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CASES AND PROBLEMS IN CIVIL RIGHTS LITIGATION:

STATE, FEDERAL, AND INTERNATIONAL PERSPECTIVES

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PART ONE
BACKGROUND TO FEDERAL CIVIL RIGHTS LITIGATION

CHAPTER ONE
INITIAL FACT PATTERNS

Spend some time with the following fact patterns. The first is loosely based on a 2012 incident in Astoria, Oregon. The second, third, and fourth adhere closely to the facts of recent situations in Portland, Oregon, although the names have been changed. The fifth follows the facts of a recent incident in Eugene, Oregon. Although each fact pattern derives from incidents in Oregon, nothing about them is unique to Oregon or to the Pacific Northwest.

For each fact pattern, consider what the legal ramifications of the events might be:

1) Has anyone been harmed in a way that you think should give rise to a legal claim? If so, what kinds of claims are possible? For example, should the common law provide the remedy, perhaps through some kind of tort action? Do any other common law doctrines seem relevant?

2) Do the actions of public officials in these fact patterns raise any constitutional issues? Put slightly differently, do their actions arguably violate anyone's constitutional rights? If so, what kind of claim or cause of action should be available?

3) If the injured parties or their representatives or estates filed suit, whom should they sue? Individual officials? Which ones? What about state or local governments – should they be defendants as well? Why?

4) If you were representing the plaintiff(s) in one of these cases, what would you anticipate are the strengths and weaknesses of your case? Should you win?

5) Finally, consider whether the potential defendants in these cases have any obvious defenses. If, for example, you think the official(s) should prevail in any subsequent litigation, how do you turn those thoughts into a defense case?

1. William Babcock

On an early Sunday evening in February, the desk clerk at the Highlander Motel in Astoria called the police about a guest who was acting "suspiciously." Specifically, the guest, William Babcock, was making frequent trips back and forth to his car, was acting aggressively towards other guests, and had paid cash for the room. Even more, the clerk stated that he knew Babcock, that Babcock was a resident of Astoria, and that it "seems strange" that he'd be staying at a motel when he had an apartment a mile away.

Officers David Gordon and Jorge Rivera responded to the call. As they were getting out of their car, the desk clerk approached them and pointed out Babcock, who was leaving his room with a duffel bag and walking quickly towards his car. Rivera called out to Babcock, shouting "Hold on a minute. We'd like to talk to you." Babcock started, looked at the officers, and dropped his bag. Quickly, he pulled a gun from inside his coat, fired at the officers, and ran towards his car. Gordon drew his gun and fired three shots. The third shot hit Babcock under the

right shoulder as he was opening his car door. Babcock spun around and collapsed. His gun tumbled a few feet away from his body. With Gordon covering him, Rivera ran over, kicked the gun away, determined that Babcock was still alive, and placed handcuffs around his wrists. Gordon then ran over to the motel room that Babcock had vacated and made a quick sweep to determine whether there were other people who might pose a problem. Only when they were certain that they had secured the area did they call for medical backup.

Babcock lost a great deal of blood, much of it due to the passage of time between when he was shot and when the medical team arrived. Doctors were able to treat his injuries fairly successfully, but he was in the hospital for two weeks because of blood loss. Even after he recovered, he had lost 20% of the mobility in his right shoulder and suffered chronic soreness.

Babcock's duffel bag contained $12,000 in cash, another gun, and roughly two-thirds of a kilo of powder cocaine. He was charged with several crimes, including attempted murder, assault on an officer, resisting arrest, and possession of cocaine with intent to distribute.

2. Jose Acosta

Shortly after midnight in October, Jose Acosta and Anthony Jameson exited a bar in Portland's Old Town. Neither man had a blood alcohol level that was above the legal limit. Jameson wanted a cigarette, and the two men sat down on a curb in an alley just around the corner from the bar. As they sat talking, Officer Teresa King drove down the street on a routine patrol. When she saw the two mean, she stopped and got out of her car with her flashlight. She shone the light on them and asked for identification. Both Acosta and Jameson complied. King ran their names to check for warrants, but nothing came up.

Nonetheless, King thought she smelled marijuana, and she suspected that one or both of the men was a dealer. King next asked the two men to consent to a search of their pockets. Jameson consented, and King searched his pockets but found nothing of interest. Acosta, however, did not consent. Instead, he informed King that he thought she was violating his Fourth Amendment rights. He pulled an ACLU "Know Your Rights" guide out of his back pocket to back up his assertion.

In response to Acosta's refusal to consent and his assertion that she had violated his rights, King arrested Acosta for criminal trespass. She asserted that the curb in the alley that the two men had been sitting on was private property that was not open to the public. She told Jameson that he was free to go, but she cuffed Acosta tightly and searched his clothing, including his pockets. Her search revealed nothing of interest.

After the search, King led Acosta to her cruiser and then drove him to the Multnomah County Detention Center where he was booked and held for four hours. The District Attorney's office ultimately declined to prosecute.

Acosta had bruises on his wrists from the handcuffs but no other injuries. Neither he nor Jameson had a criminal history of any kind.

3. Mack Wilkins

On an April afternoon, Karen Forest, the natural area supervisor at Portland's Hoyt Arboretum, received a report from a volunteer that a strange man was making people feel uncomfortable. A few minutes later, a woman entered the visitor center and informed Tyler Maples, the arboretum's executive director, that she felt threatened by an apparently drunk transient who was approaching the visitor center. Forest and Maples quickly conferred, and Forest called 9-1-1.

Shortly thereafter, Officer Samuel Larch received the following low-priority dispatch on his mobile computer:

> "Drunk transient harassing people at arboretum. One female said he threatened her, but complainant did not have specifics. Not physically violent, last seen in parking lot, is a male white, 50s, 5 foot 8, 180, green jacket, tan hoodie, jeans and has plastic bag. Advised to call back if becomes violent."

Larch, a 13-year veteran of the police bureau, had been working in the area around arboretum for the previous five years. As he drove towards the scene, he called the arboretum and spoke with Forest. Forest told Larch that the man had just locked himself in the visitor center's restroom. Forest also stated, "This looks pretty serious to me." Larch then called for a detox van to come out to the arboretum to possibly pick up a drunken transient.

Larch met Maples and Forest in the courtyard outside the visitor's center. They told him that the man had been holed up in the restroom for about 15 minutes. Larch approached the bathroom door and knocked on it. Suddenly, the man, whose name was Mack Wilkins, emerged from the restroom. He had blood on his neck and beard and was gripping an X-Acto knife with a six-inch handle and one-inch blade in his left hand. He was also muttering and swearing, and he appeared disoriented. Larch was shocked and startled. He took a couple of steps back, radioed for Code 3 cover (Code 3 indicates an officer is in peril), and pulled his 9 mm pistol. He held it in two hands, pointed at Wilkins. As Wilkins slowly staggered forward, still holding the knife, Larch stepped backward toward the planters on the south side of courtyard. He started to feel constricted and became concerned that he was running out of room to move. Larch shouted commands to "drop it" and "get down." Wilkins replied, "No. I'm not going to. I won't. I can't." Larch fired two shots at the man.

After firing, Larch moved around the planter box and backed out of the courtyard, closer to the walkway path. Wilkins stopped after he was struck by the bullets and did a "slow move spin" (as Larch later described it). Larch moved farther away. Wilkins took a sideways step toward him, continuing to ignore commands to drop his knife. Larch fired two more shots and Wilkins fell to the ground.

Larch later stated that this was the first time he had fired a gun on duty. "I've never had a day where I have been more scared at work, where I thought somebody would try to kill me." Larch had a beanbag shotgun in his police cruiser, but he left it in the car because he did not have a cover officer to back him up. On his belt Larch carried a baton, pepper spray, a Taser, and a gun. He was also wearing a Kevlar vest.

Mack Wilkins was a 58-year-old homeless man who had been living on the street for over 20 years. Estranged from his family for many years, Collins ate occasional meals at a church soup kitchen. Church members described him as a quiet man who evidenced mental illness and alcoholism and had engaged in self-mutilation (cutting). From 1980 to 2010, Collins was reported in 25 incidents with the Portland Police, including eight public park exclusions and nine citations for drinking in public.

Eleven days before the shooting, Wilkins went to the Portland Central Precinct. He asked for mental health care and confessed he had committed sexual abuse as a teenager. The officer who talked with him wrote that Wilkins had difficulty with the conversation and "acted as if he didn't understand several of the questions." The officer referred Wilkins to a non-profit mental health agency. He did not offer Wilkins transportation to Cascadia, but later stated that he would have arranged for a ride if Wilkins had asked for one.

The medical examiner found that Wilkins bled to death within 30-60 seconds after a bullet entered his hip and struck a major artery. Wilkins had recently cut himself across the neck several times and may have been trying to kill himself. There were no signs of intoxication.

4. Brenda Johnson

At 9:45 on a January night, 21-year-old Brenda Johnson was walking home down the middle of a street in North Portland. Johnson was walking with 21-year-old Shaun Martin and 27-year-old Thomas Williams, Martin's older brother. Johnson and Williams were students at Portland Community College, and Johnson was a guard on the Portland Community College women's basketball team. All three were African American.

A police car pulled up beside them, driven by Officer James Kenton, who asked, "Where you guys headed?" They told him they were going home. Kenton, who was white, then asked if they had any weapons or sharp objects. They replied that they did not. Kenton pointed to Martin's blue Kansas City Royals cap and asked if he was a Crip gang member. Martin said no.

Suddenly, two more police vehicles arrived, driven by Officers Mark Chiefson and Greg Kemp. Chiefson was African-American and Kemp was white. The officers directed Johnson, Martin, and Williams to put their hands behind their heads, with their legs apart. The officers later claimed that they asked the three if they could pat them down for weapons. Johnson, Martin, and Williams claimed the officers did not ask but told them they would be searched.

Johnson was smoking a thin black cigar and put it in her mouth to take a puff. One officer told her to keep it there. Johnson left the cigar in her mouth and put her hands above her head. Kenton stepped behind her to search her and asked again, "Where you headed?" Johnson reached with her left hand to pull the cigar out of her mouth and one or more of the officers knocked her to the ground. Johnson was held facedown with Kenton's knee on her head. She believed that she heard the sound of guns being cocked. Kemp held her legs. She yelled, "Don't shoot! Don't shoot! I'm not resisting." She then told the officer, "You're hurting me!" Johnson later stated that Kenton dug his knee into her head harder, told her to shut up, and called her a vulgar name.

The officers handcuffed Johnson, searched her, and put her in the back of a patrol car. The search produced Johnson's ID, her inhaler, an ibuprofen pill, cologne, and $8. After looking at her ID and running her name, the officers learned that she had no criminal history. At that point, they told her and her companions that they were free to go. No charges were filed.

The day after the incident, Johnson woke up with a migraine headache, a knot on her forehead, and a swollen bump and cut behind her right ear. She went to the hospital for treatment. She wasn't able to play basketball the following Saturday (two days after the incident) because her trainer thought she might have a minor concussion. She was able to resume school and basketball the following week.

The officers' reports indicate they stopped Johnson for a violation (walking in the middle of the street), and that they took her to the ground because she didn't follow orders. Kenton stated that he believed she was moving her hand to try to access a weapon.

The three officers were gang enforcement officers, intent on suppressing gang activity in an area known to be Kerby Blocc Crip territory. Kenton wrote that he and Chiefson would "contact numerous gang members in the area and routinely pat them down for weapons as an officer safety precaution." The officers were also under the impression that Johnson was male.

Johnson says she was following their orders but couldn't answer their questions with her cigar in her mouth. "I felt like I had been violated," she said. "I was naive to the whole situation." Johnson also claims the officers touched her breasts and genitals, and insulted her.

5. Susan Erikson

On a December afternoon, 15 year old Susan Erikson died at her Eugene home. Fourteen years earlier, Susan's mother, Cathy Richards, lost custody of her three children because of suspected abuse and neglect. The children's father was in prison for drug offenses and had little contact with his children. Susan's two older brothers grew up in foster care after they pleaded with a family court judge not to be sent back to their mother. Susan spent 5½ years in foster care before being returned to her mother. Sometime later, her mother met David Richards, a truck driver. The two were married about a year after Susan returned to her mother's home.

Susan was a quiet, dark-haired girl, who sought refuge in books at her middle school's library. She would go to school in ratty sweatpants and an old yellowing T-shirt. She was constantly hungry, and each day when it was time to go home, she became sad, withdrawn, and anxious. Her mother wouldn't allow friends to call Susan or let Susan visit their homes or invite them over. Susan tried to hide her injuries. When friends saw bruises on her abdomen and legs during gym class, she would say that she had fallen.

When Susan was 12, a friend and classmate, Miranda Garcia, wouldn't accept Susan's explanations about her injuries and pressed her for the truth. Susan admitted that her mother was abusing her. Garcia told her mother, who then contacted the child welfare division of the Department of Human Services (DHS), the state agency responsible for investigating reports of child abuse and neglect. According to Garcia's family, child welfare screeners downplayed their

concerns and stated that secondhand accounts of abuse were not sufficiently serious to send social workers out. Garcia and her mother then went to officials at Cascade Middle School. School officials subsequently contacted the DHS three times while Susan was a student.

Two years later, after finishing eighth grade, Susan withdrew from public school. Friends and family say she was hidden away with almost no contact with the outside world. One of the few people to have contact with Susan was her step-grandmother, Peggy Richards. A year before Susan's death, and concerned that Susan was emaciated and bruised, Peggy made the first of many (at least 5) calls to DHS to report her suspicions of abuse. She did not give her name because she was worried her son and daughter-in-law would find out. DHS said they would check into the situation. Peggy claims that when she asked one screener whether she should call the police, she was advised that child protection workers could handle the situation.

On the day Susan died, Peggy Richards received a frantic call from David and Cathy, who said Jeanette was cold and had stopped breathing. Peggy screamed at them to call 9-1-1, which they did. The couple were arrested later that night after Susan was pronounced dead at a nearby hospital. Peggy later had the unpleasant task of cleaning out the house. She found food padlocked in kitchen cupboards and a blood-spattered bedroom. She described the inside of the house as filthy, with junk and toys everywhere. Investigators urged her not to view her step-granddaughter's body. "They all told me that I did not want to see this body because it was the most horrific thing they'd ever seen," said Richards, who took their advice.

Cathy Richards is now on Oregon's death row after pleading guilty to the aggravated murder of her daughter. David Richards is serving a life sentence after pleading guilty to murder by abuse. He denied inflicting harm but admitted failing to protect Susan from her mother and failing to report her injuries and starvation to authorities.

DHS convened a Critical Incident Response Team (CIRT) review to examine how the agency handled the case, including a review of all prior contacts with the family. The CIRT found that state workers only referred one report of abuse for assessment and that they quickly decided Susan was not abused. DHS did not investigate four subsequent documented reports through 2009. The CIRT expressed concern that additional reports of abuse may have been made to DHS that were not documented. The CIRT also stated that DHS did not adequately consider the fact that Susan was in a high-risk family (due to the history of abuse and neglect) or the reports of abuse received from credible sources. In addition, Susan's ability to protect herself was not properly evaluated.

The CIRT's report concluded that state workers investigating abuse should visit isolated children more often, with multiple visits over a 30-day period when a child has been identified as isolated from school, sports groups, church, medical workers, or other outside connections. The CIRT also indicated that child welfare screeners should stop considering older kids less vulnerable. Screeners should not even be trying to determine a child's vulnerability, which requires "a face-to-face evaluation," the report said. Finally, the CIRT recommended that DHS improve its screening, provide better and more specific guidance to workers, and take steps to ensure adequate investigations.

Notably, Susan's death, and the subsequent investigation, followed five years of CIRT reviews of child deaths and serious injuries of children who had been in contact with the DHS. Twenty-one reports from the five years before Susan's death identified a myriad of problems, including a failure to investigate and follow up on cases, inadequate documentation, and lack of ongoing assessment. No Oregon child welfare worker was fired as a result of the case. Two employees were disciplined and a third was reassigned.

CHAPTER TWO
STATE TORT LAW AND CIVIL RIGHTS LITIGATION

A. SOVEREIGN IMMUNITY

The American law of sovereign immunity derives from English common law. At the time of the American Revolution, the common law held that the King or Queen could "do no wrong" in the sense that he or she could not be sued in his or her own courts. Put differently, because sovereign power rested in the monarch, no court could order an unwilling monarch to comply with a judgment, even if the monarch had violated the law. Yet it was still possible to obtain remedies from the government so long as the claim "did not take the form of a suit against the Crown." Further, "when it was necessary to sue the Crown *eo nomine* [by that name,] consent apparently was given as of course." Finally, although the King or Queen was immune from suit, it was often possible to seek remedies for the tortious conduct of government officials. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 3-4, 11-18 (1963). A variety of common law writs were available:

> "Habeas focused on the legality of detention; mandamus issued to compel official action; trespass claimed damages for a government invasion of liberty or property; and assumpsit facilitated a challenge to the legality of taxes and other government exactions. In each case, the action went forward against the government officer, thereby preserving the formal truth that the government itself was immune from suit at common law." James R. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnity and Government Accountability in the Early Republic*, 85 NYU L. Rev. 1862, 1872 (2010).

In the early United States, the general idea of sovereign immunity persisted, but the various devices for obtaining relief directly against government entities became more constrained. Professor Jaffe suggests that "the prime cause was the powerful resistance of the states to being sued on their debts," which was also the chief reason for adoption of the Eleventh Amendment to the U.S. Constitution prohibiting suits against non-consenting states in federal courts. Jaffe, *supra*, at 19. In addition, with no monarch available to give consent, the power to waive immunity was thought to have passed to the legislature (the locus of popular sovereignty). The result was a strong doctrine of sovereign immunity. *See* Pfander & Hunt, *supra*, at 1873-74 (noting the variety of early state approaches to resolving claims against governments but also observing that "the institutional practices that arose after the Constitution's ratification presumed the existence of . . . immunity").[1]

Notes and Questions

1. Leaving aside the possibility that, as a matter of sheer power, a government may im-

[1] Although the major impetus for sovereign immunity in the United States was a federalism concern about state liability in federal court – the problem that the Eleventh Amendment addressed – the Supreme Court fairly quickly assumed that the same immunity applied to suits against the United States. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821). This chapter touches on federal sovereign immunity in section C.1.

munize itself from suit, what are the arguments for and against sovereign immunity? Is immunity an all or nothing proposition, or are there areas in which immunity is more or less justifiable?

