.S. service members who allege that they were exposed to radiation during the humanitarian operation in response to the earthquake, tsunami, and ensuing meltdown at the Fukushima-Daiichi nuclear power plant in Japan, operated by TEPCO. On June 22, 2017, the Ninth Circuit issued its opinion in the case, which is excerpted below (with footnotes omitted). The Ninth Circuit affirmed the lower court's denial of TEPCO's motion to dismiss. The section of the Court's opinion discussing the impact of the Convention on Supplementary Compensation for Nuclear Damage ("CSC") on the court's jurisdiction is excerpted in Chapter 19.

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B. *International Comity*

TEPCO next contends that the district court erred by not dismissing Plaintiffs' claims on comity grounds. We review the district court's international comity determination for an abuse of discretion and will reverse only if the district court applies an incorrect legal standard or if its "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

"International comity 'is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'" *Id.* at 597 (quoting *In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998)). There are two kinds of international comity: prescriptive comity (addressing the "extraterritorial reach of federal statutes") and adjudicative comity (a "discretionary act of

deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state"). *Id.* at 598–99. This case concerns the latter.

District courts deciding whether to dismiss a case on comity grounds are to weigh (1) "the strength of the United States' interest in using a foreign forum," (2) "the strength of the foreign governments' interests," and (3) "the adequacy of the alternative forum." *Id*. at 603 (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)). Here, the district court correctly laid out this legal standard, and the only question is whether the district court's decision not to dismiss Plaintiffs' claims was illogical, implausible, or unsupported by the record. Although this is a close case with competing policy interests, we hold that the district court did not abuse its discretion in deciding to maintain jurisdiction. For our convenience, we will discuss together the interests of the United States and Japan. We then consider the adequacy of a Japanese forum.

1. U.S. and Japanese interests

In *Mujica*, we expounded on how to assess the United States' and foreign governments' interests:

> The (nonexclusive) factors we should consider when assessing [each country's] interests include (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the [countries], and (5) any public policy interests.

Id. at 604, 607. The district court determined that because the FNPP incident occurred in Japan, Japan has a strong interest in this litigation. On the other hand, the district court reasoned that Plaintiffs are U.S. service members, suggesting that the United States also has an interest in this litigation. In balancing the first two factors, the district court concluded that the parties' ties to the United States outweighed the fact that the allegedly negligent conduct occurred in Japan. We agree with the district court that, at least with respect to the first two factors, there are competing interests. Under these facts, we find these considerations not particularly helpful in determining whether to dismiss Plaintiffs' claims.

With respect to the character of the conduct in question, the district court determined that the factor was neutral. The court found that Japan had an interest in regulating its nuclear utilities and compensating those injured by the FNPP incident, but that the United States also had an "interest in the safe operation of nuclear power plants around the world, especially when they endanger U.S. citizens." *Cooper II*, 166 F. Supp. 3d at 1138. The district court also rejected TEPCO's argument that the foreign policy interests of Japan and the United States favored a Japanese forum. TEPCO argued that the CSC's jurisdiction-channeling provision, even if not applicable of its own force, reflected a policy judgment of centralizing claims arising out of nuclear incidents in the courts of the country where the nuclear incident occurred. The district court gave little weight to the CSC because it saw no evidence that maintaining jurisdiction would create friction between the United States and Japan and because the CSC's supplemental fund is unavailable to Plaintiffs. Finally, the district court found that there were public policy considerations cutting both in favor of and against dismissing the case.

One of the reasons the district court cited for maintaining jurisdiction was that neither Japan nor the United States had expressed an interest in the location of this litigation. Indeed, a foreign country's request that a United States court dismiss a pending lawsuit in favor of a foreign forum is a significant consideration weighing in favor of dismissal. See *Jota v. Texaco*,

Inc., 157 F.3d 153, 160 (2d Cir. 1998) ("[I]nherent in the concept of comity is the desirability of having the courts of one nation accord deference to the official position of a foreign state, at least when that position is expressed on matters concerning actions of the foreign state taken within or with respect to its own territory."). By contrast, when the country in question expresses no preference, the district court can take that fact into consideration. See *Abad v. Bayer Corp.*, 563 F.3d 663, 668 (7th Cir. 2009) (finding it relevant that neither the United States nor Argentina took a position on where litigation should proceed).

Although Japan took no position in the district court, Japan has not remained silent on appeal. The government of Japan submitted an amicus brief urging us to reverse the district court. In its amicus brief, Japan presents a compelling case that FNPP-related claims brought outside of Japan threaten the viability of Japan's FNPP compensation scheme. In dealing with claims arising out of the FNPP incident, Japan has developed a set of universal guidelines applicable to all claims brought in Japan. If Plaintiffs' lawsuit and others like it are permitted to proceed in foreign countries, those courts might apply different legal standards, which could result in different outcomes for similarly situated victims. That risk is especially troublesome to Japan because the Japanese government finances TEPCO's compensation payments, which are being administered through Japanese courts. As Japan explained in its amicus brief, "The irony of the situation is that this U.S. lawsuit against TEPCO is possible only because the Government of Japan, as part of its compensation system, ensured TEPCO's solvency, including by providing ongoing funds for damage payments." Brief of Amicus Curiae the Government of Japan 3-4. Judgments originating in American courts may well be inconsistent with the overall administration of Japan's compensation fund. In light of Japan's justifiable insistence that we direct Plaintiffs to Japanese courts, we might well have either reversed the district court's decision to maintain jurisdiction or remanded to the district court for further consideration.

Because we became aware of Japan's position by way of an amicus brief on appeal, concerns of fairness and thoroughness led us to seek the State Department's views. We asked for a Statement of Interest. In lieu of a Statement of Interest, the United States submitted an amicus brief in support of affirming the district court's order. In its brief, the United States expressed that it "has no clear independent interest in Japan's compensation scheme beyond [its] general support for Japan's efforts to address the aftermath of Fukushima." United States' Brief 12, ECF No. 81. That alone would not be enough for us to conclude that the comity doctrine does not apply to this case. But the United States also makes a much more important point about U.S. interests: allowing the suit to continue in California is consistent with U.S. interests in promoting the CSC.