2. The brief account above suggests a practical reason for sovereign immunity: that a court would not be able to enforce a judgment against a non-consenting sovereign. Is that a sufficient justification?

3. Other justifications – both historical and contemporary – take a more theoretical form. Alexander Hamilton wrote, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *The Federalist*, No. 81 (Hamilton). Similarly, Justice Holmes declared that "there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). More recently, Justice Thomas stated, "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743, 760 (2002). Are any of these justifications convincing?

4. Yet another set of justifications looks to considerations of public policy. Widespread government liability could raise fiscal concerns. Indeed, the need to engage in litigation at all has fiscal consequences and also distracts (and may even deter) officials from their duties. Further, judicial decisions that governments and their officials have violated the law could interfere with government control over operations, property, and finances.

Are you swayed by arguments about fiscal responsibility? How do such arguments weigh against the claim of justice for those injured by tortious conduct? What about the concern to avoid undue interference with government functions or with the actions of officials that require flexibility or on the spot judgments? Is it a sufficient response to invoke a need to control the exercise of state power and to limit discretionary authority?

Chapter 4 addresses the constitutional aspects of sovereign immunity more fully. For now, it is important to understand, first, the background presumption that the federal and state governments enjoy sovereign immunity from suit, with state immunity finding its source in the Eleventh Amendment to the federal Constitution. Second, foreign governments also receive some level of immunity, initially as a matter of comity but now through a federal statute (a topic addressed more fully in Chapter Ten). Third, local governments enjoy a traditional immunity, but it does not derive from the Eleventh Amendment. Rather, it is based on the idea that, under state law, "the supposed municipality was not an entity at all, simply an aggregation of many people; consequently no suit could be entertained." 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 334, at 330 (2d ed. 2011). This immunity persists as a background rule even though most contemporary local governments are corporate entities under state law.

Fourth – and most important – these immunities do not necessarily prevent people from pursuing remedies for injuries caused by government action. Under the doctrine of *Ex parte Young*, 299 U.S. 113 (1908), discussed in more detail in Chapter Four, federal courts can enjoin state or federal officials from carrying out unconstitutional statutes or policies. The ability to

bring suits for injunctive relief against government officials who are carrying out their duties, where the basis for those duties is unconstitutional, goes a long way toward drawing the sting of sovereign immunity.

It also remains possible to bring common law damages claims against individual officials for their harmful conduct, in addition to the constitutional claims against individual officials that are the primary focus of this book. Further, the federal government and every state government have waived their immunity under certain circumstances. The extent of waiver varies from jurisdiction to jurisdiction. The result is that state and federal tort law provide remedies for people injured by government action, including actions that also support civil rights claims under federal law. In some situations, state tort law provides remedies that go beyond federal law.

B. TORT CLAIMS AGAINST STATE AND LOCAL OFFICIALS

1. Overview of State Tort Law Claims Against State and Local Officials

> "Almost all states have now enacted tort claims statutes waiving the blanket common law immunity of the state and its agencies. Besides these general statutes, other statutes may affect immunities in particular cases, and of course both kinds of statutes must be consulted for details. As a matter of structure, about thirty states abolish tort immunity generally, but retain it in specified circumstances. A second group works in reverse, retaining the immunity generally, but abolishes it for a list of cases in which liability is permitted. In several states, a tort claim against the state must be presented to an administrative body instead of to a court. Some states set up a separate court of claims for hearing tort claims against the state. About three states appear to retain a very broad sovereign immunity." Dobbs, *et al*., *supra*, § 342, at 362.

Whether or not a state waives immunity in general, while retaining some exclusions, or only waives immunity with respect to certain kinds of cases, most states also impose additional limitations on liability. Caps on general or non-economic damages are common, as are caps on or prohibition of punitive damages. States that allow plaintiffs to sue in court might still require plaintiffs to present the claim first to the relevant government agency (a requirement known generally as a "notice of claim statute").

State waivers of immunity may or may not include claims against local governments. Remember that local governments cannot claim *sovereign* immunity (because they are not seen as sovereigns) but that they still enjoy a presumptive *common law* immunity. If a state waiver of immunity does not include local governments, then local government immunity continues in force. Common law decisions continue to recognize immunity for local governments, but courts have emphasized that this immunity is only partial:

> "Although states varied somewhat in their approach, they held that municipalities were immune from tort liability, except in cases of (1) torts committed in a proprietary rather than governmental capacity, and (2) nuisance committed by the municipality. Sometimes liability was also extended to cases of (3) negligently

> maintained municipal property and (4) negligently maintained roads, streets, and sewers." Dobbs, *et al*., *supra*, § 343, at 365-66.[2]

Finally, state statutes that waive sovereign immunity or that create pockets of liability may also have an impact on suits against individual officers. Individual officers may have the same immunity as the state, or they may have a different level of immunity. Further, some state statutes provide that the government is always the proper defendant in a suit over actions within the scope of an official's duties. If the plaintiff sues an official, then the state will be substituted as the proper defendant and the official is released from liability altogether. Other states indemnify officials and/or allow actions against individuals and government units.

The ultimate result is that individuals who claim to be injured by government action can bring suit in almost all states against officials or the government itself. The underlying causes of action are sometimes restricted – sometimes, for example, the state is not liable for the intentional torts of its officials – but in general the guiding law on issues of substantive liability is the law of torts.

Although tort law governs the general contours of actions against state and local governments and officials, these defendants are able to raise a series of defenses or immunities to specific claims. According to Dobbs, Hayden & Bublick, the chief defenses are (1) immunity for discretionary decisions and (2) no liability where the government or its officials had no duty toward the plaintiff (the public duty doctrine). Dobbs, *et al*., *supra*, §§ 344-46, at 369-84.

The doctrine of immunity for discretionary decisions picks up on the ideas that imposing liability on government actors can interfere with government functions and that officials must make judgment calls based on the best information available at the time. When they exercise their discretion in a reasonable manner (as opposed to arbitrarily or negligently), imposition of liability would have unfortunate consequences. Of course, denial of liability also has unfortunate consequences for injured plaintiffs, and state court decisions repeatedly attempt to balance these concerns in specific cases.

The public duty doctrine recognizes that governments have many obligations to act and that they must make judgments about how to carry out those duties. In general, the failure to perform a duty owed to the public in general will not support liability if that failure results in injury to a specific person. Courts often hold in such cases that the government and its officials did not owe a specific duty to the injured plaintiff. Again, Dobbs, Hayden & Bublick provide a clear explanation:

> "In the classic case for invoking the public duty doctrine, the duty is imposed by a statute that requires the defendant to act affirmatively, and the defendant's

[2] The government-proprietary distinction refers to a distinction between activities such as police and fire protection, which are seen as "governmental" because they are naturally the kinds of activities in which governments engage, versus activities such as utility services, which are seen as "proprietary" because the government is acting within a market and engaging in activities that could be handled by private entities. Cases discerning the line between these two categories can be very difficult, in part because courts have to apply common sense or received notions of what is and what is not truly governmental. *See* Dobbs, *et al*., *supra*, § 343, at 366-67.

> wrongdoing is a *failure* to take positive action for the protection of the plaintiff. [By contrast,] [i]f the entity undertakes to act or enters into action for the plaintiff's protection, liability may be warranted for breach of common law duties rather than the statute." Dobbs, *et al*., *supra*, § 345, at 375.

Representative cases include failure of officials to inspect or adhere to safety codes or standards, or the failure of officials, including police, to investigate reports of wrongdoing or even failure to take a person into custody when, for example, there is probable cause to arrest. *See id*. at 375-76. The public duty doctrine is controversial, and many courts have rejected or limited it. Still, it continues to have at least some force in most states.

State and local employees have their own distinct immunities and defenses. In general, these defenses reflect a concern by courts that too much liability could deter officials from optimal performance of their duties. Sometimes these defenses are complete – as in the case of judges and legislators, who typically enjoy an absolute immunity from suits arising out of their official acts. Further, these absolute immunities attach to the function, not the person, so that other officials will receive protection for some of their duties (those that are judicial or legislative in character) but not for others (typically, those that can more easily be characterized as "executive"). Executive officials more commonly enjoy a partial or "qualified" immunity for many of their actions, particularly those labeled "discretionary." "The discretionary immunity is qualified or conditional because it is usually lost if the officer is guilty of bad faith, malice, corruption, wanton misconduct or the like." Dobbs, *et al*., *supra*, § 350, at 398. Finally, and separate from these defenses, states and local governments typically have statutes that require them to provide legal representation (almost always a government attorney) for individual officials who face lawsuits arising out of their official conduct, and to indemnify those officers if they are found liable for money damages.

Fact Pattern Questions

1. Remember the fact patterns in Chapter One. Assuming it is possible to sue the state or local governments and state or local officials in state court for breach of common law tort duties, how would the various defenses and immunities that are discussed above apply?

2. Would government defendants be able to invoke the defenses of discretionary decision making or the public duty doctrine?

3. Would the government officials be able to raise absolute or qualified immunity defenses?

4. Do you need more information to answer these questions? If so, what kind of information do you need, and how do you think you would be able to get it?

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2. Case Study: The Oregon Tort Claims Act

Article IV, section 24 of the Oregon Constitution provides, "Provision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."

In *Hale v. Port of Portland*, 783 P.2d 506 (Or. 1989), the Oregon Supreme Court stated that sovereign immunity became part of the law of Oregon when the Oregon Territory adopted English common law in 1844 and that Article IV § 24 "assumes the pre-existence of sovereign immunity." The court also held that this constitutional provision (1) permits legislative waiver of sovereign immunity by general (not special) legislation and (2) forbids judicial abrogation of immunity in the absence of a statute.[3]

The Oregon Tort Claims Act is an example of a general law that partially waives sovereign immunity and allows some suits to be brought against the state government, as well as against local governments. Many other states have similar statutes.

Oregon Revised Statutes
Title 3: Remedies and Special Actions and Proceedings
Chapter 30: Actions and Suits in Particular Cases

30.265. Scope of liability of public body, officers, employees and agents; liability in nuclear incident.

(1) Subject to the limitations of ORS 30.260 to 30.300, every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598. The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287 shall be an action against the public body only. The remedy provided by ORS 30.260 to 30.300 is exclusive of any other action or suit against any such officer, employee or agent of a public body whose act or omission within the scope of the officer's, employee's or agent's employment or duties gives rise to the action or suit. No other form of civil action or suit shall be permitted. If an action or suit is filed against an officer, employee or agent of a public body, on appropriate motion the public body shall be substituted as the only defendant. Substitution of the public body as the defendant does not exempt the public body from making any report required under ORS 742.400.

(2) Every public body is immune from liability for any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when such officer, employee or agent is immune from liability.

[3] In *Smothers v. Gresham Transfer*, 23 P.3d 333 (Or. 2001), the Oregon Supreme Court overruled aspects of *Hale*, but its sovereign immunity holding remains good law.

(3) Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for:

> (a) Any claim for injury to or death of any person covered by any workers' compensation law.
>
> (b) Any claim in connection with the assessment and collection of taxes.
>
> (c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.
>
> (d) Any claim that is limited or barred by the provisions of any other statute, including but not limited to any statute of ultimate repose.
>
> (e) Any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.
>
> (f) Any claim arising out of an act done or omitted under apparent authority of a law, resolution, rule or regulation that is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice. * * *[4]

30.285. Public body shall indemnify public officers; procedure for requesting counsel; extent of duty of state; obligation for judgment and attorney fees.

(1) The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1) of this section do not apply in case of malfeasance in office or willful or wanton neglect of duty.

(3) If any civil action, suit or proceeding is brought against any state officer, employee or agent which on its face falls within the provisions of subsection (1) of this section, or which the state officer, employee or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, the state officer, employee or agent may, after consulting with the Oregon Department of Administrative Services file a written request for counsel with the Attorney General. The Attorney General shall thereupon appear and defend the officer, employee or agent unless after investigation the Attorney General finds that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or willful or wanton neglect of duty, in which case

[4] The omitted portions of OTCA 30.265 refer to liability for nuclear accidents.

the Attorney General shall reject defense of the claim.

(4) Any officer, employee or agent of the state against whom a claim within the scope of this section is made shall cooperate fully with the Attorney General and the department in the defense of such claim. If the Attorney General after consulting with the department determines that such officer, employee or agent has not so cooperated or has otherwise acted to prejudice defense of the claim, the Attorney General may at any time reject the defense of the claim.

(5) If the Attorney General rejects defense of a claim under subsection (3) of this section or this subsection, no public funds shall be paid in settlement of said claim or in payment of any judgment against such officer, employee or agent. Such action by the Attorney General shall not prejudice the right of the officer, employee or agent to assert and establish an appropriate proceedings that the claim or demand in fact arose out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of did not amount to malfeasance in office or willful or wanton neglect of duty, in which case the officer, employee or agent shall be indemnified against liability and reasonable costs of defending the claim, cost of such indemnification to be a charge against the Insurance Fund established by ORS 278.425. * * *

30.287. Counsel for public officer; when public funds not to be paid in settlement; effect on liability limit; defense by insurer.

[This section is similar to § 30.287, except that its provisions apply to local government officers, employees, or agents instead of state officers, employees or agents.]

The following statutes are not part of the Oregon Tort Claims Act, but they provide further information about litigation with state and local governments in the state:

30.320. Contract and other actions and suits against governmental units.

A suit or action may be maintained against any county and against the State of Oregon by and through and in the name of the appropriate state agency upon a contract made by the county in its corporate character, or made by such agency and within the scope of its authority; provided, however, that no suit or action may be maintained against any county or the State of Oregon upon a contract relating to the care and maintenance of an inmate or patient of any county or state institution. An action or suit may be maintained against any other public corporation mentioned in ORS 30.310 for an injury to the rights of the plaintiff arising from some act or omission of such other public corporation within the scope of its authority. An action may be maintained against any governmental unit mentioned in ORS 30.310 for liability in tort only as provided in ORS 30.260 to 30.300. An action or suit to quiet title may be maintained against any governmental unit mentioned in ORS 30.310.

[*Note*: ORS § 30.320 repeatedly refers to ORS § 30.310. That section concerns "the State of Oregon or any county, incorporated city, school district or other pub-

lic corporation of like character in this state."]

30.400. Actions by and against public officers in official capacity.

An action may be maintained by or against any public officer in this state in an official character, when, as to such cause of action, the officer does not represent any of the public corporations mentioned in ORS 30.310, for any of the causes specified in such section and ORS 30.320. If judgment is given against the officer in such action, it may be enforced against the officer personally, and the amount thereof shall be allowed to the officer in the official accounts of the officer.

Notes and Questions about the Oregon Tort Claims Act (OTCA)

1. The OTCA enacts a general waiver and then creates exceptions from that waiver in certain situations. As your reading above indicated, many states follow this model, but other states continue to adhere to a model of immunity, with exceptions that allow liability in certain situations.

2. Also important is the fact that the OTCA is the exclusive remedy for torts committed by state and local officials. The statute is quite clear on this point. If a plaintiff brings a qualifying tort claim against an individual official, the court must substitute the appropriate government entity as the defendant. *See* ORS § 30.265(1). The official faces no personal liability; in effect, he or she is immune from liability. *See* Jensen v. Whitlow, 51 P.3d 599 (Or. 2002) (upholding the facial constitutionality of this part of the OTCA).

It is important to remember, however, that the OTCA applies only to actions "within the scope of [an official's] employment or duties." Plaintiffs remain free to sue public officials for actions outside that scope. *Cf.* Berry v. Department of General Services, 917 P.2d 1070 (Or. 1996). The ultimate determination of whether the official's actions were within the scope of his or her employment or duties is a question for the court.

3. Consider the list of exceptions to liability (put differently, the list of retained immunities) in ORS § 30.265(2) & (3). Do they go too far? Or, should the statute contain more exclusions?

a. ORS § 30.265(2) provides that a government entity is entitled to immunity "when [the] officer, employee or agent is immune from liability." When does this provision apply? Consider the following:

> "In this context, statutes outside the OTCA may provide the privilege of immunity. *See*, *e.g.*, ORS 419B.025, relating to the reporting of child abuse. Most immunity privileges, however, derive from common law and are the result of public policy favoring a public official's freedom of action and speech in the performance of judicial, legislative, and executive functions." David B. Williams & Michele C. Smith, *Claims Against Gov-*

ernment Bodies, in 2 *Torts*, § 27.9, p.27-9 (Oregon CLE, 3d ed. 2006).

b. ORS § 30.265(3)(c) provides immunity for "[a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Although potentially very broad, Oregon courts have limited this exception in two ways. First, it applies only to claims for money damages and not to claims for injunctive relief. *See* Penland v. Redwood Sanitary Sewer Serv. Dist., 956 P.2d 964 (Or. 1998). Second, the government defendant bears the burden its entitlement to immunity under a three-part test:

> "a government function or duty . . . must be the result of a choice, that is, the exercise of judgment; that choice must involve public policy, as opposed to the routine day-to-day activities of public officials; and the public policy choice must be exercised by a body or person that has, either directly or by delegation, the responsibility to make it." Ramirez v. Hawaii T&S Enterprises, 39 P.3d 931, 932 (Or. App. 2002).

For a list of situations in which Oregon courts have classified a specific kind of conduct as either discretionary or non-discretionary for purposes of the OTCA, see Williams & Smith, *supra*, at 27-14 – 27-15.

4. The statute of limitations is two years for most claims. *See* ORS § 30.275(9). Before filing suit, however, plaintiffs seeking redress for injury by a state or local official must provide the relevant government entity with notice of the claim within 180 days of suffering injury (the notice period is one year for wrongful death claims). *See* ORS § 275(2). Failure to provide notice of the claim before filing suit is grounds for dismissal. *See* ORS § 275(1) ("No action . . . shall be maintained unless notice of claim is given . . . ."); Perez v. Bay Area Hosp. 846 P.2d 405 (Or. 1993) (holding summary judgment was proper for failure to comply with the notice of claim provision).

5. The OTCA limits the liability of government defendants to an amount that is adjusted annually for inflation. *See* ORS §§ 30.269, 30.271 & 30.272; *see also* Clarke v. Oregon Health Sciences University, 175 P.3d 418 (Or. 2007) (holding the $200,000 limit in an earlier version of the OTCA is unconstitutional as applied to claims that would otherwise be brought against individual state employees). The OTCA also prohibits punitive damages. *See* ORS § 30.269(1).

Fact Pattern Questions

The previous set of questions asked you to speculate about how the general doctrines for tort claims against state and local government and officials would apply to the fact patterns in Chapter One. Now consider those fact patterns against the specific provisions of the Oregon Tort Claims Act.

1. Who are the proper defendants in each case? When, if ever, would the plaintiff(s) be able to bring a tort claim against an individual official under these fact patterns?

2. How would the OTCA's exceptions to liability apply to each fact pattern?

C. TORT CLAIMS AGAINST THE FEDERAL GOVERNMENT AND FEDERAL OFFICIALS

1. Background

Remember that the federal government, like the state governments, claims the presumption of sovereign immunity. The Supreme Court noted the existence of federal sovereign immunity as early as 1821. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411 (1821). In 1882, the Court declared that "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." United States v. Lee, 106 U.S. 196, 207 (1882).

Despite the general doctrine that sovereign immunity applies to the United States, the Constitution abrogates that immunity (as well as the immunity of the states) in certain circumstances.[5] In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court held that the Takings Clause – specifically the requirement of "just compensation" – provided a cause of action against state and local governments. The Court rejected a sovereign immunity argument and stated that "the Constitution . . . dictates the remedy for interference with property rights amounting to a taking." A second example is the intersection of due process and unconstitutional taxes. In *Reich v. Collins,* 513 U.S. 106 (1994), the Court held that due process requires states to provide remedies for taxes that violate the Constitution, specifically including state court actions against state officials for refund of taxes allegedly exacted in violation of the federal Constitution, notwithstanding any claims of sovereign immunity.

More recent cases, however, have suggested limits on these doctrines. *See* City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 714 (1999) (suggesting states may be able to invoke sovereign immunity in just compensation cases); Alden v. Maine, 527 U.S. 706, 740 (1999) (suggesting *Reich* turned on the state's breach of an earlier promise to provide a remedy). For additional discussion, see Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart & Weschler's The Federal Courts and the Federal System* 867-68 (6th ed. 2009).

Remember, too, the doctrine of *Ex parte Young*, 299 U.S. 113 (1908), discussed above with respect to state sovereign immunity and later in Chapter Four. *Young*'s holding that an implied cause of action exists for federal courts to enjoin officials from carrying out unconstitutional statutes applies to suits against both state and federal officials.

In addition – as with the states and, for that matter, in England – the existence of sovereign immunity has not always prevented suits against individual federal officials for the consequences of their official acts. The "traditional tools of government accountability – habeas, mandamus, trespass, and assumpsit claims against federal officials, rather than against the government itself" – remained available. Pfander & Hunt, *supra*, at 1874. The Supreme Court rec-

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[5] In addition, the Fourteenth Amendment allows Congress to abrogate state sovereign immunity in some circumstances, as discussed in Chapter Four.

ognized the propriety of such suits as early as 1804, when it allowed a trespass action for damages against a captain who seized a Danish ship while acting under military orders. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804). The imposition of individual damages liability in cases such as *Little* was potentially ruinous, and Congress routinely enacted private bills of indemnification for individual officials. *See* Pfander & Hunt, *supra*.

The general doctrine today is that suits against a federal official are appropriate, despite sovereign immunity, (1) "if the officer allegedly acted outside of the authority conferred on his or her office by Congress," and (2) "if the officer acted within the conferred statutory limits of the office, but his or her conduct allegedly offended a provision of the Constitution." Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 Oklahoma L. Rev. 439, 457 (2006). Chapter Three considers the second of these situations in much greater detail.

Finally, against this background of immunity, exceptions to immunity, and suits against officers in certain circumstances, Congress has passed numerous statutes that waive aspects of federal sovereign immunity.

2. Congressional Waivers of Federal Sovereign Immunity

Over the years, Congress has enacted several waivers of federal sovereign immunity. The most significant for purposes of this course is the Federal Tort Claims Act (FTCA). Before turning to that statute, two other waivers of immunity merit some attention.

a. The Tucker Act

The 1887 Tucker Act gives the Court of Claims and its successors, the United States Claims Court and today's Court of Federal Claims, jurisdiction over claims seeking money from the United States in cases other than tort. The current version of the statute provides that the Court of Federal Claims

> "shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1)

See also 28 U.S.C. § 1346(a)(2) (giving U.S. district courts concurrent jurisdiction over cases where the claimed damages do not exceed $10,000). The Court of Federal Claims is an Article I court. Appeals from judgments of that court are taken to the United States Court of Appeals for the Federal Circuit, which is an Article III court. *See* 28 U.S.C. §1295(a).

Note that the Tucker Act creates federal court jurisdiction but does not create any substantive rights. That is not a problem for breach of contract cases, but it creates issues for constitutional claims:

"A suit under the Tucker Act must therefore "demonstrate that the source of sub-

> stantive law * * * [relied] upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983), quoting *United States v. Testan*, 424 U.S. 392, 400 (1976). Constitutional claims founded on the Just Compensation Clause satisfy this standard. *See*, *e.g.*, United States v. Causby, 328 U.S. 256 (1946). The lower courts have consistently rejected Tucker Act suits based on violations of other constitutional provisions, however, on the ground that these provisions do not 'expressly grant a money remedy.' Featheringill v. United States, 217 Ct.Cl. 24, 33 (1978)." Fallon, *et al*., *supra*, at 860.

Remember as well the exclusion of "cases not sounding in tort." The result is that those injured by tortious actions of government officials, including torts that also violate the Constitution, must look elsewhere for a remedy.

b. Relief Other Than Money Damages

In 1976, Congress waived the sovereign immunity of the United States in cases "seeking relief other than money damages." The waiver is codified at 5 U.S.C. § 702:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein
>
> > (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or
> >
> > (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought. "

Section 702 makes clear that plaintiffs can sue the United States itself when "an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority," so long as the plaintiff is not seeking money damages. The term "agency" is defined in 5 U.S.C. § 701(b)(1) to include "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," but § 701(b)(1) also has several specific exclusions, among them Congress, the federal courts, the government of the District of Columbia and "the territories or possessions of the United States."

The intersection of the Tucker Act and § 702 can be complex. Consider the following comments:

> "It may not always be clear whether a suit seeking specific relief should be filed in district court, or, because it is 'really' a disguised suit for breach of contract, in the Court of Federal Claims. Similar uncertainty may arise concerning whether a suit for monetary relief is for money damages, and thus outside § 702 (though perhaps cognizable in the Court of Federal Claims), or for some other kind of monetary relief, and therefore within the district court's jurisdiction under § 702. Further examples could be multiplied." Fallon, *et al*., *supra*, at 866.

See also Bowen v. Massachusetts, 487 U.S. 879 (1988) (stating a claim for reimbursement of money improperly withheld under Medicaid is not "money damages" for purposes of § 702).

3. The Federal Tort Claims Act

a. General Provisions

In 1946, Congress enacted the Federal Tort Claims Act (FTCA). The FTCA waives the sovereign immunity of the United States

> "on claims for money damages . . . for injury or the loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

In addition to waiving sovereign immunity for certain damages claims, § 1346(b)(1) also contains a choice of law provision. Liability will be determined "in accordance with the law of the place where the act of omission occurred." That is to say, if a private party would be liable under the relevant state law for the torts of its employees, the United States will be liable for the torts of its employees.

b. Exclusions from Liability

This broad waiver of immunity comes with several exceptions, some of which deserve mention here.[6] First, plaintiffs cannot bring claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a).

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[6] In addition to the exclusions discussed in the text, the FTCA also bars claims relating to such things as "transmission of letter or postal matter," "assessment or collection of any tax or customs duty," "imposition or establishment or a quarantine," "the fiscal operations of the Treasury," and "the activities of the Tennessee Valley Authority." 28 U.S.C. § 2680.

Second – and perhaps most important – the FTCA bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). This scope of this exception plainly depends on how the courts interpret it, but the core idea is "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy." United States v. S.A. Empresa de Vicao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984). This discretion "includes more than the initiation of programs and activities."

> "It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." Dalehite v. United States, 346 U.S. 15, 36 (1953).

In *Varig*, the Court stated that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." Further, "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of prvate individuals."

In *Berkovitz v. United States*, 486 U.S. 531 (1988), the Court added that the discretionary function exception covers acts that include "an element of judgment or choice." By contrast, where a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," the discretionary function exception does not apply because "the employee has no rightful option but to adhere to the directive." Still the mere existence of discretion does not automatically insulate the government from liability for official action. To come within the exception, the decision at issue must actually be "based on considerations of public policy." Note, though, that where discretion exists, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." United States v. Gaubert, 499 U.S. 315 (1991). Although these various statements are helpful, they also make clear (1) that the discretionary function exception has broad application to policy judgments and thereby insulates much conduct that otherwise would support claims for relief, and (2) that the application of the exception to specific cases requires judgment and balancing of interests and not the mere application of a rule.

The third significant exception is a general bar against claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" 28 U.S.C. § 2680(h). In other words, the government's waiver of sovereign immunity includes negligence torts, but it excludes intentional torts. Yet the intentional tort exclusion is itself subject to a limitation. In 1974, Congress amended the FTCA to provide that injured parties may bring claims against "investigative or law enforcement officers" for six specific intentional torts: "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h).

Fourth, federal civilian employees who are injured by the actions of other federal employees may not bring suit under the FTCA if they are already covered by the Federal Employees' Compensation Act. *See* 5 U.S.C. § 8116(c).

Fifth, the FTCA, both textually and by interpretation, largely sidesteps injuries that relate to military activities. A textual exclusion bars "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). In addition, the Supreme Court has held that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity related to service." Feres v. United States, 340 U.S. 135 (1950). The Court has provided three justifications for this exclusion:

> "First, the relationship between the Government and members of its Armed Forces is '"'distinctively federal in character,'"' . . . ; it would make little sense to have the Government's liability to members of the Armed Services depend on the fortuity of where the soldier happened to be stationed at the time of the injury.
>
> "Second, the Veterans' Benefits Act establishes as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government.
>
> "A third factor was explicated in *United States v. Brown*, 348 U.S. 110, 112 (1954), namely, '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . . " Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-72 (1977) (citations omitted).

Although the *Feres* doctrine is controversial, the Supreme Court has repeatedly affirmed its validity and has also made clear that it applies to injuries to servicemen caused by civilian employees as well as by military employees. United States v. Johnson, 481 U.S. 681 (1987). As a result, lower courts have ruled that the *Feres* doctrine encompasses medical malpractice claims by service members arising out of the conduct of federal employees.

Do these exclusions go too far and leave too many people without remedies? Presumably some exclusions are necessary if the government is to operate effectively and efficiency. But are these specific exclusions the right ones (or if, in general, they are the right ones, is their scope too broad?)

c. Other Important Provisions

In FTCA cases, the United States is "entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the

United States is entitled." 28 U.S.C. § 2674. Chapter Three addresses judicial and legislative immunity in more detail. For now, you should know that, in general, judges and legislators are entitled to absolute immunity for their judicial and legislative acts.

The FTCA also contains a number of other specific provisions that limit remedies or control the way in which the litigation takes shape. Before filing suit, the injured person must first present his or her claim "to the appropriate Federal agency." 28 U.S.C. § 2675(a). Once the agency has denied the claim, or six months have passed with no final disposition, the injured person may file suit. But, suit "shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency" unless the additional amount is based on "newly discovered evidence" or intervening facts." 28 U.S.C. § 2675(b).

Once a plaintiff files suit against a government official, the federal Department of Justice 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." If the Attorney General certifies that such is the case, then "the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). If the Attorney General refuses to make this certification, the defendant official can petition the court to make the certification. 28 U.S.C. § 2679(d)(3). Either way, certification makes the case removable to federal court if it was filed in state court. 28 U.S.C. § 2679(d)(2)&(3). In addition, because the FTCA is the "exclusive" remedy for torts committed in the scope of official employment, 28 U.S.C. § 2679(a), federal employees are immune from personal financial liability and the burdens of defending a lawsuit.

Finally, the FTCA prohibits punitive damages or prejudgment interest. 28 U.S.C. § 2674. It also limits the fees that private attorneys can charge their clients. 28 U.S.C. § 2678. When an FTCA case goes to trial, it is a bench trial; there is no jury.

d. One Further Limitation on the FTCA

Note that the FTCA applies to non-intentional torts, except for certain intentional torts committed by investigative or law enforcement officers. What about government actions that also violate the Constitution? Some constitutional claims, such as the use of excessive force in violation of the Fourth Amendment, will overlap with the intentional tort of battery that is sometimes actionable under the FTCA. But as Chapter Three discusses, the Supreme Court has recognized a separate cause of action – the *Bivens* action, named for *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) – for damages claims alleging violations of constitutional rights. In a subsequent case, the Court held that the FTCA's waiver of sovereign immunity for certain tort claims, and its provisions for substituting the United States as a defendant, do not prevent plaintiffs from bringing *Bivens* actions against individual officers.

Fact Pattern Questions

Remember the Brenda Johnson fact pattern in Chapter One. Assume that, instead of being stopped by Portland police officers, she and her companions were stopped by federal investigators.

1. Would she or her companions be able to bring a tort claim against an individual official under these fact patterns?

2. How do the exceptions to liability apply to this fact pattern?

CHAPTER THREE
CLAIMS UNDER 42 U.S.C. § 1983

* * *

D. SUPERVISORY LIABILITY

In between the officials who take the specific actions that cause harm, and the government entities that employ them and establish policies, are supervisory officials.

ASHCROFT v. IQBAL
556 U.S. 662 (2009)

Justice Kennedy delivered the opinion of the Court. * * *

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public."

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be "of 'high interest'" to the investigation. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world.

Respondent [Javaid Iqbal] was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort.

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal corrections officers. The defendants range from the correctional officers

who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners [former Attorney General John Ashcroft and FBI Director Robert Mueller] – officials who were at the highest level of the federal law enforcement hierarchy.

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists."

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001." Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The pleading names Ashcroft as the "principal architect" of the policy, and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation."

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly*'s applicability to this case. * * * [I]t held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law. * * *

III

In *Twombly*, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to

state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

In *Bivens* – proceeding on the theory that a right suggests a remedy – this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." Correctional Services Corp. v. Malesko, 534 U. S. 61, 66 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, *see* Davis v. Passman, 442 U. S. 228 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. Bush v. Lucas, 462 U. S. 367 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under . . . 42 U. S. C. §1983." Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior.* Iqbal Brief 46 ("[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*"). Because vicarious liability is inapplicable to *Bivens* and §1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 540-541 (1993) (First Amendment); Washington v. Davis, 426 U. S. 229, 240 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." Personnel Administrator of Mass. v. Feeney, 442 U. S. 256, 279 (1979). It instead involves a decisionmaker's undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a §1983 suit or a *Bivens* action – where masters do

not answer for the torts of their servants – the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

[The Court next held that Iqbal's pleadings were insufficient under Federal Rule of Civil Procedure 8, as interpreted in *Twombly*, to state a claim for violations of his rights by Ashcroft and Mueller.]

Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting.

This case is here on the uncontested assumption that *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), allows personal liability based on a federal officer's violation of an individual's rights under the First and Fifth Amendments, and it comes to us with the explicit concession of petitioners Ashcroft and Mueller that an officer may be subject to *Bivens* liability as a supervisor on grounds other than *respondeat superior*. The Court apparently rejects this concession and, although it has no bearing on the majority's resolution of this case, does away with supervisory liability under *Bivens*. The majority then misapplies the pleading standard under *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007), to conclude that the complaint fails to state a claim. I respectfully dissent from both the rejection of supervisory liability as a cognizable claim in the face of petitioners' concession, and from the holding that the complaint fails to satisfy Rule 8(a)(2) of the Federal Rules of Civil Procedure. * * *

* * * According to the majority, because Iqbal concededly cannot recover on a theory of *respondeat superior*, it follows that he cannot recover under any theory of supervisory liability. The majority says that in a *Bivens* action, "where masters do not answer for the torts of their servants," "the term 'supervisory liability' is a misnomer," and that "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects [when it states that] petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic"[.]

The dangers of the majority's readiness to proceed without briefing and argument are apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which "an employer is subject to liability for torts committed by employees while acting within the scope of their employment," Restatement (Third) of Agency §2.04 (2005), or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate.

In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces, *see*, *e.g.*, Baker v. Monroe Twp., 50 F. 3d 1186, 1994 (CA3 1995); Woodward v. Worland, 977 F. 2d 1392, 1400 (CA10 1992); or where supervisors "'know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,'" International Action Center v. United States, 365 F. 3d 20, 28 (CADC 2004) (Roberts, J.) (quoting *Jones* v. *Chicago*, 856 F. 2d 985, 992 (CA7 1988) (Posner, J.)); or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate, *see*, *e.g.*, *Hall*, *supra*, at 961; or where the supervisor was grossly negligent, *see*, *e.g.*, Lipsett v. University of Puerto Rico, 864 F. 2d 881, 902 (CA1 1988). I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one.

Neither is the majority, but what is most remarkable about its foray into supervisory liability is that its conclusion has no bearing on its resolution of the case. The majority says that all of the allegations in the complaint that Ashcroft and Mueller authorized, condoned, or even were aware of their subordinates' discriminatory conduct are "conclusory" and therefore are "not entitled to be assumed true." As I explain below, this conclusion is unsound, but on the majority's understanding of Rule 8(a)(2) pleading standards, . . . it presumably would still conclude that the complaint fails to plead sufficient facts and must be dismissed [whether or not supervisory liability were possible]. * * *

CHAPTER FIVE
ADDITIONAL FACT PATTERNS

The following fact patterns are more complex than those in Chapter One. As with the initial set, each fact pattern is based on recent events in Oregon, usually in the Portland area, but nothing about them is unique to Oregon or to the Pacific Northwest.