The United States has a strong interest in promoting the CSC's widespread acceptance. As explained above, the CSC was designed as a global liability regime for handling claims arising out of nuclear incidents, and its effectiveness naturally depends on global, or at least widespread, adherence. The CSC creates an international compensation fund to supplant domestic funding for victims of nuclear incidents. CSC arts. III, IV. The CSC cannot provide the robust supplemental compensation fund it was intended to provide if only a few countries contribute to the fund. The CSC also grants contracting parties exclusive jurisdiction over actions concerning nuclear incidents that occur within their borders. CSC art. XIII. But this grant of exclusive jurisdiction has little value if it binds only a few countries. In short, the CSC cannot be the global liability system it was intended to be without widespread adherence, particularly from developed nations. See Letter of Transmittal for the Convention on Supplementary Compensation for Nuclear Damage at IV, Nov. 15, 2002, S. Treaty Doc. No. 107-21 ("[U]nder

existing nuclear liability conventions many potential victims outside the United States generally have no assurance that they will be adequately or promptly compensated in the event they are harmed by a civil nuclear incident, especially if that incident occurs outside their borders or damages their environment. The Convention, once widely accepted, will provide that assurance." (emphasis added)); see also Letter of Submittal at VIII–IX ("[T]he CSC can strengthen U.S. efforts to improve nuclear safety, because, once widely accepted, the CSC will eliminate ongoing concerns on the part of U.S. suppliers of nuclear safety equipment and technology that they would be exposed to damage claims by victims of a possible future accident at a facility where they have provided assistance." (emphasis added)).

Thus, the United States, as a party to the CSC, has a strong interest in encouraging other countries, especially those with large nuclear industries such as Japan, to join the CSC. As we have discussed, one of the perquisites of joining the CSC is the guarantee of exclusive jurisdiction over nuclear incidents vis-à-vis other contracting parties. … If a country knew it could receive the benefit of the exclusive jurisdiction provision by becoming a party to the CSC after a nuclear incident has occurred within its borders (as Japan did here), or even avoid foreign jurisdiction altogether by virtue of international comity, there would be less incentive to join the CSC before a nuclear incident occurs. As the State Department advised us in its brief:

> The exclusive jurisdiction provision forms part of a bargain in exchange for robust, more certain and less vexatious (e.g., the application of strict liability without need to establish fault) compensation for victims of a potential incident. United States policy does not call for advancing one element of this system in isolation from the other elements of the Convention's system.
>
> For these two inextricably interrelated interests to be fully realized, it is essential that the Convention be as widely adhered to internationally as possible. Thus, broad international adherence to the Convention is the ultimate U.S. policy goal.

United States' Brief 6–7. Accordingly, "[t]he United States has no specific foreign policy interest necessitating dismissal in this particular case." *Id*. at 17. We understand the position of the United States to be that, faced with the reality that there is no guarantee of exclusive jurisdiction outside of the CSC, more countries will accede to the CSC, thus fostering the global liability regime the CSC was designed to create. Indirectly, this suit makes the case—and Japan has become the poster child—for why recalcitrant countries should join the CSC.

In its supplemental brief in response to the United States' brief, TEPCO argues that the United States has misapprehended its own foreign policy interests. In support of this rather bold assertion, TEPCO repeats its argument made in the district court that the CSC merely codified the longstanding U.S. policy of centralizing jurisdiction over claims from nuclear accidents in a single forum. TEPCO points to State Department testimony before the Senate that, even before the CSC, the State Department "would expect that if a nuclear incident occurs overseas[,] U.S. courts would assert jurisdiction over a claim only if they concluded that no adequate remedy exists in the court of the country where the accident occurred." Treaties: Hearing Before the S. Comm. on Foreign Relations, S. Hearing No. 109-324, 109th Cong. 27 (2005) (statement of Warren Stern, Senior Coordinator for Nuclear Safety, Department of State). This may well have been the United States' position prior to the CSC's ratification. In hopes that other countries would do the same, the United States may have preferred that U.S. courts not exercise jurisdiction over claims arising out of foreign nuclear incidents. But that policy appears to have

changed. Now that the United States has ratified the CSC, the State Department takes the position that it would prefer to keep exclusive jurisdiction as a bargaining chip to encourage other nations to join the CSC. We owe this view deference. See *Mujica*, 771 F.3d at 610 ("[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." (citation omitted)); *id.* at 607 ("[C]ourts will not extend comity to foreign proceedings when doing so would be contrary to the policies . . . of the United States." (second alteration in original) (citation omitted)).

In light of these important, competing policy interests, we conclude that the district court did not abuse its discretion in weighing U.S. and Japanese interests. Although Japan has an undeniably strong interest in centralizing jurisdiction over FNPP-related claims, the United States believes that maintaining jurisdiction over this case will help promote the CSC, an interest that encompasses all future claims arising from nuclear incidents around the globe. Competing policy interests such as these require our district court judges to make difficult judgment calls, judgment calls committed to their sound discretion. We recognize that the district court did not have the benefit of the views of Japan and the United States. We might, in this case, have remanded to the district court to review its judgment on this question in light of the briefs filed by the two governments. We are not sure why neither government decided to weigh in when the district court was considering this question. Nevertheless, the district court had before it the facts that underlie the positions taken by Japan and the United States, and we cannot say that the district court abused its discretion.

2. Adequacy of the alternative forum

Like the district court, we have no doubt that Japan would provide an adequate alternative forum. TEPCO is certainly subject to suit in Japanese courts, and the doors of those courts are undisputedly open to Plaintiffs. See *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006) ("Generally, an alternative forum is available where the defendant is amenable to service of process and the forum provides 'some remedy' for the wrong at issue." (citation omitted)). We have held that district courts have not abused their discretion in holding that Japanese courts are an adequate alternative forum, despite their procedural differences with U.S. courts. See, *e.g.*, *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 768–69, 769 n.3 (9th Cir. 1991). Plaintiffs provide no evidence that Japanese courts would be inadequate aside from unsubstantiated fears of bias against foreign claimants. The district court did not abuse its discretion in finding that Japan would provide an adequate alternative forum for resolving Plaintiffs' claims.

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This is a difficult case that required the district court to weigh a number of complex policy considerations. Though there are strong reasons for dismissing Plaintiffs' claims in favor of a Japanese forum, the district court did not abuse its discretion in maintaining jurisdiction. Comity is not a doctrine tied to our subject matter jurisdiction. As we have explained:

> Comity is not a rule expressly derived from international law, the Constitution, federal statutes, or equity, but it draws upon various doctrines and principles that, in turn, draw upon all of those sources. It thus shares certain considerations with international principles of sovereignty and territoriality; constitutional doctrines such as the political question doctrine; principles enacted into positive law such as the Foreign Sovereign

> Immunities Act of 1976; and judicial doctrines such as *forum non conveniens* and prudential exhaustion.