For each fact pattern, consider what the legal ramifications of the events might be:

1) If you were the attorney for the plaintiff(s), would you bring a § 1983 action? If so, what specific constitutional claims would you include in your complaint? Who would be the defendants?

2) If you were the attorney for the likely defendant(s), how would you assess the merits of the claims against your clients? Would you seek dismissal on immunity grounds? Are there any other defenses you would assert?

6. Lukus Glenn

This fact pattern is an excerpt from a 2011 opinion by the United States Court of Appeals for the Ninth Circuit.

GLENN v. WASHINGTON COUNTY, *et al*.
673 F.3d 864, 866-69 (9th Cir. 2011)

* * * On September 15, 2006, Lukus Glenn left his home to attend a Tigard High School football game with his girlfriend. He had graduated from Tigard High a few months before and was living with his parents, Hope and Brad Glenn, and his grandmother. Lukus had no history of violence or criminal activity. He returned home at 3:00 a.m., agitated, intoxicated and intent on driving his motorcycle. His parents told him he could not take the motorcycle, and to their surprise Lukus became angry. He began to damage household property, including windows and the front door, and the windows of cars parked in the driveway. His parents had never seen Lukus drunk before, and believed they needed help to calm him down. They first called his friends, Tony Morales and David Lucas, who came over to the Glenn home. Lukus' friends were unable to calm him down, however, and his parents became alarmed when he held a pocketknife to his neck and threatened to kill himself.

Frightened that Lukus would harm himself, Hope called 911 believing that "the police would have the expertise and experience to deal with an emotionally distraught teenager." The transcript of the 911 call states that Hope told the dispatcher her son was "out of control, busting our windows, and has a knife and is threatening us."[3] Hope clarified that the knife was "just a pocket knife" and that Lukus had not hurt anyone, and said he was "just really, really intoxicated." When the dispatcher asked if everyone could move away from Lukus, Hope said "well,

[3] Hope says that she misspoke, and that Lukus never actually threatened anyone but himself. She also contends that the 911 transcript in the record is only a rough transcription, contains inaccuracies and does not fully convey a sense of the scene.

yeah," but explained that they were "just trying to talk to him right now." She said Lukus was "threatening the knife to his neck and he keeps saying he's gonna kill himself if the cops come," and "he's not leaving until the cops shoot him and kill him."

Hope asked if paramedics could be sent to the house, remarking that Lukus was "so suicidal right now." She explained that she thought he had attempted suicide once before and had been "really depressed," but that "[h]e's always been a good athlete and a good kid." In response to the dispatcher's questions, Hope said Lukus was born in 1988, was about 5'11" and had a thin build. She explained that he had damaged their windows and front door. She also said the family owned hunting rifles, but they were locked up and Lukus could not get to them.

The 911 dispatcher informed the Washington County Sheriff's Department that officers were needed at the Glenn home for a domestic disturbance involving a "fight with a weapon." Dispatch advised that "Caller has a son. Has a knife . . . It's a pocket knife. Glenn Lucas [sic] born in '88 . . . . Caller is advising he is probably going to kill himself if you show up." Officers were informed that there was no "premise history" and that Lukus was suicidal and "very intoxicated." Dispatch relayed that Lukus had broken a window and was out in the driveway. Officers were also told there were hunting rifles inside the house, but Lukus could not get to them. An officer can then be heard asking whether the Glenns could lock the doors since he "[doesn't] want [the son] going inside if there are guns in there," and dispatch responded that Lukus had "busted through the front door." A staging area for responding officers was established a short distance from the Glenn home.

Deputy Mikhail Gerba was not on duty with the Washington County Sheriff's Department that night, but was working on a special assignment for the Oregon Department of Transportation performing traffic control for a construction project. He heard the dispatch, however, and responded. For some unknown reason, he skipped the staging area and went directly to the Glenn home, where he was the first officer to arrive on the scene at 3:11 a.m. Gerba initially encountered David Lucas and, pointing his gun at David, ordered him to "[g]et on the fucking ground." David did as ordered and told Gerba that Lukus was "over there by the garage; we have him calmed down."

Gerba proceeded up the driveway and positioned himself eight to twelve feet from Lukus, who was standing by the garage near his parents and Tony Morales. Gerba had a completely unobstructed view of Lukus, who could be seen clearly under the garage light. Lukus was not in a physical altercation with anyone, nor was he threatening anyone with the pocketknife or in any other way, and no one was trying to get away from him. He was, however, holding the pocketknife to his own neck.

Gerba held his .40 caliber Glock semiautomatic pistol in "ready position, aimed at Lukus." From the moment he arrived, Gerba "only scream[ed] commands loudly at Lukus" such as "drop the knife or I'm going to kill you." As the district court recognized, Lukus may not have heard or understood these commands because he was intoxicated and many people were yelling at once. Gerba "did not attempt to cajol[e] or otherwise persuade Lukus to drop the knife voluntarily." Numerous witnesses described Gerba's behavior as "angry, frenzied, amped and jumpy," and noted that they were "shocked by how [he] approached this situation." Within a minute of

Gerba's arrival, Hope began "begging the 911 operator, 'Don't let him shoot him. Please don't let him shoot him . . . . [T]hey're gonna shoot him.' " The dispatcher tried to reassure her that the police were "gonna try and talk to him," but Hope said "I shouldn't have called but I was so scared," "they're gonna kill him."

Washington County Deputy Timothy Mateski was the next officer to reach the scene, approximately one minute after Gerba's arrival. Mateski had initially headed toward the staging area, but rushed to the Glenn home when he heard from dispatch that Gerba had gone directly there. En route he asked whether Hope and Brad could leave the house, and was advised that dispatch was checking. He never received a response, and did not follow up. Upon arrival, Mateski took a position six to twelve feet from Lukus, where he had a completely unobstructed view of Lukus. Like Gerba, "Mateski drew his gun and began screaming commands as soon as he arrived, including expletives and orders like 'drop the knife or you're going to die' " and "drop the fucking knife." Numerous witnesses described Mateski as "frantic and excited and only pursu[ing] a course of screaming commands at Luke." Tony Morales "implore[d] the officers to 'calm down' and t[old] them that Luke [wa]s only threatening to hurt himself." The officers ordered Morales to crawl behind them and ordered Hope and Brad to go into the house and close the door, which officers knew was broken and could not be locked. Everyone complied. Lukus' grandmother, who lived in a residence between the main house and garage, opened her door to come talk to Lukus. The officers ordered her back inside her home, and she complied. All of the people "in and around the house could have easily walked away from the scene to a spot behind the officers or even to the street behind without having to pass any closer to Luke than [they] already had been." Instead, they did as the officers instructed them to do. Having ordered the Glenns to go into their home, the officers could have positioned themselves between Lukus and the front door to the home without having to get any closer to Lukus, but they chose to stand elsewhere.

At about 3:14 a.m., Corporal Musser advised Mateski and Gerba that back-up was en route. Sergeant Wilkinson radioed that the officers on the scene should "remember your tactical breathing, and if you have leathal [sic] cover a taser may be an option if you have enough distance. Just tactical breathe, control the situation." Neither Mateski nor Gerba was carrying a taser or a beanbag gun. Shortly after these dispatch messages, however, Officer Andrew Pastore of the City of Tigard Police Department arrived with a beanbag shotgun and a taser. Gerba and Mateski apparently were not aware that Pastore had a taser, and did not ask.

Mateski immediately ordered Pastore to "beanbag him." Pastore yelled "beanbag, beanbag" and opened fire on Lukus. Pastore shot all six of the shotgun's beanbag rounds. Gerba recalled that, "when [Lukus] got hit, I remember . . . he kind of cowered up against the garage and he kind of looked like, kind of like, did I just get hit with something?" The officers' brief acknowledges that Lukus "appeared surprised, confused, and possibly in pain." Numerous witnesses observed that, "[w]hile being struck by beanbag rounds, Luke put his hands down, grabbed his pants and began to move away from the beanbag fire toward the alcove between the house and garage . . . in the most obvious line of retreat from the fire." Mateski and Gerba stated in their declarations that they had independently determined that if Lukus made a move toward

the house with his parents inside, they would use deadly force.[5]

After Lukus took one or two steps, Gerba and Mateski began firing their semiautomatic weapons at him. They fired eleven shots, eight of which struck Lukus in the back, chest, stomach, shoulder and legs. The remaining three bullets struck his grandmother's residence. All the lethal fire occurred before the last beanbag round was fired, and less than four minutes after the first officer arrived on the scene. Seconds before he was fired upon, Lukus "pled[,] 'Tell them to stop screaming at me' " and "why are you yelling?" Lukus bled out and died on his grandmother's porch shortly after he was shot.

In April 2007, Washington County Sheriff Rob Gordon released to the public an Administrative Review of the Lukus Glenn shooting. The review concluded that "[n]o policies were violated during this critical incident," and that the "WCSO deputies involved in this incident performed as trained, followed established policies, and acted in a professional manner." * * *

7. Stephen Dallas and Gil Sandlar

On a January morning, Professor Stephen Dallas was teaching an economics class to a roughly 45 Portland State University students. Suddenly, Dallas announced that an FBI informant was enrolled in the class. He talked for a moment about his experience with government informants during several research visits to authoritarian countries and asserted his ability to identify them. He then pointed to a student, Gil Sandlar, and accused him of being the informant.

Dallas next projected a copy of a letter that he had written to the FBI, which detailed his accusations. While students were reading it, Dallas handed Sandlar a packet to give to "his superiors." Dallas also took a photo of Sandlar and said that if "he ever saw him on campus again, he would plaster his photo and copies of his photos all over campus and tell everybody who he was." Sandlar remained silent until Dallas was finished. He then made a short statement denying Dallas's accusations and walked out.

Sandlar was 30 years old and a member of the student government board. He had previously served in the Israel Defense Forces and held dual Israeli and US citizenship. Earlier in the term, he had disassembled parts of a semiautomatic Colt AR-15 in Dallas's class as part of a presentation.

The next day, the campus newspaper carried a story about the incident. It quoted Sandlar as saying that he had admired Hall and "cannot imagine what I did or said to cause him to treat me the way he did." Portland FBI confirmed that he was not and had never been an FBI agent or informant.

One student told the paper that he had been concerned about Sandlar's behavior. He reported that, at an Economics Department party a month earlier, Sandlar had told a campus activist how to make a particularly effective Molotov cocktail. Sandlar also offered to act as a mid-

[5] The district court determined that "Lukus could not have headed in the direction of the alcove without also heading in the direction of his parents' front door." [Plaintiff Hope] Glenn argues that it is possible Lukus did not make any volitional movement at all, but rather was "moved by . . . the onslaught of beanbag fire."

dleman to help students buy military style rifles – AR-15s or AK-47s – through a gun dealer he knew in Washington, and he claimed that he had access to machine guns. Sandlar apparently also told stories about confrontations involving guns. Other students reported that Sandlar had told them he held a concealed weapons permit and frequently brought a gun to school. In fact, several students formally accused him of carrying a gun on campus and threatening to use it. The Student Conduct Committee held a closed-door hearing at which it cleared Sandlar of all charges. Sandlar was also threatened after the incident by white supremacy groups directly and on public social networking profiles. The threats were generally anti-Semitic. At the end of the school year, Sandlar withdrew from PSU and enrolled at Washington State University's Vancouver campus.

For his part, Dallas claimed that he confronted Sandlar solely out of concern for the safety of his students and the community. His actions came after several students that he had been advising came to him with concerns that Sandlar was trying to "create a cabal of students on campus oriented toward violence." They told Dallas that Sandlar "was trying to get them interested in shooting and blowing things up – all kinds of weapons, not just rifles, illegal weapons. They were scared." Dallas did not go to university or city authorities with his concerns because he had extensive experience with school bureaucracy and "did not feel like taking this to campus safety was the right way to go." Dallas claimed that when he had reported concerns about his personal safety in the past, the university had dismissed his concerns. The students also told Dallas that Sandlar had boasted about a "special relationship" with campus public safety, which suggested that they might not take any complaint about him seriously.

When he learned of the incidence, the university president immediately suspended Dallas from teaching and ordered him to stay out of his office and off campus during the University's inquiry into the incident. He continued to receive his regular salary, but he was barred from receiving any research or travel funding during his suspension. A PSU administrator also stated that Dallas had dishonored the university and violated Sandlar's privacy. Possible sanctions included termination or loss of tenure. Eighteen months later, Dallas was reinstated.

8. Martin Cosgrove

Late on a March afternoon, Carla Mendez became concerned that her niece, 24 year old Angela Mendez, was not answering her phone. She called 9-1-1 and told the operator that Mendez's boyfriend, 26 year old Martin Cosgrove, had spent the night at Carla's apartment, that he was despondent over the death of his brother the day before. She opined that Cosgrove was suicidal and asserted that he had a gun. Carla explained her fear that Cosgrove might hurt himself and/or Jones; she wanted the police to help.

An officer responded to the call by going to Angela Mendez's apartment building. He found Mendez in the parking lot, distraught, talking to her father on her phone. She did not know that the police had been called. She was outside because Cosgrove was napping. She had been asleep, and when she woke, she went outside to contact family members without disturbing Cosgrove. She told the officer that her two young children were also in the apartment with Cosgrove. She was worried about him – like her aunt, she thought he might be suicidal, and she con-

firmed that he had a gun. In fact, she related that he had put the gun to his own head several times. She told police that she suspected Cosgrove wanted them to kill him.

The officer told Mendez to remain outside, and she texted Cosgrove, asking his to come out too. He refused. More officers arrived, and he texted her again, "Don't make me get my gun, I ain't playin'." Soon, Officer Douglas Faith began to text with Cosgrove. "Martin, we need to know if you intend on hurting yourself." Cosgrove responded, "Never. Wow you guys text too. LOL." Cosgrove's response reassured Faith. But Faith did not communicate with the five officers standing ready behind a parked patrol car and garbage bin in the parking lot, armed with a high-powered rifle, beanbag shotgun, and accompanied by a police dog.

Twenty minutes later, Mendez's two children emerged from the building, uninjured. Faith texted, "Thanks Martin, I appreciate your help. I'm truly sorry about your brother. Can you promise me you won't hurt yourself?" Cosgrove asked that they talk instead of text, so Faith called and, after a brief conversation, asked him to come out.

Ten minutes later, at 5:45, Cosgrove came out of the building, walking backward with his hands locked behind his head. Officer Thomas Newton ordered Cosgrove to walk slowly backward toward his voice. "Slow, slow, slow," he shouted. When he thought Cosgrove was far enough from the building, he ordered Cosgrove to stop and "put your hands straight up in the air." Cosgrove kept his hands at the back of his head, and Newton warned that he would shoot if Cosgrove did not raise his hands (he was armed with a non-lethal beanbag shotgun). Cosgrove reportedly replied, "Fucking shoot me then!" Newton did just that; he fired and hit Cosgrove in the lower back. Cosgrove leaned over, and Newton thought he was about to run back to the building. He fired five more shots at Cosgrove's lower back and buttocks.

Officer David Marlboro, who was stationed several yards to Newton's left, kept the sights of his AR-15 rifle trained on Cosgrove as he came out. He was unable to hear any of the commands shouted by Newton or anyone else. None of them used a loudspeaker and Marlboro did not have an earpiece that would have allowed him to listen to radio communications. He later stated that he had not been part of any police planning on how to handle the situation and didn't know much when he was summoned to the scene upon the request of an AR-15-certified officer. He remembered hearing from the on-scene supervisor at incident, Officer Patricia Vazquez, that police were communicating with Campbell by text and things were going well. But he wasn't told that Cosgrove might be coming out, and the only specific text he knew about was an early one from Cosgrove: "Don't make me get my gun, I'm serious."

As Marlboro watched Cosgrove react to being shot by the beanbag shotgun, he saw Cosgrove reach down to the back waistband of his pants. "I instantly thought, 'He is pulling a gun out,'" he later said. Cosgrove also started running back toward the apartment, and there was a parked car nearby. Marlboro explained his next actions in this way: "I remember thinking, 'I cannot let him get to the car because he's gonna shoot at us, and he's protected if he shoots at us from there.' I knew there was going to be a gun coming out of back of his waistband and before he got to the corner of the car, I shot him." Several witnesses stated that Cosgrove appeared to be cooperating, only started running after being shot by Newton, and reached his hand back to

touch the part of his back where he had been shot. They were surprised when Marlboro opened fire.

Officer Barnaby Laswell, canine handler for the bureau, stood behind a parking lot trash bin with his dog, Odo. He unleashed the dog when he saw Cosgrove start running. "Right when he started running, I gave the dog a take command," Laswell said. "The next thing I know he fell down and the dog was on top of him." Not seeing Cosgrove move or respond to commands to move, Elias believed he was dead.

None of the officers approached Cosgrove's body. Two minutes later, at 5:50, an ambulance arrived. Officer Vazquez instructed it to wait while officers entered the apartment building and secured the area. By 6 p.m., medics were examining Cosgrove, and they pronounced him dead from a gunshot to his back. The bullet from Marlboro's gun entered Cosgrove's lower back to the right of his spine and traveled slightly upward, hitting what the medical examiner called "vital structures," including his spinal column. There were also dog bites on his right calf and shin. Cosgrove was unarmed.

The Portland Police Department has a Special Emergency Response Team (SERT), an elite tactical unit specially trained for hostage scenes, standoffs and other situations with a high level of danger for police and bystanders. SERT comes with trained hostage negotiators and a wider variety of less-lethal weapons, and its members receive biweekly training in dealing with hostage scenes. A bureau directive lists both a barricaded person and a hostage situation as situations in which officers should call SERT and the hostage negotiation team. The officers who responded to Carla Mendez's call initially didn't think the incident fit either scenario, and they did not contact SERT until after Marlboro shot Cosgrove.

Cosgrove was African American; Faith, Laswell, and Marlboro were white.

9. Kurt Chambers

At 11 o'clock on a September morning, Officers Sam Connor and Larry Dakota spotted Kurt Chambers near the corner of N.W. 18th Avenue and Everett Street. Chambers shuffled along the sidewalk, stopped, and then appeared to urinate against a tree. Connor and Dakota thought that Chambers might be under the influence of drugs or alcohol or possibly was suffering from a mental disorder. In fact, Chambers, who was 42, had schizophrenia and had struggled with mental illness since he was a teenager. He had been a musician and a writer, but for the past several years he had been in and out of half-way houses and acute care settings with various medical/psychiatric diagnoses and prescribed treatments.