Mujica, 771 F.3d at 598 (citation omitted). Accordingly, it is a "a doctrine of prudential abstention." *Id*. Because comity is not a jurisdictional decision, comity is not measured as of the outset of the litigation; it is a more fluid doctrine, one that may change in the course of the litigation. Should either the facts or the interests of the governments change—particularly the interests of the United States—the district court would be free to revisit this question.

C. Forum Non Conveniens

The doctrine of *forum non conveniens* allows a court to dismiss a case properly before it when litigation would be more convenient in a foreign forum. …

1. Adequacy of the alternative forum

The analysis used in evaluating the adequacy of an alternative forum is the same under the doctrine of *forum non conveniens* as it is under the doctrine of international comity. *Mujica*, 771 F.3d at 612 n.25. As we stated in our international comity analysis, Japan provides an adequate alternative forum for resolving Plaintiffs' claims. …

2. Private and public interest factors

To some extent, analysis of the private and public interests factors also overlaps with the analysis under international comity. See *Mujica*, 771 F.3d at 598 (explaining the relationship between international comity and *forum non conveniens*). However, the *forum non conveniens* analysis introduces a presumption that litigation is convenient in the plaintiff's chosen forum when a domestic plaintiff sues at home. *Carijano*, 643 F.3d at 1227. Defendants have the "heavy burden of showing that the [plaintiff's choice of] forum results in 'oppressiveness and vexation…out of all proportion' to the plaintiff's convenience." *Id*. (second alteration in original) (quoting Piper, 454 U.S. at 241).

In this case, Plaintiffs are U.S. citizens, and their decision to sue in the United States must be respected. The district court properly took Plaintiffs' choice of their home forum into consideration and did not abuse its discretion in finding that other private and public considerations did not outweigh Plaintiffs' interest in suing at home.

The private interest factors are

> (1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Id*. at 1229 (citation omitted).

The district court reasonably balanced these private interest factors. The district court noted that while most of TEPCO's witnesses reside in Japan, all Plaintiffs reside in the United States. *Cooper II*, 166 F. Supp. 3d at 1132–33. It further found that it would be more difficult for Plaintiffs to travel to Japan given their alleged medical conditions. *Id*. at 1133. The district court agreed with TEPCO that most of the relevant documents and physical proof remained in Japan, and also that litigating in the United States would make it more difficult to obtain testimony from non-party witnesses located in Japan, but did not believe that these considerations outweighed Plaintiffs' interest in suing at home. *Id*. at 1133–35. In sum, "[b]ecause of the nature of

international litigation, each side would incur expenses related to traveling and procuring witnesses in either forum." *Id*. at 1135 (emphasis added). This was a reasonable determination.

The public interest factors relevant to a *forum non conveniens* analysis include "(1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum." *Carijano*, 643 F.3d at 1232 (citation omitted). The district court also reasonably weighed the public interest factors and concluded that they were neutral. It balanced Japan's interest in centralizing litigation in Japan with the United States' interest in compensating its military servicemembers. *Cooper II*, 166 F. Supp. 3d at 1132–36. It noted that this litigation would be burdensome to either country's courts. *Id*. at 1136. This determination was neither illogical, implausible, nor unsupported by the record.

Of course, the policy considerations addressed in the international comity discussion may also be relevant here. But as we explained above, these policy considerations did not require the district court to dismiss this case on international comity grounds. Nor do they require dismissal under *forum non conveniens*. We therefore affirm the district court's decision not to dismiss Plaintiffs' claims under the *forum non conveniens* doctrine.

D. *The Political Question Doctrine*

TEPCO next contends that the political question doctrine bars Plaintiffs' suit. It argues that the Navy's decision to deploy Plaintiffs near the FNPP was a superseding cause of Plaintiffs' injuries, and that Plaintiffs, accordingly, cannot prove their claims without asking the court to review nonjusticiable military decisions. The district court found that TEPCO's superseding causation defense did not render this case nonjusticiable. *Cooper II*, 166 F. Supp. 3d at 1119–24. We review de novo the district court's determination that the political question doctrine does not bar Plaintiffs' case. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007).

1. The political question doctrine framework

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). The Court has cautioned, however, that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Corrie*, 503 F.3d at 982 (quoting *Baker*, 369 U.S. at 211). Rather, courts look to a series of factors to determine whether a case presents a nonjusticiable political question. As Baker explains:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

Typically, deciding whether a case presents a nonjusticiable political question requires the court simply to look at the complaint and apply the *Baker* factors to decide whether there are any nonjusticiable issues. Sometimes, however, and as is the case here, no political questions are apparent from the complaint's face. Plaintiffs' allegations that TEPCO, an entity unaffiliated with the United States government, was negligent in operating the FNPP do not, on their face, trigger any of the six *Baker* factors. But even when the face of a complaint does not ask the court to review a political question, issues "that are textually committed to the executive sometimes lie just beneath the surface of the case." *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 465 (3d Cir. 2013). Such may be the case when, as here, the defendant argues that the U.S. military is responsible for all or part of a plaintiff's injuries. See *id*. Because "the political question doctrine is jurisdictional in nature," we must evaluate these potential defenses and facts beyond those pleaded in the complaint to determine whether the case is justiciable. See *Corrie*, 503 F.3d at 979; see also *Harris*, 724 F.3d at 466 ("[T]o avoid infringing on other branches' prerogatives in war-time defense-contractor cases, courts must apply a particularly discriminating inquiry into the facts and legal theories making up the plaintiff's claims as well as the defendant's defenses."); *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 409 (4th Cir. 2011) ("[W]e are obliged to carefully . . . 'look beyond the complaint, and consider how [the plaintiff] might prove his claim and how [the defendant] would defend.'" (citation, emphasis, and alterations omitted)); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1285 (11th Cir. 2009) (finding the political question doctrine applicable where "any defense mounted by [defendants] would undoubtedly cite the military's orders as the reason" for defendants' actions); *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) ("We must look beyond the complaint, considering how the Plaintiffs might prove their claims and how [the defendant] would defend.").

Thus, analyzing TEPCO's contention that the political question doctrine bars Plaintiffs' claims requires a two-part analysis. First, we must determine whether resolving this case will require the court to evaluate a military decision. Doing so requires us to consider what Plaintiffs must prove to establish their claim, keeping in mind any defenses that TEPCO will raise. If step one reveals that determining TEPCO's liability will require the court to evaluate a military decision, step two requires us to decide whether that military decision is of a kind that is unreviewable under the political question doctrine. See *Harris*, 724 F.3d at 466 ("[A] determination must first be made whether the case actually requires evaluation of military decisions. If so, those military decisions must be of the type that are unreviewable because they are textually committed to the executive."); *Lane*, 529 F.3d at 560 ("First, [the defendant] must demonstrate that the claims against it will require reexamination of a decision by the military. Then, it must demonstrate that the military decision at issue … is insulated from judicial review." (second alteration in original) (citation omitted)).

Although we have never expressly adopted this two-part test, it is consistent with our precedent. For example, in *Corrie*, the plaintiffs were family members of individuals who were killed or injured when the Israeli Defense Forces demolished homes in the Palestinian Territories using bulldozers manufactured by a U.S. defense contractor. 503 F.3d at 977. The plaintiffs sued the defense contractor, arguing that it knew the bulldozers would be used to demolish homes in violation of international law. *Id*. Though the complaint standing alone did not appear to raise a political question, it turned out that the United States paid for each of the bulldozers sold to the Israeli Defense Forces pursuant to a congressionally enacted program giving the executive

discretion to finance aid to foreign militaries. *Id*. at 978. We concluded that resolving the plaintiffs' claims would require us to evaluate the United States' decision to provide military aid because it was "difficult to see how we could impose liability on [the defense contractor] without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs' family members." Id. at 982. Having determined that evaluating the plaintiffs' claims would require us implicitly to evaluate the United States' decision to pay for the bulldozers, we concluded that the decision "to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations." *Id*. at 983. In light of our conclusion that we could not "intrude into our government's decision to grant military assistance to Israel, even indirectly," we affirmed the district court's dismissal of the plaintiffs' claims under the political question doctrine. *Id*. at 983–84.

Because determining whether a case raises a political question requires a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, it is not always possible to tell at the pleading stage whether a political question will be inextricable from the case, see *Lane*, 529 F.3d at 554. For example, in *Lane*, a defense contractor recruited the plaintiffs to drive trucks in Iraq. *Id.* While in Iraq, Iraqi insurgents attacked the plaintiffs' convoys resulting in deaths and injuries to the plaintiffs. *Id*. at 555. The plaintiffs argued that the contractor fraudulently induced them into employment by falsely representing that their work in Iraq would be entirely safe. *Id*. They also asserted that the defense contractor was negligent in carrying out the convoy. *Id*. The defense contractor argued that the case presented a nonjusticiable political question, and the district court agreed and dismissed the case. *Id*. at 555–56.

On appeal, the Fifth Circuit reversed. The court stressed that in order to dismiss a case on political question grounds, "a court must satisfy itself that [a] political question will certainly and inextricably present itself." *Id*. at 565. Though acknowledging the potential for a political question to arise in the case, the court was not satisfied that addressing a political question would be inevitable. The plaintiffs' fraud theory, for example, might have succeeded if the plaintiffs could establish that the defense contractor guaranteed the plaintiffs' safety while knowing that the plaintiffs were at a greater risk of harm than they were led to believe. *Id*. at 567. The court also permitted the plaintiffs' negligence claims to proceed, while noting that those claims "move precariously close to implicating the political question doctrine, and further factual development very well may demonstrate that the claims are barred." *Id*. But given the lack of clarity at the pleading stage regarding what duties the defense contractor owed toward the plaintiffs while in Iraq, it was not certain that a political question was inextricable from the case. *Id*. Accordingly, the court remanded to the district court for further factual development. *Id*. at 568; see also *Carmichael*, 572 F.3d at 1279 (noting that factual developments during discovery aided the district court in determining whether a political question existed); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1361 (11th Cir. 2007) (rejecting a defendant's arguments that the political question doctrine barred the plaintiffs' claims because it was not clear from the pleadings that a political question existed).

Another consideration that may make it difficult to determine in the early stages of litigation whether a nonjusticiable political question exists is a lack of clarity as to which state's or country's law applies. See *Harris*, 724 F.3d at 474. Deciding whether a political question is inextricable from a case necessarily requires us to know what the plaintiff must prove in order to succeed. Although there is often similarity between the tort regimes of different jurisdictions, the elements of a particular tort and the host of defenses available to the defendant can vary in

significant ways. See *id*. (contrasting the tort laws of Pennsylvania, Tennessee, and Texas). This leaves open the possibility that a political question may arise under the laws of one jurisdiction but not under the laws of another. For example, in *Harris*, the Third Circuit concluded that a political question would arise under Tennessee or Texas law because their proportional liability systems would require the court to apportion fault among all possible tortfeasors, including the military. *Id*. Doing so would require the court to determine whether a particular military decision was reasonable, which raised a political question. In contrast, under Pennsylvania's joint-and-several liability system, it would be possible to impose liability on the defense contractor without needing to apportion any fault to the military or otherwise review its decisions. *Id*. Thus, at least where the potentially applicable bodies of law differ, the district court must either decide what law applies or conclude that a political question would arise under any potentially applicable body of law before it can dismiss a case as nonjusticiable.

2. Analysis

At this stage in the litigation, we find ourselves unable to undertake the "discriminating inquiry" necessary to determine if this case presents a political question. *Baker*, 369 U.S. at 217. The parties have agreed, and we assume for present purposes, that the political question doctrine prevents us from evaluating the wisdom of the Navy's decision to deploy troops near the FNPP. See *Corrie*, 503 F.3d at 983 ("Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations."); see also *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . . ."); *id*. ("It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches ….Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence."); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."). In other words, step two is not in dispute. The dispute is whether Plaintiffs' claims or TEPCO's superseding causation defense would actually require the court to review the wisdom of the Navy's decisions during Operation Tomodachi. Several considerations make it difficult for us to tell at this stage in the proceedings whether the district court would actually need to review the Navy's decisions. First, the district court has yet to undergo a choice-of-law analysis, and the parties have briefed the issue assuming California law applies. Without knowing what body of law applies— whether it is California law, Japanese law, federal common law, or something else—we cannot know what Plaintiffs must demonstrate in order to prove their claims or what defenses are available to TEPCO. We cannot, therefore, decide with certainty that a political question is inextricable from the case. See *Harris*, 724 F.3d at 474–75.