The officers pulled their car to the curb and shouted to get Chamber's attention. He turned and ran. They got out of the car, chased him, and caught him. According to Connor and Dakota, Chambers fought with them and bit Dakota as they tried to take him into custody. Dakota used his Taser on Chamber's torso, but it had no effect. Connor knocked Chambers to the ground with his full weight on Chamber's back. He later told fellow officers, "We tackled him and he landed hard." Witnesses stated that Connor and Dakota also repeatedly kicked Chambers after he fell to the pavement.

Chambers lost consciousness but was still breathing. Dakota called for an ambulance. Paramedics came to the scene but did not take Chambers to the hospital. Although he was bleeding from the mouth, they indicated that his vital signs were normal. Connor signed a form for Chambers that declined transport to a hospital. Connor and Dakota drove Chambers to the Multnomah County Detention Center to book him for assaulting a police officer and resisting arrest. Chambers regained consciousness, but jail staff had to remove him from the car as he screamed and spit at them. The jail staff placed a "spit sock" of nylon material over Chamber's head to keep him from spitting at them. They did not think it would impair his breathing.

Chambers was placed in a separation cell. Connor noticed that Chambers had stopped screaming and appeared unconscious. He called for a nurse, who observed Chambers through the cell door window, saw that he had blood around his mouth, and concluded that he was experiencing seizures. She told Connor and Dakota that the jail would not book Chasse because of his medical condition, but no one called for an ambulance. Instead, Connor and Dakota put Chambers back in their cruiser and started toward Adventist Hospital, which was not the nearest hospital but was the one with which the department contracted for prisoners.

As Dakota drove, Connor noticed that Chambers had fallen against the car door and that his face was "ashen." He told Dakota to get off the highway and they called for medical help. Once they were stopped, Connor removed Chamber's handcuffs and performed chest compressions. The ambulance arrived nearly 20 minutes later and made it to the hospital in three more minutes.

Chambers was pronounced dead soon after arriving at the hospital. The medical examiner concluded that he died from broad-based, blunt force trauma to his chest. He suffered 26 breaks to 16 ribs, some of which punctured his left lung. He also suffered 46 separate abrasions or contusions on his body, including six to the head and 19 to the torso. The medical examiner also concluded that, had he received proper medical attention at the scene or been taken to a hospital right away, Chambers probably would have survived. He had no drugs or weapons in his possession and toxicology tests indicated that there were no drugs in his system.

A grand jury heard testimony from 30 witnesses over five days but found no criminal wrongdoing by any officials involved in the arrest, custody, or treatment of Chambers. A task force that included members of the city's Independent Police Review Division and the Police Department concluded that Portland's use-of-force policy meets only the minimal constitutional requirements and should be tightened. A Portland police training review found that Connor never should have chased Chambers or knocked him to the ground because there was no evidence that Chambers had committed a crime or posed any danger. The review concluded that both the police foot chase – which department documents describe as "one of the most dangerous police actions that officers can engage in" – and the knockdown of Chambers were "inconsistent" with bureau training. The department did not impose any sanctions on Connor for either of those breaches. It did, however, suspend Dakota without pay for 80 hours for not arranging for Chambers to be transported to a hospital after using a Taser on him (and for not telling the ambulance responders that Chambers had been tased).

The department mandated "crisis intervention training" for all officers after Chamber's death to help them respond more effectively and compassionately to mentally or developmentally disabled people. The department also incorporated crisis intervention training into the police academy curriculum. And, it adopted a new policy forbidding officers from transporting seriously injured persons in patrol cars. The city council allocated funds for more Project Respond mental health specialists to respond with police directly to crises.

10. Woodsprings Development

Woodsprings Development is an Oregon limited liability company. It owned a parcel of farmland on the west side of Sherwood, Oregon (southwest of Portland) that it wanted to develop into a 200 lot subdivision. After a public notice and comment process, in January 2005, the City of Sherwood granted what is known as a preliminary plat approval and conditions for the development – a document that is meant to be binding on the city and the developer.

The conditions included the requirement that the development's sewer system comply with the city's master plan. Woodsprings submitted a set of engineered construction plans during the approval process. City officials, including City Engineer Judith Boulder, determined that the plans met city requirements, but no one informed Woodsprings. Instead, officials insisted that the plans required modifications, such as rerouting the sewer line and expanding its capacity. These modifications would benefit the efforts of a different company, Sherwood Farms, to develop an adjacent parcel of land. Specifically, the modifications would allow Sherwood Farms to develop its parcel of land at a significantly reduced cost (perhaps as much as $250,000) because Woodspring would be bearing disproportionately greater costs. The owner of Sherwood Farms, Mitchell Dean, was a close friend of Boulder and of City Manager Paul Bowheimer.

Woodsprings refused to modify the sewer plans for its development. It asserted, first, that its existing plan complied with city requirements, second, that the city's requests were not feasible, and, third, that the costs of complying with changes of this nature would be prohibitive and would be arbitrary when compared to the scope of the development.

After Woodspring's refusal, Boulder and Bowheimer began to raise a series of objections to Woodspring's ability to proceed with its project. Among other things, they refused to give Woodsprings a temporary right of way over city owned property, something they had done numerous times in the past. As a result, Woodsprings had to obtain those rights from private landowners, including Sherwood Farms, at significant cost. They also insisted that Woodsprings install a 12-foot wide median in the middle of the road that led to the development, which added further costs and reduced the size (and therefore the value) of several lots. The same road led to the proposed Sherwood Farms development, but Sherwood Farms was not required to install a median on the parts of the road that abutted its property. When an issue concerning a wetland on portions of the Woodsprings property arose, the city refused to allow Woodsprings to build in phases (and thereby construct in areas away from the wetland) until the issue was resolved. Other developers had been allowed to complete construction in phases. Finally, the city delayed recording the final plat and the construction permit for the development for several months (even though these steps usually took only a few weeks).

None of the city's requests were included in the preliminary plat approval and conditions. The delays meant that, initially, Woodsprings was required to pay increasing property taxes on land that it had planned to develop and sell. When it was able to do preliminary site work beginning in mid to late 2006, the costs of labor and materials had increased from the amount Woodsprings had initially budgeted. By the time the city allowed construction to begin, the development was more than a year behind schedule and it was March 2007. At the point, the housing crisis had begun and Woodsprings was unable to maintain the line of credit that it needed to build the homes. Woodsprings's owners are certain that, but for the delays created by the city's requests, they would have finished construction of at least 2/3 of the homes in the development by mid-2006 and that most or all of those homes would have sold, thereby ensuring a reasonable profit on their investment. Instead, they found themselves with a large parcel of land that was ready for home construction, on which they were paying taxes, but which they were unable to develop and sell. They estimate their losses at somewhere between $2.5 and 6 million.

CHAPTER SIX
REMEDIES AND PROCEDURAL ISSUES

A. REMEDIES

*** * ***

2. Declaratory and Injunctive Relief

*** * ***

_. Prospective Relief Against Officials and Local Governments: In General

According to the Supreme Court, § 1983 does not authorize suits against states in either state or federal court. The federal waivers of sovereign immunity allow few suits against the federal government for constitutional claims. However, under *Ex parte Young,* 209 U.S. 123 (1908), a § 1983 plaintiff can obtain prospective declaratory and/or injunctive relief against a state or federal official, and this relief will effectively operate against the state or federal government itself. Local governments and their officials can likewise be sued for prospective relief, either under the logic of *Ex parte Young* or under *Monell v. New York Department of Social Services,* 436 U.S. 658 (1978). (And, of course, state, local, and federal officials, as well as local governments, can be sued for damages.) As a result, assuming one sues the proper government official, prospective relief is available under § 1983.

Unlike litigation with federal agencies, § 1983 suits against state and local officials ordinarily need not await the outcome of state administrative proceedings. Plaintiffs rarely have to "exhaust" administrative remedies before commencing a § 1983 action. Indeed, § 1983 does not ordinarily require plaintiffs to complete any state remedial processes, whether administrative or judicial. *See* Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). Instead, a § 1983 plaintiff can proceed directly to state or federal court. (Note, however, that in 1996, Congress passed a general exhaustion requirement for inmates challenging conditions of confinement. *See* 42 U.S.C. § 1997e(a): "No action shall be brought with respect to prison conditions under section 198,9 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.")

Even without an exhaustion requirement, timing remains a problem in constitutional litigation with government officials and local governments. Retrospective relief ordinarily forces the wrongdoer to pay money damages for a past wrong done to the victim. The timing of an action seeking retrospective relief such as money damages is defined by the date of this wrong. So long as claimants file within the applicable period of limitations, they will not be time-barred from pursuing their claims. An action for prospective relief, in contrast, seeks to alter future actions of government. Because past harm is not needed in this context, statutes of limitations are not generally problematic.

Article III's "case or controversy" requirement – particularly the requirement of "standing" – can also be an issue for plaintiffs seeking relief in federal court. Plaintiffs easily satisfy

Article III when they seek money damages for past injuries they have suffered. *See* Richmond *v.* J.A. Croson Co., 488 U.S. 469, 478 n.1 (1989). But Article III raises issues for plaintiffs seeking prospective relief in federal court. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding § 1983 plaintiff must have standing to seek particular forms or relief, which for injunctions requires continuing harm or risk of harm to the plaintiff).

* * *

Standing

* * *

MAYFIELD v. UNITED STATES
599 F.3d 964 (9th Cir. 2010)

Paez, Circuit Judge.

In this appeal, we must decide whether Plaintiffs-Appellees Brandon Mayfield, a former suspect in the 2004 Madrid train bombings, and his family, have standing to seek declaratory relief against the United States that several provisions of the Foreign Intelligence Surveillance Act ("FISA") as amended by the PATRIOT Act are unconstitutional under the Fourth Amendment of the U.S. Constitution. Although Mayfield settled the bulk of his claims against the government, the Stipulation for Compromise Settlement and Release (the "Settlement Agreement") allowed him to pursue his Fourth Amendment claim. According to the terms of the Settlement Agreement, the only relief available to Mayfield, if he were to prevail on his Fourth Amendment claim, is a declaratory judgment. He may not seek injunctive relief. We hold that, in light of the limited remedy available to Mayfield, he does not have standing to pursue his Fourth Amendment claim because his injuries already have been substantially redressed by the Settlement Agreement, and a declaratory judgment would not likely impact him or his family. We thus vacate the judgment of the district court.

I.

On March 11, 2004, terrorists' bombs exploded on commuter trains in Madrid, Spain, killing 191 people and injuring another 1600 people, including three U.S. citizens.[1] Shortly after the bombings, the Spanish National Police ("SNP") recovered fingerprints from a plastic bag containing explosive detonators. The bag was found in a Renault van located near the bombing site. On March 13, 2004, the SNP submitted digital photographs of the fingerprints to Interpol Madrid, which then transmitted them to the FBI in Quantico, Virginia.

The FBI searched fingerprints in its own computer system, attempting to match the prints received from Spain. On March 15, 2004, an FBI computer produced 20 candidates whose

[1] Under the terms of the parties' Settlement Agreement, the parties agreed that plaintiffs' Fourth Amendment claim would be litigated solely on the basis of the Amended Complaint for Declaratory Relief ("Amended Complaint"), the parties' Recitation of Stipulated Facts, and memoranda of law. * * * [The United States stipulated], for purposes of this litigation only, to the facts recited in the Recitation of Stipulated Facts. * * *

known prints had features in common with what was identified as Latent Finger Print # 17 ("LFP # 17"), one of whom was Brandon Mayfield.

Mayfield is a U.S. citizen, born in Oregon and brought up in Kansas. He lives with his wife and three children in Aloha, Oregon, a suburb of Portland. He is 43 years old, a former Army officer with an honorable discharge, and a practicing lawyer. Mayfield is also a Muslim with strong ties to the Muslim community in Portland.

On March 17, 2004, FBI Agent Green, a fingerprint specialist, concluded that Mayfield's left index fingerprint matched LFP # 17. Green then submitted the fingerprints for verification to Massey, a former FBI employee who continued to contract with the FBI to perform forensic analysis of fingerprints. Massey verified that Mayfield's left index fingerprint matched LFP # 17. The prints were then submitted to a senior FBI manager, Wieners, for additional verification. Wieners also verified the match.

On March 20, 2004, the FBI issued a formal report matching Mayfield's print to LFP # 17. The next day, FBI surveillance agents began to watch Mayfield and follow him and members of his family when they traveled to and from the mosque, Mayfield's law office, the children's schools, and other family activities. As detailed in the Recitation of Stipulated Facts, the FBI also applied to the Foreign Intelligence Security Court ("FISC") for authorization to "collect foreign intelligence information." Pursuant to that authorization, the FBI conducted "covert physical searches of the Mayfield home," and "electronic surveillance targeting Mr. Mayfield at the Mayfield home and at Mr. Mayfield's law office."

In April 2004, the FBI sent Mayfield's fingerprints to the Spanish government. The SNP examined the prints and the FBI's report, and concluded that there were too many unexplained dissimilarities between Mayfield's prints and LFP # 17 to verify the match. When FBI agents then met with their Spanish counterparts in Madrid, the Spanish investigators refused to validate the FBI's conclusion that there was a match.

After the meeting with the SNP, the FBI submitted an affidavit to the district court, stating that experts considered LFP # 17 a "100% positive identification" of Mayfield. The affidavit also included information about Mayfield's religious practice and association with other Muslims. On May 4, 2004, the government named Brandon Mayfield as a material witness and filed an application for material witness order. The district court appointed an independent fingerprint expert, Kenneth Moses, to analyze the prints in question. Mayfield and his defense attorneys approved the appointment. Moses concluded that LFP # 17 was from Mayfield's left index finger.

The district court issued several search warrants, which resulted in the search of Mayfield's home and office, and the seizure of his computer and paper files. On May 6, 2004, Mayfield was arrested and imprisoned for two weeks. Mayfield alleged that his family was not told where he was being held, but was told that his fingerprints matched those of the Madrid train bomber, and that he was the prime suspect in a crime punishable by death. While Mayfield was detained, national and international headlines declared him to be linked to the Madrid bombings. On May 20, 2004, news reports revealed that Spain had matched LFP # 17 with a man named Ouhane Daoud, an Algerian citizen. Mayfield was released from prison the following day.

On October 4, 2004, Mayfield, his wife, and his children filed suit against the government in the United States District Court for the District of Oregon. The complaint alleged a *Bivens* claim for unlawful arrest and imprisonment and unlawful searches, seizures, and surveillance in violation of the Fourth Amendment; a claim under the Privacy Act, 5 U.S.C. § 552a, for leaking information from the FBI and DOJ to media sources regarding Brandon Mayfield's arrest; a claim for the return of property improperly seized; and a Fourth Amendment challenge to the constitutionality of several FISA provisions and the PATRIOT Act.

Mayfield reached a settlement with the government, and the district court approved it on November 29, 2006. The Settlement Agreement provided that the government would pay compensatory damages of $2 million to Mayfield and his family; destroy documents relating to the electronic surveillance conducted pursuant to FISA; return seized "material witness materials" to Mayfield; and apologize to Mayfield and his family. In return, Mayfield agreed to release the government of all liability or further litigation, except as to one specific claim: that 50 U.S.C. §§ 1804 (authorizing electronic surveillance under FISA) and 1823 (authorizing physical searches under FISA) violate the Fourth Amendment of the U.S. Constitution. The parties agreed that the sole relief that Mayfield could seek or that the court could award with regard to this claim would be a declaratory judgment.

On December 6, 2006, Mayfield filed an Amended Complaint for Declaratory Judgment. The Amended Complaint challenged the constitutionality of 50 U.S.C. §§ 1804 and 1823, the portions of FISA, as amended by the PATRIOT Act,[4] that allow the government to conduct physical searches, electronic surveillance, and wiretaps of residences and offices without requiring proof of probable cause or an assertion that the primary purpose of such activities is to gather foreign intelligence information. The complaint asserted that the statutory provisions were facially unconstitutional. Mayfield alleged that he continued to suffer injury because the government refused to identify and destroy all materials derived from the FISA searches and seizures,[5] and that he feared future uses of the materials as well as other future applications of FISA against him and his family.

Both Mayfield and the government moved for summary judgment. The government also moved to dismiss on the ground that Mayfield did not have standing to pursue the Fourth Amendment claim and therefore the court lacked jurisdiction. The court subsequently issued a decision denying the motion to dismiss and granting summary judgment to Mayfield. The district court determined that it had jurisdiction because there was a live case or controversy that could be redressed with a declaratory judgment. As to the merits, the court held that the challenged provisions of FISA, namely 50 U.S.C. §§ 1804 and 1823, as amended by the PATRIOT Act, were unconstitutional because they violate the Fourth Amendment's requirement of proba-

[4] Prior to 2001, several federal courts construed FISA to authorize searches and electronic surveillance only when the government's primary purpose was to collect foreign intelligence information. Following the September 11, 2001 terrorist attacks, Congress enacted the PATRIOT Act, which changed the original statutory language of "the purpose" to "a significant purpose."

[5] Although the settlement agreement required the government to destroy or return to Mayfield certain FISA material that it acquired or seized pursuant to the FISA electronic surveillance and search authority targeting Mayfield, the government was not required to destroy any derivative material contained in government files. The Recitation of Stipulated Facts acknowledges that "[s]ome derivative materials . . . remain in government files at present."

ble cause, and because they authorize FISA activities as long as a "significant purpose" – rather than the "primary purpose" required pre-Patriot Act – is to gather foreign intelligence information.

The government filed a timely appeal. The government argues that the district court did not have jurisdiction to hear Mayfield's Fourth Amendment claim because a declaratory judgment will not redress Mayfield's residual injuries. In addition, the government argues that the district court erred in declaring 50 U.S.C. §§ 1803 and 1823 unconstitutional. Finally, the government argues that the district court improperly decided other issues that were outside the scope of the Amended Complaint and thus foreclosed by the Settlement Agreement.

II.