Even assuming California law applies, we are unable to conclude at this juncture that TEPCO's superseding causation defense injects a political question into this case. "California has adopted sections 442–453 of the Restatement of Torts, which define when an intervening act constitutes a superseding cause." *USAir Inc. v. U.S. Dep't of Navy*, 14 F.3d 1410, 1413 (9th Cir. 1994). Section 442 of the Restatement lays out several considerations used to determine whether an intervening force is a superseding cause. Restatement (Second) of Torts § 442 (Am. Law Inst. 1965). …

The district court ruled that it was foreseeable that Plaintiffs and other foreign responders would be in the area to provide aid in the wake of the earthquake and tsunami. *Cooper II*, 166 F. Supp. 3d at 1121. TEPCO argues, and we agree, that the proper inquiry is not whether it was foreseeable that Plaintiffs would be in the area, but whether TEPCO, in anticipation of its alleged negligence, could have foreseen the Navy's actions in response. Only if TEPCO could not have foreseen the Navy's actions and the Navy's actions caused the Plaintiffs' injuries would the Navy's conduct break the chain of proximate causation. But deciding whether a particular military action was "reasonably foreseeable" is not the same as requiring an evaluation of whether that action was itself reasonable. We cannot begin to resolve these questions at this stage in the litigation because there are basic factual disputes regarding the Navy's operations during Operation Tomodachi. We agree with the district court that it may "hear evidence with respect to where certain ships were located and what protective measures were taken" without running afoul of the political question doctrine. *Cooper II*, 166 F. Supp. 3d at 1123; see *Harris*, 724 F.3d at 473 ("[T]he submission of evidence related to strategic military decisions that are necessary background facts for resolving a case . . . is not sufficient to conclude that a case involves an issue textually committed to the executive.").

Second, TEPCO relies on § 452(2) of the Restatement (Second) of Torts, which provides: "Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause." …Even assuming TEPCO is correct that the duty to protect Plaintiffs shifted from TEPCO to the Navy, it is not clear that determining whether the duty shifted would raise a political question. A determination that someone other than TEPCO bore the responsibility for Plaintiffs' safety might simply absolve TEPCO of liability to Plaintiffs. The district court may not have to then decide whether the Navy fulfilled its duty to Plaintiffs.

The political question doctrine does not currently require dismissal. As the facts develop, it may become apparent that resolving TEPCO's superseding causation defense would require the district court to evaluate the wisdom of the Navy's decisions during Operation Tomodachi. But at this point, that is not clear. Further district court proceedings will help flesh out the contours of whatever law the district court finds applicable. TEPCO is free to raise the political question doctrine again if and when further developments demonstrate that a political question is inextricable from the case.

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D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

1. *Hernandez*

As discussed in *Digest 2016* at 192 and *Digest 2015* at 163-66, the U.S. Court of Appeals for the Fifth Circuit, en banc, affirmed the dismissal of all claims in *Hernandez v. Mesa et al.*, 785 F.3d 117 (5th Cir. 2015). *Hernandez* is a damages action against a U.S. Border Protection officer (Mesa) and the United States for the death of a Mexican national in a shooting across the U.S. border with Mexico. On October 11, 2016, the U.S. Supreme Court granted the petition for certiorari in the case. Excerpts follow from the U.S. brief filed in the Supreme Court on January 9, 2017, first from the "Summary of the

Argument" section and then from the section on the presumption against extraterritoriality with respect to a *Bivens* action.

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I. In granting certiorari, this Court directed the parties to address the question whether petitioners' claims may be asserted under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That antecedent question resolves this case: The judicially created *Bivens* remedy should not be extended to aliens injured abroad.

In *Bivens*, this Court recognized an implied private right of action for damages against federal officers alleged to have violated a citizen's Fourth Amendment rights. But because the Court's subsequent decisions have clarified that "implied causes of action are disfavored," the Court has long "been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.' " *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). And the Court has admonished that *Bivens* should not be extended to any new context where special factors suggest that Congress is the appropriate body to provide any damages remedy.

Petitioners seek to extend *Bivens* to injuries suffered by aliens abroad—a significant and unprecedented expansion. That expansion is inappropriate because Congress, not the Judiciary, should decide whether and under what circumstances to provide monetary remedies for aliens outside our borders who are injured by the government's actions. An injury inflicted by the United States on a foreign citizen in another country's sovereign territory is, by definition, an incident with international implications. This case illustrates that point: Both the problem of border violence in general and the specific incident at issue here have prompted exchanges between the United States and Mexico, and Mexico's amicus brief confirms its sovereign interest in those issues.

The need for caution before inserting the courts into such sensitive matters of international diplomacy is reinforced by the fact that, in a variety of related contexts—including the statutory remedy for persons deprived of constitutional rights by *state* officials, 42 U.S.C. 1983—Congress has taken care not to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. Instead, where Congress has addressed injuries inflicted by the government on aliens abroad, it has relied on voluntary payments or administrative claims mechanisms. And the general presumption against extraterritoriality further confirms that *Bivens* should not apply here: It would be anomalous to extend a judicially inferred remedy to a case where the Court would not extend an express statutory cause of action absent a clear indication that Congress intended to reach injuries outside our Nation's borders.

II. The en banc court of appeals held that the Fourth Amendment did not apply to Agent Mesa's alleged conduct because Hernández was an alien located in Mexico who had no connection to the United States. That conclusion was compelled by *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), which held that the Fourth Amendment had "no application" to the search and seizure of an alien's property in Mexico. *Id.* at 275. This Court reached that conclusion after a careful analysis of the Fourth Amendment's text, purpose, and history, as well as the "significant and deleterious consequences for the United States" that would follow from extending the Fourth Amendment to aliens abroad. *Id.* at 273.

Petitioners do not deny that *Verdugo-Urquidez* forecloses their claim. Instead, they assert that *Verdugo-Urquidez* is no longer good law because it employed an approach to extraterritoriality that purportedly conflicts with Justice Kennedy's concurring opinion in that case and with this Court's subsequent decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). But Justice Kennedy "join[ed]" the Court's opinion in *Verdugo-Urquidez* and agreed with the "persuasive justifications stated by the Court." 494 U.S. at 275, 278 (Kennedy, J., concurring). And nothing in *Boumediene*— which addressed the application of the right to habeas corpus in an area where the United States maintains de facto sovereignty—undermines either *Verdugo-Urquidez*'s analysis or its holding that the Fourth Amendment generally does not apply to aliens abroad.