In the Amended Complaint, Mayfield sought a declaratory judgment that 50 U.S.C. §§ 1804 and 1823, as amended by the PATRIOT Act, are facially unconstitutional. Mayfield alleged that the government used the challenged statutory provisions to conduct covert surveillance, searches of the family's private quarters, and seizures of the family's private materials. Mayfield further asserted that because the government obtained these materials unlawfully, and even though the government returned the physical materials, the continued retention of any derivative material was also unlawful. The purpose of the desired declaratory judgment was thus twofold: 1) to prevent future uses of FISA against Mayfield; and 2) to force the government to return or destroy all derivative materials in its possession obtained from Mayfield by unconstitutional means.[6]

To bring suit in federal court, a plaintiff must establish three constitutional elements of standing. First, the plaintiff must have suffered an "injury in fact," the violation of a protected interest that is (a) "concrete and particularized," and (b) "actual or imminent." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Second, the plaintiff must establish a causal connection between the injury and the defendant's conduct. Third, the plaintiff must show a likelihood that the injury will be "redressed by a favorable decision."

"[A] plaintiff must demonstrate standing separately for each form of relief sought." Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167, 185 (2000). Thus, a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment. *See id*. at 185-86; City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

The government contends that the district court lacked jurisdiction over Mayfield's claims because Mayfield lacks the requisite Article III standing. According to the government, Mayfield's Fourth Amendment claim in the Amended Complaint is based on past injuries and

[6] [In the district court, the government stated that] "derivative materials may include photocopies or photographs of documents from confidential client files in Mayfield's law office, summaries and excerpts from the computer hard drives from the Mayfield law office and plaintiffs' personal computers at home, analysis of plaintiffs' personal bank records and bank records from Mayfield's law office, analysis of client lists, websites visited, family financial activity, summaries of confidential conversations between husband and wife, parents and children, and other private activities of a family's life within their home. These materials, in a derivative form, have been distributed to various government agencies."

speculation about the possibility of future injuries. Furthermore, as the government argues, the retention of derivative materials obtained from the FISA activities would not be affected by a declaratory judgment because there is no requirement that the government release or destroy the fruits of an unlawful search. The government thus asserts that Mayfield has not demonstrated that his injury is "imminent" or will be redressed by the relief sought. *See Defenders of Wildlife*, 504 U.S. at 560-61.

Standing is a question of law that we review de novo. Bernhardt v. County of Los Angeles, 279 F.3d 862, 867 (9th Cir. 2002). We also review de novo a grant of summary judgment. Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1039 (9th Cir. 1999). The district court determined that Mayfield alleged an ongoing injury by the very fact of the government's retention of derivative FISA materials. The court further concluded that a judgment declaring the challenged statutory provisions unconstitutional would likely result in the government's making reasonable efforts to destroy the derivative materials in its possession. We agree that Mayfield suffers an actual, ongoing injury, but do not agree that a declaratory judgment would likely redress that injury. We therefore reverse the judgment of the district court with regard to standing. We also vacate the district court's judgment on the merits and do not address the question of whether the challenged provisions of FISA, as amended by the PATRIOT Act, are unconstitutional.

A. Ongoing Injury

To establish Article III standing, a plaintiff must show *inter alia* that he faces imminent injury on account of the defendant's conduct. *Defenders of Wildlife*, 504 U.S. at 560. Past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. Nor does speculation or "subjective apprehension" about future harm support standing. *Friends of the Earth*, 528 U.S. at 184; *see also Defenders of Wildlife*, 504 U.S. at 560. Once a plaintiff has been wronged, he is entitled to injunctive relief only if he can show that he faces a "real or immediate threat . . . that he will again be wronged in a similar way." *Lyons*, 461 U.S. at 111 (1983).

The government does not contest that Mayfield was subjected to surveillance, searches, and seizures authorized by FISA and the FISC. The government argues, however, that it acted under a unique set of circumstances that are highly unlikely to recur. The government further argues that any possibility that it will use the derivative materials in its possession is "wholly speculative." Mayfield responds that he continues to suffer harm as the result of the FISA activities. He argues that the retention by government agencies of materials derived from the seizures in his home and office constitutes an ongoing violation of his constitutional right to privacy.

Although questions of standing are reviewed de novo, we will affirm a district court's ruling on standing when the court has determined that the alleged threatened injury is sufficiently likely to occur, unless that determination is clearly erroneous or incorrect as a matter of law. Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001). In *Armstrong*, we enumerated two ways in which a plaintiff can demonstrate that such injury is likely to recur. "First, a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from' that policy." "Second, the plaintiff may demonstrate that the harm is part of a 'pattern of officially sanctioned . . . behavior, violative of the plaintiffs' [federal] rights.'" Here, Mayfield

asserts that his injury stems from the government's application of the challenged FISA provisions, as amended by the PATRIOT Act. The causal link between the government's actions and Mayfield's injury is not disputed. Nor is the fact that the government's actions were authorized by FISA, which constitutes both the "written policy" and "pattern of officially sanctioned behavior" that gave rise to standing under *Armstrong*. Based on the undisputed facts, the district court concluded that Mayfield "continue[s] to suffer a present, on-going injury due to the government's continued retention of derivative material from the FISA seizure." We agree with the district court's determination.

B. Redressability

To establish standing, a plaintiff must also show that a favorable decision will likely redress his injury. *Defenders of Wildlife*, 504 U.S. at 560; *Levine v. Vilsack*, 587 F.3d 986, 991-92 (9th Cir. 2009). When the lawsuit at issue challenges the legality of government action, and the plaintiff has been the object of the action, then it is presumed that a judgment preventing the action will redress his injury. *Defenders of Wildlife*, 504 U.S. at 561-62. Here, Mayfield seeks declaratory relief against the type of government action that indisputably caused him injury. He is thus entitled to a presumption of redressability.

The government argues that a declaration that the challenged provisions of FISA are unconstitutional would not require the government to destroy the derivative materials in its possession, and therefore would not redress Mayfield's injury. The government is correct that it would not necessarily be required by a declaratory judgment to destroy or otherwise abandon the materials. *See*, *e.g.*, Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 362 (1998) (noting that a Fourth Amendment violation occurs at the moment of the illegal search or seizure, and that the subsequent use of the evidence obtained does not *per se* violate the Constitution); INS v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984) (holding that the Fourth Amendment does not provide a retroactive remedy for illegal conduct). The district court stated that a declaratory judgment would require the government to "act lawfully and make all reasonable efforts to destroy the derivative materials." But there is nothing in the declaratory judgment that would make it unlawful for the government to continue to retain the derivative materials.[7] To establish standing, Mayfield must show a "substantial likelihood" that the relief sought would redress the injury. There is no such likelihood here.

We recently addressed standing in *Stormans, Inc. v. Selecky*, 571 F.3d 960 (9th Cir. 2009). In *Stormans*, pharmacy owners challenged – under the Free Exercise Clause – a Washington regulation requiring pharmacists to stock and dispense Plan B (emergency contraception). In holding that the pharmacy owners met the criteria for Article III standing, we found that their injury would be redressed by a judgment that the regulation was unconstitutional. The connection in *Stormans* was direct: the regulation required the pharmacists to perform actions that they would not have to perform if the regulation were invalidated. If the statutes challenged by Mayfield were declared unconstitutional, there will be no direct consequence to him. The govern-

[7] The district court stated "that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, are unconstitutional because they violate the Fourth Amendment of the United States Constitution. Plaintiffs' Amended Complaint for declaratory relief is granted." The court did not address the legality of the government's retention of derivative materials.

ment will not be required to act in any way that will redress Mayfield's past injuries or prevent likely future injuries. Our opinion in *Stormans*, therefore, does not affect our holding here.

We also recently addressed, in *Paulsen v. CNF Inc*., a scenario analogous to Mayfield's. 559 F.3d 1061 (9th Cir. 2009). In *Paulsen*, plaintiffs were prescription drug plan participants who brought suit against a benefits management company under ERISA § 502(a), 29 U.S.C. § 1132, alleging breach of fiduciary duty. Plaintiffs argued that if the court found in their favor, the plan's drug costs, contributions, and co-payments would decrease. We found that the alleged injury was not redressable because the court's judgment would not compel the defendants to increase their disbursement of benefits payments. We thus held that plaintiffs lacked standing under Article III because "any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or predict." Mayfield's situation resembles that of the plaintiffs in *Paulsen*, as redressability depends upon the actions of the government in response to the court's judgment; as in *Paulsen*, such actions, in light of the unique circumstances of this case, are not within the control of the court.

III.

Mayfield unquestionably had standing to seek damages and injunctive relief when he filed the original complaint. The requirements for seeking such relief, however, differ from the requirements for seeking a declaratory judgment. *See Lyons*, 461 U.S. at 111. Having bargained away all other forms of relief, Mayfield is now entitled only to a declaratory judgment. Although it is undisputed that the government retains materials derived from the FISA searches and surveillance of Mayfield's property, the only relief that would redress this alleged Fourth Amendment violation is an injunction requiring the government to return or destroy such materials. Under the terms of the Settlement Agreement, Mayfield cannot seek injunctive relief.[8] Nor is it likely that the government will return the materials of its own volition, as it is under no legal obligation to do so, and has stated in its brief that it does not intend to take such action. Finally, the district court did not * * * order the government to return or destroy the derivative materials, but merely stated that "it is reasonable to assume that the Executive branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials when a final declaration of the unconstitutionality of the challenged provisions is issued."

Given the limited remedy left open by the Settlement Agreement and the absence of any authority on which the district court could rely to insist *sua sponte* that the derivative materials be returned or destroyed, we must conclude that Mayfield lacks standing to pursue his Fourth Amendment claim. We therefore vacate the judgment of the district court without reaching the merits of Mayfield's Fourth Amendment claim, and we remand to the district court with directions to dismiss Mayfield's Amended Complaint.

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[8] Paragraph 8 of the Settlement Agreement stated: "The parties agree that the sole claim that is not released as part of this settlement and that is at issue in such Amended Complaint is the plaintiffs' claim that 50 U.S.C. 1804 (relating to electronic surveillance under the Foreign Intelligence Surveillance Act) and 50 U.S.C. 1823 (relating to physical searches under such Act) violate the Fourth Amendment on their face, and the parties agree that the *sole relief* that will be awarded should the plaintiffs prevail on such claim is a declaratory judgment that one or both provisions is in violation of the Fourth Amendment . . . ." (emphasis added).

PART FOUR
INTERNATIONAL HUMAN RIGHTS IN UNITED STATES COURTS

CHAPTER NINE
SECTION 1983 AND INTERNATIONAL LAW

A. A BRIEF OVERVIEW OF INTERNATIONAL LAW

Speaking roughly, public international law takes two forms: customary international law and treaties. Treaties often are straightforward bilateral agreements (agreements between two countries), such as investment or extradition treaties, but they can also take the form of multilateral conventions among dozens of countries. Either way, they contain an agreed-upon text of more or less formal commitments to which signatory nations bind themselves. (Note, though, that with multilateral conventions, nations sometimes sign on with caveats known as reservations, understandings, or declarations – or RUDs). Treaties are therefore similar to statutes and constitutions in the sense that interpretation of the obligations that they create turns on analysis of text and purpose (along with the familiar controversies over which should take precedence). There is even a multi-lateral convention – the Vienna Convention on the Law of Treaties – that creates rules for interpreting treaties.

Customary international law (often referred to as CIL), by contrast, is more like common law. CIL develops from consistent actions and statements by a number of states over many years, where there is relatively little contrary action by other states, and where the conduct of those states also reflects a sense of obligation – that is, an idea that their actions are obligatory to at least some extent. CIL is dynamic; norms emerge, grow, and disappear over time, and states are permitted to engage in conduct that is consciously intended to change CIL. The exception to this dynamic process is a fairly small number of customary international law rules known as "peremptory norms" (or "jus cogens norms"), which are considered binding on all states, at all times, and whether or not those states have agreed to be bound. Peremptory or jus cogens norms include prohibitions on genocide, torture, and slavery. States are not permitted to violate these norms in an effort to establish different norms.

Although international law long has included doctrines about the treatment of individuals – for example, efforts in the 18th and 19th centuries to end the slave trade, as well as rules about the conduct of war, discussed below – its focus until very recently was relations among sovereigns. After World War II and the adoption of the United Nations Charter, however, human rights – and in particular a sovereign state's relationship to its own population – has become an increasingly important part of international law. The fountainhead of international human rights law is the Universal Declaration of Human Rights (UDHR), adopted by the U.N. General Assembly in 1948. Much of the content of international human rights law comes from multilateral conventions that build on the UDHR, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT).[7] (For a much more extensive list of human rights conventions, see the website of the U.N. High Commissioner for Human Rights, http://www2.ohchr.org/english/law/). But CIL also provides human rights norms in some circumstances.

[7] It is simply a fact that international law generates acronyms, perhaps because the titles of international law documents are often lengthy.

In addition to international human rights law, a separate category of law – known as international humanitarian law – exists to cover the conduct of states during war and other armed conflicts. For much of its history, international humanitarian law took the form of CIL – unwritten rules that developed out of state practice and the work of scholars. Beginning in the mid nineteenth century, states began codifying rules of humanitarian law in what have become known as the Geneva Conventions. The four current Geneva Conventions, which create rules for the treatment of prisoners of war, civilians, and the wounded, were promulgated in 1949. Most states have signed on to the Conventions and have also agreed to expansion of their coverage through a series of "optional protocols." Several other humanitarian conventions have also been adopted. (For more information, see the website of the International Committee of the Red Cross, http://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm). As with human rights law, CIL continues to provide humanitarian law rules beyond those codified in conventions.

Disputes exist about the relationship between international human rights law and international humanitarian law. Some commentators state that human rights law applies with the same force during times of war (a position which finds support in the text of, for example, the ICCPR and CAT). Others claim that human rights law gives way to humanitarian law for actions taken during armed conflicts.

B. INTERNATIONAL LAW AND THE U.S. CONSTITUTION

Contemporary international law provides a multitude of individual rights. But it provides relatively few avenues for enforcement of those rights on behalf of specific individuals. Typically, individual countries take the lead role in implementing international human rights within their borders. In some counties, international law rules operate in the same manner as domestic law once that country has adopted the international law rule – for example by ratifying a treaty. (Commentators usually call these counties "monist," to indicate the unity of international and domestic law in those countries.) In other countries, international law does not operate directly as law, even in the case of a ratified treaty, until that country takes additional steps to incorporate it into domestic law – for example, through implementing legislation. (Commentators refer to these countries as "dualist," to highlight the fact that international law and domestic law are separate.) Thus, a dualist country that signs a human rights treaty but does nothing to implement it will be obligated to comply with that treaty as a matter of international law, and violations of the treaty's provisions may subject the country to international sanctions, but it may not be bound to comply with the treaty as a matter of domestic law, and individuals may have no rights of redress in domestic courts.

The best description of the United States might be as a mixed monist-dualist state. The following discussion demonstrates, however, that as a practical matter, and certainly with respect to human rights norms, the United States is primarily a dualist country.

1. Treaties

With respect to treaties, the Supremacy Clause of the U.S. Constitution states that ratified treaties are "the supreme Law of the Land," which suggests that they function automatically as

law, in the same manner as a statute. But in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), in an opinion by Chief Justice Marshall, the Supreme Court distinguished between a treaty that "operates of itself without the aid of any legislative provision" and treaties in which "the terms of the stipulation import a contract, when either of the parties engages to perform a particular act." In the first situation, the treaty goes immediately into effect as law (what has come to be known as self-execution). In the second situation, "the legislature must execute the contract before it can become a rule for the Court" (what has come to be known as non-self-execution). The trick, of course, is deciding how this distinction applies to a particular treaty or treaty provision.

Many scholars have suggested a presumption in favor of self-execution, but the Supreme Court recently stated, not only that a treaty is "of course, 'primarily a compact between independent nations'" that "'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it,'" but also that, to be self-executing, the terms of the treaty must "reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect." Medellín v. Texas, 552 U.S. 491 (2008) (quoting Head Money Cases, 112 U.S. 580, 598 (1884)). This language seems to reject a presumption in favor of self-execution. Whether it goes so far as to impose a presumption *against* self-execution is less clear.

With respect to human rights treaties, there is a further wrinkle. When the Senate has given its advice and consent to human rights treaties, it has usually included a reservation or declaration that the treaty is not self-executing. *See* John T. Parry, *Torture Nation, Torture Law*, 97 Geo. L.J. 1001, 1034-48 (2009) (discussing the inclusion of non-self-execution statements in the ICCPR and CAT). If these statements by the Senate are valid – and, so far, courts have accepted their validity, *see, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (appearing to accept validity of the non-self-execution declaration for the ICCPR) – then neither the text of the treaty nor the intentions of the treaty writers is controlling.

The Senate sometimes uses RUDs to affect the substance of a treaty, as well. For example, Article 16 of the Convention Against Torture states that signatory nations will "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture," but it does not define "cruel, inhuman or degrading treatment or punishment." The Senate adopted a reservation as part of its resolution of advice and consent to the Convention, to the effect that the United States is bound by Article 16 "only insofar as the term . . . means the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." The Senate adopted a similar reservation for Article 7 of the ICCPR, which also bans cruel, inhuman or degrading treatment or punishment. These reservations seek to prevent the creation of new legal rights beyond those already protected by the Constitution, which makes these conventions less useful to people seeking remedies. *See* Parry, *supra*, at 1034-48.[8]

Finally, the Supremacy Clause states that the Constitution, laws, and treaties are all supreme law of the land. What if they conflict? Just as the Constitution trumps statutes, it also

[8] It is worth noting that the executive branch often proposes RUDs when it transmits a treaty to the Senate, and the final package of RUDs typically results from a process of negotiation among the executive branch officials and members of the Senate's Foreign Relations Committee.

trumps treaties. *See* Boos v. Barry, 485 U.S. 312 (1988); Reid v. Covert, 354 U.S. 1 (1954). The harder question is what to do when a statute and treaty conflict. The Supreme Court resolved the issue by adopting a "last in time" rule, which means that the more recent of the two, whether statute or treaty, prevails in the event of a conflict. *See* Whitney v. Robertson, 124 U.S. 190 (1888). However, the Court has instructed that a statute will not abrogate an earlier treaty unless it appears that Congress intended to do so – ambiguities should be construed to prevent conflicts. *See* Cook v. United States, 288 U.S. 102 (1933).

All ratified treaties are federal law by virtue of the Supremacy Clause. But, if a treaty is self-executing, it can also provide rules of decision for courts. If a treaty is not self-executing, either through its text or because of an RUD, then Congress must implement it through legislation before it can "become a rule for the Court." Either way, determining whether or not a treaty is self-executing is only the first step in implementing that treaty. The treaty or implementing legislation must actually create individual rights, and a cause of action must be available to enforce those rights. *Cf.* Gonzaga University v. Doe, 536 U.S. 273 (2002) (discussed in Chapter Three). The *Jogi* case, in section C, below, discusses these issues.

2. Customary International Law

The Constitution does not treat CIL as a category in the same way that it addresses treaties. But Article III clearly envisioned that federal judges would interact with international law. The grant of admiralty jurisdiction and the party-based sources of federal subject matter jurisdiction in Article III tasked federal judges with the duty – albeit an inchoate duty under the Madisonian compromise[9] – to hear many of the cases in which international law would or might play a role.

The harder question is whether CIL is a form of federal law. The Supreme Court famously stated in *The Paquete Habana*, 175 U.S. 677 (1900), that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." But the Court did not say that international law is specifically federal law. *Paquete Habana* was decided in 1900, more than 30 years before the decision in Erie *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). At that time, the idea of "general law" still retained force, and federal courts regularly applied general law in diversity cases without pausing to determine whether it had a specific federal pedigree. And, again during the pre-*Erie* era, the Supreme Court indicated that federal courts did not have federal question jurisdiction over cases arising under "the general public law," such as "the general laws of war, as recognized by the law of nations." New York Life Ins. Co. v. Hendren, 92 U.S. 286 (1876).

After the *Erie* decision, and its rejection of federal power to draw on general law as a rule of decision in diversity cases, the status of CIL became less clear. The Restatement (Third) of the Foreign Relations Law of the United States § 111(1) & (3), comment d, and reporters' note 3 (1986), takes the position that customary international law is now federal law and is "like com-

[9] The Madisonan compromise left to Congress the decisions whether to create lower federal courts and how to define their jurisdiction. *See* Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, and David L. Shapiro, *Hart & Weschler's The Federal Courts and the Federal System* 7-9, 275-76 (6th ed. 2009).

mon law." Many commentators assert that it is federal common law. These assertions have two important corollaries. First, if CIL is federal common law, then CIL overrides inconsistent state law. Second, cases arising under CIL would fit within 28 U.S.C. § 1331's grant of federal question jurisdiction. *See* Restatement, *supra*, § 111(2), comment 3, and reporters' note 4; § 115 comment e.

Other commentators disagree or take intermediate positions. Recent Supreme Court decisions also seem to support a middle path. The Court has held that CIL can be federal common law in at least some circumstances. *See* Samantar v. Yousef, 130 S. Ct. 2278 (2010) (holding immunity claims raised by foreign officials are "properly governed by the common law"); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding the Alien Tort Statute, 28 U.S.C. § 1350 allows federal courts to "reogniz[e] a claim under the law of nations as an element of common law"). But the Court has also emphasized the need "for great caution in adapting the law of nations to private rights." *Sosa*, 542 U.S. at 728. The Supreme Court has never suggested that § 1331 supports federal question jurisdiction over CIL claims in general. *Cf. Sosa*, 542 U.S. at 731 n.19 (appearing to suggest that § 1331 does not support jurisdiction over CIL claims in general). Several lower courts have rejected that possibility. *But see* Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.22 (2nd Cir. 1980) (upholding federal jurisdiction over an Alien Tort Statute claim on the basis that international law is federal common law, and recognizing that "our reasoning might also sustain jurisdiction under the general federal question provision").

3. Application of International Law in U.S. Courts

Regardless of the debates about judicial enforcement of treaties and CIL, federal courts look to international law in a variety of instances.

First, a longstanding principle of statutory interpretation, known as the *Charming Betsy* canon, provides that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). The Restatement (Third) of the Foreign Relations Law of the United States § 114 restates the canon in more moderate terms: "When fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Under either formulation, a court that applies the *Charming Betsy* canon must determine what the relevant international law rules are and then must compare those rules with the federal statute at issue. Although the *Charming Betsy* canon is important, remember that it provides a rule primarily for interpreting an ambiguous statute, where Congress's intent is not clear – as the Restatement version appears to recognize. Congress has the power to adopt statutes that violate international law, and where it appears that Congress has done so, the *Charming Betsy* canon has little application. *But cf.* Cook v. United States, 288 U.S. 102 (1933) (stating courts should not find conflicts between statutes and treaties unless congressional intent to create the conflict is clear).

Second, the Court sometimes applies international law principles – specifically rules of prescriptive or legislative jurisdiction – when assessing whether or to what extent a federal statute applies to conduct outside the United States. Antitrust cases provide the most recent examples. *See* F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155 (2004); Hartford Fire Ins.

Co. v. California, 509 U.S. 764, 816-21 (1993) ((Scalia, J., dissenting).

Third, when interpreting treaties, the Court often considers how other signatory countries and scholars of international law have interpreted a treaty. *See*, *e.g.*, Abbott v. Abbott, 130 S. Ct. 1983 (2010); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999). The Court has also cited the Vienna Convention on the Law of Treaties, *see* Weinberger v. Rossi, 456 U.S. 25 (1982), as have individual justices, *see Abbott*, *supra*, at 2007 n.11 (Stevens, J., dissenting); Sanchez-Llamas v. Oregon, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting); Sale v. Haitian Ctrs. Council, 509 U.S. 155, 191, 194-95 (1993) (Blackmun, J. dissenting). Lower courts have consulted the Convention more frequently. Citations to the Restatement (Third) of the Foreign Relations Law of the United States, which among other things articulates several international law rules, are more frequent in both Supreme Court and lower court opinions.

Finally, and more controversially, several Supreme Court majority opinions have cited foreign or international law to support particular interpretations of the Constitution. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (holding the juvenile death penalty is unconstitutional) These citations have been controversial because dissenting justices and many commentators have charged that it is illegitimate to rely on materials of this kind to interpret a national document. Defenders of the practice contend that the practice is not new and that in any event these citations were not decisive. Several states have considered, and some have adopted, statutes or constitutional provisions that limit the ability of their courts to consult foreign or international law.

C. SECTION 1983 AND TREATIES

1. The Text of § 1983

42 U.S.C. § 1983 provides a cause of action for violations, under color of state law, of "the Constitution and laws." Do treaties fit within this category? Remember that in *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Supreme Court held that the word "laws" in § 1983 "means what it says." Does that statement help at all? Perhaps not, because nothing in the text of § 1983 signals that "laws" means anything other than statutes. *See id*. ("the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law"); *cf.* Owen v. City of Independence, 445 U.S. 622 (1980) (§ 1983 applies to the "Federal Constitution and statutes"); Greenwood v. Peacock, 384 U.S. 808 (1966) (referring to "federal constitutional and statutory rights").

A few months after *Thiboutot*, however, the Court held in *Cuyler v. Adams*, 449 U.S. 433 (1981), that § 1983's reference to "laws" also includes "a congressionally sanctioned interstate compact" – in that case, the Interstate Agreement on Detainers. *Cuyler*, in short, indicates, first, that "laws" can include more than federal statutes and, second, that it includes something that is at least arguably analogizable to treaties. Yet *Cuyler* is also distinguishable on the ground that congressional action makes an agreement among states into federal law, and therefore enforceable through § 1983 if it creates individual rights – which is quite different from interpreting "laws" to include treaties simply because the Senate gave its consent to each treaty.

How constrained should the textual analysis be? The Supreme Court has often – alt-

hough perhaps not so much in recent years – spoken of the § 1983 cause of action in broad terms. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for example, the Court declared that § 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." If statements like this provide the appropriate interpretive stance for the statute, then doesn't it easily encompasses treaty claims? Is this the appropriate interpretive stance?

2. "Laws" in Other Statutes

Analogies to other statutes are not very helpful. In 1875, one year after the addition of "laws" to the text of § 1983, Congress enacted the predecessor of 28 U.S.C. § 1331, which extended original federal court subject matter jurisdiction to cases "arising under the Constitution or laws of the United States, or treaties." If the 1874 Congress understood the word "laws" to include treaties, why did the 1875 Congress specifically include "treaties" in addition to "laws"?

The difference in the two statutes could reflect a substantive decision, but it could also reflect the fact that Congress does not use consistent language when it legislates. For example, 28 U.S.C. § 2241 allows courts to grant the writ of habeas corpus if a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." Like § 1331, it distinguishes between treaties and statutes. When Congress enacted the predecessor of § 2241 in 1867, however, it used two different phrases to refer to the kinds of legal violations that would support a grant of the writ. The statute first refers to violations "of the constitution, or of any treaty or law of the United States," but a different phrase – "constitution or laws," nearly the same phrase used in § 1983 – appears three times in the rest of the statute, apparently as a shorthand. Did the 1874 Congress mean to apply that shorthand to the Revised Statutes version of § 1983? If so, why did they depart from the shorthand when they adopted § 1331 a year later?

In short, one can speculate, but it seems clear that the differences of language in these statutes are suggestive but not conclusive in either direction.

3. The Supremacy Clause

The Supremacy Clause states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." It distinguishes between a category of laws that includes federal statutes and excludes treaties, but it then groups "treaties" and "laws" together as "supreme Law of the Land." On the one hand, as the Supreme Court explained in *Whitney v. Robertson*, 124 U.S. 190 (1888), the Supremacy Clause places treaties and federal statutes "on the same footing," and "no superior efficacy is given to either over the other." Treaties *are* laws in that sense. On the other hand, the declaration that treaties have the same legal status as federal statutes and are supreme law of the land does not necessarily mean that every congressional or judicial reference to federal "law" or "laws" includes a reference to treaties by virtue of the Supremacy Clause.

4. Judicial Interpretation

JOGI v. VOGES
480 F.3d 822 (7th Cir. 2007)

On Petition for Rehearing.

Wood, Circuit Judge.

This case presents the question whether a foreign national who is not informed of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 596 U.N.T.S. 261, has any individual remedy available to him in a U.S. court. This panel's original opinion in the case concluded that the answer was yes. The original opinion, to which we refer here as *Jogi I*, held that the district court had subject matter jurisdiction under both the general federal jurisdiction statute, 28 U.S.C. § 1331, and under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. *Jogi I* also held that the Vienna Convention is a self-executing treaty, that Article 36 of the Convention confers an individual right to notification on nationals of parties to the treaty, and that the Convention itself gives rise to an implied individual private right of action for damages. * * *

Since *Jogi I* was decided, the Supreme Court has spoken on the subject of the Vienna Convention, albeit in the context of the availability of certain remedies in criminal proceedings and the applicability of the normal rules of procedural default. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006). In addition, the Court has addressed the exclusionary rule, describing it as a remedial rule of "last resort," and its relation to the remedy provided by 42 U.S.C. § 1983 for police misconduct. *See* Hudson v. Michigan, 126 S. Ct. 2159 (2006). The Court's reference to § 1983 prompted us to request supplemental memoranda in Jogi's case addressing * * * whether § 1983 provides a private right of action here, rendering unnecessary our discussion of an implied action directly under the Convention. The parties have submitted their memoranda, and we also have the benefit of an *amicus curiae* submission from the United States.

In the interest of avoiding a decision on grounds broader than are necessary to resolve the case, especially in an area that touches so directly on the foreign relations of the United States, the panel has re-examined its earlier opinion and has decided to withdraw that opinion and substitute the following one. Briefly put, we are persuaded that it is best not to rest subject matter jurisdiction on the ATS, since it is unclear whether the treaty violation Jogi has alleged amounts to a "tort." Both parties, as well as the United States, have suggested that jurisdiction is secure under 28 U.S.C. § 1331, and we agree with that position. Furthermore, rather than wade into the treacherous waters of implied remedies, we have concluded that Jogi's action rests on a more secure footing as one under 42 U.S.C. § 1983. At bottom, he is complaining about police action, under color of state law, that violates a right secured to him by a federal law (here, a treaty). We can safely leave for another day the question whether the Vienna Convention would directly support a private remedy.

I

* * * Tejpaul S. Jogi is an Indian citizen who was charged with aggravated battery with a firearm in Champaign County, Illinois. Jogi pleaded guilty to the crime and served six years of a twelve-year sentence; at that point, he was removed from the United States and returned to India. No state official ever advised him of his right under the Vienna Convention to contact the Indian consulate for assistance, nor did any Champaign County law enforcement official ever contact the Indian consulate on his or her own initiative on Jogi's behalf.

At some point after Jogi was in prison, he learned about the Vienna Convention. This prompted him to initiate several lawsuits, including the present case, in which he filed a *pro se* complaint seeking compensatory, nominal, and punitive damages to remedy this violation. He named as defendants various Champaign County law enforcement officials, including the two investigators who questioned him after his arrest. * * *

II

A

As before, the first issue we reach is that of subject matter jurisdiction. In the end, very little needs to be said on that point. Jogi's complaint makes it clear that he is attempting to assert rights under Article 36 of the Vienna Convention. The general federal jurisdiction statute, 28 U.S.C. § 1331, confers jurisdiction over claims arising under the "Constitution, laws, or treaties of the United States." As everyone, including the United States, acknowledges, the assertion of a claim arising under any one of those sources of federal law is enough to support subject matter jurisdiction unless the claim is so plainly insubstantial that it does not engage the court's power. * * * There can be no doubt that Jogi's claim does not fall within that small subset of utterly frivolous actions that are insufficient to support the court's jurisdiction. * * *

B

We now turn to the question whether 42 U.S.C. § 1983 provides the statutory right of action that Jogi needs for his claim. (The reason that the panel's opinion in *Jogi I* did not discuss this possibility is simple: the parties did not rely on § 1983. It is established, however, that complaints need not plead legal theories. Particularly with the benefit of the parties' supplemental memoranda on this point of law, we are free to consider it as a possible basis for the suit.) * * *

In *Maine v. Thiboutot,* 448 U.S. 1 (1980), the Supreme Court held that § 1983 encompasses claims based on purely statutory violations of federal law – there, violations of the federal Social Security Act. Or, as the Court put it more precisely, "[t]he question before us is whether the phrase 'and laws,' as used in § 1983, means what it says, or whether it should be limited to some subset of laws." After reviewing earlier cases and the legislative history of the Civil Rights Act of 1871, the Court resolved the question in favor of the straightforward reading: "laws" meant all laws.

The United States argues here, in its *amicus curiae* submission, that the word "laws" in § 1983 should be read to be restricted to statutes passed by Congress and to exclude treaties. This,

it concedes, is a novel argument. There is nothing wrong with novelty *per se,* but this argument suffers from the disadvantage of being in tension with the Supreme Court's decision in *Baldwin v. Franks*, 120 U.S. 678 (1887), where the Court considered whether the criminal counterpart to what has become § 1983 (now codified at 18 U.S.C. §§ 241-42) supported a claim by a class of Chinese aliens that they had been deprived of their rights under certain treaties by a conspiracy of local officials. The Court decided that the statute did not reach that far, but for federalism reasons, not because "treaties" fell outside its scope. Indeed, it indicated that a proper claim under the treaty would be cognizable:

> The United States are bound by their treaty with China to exert their power to devise measures to secure the subjects of that government lawfully residing within the territory of the United States against ill treatment, and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen. But that is not what Baldwin has done. His conspiracy is for the ill treatment itself, and not for hindering or delaying the United States in the execution of their measures to prevent it.

Beyond that, the Supremacy Clause of the Constitution makes the "Constitution, and the Laws of the United States . . . and all Treaties made" the supreme law of the land. The government's concern that the inclusion of treaties as part of the law of the United States included in § 1983 would flood the courts with cases is overblown. As the government itself urges elsewhere in its filings before us, there are numerous hurdles that must be overcome before an individual may assert rights in a § 1983 case under a treaty: the treaty must be self-executing; it must contain provisions that provide rights to individuals rather than only to states; and the normal criteria for a § 1983 suit must be satisfied. Only a small subset of treaties, some assuring economic rights and others civil rights, would even be candidates for such a lawsuit. We are not persuaded that the addition of the words "and treaties" in statutes like § 1331 and 28 U.S.C. § 2241 (and the absence of those words in § 1983) compels a different result. Section 1983 is a statute that was designed to be a remedy "against all forms of official violation of federally protected rights," *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 700-01 (1978), when those violations are committed by state actors. To read it as excluding protection for the subset of treaties that provide individual rights would be to relegate treaties to second-class citizenship, in direct conflict with the Constitution's command. We conclude, therefore, that the fact that Jogi is asserting rights under a treaty does not in and of itself doom his case.

Before Jogi can proceed under § 1983, he must show two things: first, that a personal right can be inferred from Article 36 of the Vienna Convention; and second, that he is entitled to a private remedy. With respect to the first of those inquiries, the Supreme Court held in *Gonzaga Univ. v. Doe,* 536 U.S. 273 (2002), that the same analysis applies to § 1983 cases as applies to other cases raising the question whether a private right exists. The right*,* it held, must appear unambiguously in either the statute or, as applied here, the treaty. For purposes of the inquiry into the existence of a legal right, the Court identified two relevant inquiries: (1) whether the statute by its terms grants private rights to any identifiable class; and (2) whether the text of the statute is phrased in terms of the persons benefitted. Before addressing those two questions, however, we consider it necessary to review the Vienna Convention in greater detail. * * *

1. The Vienna Convention and Article 36

The Vienna Convention is a 79-article, multilateral treaty to which both the United States and India are signatories. * * * The Preamble recalls that "consular relations have been established between peoples since ancient times," notes the principle of sovereign equality among states, recognizes the usefulness of a convention on this subject, and, importantly for our case, "realiz[es] that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."

Notwithstanding the latter paragraph of the Preamble, the Vienna Convention singles out individual rights in at least two places. The first is in the list of consular functions found in Article 5, which includes "helping and assisting nationals, both individuals and bodies corporate, of the sending State" and "representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests."

The second, which is the critical one for Jogi, is Article 36, which reads as follows:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) *if he so requests*, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph*;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the *said laws and regulations must enable full effect* to be given to the purposes for which the rights accorded under this Article are intended.