In contrast, petitioners' ad hoc, totality-of-the-circumstances approach to the extraterritorial application of the Fourth Amendment finds no support in *Boumediene* or in any other decision of this Court. Petitioners' all-factors-considered test is unworkable; it would upend an understanding on which Congress and the Executive Branch have relied; and it could "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest," *Verdugo-Urquidez*, 494 U.S. at 273-274.

III. Agent Mesa is entitled to qualified immunity on petitioners' substantive-due-process claim because his alleged actions did not violate any clearly established Fifth Amendment right. To overcome a motion to dismiss based on qualified immunity, a *Bivens* plaintiff must plead facts establishing that "every reasonable official" in the defendant's position would have known that his actions violated the asserted constitutional right. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted). The dispositive question here is thus whether "every reasonable official" in Agent Mesa's position "would have understood that what he is doing violates [the Fifth Amendment]." *Ibid.*

Petitioners do not dispute the court of appeals' unanimous conclusion that it was not clearly established that an alien in Hernández's position had Fifth Amendment rights. Instead, petitioners maintain (Br. 28-33) that the court should have conducted the qualified-immunity analysis as if Hernández were a U.S. citizen because Agent Mesa did not know with certainty that he was an alien. Petitioners are correct that the qualified-immunity analysis focuses on facts known to the defendant at the time of the challenged conduct. But it does not follow that the analysis in this case should assume, counterfactually, that Agent Mesa knew Hernández was a U.S. citizen. Instead, the question is whether every reasonable officer in Agent Mesa's position would have known that his alleged actions violated the Fifth Amendment, where the officer did not know Hernández's nationality with certainty but had no reason to believe that he was a U.S. citizen.

The answer to that question is no—both because no case law addresses the application of the Fifth Amendment to uses of force against persons of unknown nationality outside the United States, and because it is not clearly established that the Fifth Amendment (rather than the Fourth Amendment) has any application to such uses of force, regardless of the nationality of the affected individual.

* * * *

3. The presumption against extraterritoriality reinforces the inappropriateness of extending Bivens *to aliens injured abroad*

The presumption against extraterritoriality further confirms that *Bivens* should not be extended to aliens injured abroad. It is a basic principle of our legal system that, in general, "United States law governs domestically but does not rule the world." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citation omitted). In statutory interpretation, that presumption is reflected in the canon that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). That canon "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664.

Petitioners assert (Br. 47) that the presumption against extraterritoriality is relevant only to "interpreting *statutes*," not to defining the scope of a common-law remedy like *Bivens*. But this Court has held otherwise. In *Kiobel*, the Court held that although the presumption "typically" applies to statutory interpretation, "the principles underlying the canon of interpretation similarly constrain courts" recognizing common-law causes of action. 133 S. Ct. at 1664.

Kiobel involved the ATS, a jurisdictional statute that "does not expressly provide any causes of action," but that this Court had previously held is "best read as having been enacted on the understanding that the common law would provide a cause of action for a modest number of international law violations." 133 S. Ct. at 1663 (quoting *Sosa*, 542 U.S. at 724) (brackets omitted). Although the international-law rules asserted by the plaintiffs applied abroad, this Court held that courts recognizing causes of action under the ATS must be guided by the presumption against extraterritoriality. In fact, the Court admonished that "the danger of unwarranted judicial interference in the conduct of foreign policy is *magnified* in the context of the ATS, because the question is not what Congress has done, but instead what courts may do." *Id.* at 1664 (emphasis added). That danger is still greater in the *Bivens* context, where courts are asked to create a common-law cause of action without even the minimal congressional guidance found in the ATS.

The presumption against extraterritoriality should thus "constrain courts exercising their power" under *Bivens*. *Kiobel*, 133 S. Ct. at 1665. And as this Court recently explained, the presumption counsels against extending a private damages remedy to injuries suffered abroad even if the underlying substantive rule has extraterritorial reach. In *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), the Court held that some provisions in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, govern foreign conduct. But "despite [its] conclusion that the presumption ha[d] been overcome with respect to RICO's substantive provisions," the Court "separately appl[ied] the presumption against extraterritoriality to RICO's cause of action." *RJR Nabisco*, 136 S. Ct. at 2106. The Court held that the private right of action did not reach injuries suffered abroad—even injuries caused by domestic conduct—because "[n]othing in [RICO] provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States." *Id.* at 2108.

Accordingly, even if Congress had enacted a statute expressly providing a damages remedy for individuals whose constitutional rights are violated by federal officers—and even if petitioners were correct that the Fourth and Fifth Amendments apply in this extraterritorial context—this Court would not extend that statutory remedy to this case absent "clear indication" that Congress intended to reach "injuries suffered outside of the United States." *RJR Nabisco*,

136 S. Ct. at 2108. Given this Court's longstanding reluctance to extend *Bivens*, it would be "grossly anomalous * * * to apply *Bivens* extraterritorially when [courts] would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring).

* * * *

On June 26, 2017, the Supreme Court issued its decision in *Hernandez v. Mesa*, No. 15-118, 137 S.Ct. 2003 (2017). The Court vacated the judgment of the Fifth Circuit (en banc) and remanded for further proceedings. The Supreme Court had recently issued an opinion in another *Bivens* case, *Abbassi*, and reasoned that the Court of Appeals should have an opportunity to consider how *Abbassi* would apply to this case. Justice Thomas filed a dissenting opinion, writing that he "would decline to extend *Bivens* and would affirm." Justices Breyer and Ginsburg also dissented, asserting that Hernandez was entitled to protection under the Fourth Amendment because of the significant connection to the United States of the area around the international border with Mexico and therefore should be allowed to pursue a *Bivens* action for damages. Excerpts follow from the *per curiam* opinion of the U.S. Supreme Court.

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With respect to petitioners' Fourth Amendment claim, the en banc Court of Appeals found it unnecessary to address the *Bivens* question because it concluded that Hernández lacked any Fourth Amendment rights under the circumstances. This approach—disposing of a *Bivens* claim by resolving the constitutional question, while assuming the existence of a *Bivens* remedy—is appropriate in many cases. This Court has taken that approach on occasion. See, *e.g.*, *Wood*, *supra*, at ___ (slip op., at 11). The Fourth Amendment question in this case, however, is sensitive and may have consequences that are far reaching. It would be imprudent for this Court to resolve that issue when, in light of the intervening guidance provided in *Abbasi*, doing so may be unnecessary to resolve this particular case.

With respect to petitioners' Fifth Amendment claim, the en banc Court of Appeals found it unnecessary to address the *Bivens* question because it held that Mesa was entitled to qualified immunity. In reaching that conclusion, the en banc Court of Appeals relied on the fact that Hernández was "an alien who had no significant voluntary connection to . . . the United States." 785 F. 3d, at 120. It is undisputed, however, that Hernández's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting. The en banc Court of Appeals therefore erred in granting qualified immunity based on those facts.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established …constitutional rights of which a reasonable person would have known.'" *Mullenix* v. *Luna*, 577 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 4–5) (quoting *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009)). The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U. S.

194, 202 (2001). The qualified immunity analysis thus is limited to "the facts that were knowable to the defendant officers" at the time they engaged in the conduct in question. *White* v. *Pauly*, 580 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 3). Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant.

Mesa and the Government contend that Mesa is entitled to qualified immunity even if Mesa was uncertain about Hernández's nationality and his ties to the United States at the time of the shooting. The Government also argues that, in any event, petitioners' claim is cognizable only under the Fourth Amendment, and not under the Fifth Amendment. This Court declines to address these arguments in the first instance. The Court of Appeals may address them, if necessary, on remand.

The facts alleged in the complaint depict a disturbing incident resulting in a heartbreaking loss of life. Whether petitioners may recover damages for that loss in this suit depends on questions that are best answered by the Court of Appeals in the first instance.

* * * *

2. *Rodriguez*

As discussed in *Digest 2016* at 192, the United States notified the U.S. Court of Appeals for the Ninth Circuit that it should await the Supreme Court's guidance in *Hernandez* before deciding a case involving the same issues. After the Supreme Court issued its decision in *Hernandez* in 2017, the United States filed a supplemental *amicus* brief supporting reversal in *Rodriguez v. Swartz*, No. 15-16410, in the Ninth Circuit. Excerpts follow from the U.S. supplemental brief, filed July 27, 2017.

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In *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), the Supreme Court considered *Bivens* claims similar to the claims presented here: the plaintiffs sought to invoke *Bivens* to recover for a cross-border shooting by a U.S. Border Patrol agent that resulted in the death of an alien in Mexico. The Court vacated the Fifth Circuit's decision holding that the plaintiffs had no Fourth Amendment claim and directed the court to consider the "antecedent" question of whether a *Bivens* remedy is available in light of *Abbasi. Id.* at 2006. The Court noted that resolving the underlying Fourth Amendment question "would be imprudent" and "may be unnecessary" in light of the intervening guidance provided by *Abbasi. Id.* at 2007.

The Court's instruction on remand in *Hernandez*, makes clear that this Court should address the antecedent question of whether a *Bivens* remedy exists before addressing the question of whether the Fourth Amendment applies to an alien injured abroad. And the Supreme Court's analysis of the special factors in *Abbasi* makes clear that it would not be proper to imply a non-statutory damages remedy in this case. The category of claims by aliens injured abroad, and specifically claims by those injured due to cross-border shootings, implicate foreign relations and national security policy. As the Court reiterated in *Abbasi*, the Constitution unequivocally assigns those functions to the political branches, so it would not be appropriate for the Judiciary

to intrude on those powers and provide monetary remedies for aliens outside U.S. borders who are injured by the government's actions. In addition, Congress has not provided aliens injured abroad with the sort of judicial damages remedy plaintiff seeks; instead, when it has chosen to address injuries inflicted by the government on aliens abroad, Congress has relied on voluntary payments or administrative claims mechanisms. As in *Abbasi*, Congress's failure to provide a damages remedy "is notable" and "more than 'inadvertent.'" 137 S. Ct. at 1862. Finally, the general presumption against extraterritoriality further confirms that *Bivens* should not be extended here.

* * * *

Any doubt on this question [of whether to recognize a *Bivens* action when an injury was inflicted on a foreign citizen in another country's sovereign territory] is resolved by *Hernandez*, which also involves a cross-border shooting. In *Hernandez*, the Court remanded and directed the Fifth Circuit to address whether a *Bivens* remedy exists in light of *Abbasi's* clarification of the special factors analysis. That disposition presupposed that the claims in *Hernandez* arose in new contexts. Like the Fifth Circuit in *Hernandez* therefore, this Court must determine whether special factors weigh against implying a damages remedy in this new context.

B. The Court in *Abbasi* clarified that whether "special factors counselling hesitation" are present "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." 137 S. Ct. at 1857-58; *see also Hernandez*, 137 S. Ct. at 2006. Indeed, if there are "sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must refrain* from creating the remedy in order to respect the role of Congress." *Abbasi*, 137 S. Ct. at 1858 (emphasis added). "In a related way," the Court explained, "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id*

These separation of powers concerns strongly weigh against implying a damages remedy here.

First, claims by aliens injured abroad implicate foreign affairs and national security. The Constitution commits these areas to the political branches. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1861; *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016). Accordingly, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981); *see Abbasi*, 137 S. Ct. at 1861.

Consistent with these principles, the Court's decisions make clear that *Bivens* should not be expanded to an area that the Constitution commits to the political branches. In *Chappell v. Wallace*, the Court declined to extend *Bivens* to claims by military personnel against superior officers because "Congress, the constitutionally authorized source of authority over the military system of justice," had not provided such a remedy and so a judicially created one "would be plainly inconsistent with Congress' authority." 462 U.S. 296, 304 (1983). In *United States v. Stanley*, the Court relied on *Chappell* to hold that *Bivens* does not extend to any claim incident to military service, again emphasizing that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." 483 U.S. 669, 683 (1987). And in *Abbasi*, the Court relied on these principles in declining to extend *Bivens* to challenges to the confinement conditions imposed on illegal aliens pursuant to executive policy in the wake of the September 11 attacks.

137 S. Ct. at 1858-63. The Court emphasized that "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to other branches,'" which are "even more pronounced" in the context of a claim seeking money damages. *Id.* at 1861 (citation omitted). The Court concluded that "congressionally uninvited intrusion [wa]s inappropriate action for the Judiciary to take." *Id.* at 1862 (quotation marks omitted).

The same logic precludes the extension of *Bivens* to aliens injured abroad by U.S. government officials. This category of cases unquestionably implicates foreign relations because the United States is answerable to other sovereigns for injuries inflicted on their citizens within their territory. Indeed, the United States and the government of Mexico have repeatedly addressed cross-border shootings in recent years. In 2014, the two governments established a joint Border Violence Prevention Council to provide a standing forum in which to address issues of border violence. Mexico and the United States have also addressed cross-border shootings in other forums, including the annual U.S.-Mexico Bilateral Human Rights Dialogue. Judicial examination of the incident at issue in this case would inject the courts into these sensitive matters of international diplomacy and risk undermining the government's ability to speak with one voice in international affairs. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

Permitting *Bivens* suits in this context also would directly implicate the security of the border. Congress has charged the Department of Homeland Security and its components, including U.S. Customs and Border Protection, with preventing terrorist attacks within the United States and securing the border. 6 U.S.C. §§ 111, 202. "[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States." *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004). Moreover, this Court has recognized that the related context of "immigration issues 'ha[s] the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' which further 'counsels hesitation' in extending *Bivens*." *Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2012) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009)).

In her initial brief, plaintiff argued that this Court should ignore the extent to which this case involves foreign relations, national security, and immigration when deciding whether to extend *Bivens* because those same factors are relevant to whether the Fourth Amendment applies extraterritorially. Br. 52-53. *Abbasi* and *Hernandez* make clear, however, that this Court must consider those factors in addressing the antecedent *Bivens* issue. Indeed, the premise of the special-factors inquiry is that a judicially created damages remedy is *not* appropriate for every constitutional violation—indeed, "in most instances [the Supreme Court] ha[s] found a *Bivens* remedy unjustified." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

Second, a variety of statutes indicate that Congress's failure to provide the damages remedy that plaintiff seeks was not "'inadvertent,'" which confirms that it would be inappropriate for the courts to provide a damages remedy here. *Abbasi*, 137 S. Ct. at 1862 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)); *see Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009). Traditionally, injuries suffered by aliens abroad were addressed through diplomatic negotiations or by voluntary *ex gratia* payments to the injured parties. *See* William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 Mil. L. Rev. 59, 61-64 (1966). The United States continues to rely on such measures in many contexts. See, e.g., Exec. Order No. 13,732, § 2(b)(ii), 81 Fed. Reg. 44,485(July1,2016). In certain recurring circumstances, Congress has authorized limited

administrative remedies for aliens injured abroad by U.S. employees. *See* 10 U.S.C. §§ 2734(a), 2734a(a); 21 U.S.C. § 904; 22 U.S.C. § 2669-1. Tellingly, Congress has not adopted a similar claims procedure for aliens injured abroad by the actions of U.S. Border Patrol agents. Moreover, where Congress has provided remedies for aliens injured abroad by U.S. employees, it has done so through administrative mechanisms, not by authorizing suits in federal court.

In addition, where Congress has provided judicial damages remedies, it has not extended those remedies to injuries of the sort plaintiff asserts here. Congress limited the statutory remedy for individuals whose constitutional rights are violated by *state* officials to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." 42 U.S.C. 1983. Similarly, in enacting the Federal Tort Claims Act (FTCA), the most comprehensive statute providing remedies for injuries inflicted by federal employees, Congress specifically excluded "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). That is a strong indication that Congress did not intend a damages remedy for injuries occurring abroad.

Plaintiff contended in her initial brief that the FTCA foreign-country exception has "absolutely no bearing" on whether a *Bivens* remedy is available here because Congress enacted the exception solely to avoid the application of foreign substantive law in FTCA cases. Br. 51. That was not Congress's only goal. Even before concerns regarding foreign law were raised during Congress's consideration of the statute, the bill that became the FTCA excluded "all claims 'arising in a foreign country *in behalf of an alien.*"'*Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (quoting H.R.5373, 77th Cong., 2d Sess., § 303(12) (1941)) (emphasis added).

More recently, in the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note, Congress created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing." 28 U.S.C. 1350 note § 2. "But the statute exempts U.S. officials, a point that President George H.W. Bush stressed when signing the legislation." *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring). "In confining the coverage of statutes such as the [FTCA] and the [TVPA], Congress has deliberately decided not to fashion a cause of action" for aliens injured abroad by government officials. *Id.* Congress's repeated decisions not to provide such a remedy counsel strongly against providing one under *Bivens*.

Moreover, plaintiff may have other remedies available to her. If the United States succeeds in prosecuting Swartz for murder, plaintiff has a potential statutory monetary remedy for restitution, which could include funeral expenses and lost future wages. *See* 18 U.S.C. § 3663A(a); *United States v. Cienfuegos*, 462 F.3d 1160, 1165-69 (9th Cir. 2006). In addition, plaintiff may have a state-law tort remedy against Swartz. The Westfall Act would protect Swartz from state-law tort suits only if the Department of Justice certifies that he was acting within the scope of his employment at the time of the incident. 28 U.S.C. § 2679(b), (d). The United States has not yet made that determination, and it would be reviewable in court. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995).

Third, the presumption against extraterritoriality underscores the inappropriateness of extending *Bivens* to aliens injured abroad. It is axiomatic that, in general, "United States law governs domestically but does not rule the world." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). The presumption against extraterritoriality "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 1664. And the Supreme Court has made clear that "the principles underlying the canon of interpretation similarly constrain courts" recognizing common-law causes of action. *Id.* Indeed, "the danger of

unwarranted judicial interference in the conduct of foreign policy is magnified" when "the question is not what Congress has done, but instead what courts may do." *Id.*

The Court recently held that even when the underlying substantive rule has extraterritorial reach, the "presumption against extraterritoriality must be applied separately" to the question of whether the private damages remedy extends to injuries suffered abroad. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2108 (2016). The Court held that the private right of action at issue did not reach injuries suffered abroad—even injuries caused by domestic conduct—because "[n]othing in [the statute] provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States." *Id.* Likewise, here, the presumption counsels against extending the *Bivens* damages remedy to injuries suffered by aliens abroad.

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Cross References

Microsoft *case and extraterritorial application of U.S. law*, **Ch. 3.A.2.**
Universal jurisdiction, **Ch. 3.A.5.**
Litigation regarding NPT (political question doctrine), **Ch. 4.B.2.**
Aviation v. United States, **Ch. 8.D.2.a.**
Ali v. Warfaa, **Ch. 10.B.2.**
Cooper v. TEPCO, **Ch. 19.B.2.**