Among other requirements, this provision instructs authorities of a receiving state to notify an arrested foreign national of "his rights" under the Convention "without delay." * * *

Jogi argues that [Article 36] confers an individual right on a person from the "sending" state to consular notification, while the defendants and the United States urge that it does no such thing, and that the notification process is for the convenience of the consular services and their respective governments. We return to this question below, when we consider whether such an individual right exists. In theory, we would also have to resolve the question whether the Convention is self-executing before proceeding, because if it is not, then Jogi's suit must fail for that reason alone. Here, however, it is undisputed that the Convention is self-executing, meaning that legislative action was not necessary before it could be enforced. We therefore dispense with that inquiry and move on to the issue that has generated the greatest degree of controversy: whether Article 36 confers individually enforceable rights.

2. Individual Rights under the Treaty

* * * In the case of the Vienna Convention, the Supreme Court has said, without finally deciding the point, that Article 36 "arguably confers on an individual the right to consular assistance following arrest." Breard v. Greene*,* 523 U.S. at 376; *see also Sanchez-Llamas,* 126 S. Ct. at 2677-78 (assuming, without deciding, that the Convention creates judicially enforceable rights). In *Breard v. Greene*, the Court faced facts that have become common-place in Vienna Convention cases: a criminal defendant who was trying to use federal habeas corpus or other criminal proceedings to seek a remedy for a Convention violation based in the criminal law. [The *Breard* Court found that he had procedurally defaulted his Vienna Convention claim on habeas corpus review by failing to raise it in state court.]

On analogous facts, this court and most of our sister circuits have refrained from deciding whether an individual right exists under the Vienna Convention; instead, most have concluded that the various remedies available to criminal defendants, such as the quashing of an indictment or the exclusionary rule, are not appropriate cures for a violation. Two circuits have found, in the context of a criminal proceeding, that the treaty does not confer individual rights.

This court is the first one to be confronted directly with the question whether the Convention creates a private right. The distinction between a private right, on the one hand, and various remedial measures that affect criminal prosecutions, on the other, is an important one, as the Supreme Court reiterated in *Hudson v. Michigan*, *supra.* The literature exploring the possibility of deterring unlawful police behavior through damages actions under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), makes the same point. Our consideration here of the question whether the Convention creates private rights is therefore in no way inconsistent with our conclusion in [an earlier case], that the exclusionary

rule is not an available remedy for violations of the Vienna Convention.

As the Supreme Court in *Gonzaga University* counseled, we begin our inquiry with the text of Article 36. "In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." [*See*] Vienna Convention on the Law of Treaties (Treaty Convention), May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 (governing the interpretation of treaties and directing courts to look first to the plain language of a treaty when attempting to determine its meaning). Article 36 ¶ 1(b) states, plainly enough, that authorities "*shall* inform the person concerned without delay *of his rights* under this sub-paragraph." (Emphasis added). Justice O'Connor, noting this language, has observed that, "if a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed." Medellin v. Dretke*,* 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting from dismissal of writ of *certiorari* as improvidently granted). * * * Faced with its unambiguous language, the defendants attempt to introduce doubt by looking at the Convention's Preamble, which we reproduced above. They place special weight on the fifth paragraph of the preamble, which says: "Realizing that *the purpose of such privileges and immunities is not to benefit individuals* but to ensure the efficient performance of the functions by consular posts on behalf of their respective States . . . ." That statement is a perfectly good reflection of almost every other article of the Convention. It does not, however, describe Article 36. Indeed, there is little reason to think that it has any application at all to Article 36. We are inclined to agree with Jogi that the most reasonable understanding of this language is as a way of emphasizing that the Convention is not designed to benefit diplomats in their individual capacity, but rather to protect them in their official capacity. * * *

Whether or not we are reading the Preamble correctly, there is a broader principle at stake. It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous. * * *

In *United States v. Stuart*, 489 U.S. 353 (1989), the Supreme Court stated that "a treaty should generally be construe[d] . . . liberally to give effect to the purpose which animates it and that [e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." [*S*]*ee* Asakura v. City of Seattle*,* 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."). We conclude that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals. Although international treaties as a rule do not create individual rights, [they] occasionally do so. * * *

It is also revealing that the regulations issued by the Department of Justice and (now) the Department of Homeland Security that address the subject of consular notification highlight the right of the individual alien to notification. * * * The State Department sends regular notices to state and local officials reminding them of their notification obligations under the treaty. * * * The Foreign Affairs Manual issued by the State Department says that "Article 36 of the Vienna

Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's *right* to communicate with the American consul." Courts have observed that the United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who have not been granted the right of consular access. * * *

We conclude, for all these reasons, that Article 36 of the Vienna Convention by its terms grants private rights to an identifiable class of persons – aliens from countries that are parties to the Convention who are in the United States – and that its text is phrased in terms of the persons benefited. We thus turn to the final question, which is whether § 1983 furnishes a remedy to Jogi and other such aliens.

3. Remedy under 42 U.S.C. § 1983

Gonzaga University drew a sharp distinction between the clarity required for finding a right and the burden of showing that a remedy is available under § 1983:

> Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. . . . Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.

Nothing in either the Vienna Convention or any other source of law has been presented to us that would rebut this presumption, apart from the argument we have rejected that treaties do not enjoy the same status as statutes. We therefore conclude that Jogi is entitled to pursue his claim under § 1983. We therefore have no need to reach the question addressed in *Jogi I* whether the Convention itself may be the source of an enforceable remedy.

III

We close by reiterating our final conclusions from *Jogi I.* As we did there, we again reject the defendants' argument that Jogi's claim is barred by *Heck v. Humphrey,* 512 U.S. 477 (1994). It is not. *Heck* holds that a plaintiff seeking damages for an allegedly unconstitutional conviction or for other harm caused by actions whose unlawfulness would undermine the validity of the conviction "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Court clarified the *Heck* rule. It explained that *Heck* prevents prisoners from making an end-run around the need to challenge the validity or duration of their convictions using the vehicle of habeas corpus, rather than through an action under 42 U.S.C. § 1983 or *Bivens.* If success in the lawsuit would not spell immediate or speedier relief, then § 1983 remains available for use, and *Heck* does not bar the action.

The Supreme Court's recent decision in *Wallace v. Kato,* 127 S. Ct. 1091 (2007), makes it clear that *Heck* does not bar this action. *Wallace* is central, however, for one of the two issues that will certainly arise on remand: when exactly did Jogi's claim arise (a question of federal law, as *Wallace* held), and did he file suit in time? The statute of limitations is an affirmative de-

fense, see Fed. R. Civ. P. 8(c), and so this issue does not affect our decision about subject matter jurisdiction or Jogi's ability to state a claim. Since we have decided that this case must proceed under § 1983, it will be subject to the two-year statute of limitations that federal courts in Illinois borrow for these claims. (We note here that the *Wallace* Court looked to state law both for the basic statute of limitations and for any pertinent tolling rules. The district court will be free to explore the implications of this aspect of the Court's decision more fully on remand.) Relevant questions, assuming that the affirmative defense is raised properly, will include when Jogi's claim accrued, whether the discovery rule applies to his case, and whether he may take advantage of any tolling rules. Second, we think it inevitable that the issue of qualified immunity – well established in § 1983 cases – will arise. Although normally we might be inclined to find waiver, because the defendants have not even whispered the phrase thus far, this is an unusual case. We leave it to the district court's sound discretion to decide whether to allow the defendants (who have not yet filed an answer, of course, because they won below on their motion under Rule 12(b)(1)) to raise this defense on remand. * * *

Notes and Questions

1. Is this case similar to *Monroe v. Pape*? To decide what might be a difficult question of statutory interpretation, the court relies in part on Supreme Court decisions interpreting the criminal analogue of § 1983, and it adopts a "purposivist" reading of the statute to supplement its textual reading. To the extent the reasoning in *Monroe* and *Jogi* is similar, does that indicate Jogi's holding about the meaning of "laws" in § 1983 is correct?

2. Remember the discussion of § 1983's language that preceded *Jogi*. In light of that discussion, is *Jogi*'s analysis of the text convincing? Under *Jogi*'s reasoning, would 28 U.S.C. § 1331 allow federal subject matter jurisdiction over treaty claims even if it only referred to cases arising under the "Constitution and laws of the United States"? The court dismisses such an objection as irrelevant – is it?

3. To interpret "laws" as meaning "federal statutes and treaties," *Jogi* also relies on a Supreme Court decision: *Baldwin v. Franks*, 120 U.S. 678 (1887). The relevant portion of *Baldwin* considered § 5336 of the Revised Statutes, which read in part: "If two or more persons in any state or territory conspire . . . by force to prevent, hinder or delay the execution of any law of the United States . . . ." The Court stated, "if in their efforts to carry the treaty into effect [federal officials] had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen." Does this language provide clear support for the conclusion in *Jogi*? Is this language a holding, or is it dicta?

Other passages of the majority opinion in *Baldwin* suggest the Court did intend to include "treaties" in the statute's reference to "laws." The dissenters had no doubts on the issue. See *id*. at 695 (Harlan, J., dissenting) ("It is also conceded that, in the meaning of the section, a treaty between this government and a foreign nation is a 'law' of the United States."); *id*. at 702-705 (Field, J., dissenting) (providing more complete analysis for the same conclusion). Is any of this necessary to decide the case? The majority's reasoning on this point begins with the word "if."

Assuming that the statement in Baldwin is binding, what is the "state of things contemplated by this statute"? Is it clear that the Court was interpreting "law of the United States" to include treaties? (Note again that the text of this statute refers only to "laws" – not to the Constitution and laws. Does that make a difference?)

4. On policy grounds, is there any reason to reject the *Jogi* court's conclusion, regardless of how one assesses the strength or weaknesses of its legal arguments? States already are bound by treaties under the Supremacy Clause, and concerns about state compliance with treaties under the Articles of Confederation were a driving force for the federal constitutional convention. Adoption of the 14th Amendment strengthened the federal government's ability to enforce laws against the states and their agents. Doesn't it make sense to assume Congress meant to include treaties in its efforts to enforce federal "law" against the states and state actors? Or should one conclude that actions under the 14th Amendment are necessarily limited to enforcing the Constitution and statutes, so that more is needed to include treaties. Again, on policy grounds, what would be the reason for reaching such a conclusion?

5. *Jogi* appears to be the only federal court decision allowing a plaintiff to proceed with a § 1983 damages claim for violation of an international treaty. But in several cases, federal courts have grappled with the application of § 1983 to treaties between the United States and Indian tribes.

Most of the relevant cases are from the Ninth Circuit. Early cases indicated that § 1983 is not available to enforce treaties involving Indian tribes. *See* Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989) (refusing to allow a § 1983 suit where the claimed rights were "grounded in treaties, as opposed to specific federal statutes or the Constitution"); United States v. Washington, 873 F.2d 240 (9th Cir. 1989) ("treaty interpretation claims do not give rise to a claim cognizable under § 1983"). Subsequent cases stated that § 1983 encompasses claims arising out of Indian treaties. *See* Shoshone-Bannock Tribes v. Fish & Game Comm'n, 42 F.3d 1278 (9th Cir. 1994); United States v. Washington, 935 F.2d 1059 (9th Cir. 1991); Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991). Most recently, however, an en banc decision insisted that the possibility of § 1983 claims for violations of Indian treaties was merely a "suggest[ion]" and had never been fully considered. Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005) (amended en banc opinion). In dissent, Judge Berzon, insisted that individuals can use § 1983 to enforce treaty-based rights. She based her position in part on the proposition that "Indian treaties are unique, governed by different canons of construction than those that apply to statutes and other treaties." *See also* 1 Cohen's Handbook of Federal Indian Law § 2.02 (Nell Jessup Newton, *et al*. eds., 2005) (discussing canons of interpretation for treaties involving Indian tribes).[10]

[10] The Supreme Court has held that Indian tribes are not "persons" entitled to sue under § 1983. *See* Inyo County v. Paiute-Shoshone Indians of Bishop Colony, 538 U.S. 701 (2003). An important issue for individuals bringing § 1983 suits to enforce treaties between the United States and Indian tribes is whether those treaties create individual rights, or whether instead the treaties create collective rights that neither individuals nor tribes may enforce through § 1983. In *Skokomish*, the banc Ninth Circuit held that the treaty did not create individual rights, and also—as the text above indicates – expressed skepticism about the ability of individuals to use § 1983 as a vehicle to enforce treaty rights.

In the end, these cases do not seem very helpful. Their statements and holdings are inconsistent and often inconclusive. The cases rejecting § 1983 treaty claims do not provide much of an explanation for their conclusions. Yet, the most recent and most extensive argument in favor of § 1983 claims rests in part on the special nature of Indian treaties. Whatever the ultimate answer is on this issue, is it ever likely to shed much light on § 1983's application to international treaties?

6. *Jogi*'s decision that Article 36 of the Vienna Convention on Consular Relations creates individual rights has not fared well in other circuits. *See* Gandara v. Bennett, 528 F.3d 823 (11th Cir. 2008) (finding Article 36 of the Vienna Convention does not create enforceable rights); Mora v. New York, 524 F.3d 183 (2nd Cir. 2008) (same); Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir. 2007) (same). Prior cases arising in contexts other than § 1983 tend to duck the issue of whether Article 36 creates individually enforceable rights although, as *Jogi* notes, some courts had already rejected the claim in the context of criminal proceedings.

7. Courts have been mixed but also more receptive to *Jogi*'s holding that § 1983 allows suits for violation of treaty rights. The *Gandara* majority simply ignored it. But *Cornejo* "assume[d] for purposes of this case that treaty such as this one that is self-executing and thus law, has that status [of law for purposes of § 1983]." In her dissenting opinion, Judge Nelson went further and contended that treaties are presumptively enforceable under § 1983. *Mora* accepted *Jogi*'s holding as an obvious conclusion:

> [W]e note that assuming *arguendo* that plaintiff has an individual right under the Convention, his claim for damages pursuant to § 1983 would likely be actionable. *See Gonzaga,* 536 U.S. at 284 ("[B]ecause § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes[,] [o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983" (citation omitted)). Section 1983 would likely provide a cause of action for damages in the case of a treaty violation in the same manner that § 1983 provides a cause of action for remedying a statutory violation.

In light of the discussion above, do you agree with the *Mora* court?

7. If § 1983 allows treaty claims, how often will plaintiffs prevail? Note that *Jogi* recognizes that the availability of § 1983 for treaty claims is only a first step. First, the court emphasized that the treaty must also be self-executing. Remember that when the United States ratifies human rights treaties, it usually includes the statement that the treaty is not self-executing. If those statements are valid, then none of the treaties ratified with such a statement will be able to support a § 1983 claim. Does this consequence affect your views on whether non-self-execution statements are valid?

Second, relying on *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the court asked whether the treaty creates personal rights. Often, the answer will be no. The Restatement (Third) of the Foreign Relations Law of the United States, § 907, cmt. a, states that, as a descriptive matter, "international agreements, even those directly benefitting private persons, generally do not create private rights . . . ."

Third, what about the typical § 1983 defenses, such as immunity? The *Jogi* court seems to assume it is available in general. Consider, too, the remarks of Judge Rogers in his *Gandara* concurrence: "Of course, in all cases brought against an individual officer under § 1983 for violation of the Convention qualified immunity would provide a defense to suit and in many cases would preclude a finding of liability."

The *Jogi* court also noted the possibility that *Heck v. Humphrey* could apply in some treaty cases. Even if *Heck* applies in theory, how likely is it that the results of § 1983 litigation over violation of a self-executing treaty would place a criminal conviction in doubt?

Finally, consider whether ordinary rules of § 1983 liability should apply to treaties, or whether the rules should be different? Does the choice between the tort law model and the public law model make a difference here?

8. What is the appropriate remedy for violation of a treaty? What is the appropriate remedy in Article 36 cases? Consider again the remarks of Judge Rogers in *Gandara*:

> Given that the right in Article 36(1)(b), to the extent it may exist, is a right of notification as opposed to a right of assistance, it is difficult to imagine what relief could be fashioned to remedy a violation, beyond injunctive relief, even under our domestic law. In this regard, I would note that I appreciate the concern * * * over "conjur[ing] a legal theory that might expose individual officers, to liability for breaches of international treaties." Due to the speculative nature of any injury resulting from the violation of a right to notification conferred under Article 36(1)(b), however, even if the injury were compensable, I do not envision the availability of more than nominal damages and injunctive relief.

Are there cases in which more than nominal damages would be available? How would you measure such damages? Would punitive damages be more or less appropriate than compensatory damages in this context?

What about injunctive relief – against whom would the injunction run? How would an injunction benefit the individual plaintiff? What kind of injunction is the plaintiff entitled to seek? *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding § 1983 plaintiff must have standing to seek particular forms or relief, which for injunctions requires continuing harm or risk of harm to the plaintiff). Can you think of situations under Article 36 in which a plaintiff could satisfy the rule of *Lyons*? Under other treaties?

9. Should § 1983 also be available for violations of customary international law? Remember that, in *Illinois v. Milwaukee*, 406 U.S. 91 (1972), the Supreme Court held that claims arising under federal common law come within 28 U.S.C. § 1331's grant of federal question jurisdiction. The Court endorsed the view that "the statutory word 'laws' includes court decisions." It is still an open question whether that conclusion should apply to § 1983. *See* Chapter Three, section D. If the answer is yes, then § 1983 would provide a cause of action for CIL claims to the extent that CIL is federal common law. *See* section B.2., *supra*.

CHAPTER TEN
OTHER CAUSES OF ACTION
FOR ENFORCING INTERNATIONAL RIGHTS

A. INTRODUCTION

Section 1983 is not the only cause of action that might assist the enforcement of international individual rights. This chapter surveys two other federal statutory causes of action that more explicitly provide for the application of international law norms: the Alien Tort Statute, and the Torture Victims Protection Act. Efforts to apply these statutes implicate issues that are different from those raised by application of 42 U.S.C. § 1983, although there is overlap on the question of how § 1983 applies to treaties, as discussed in Chapter Nine. Instead of issues of federalism, the Alien Tort Statute and Torture Victim Protection Act raise issues about separation of powers, particularly foreign relations. The Alien Tort Statute also raises knotty issues of federal court jurisdiction.

This chapter also introduces the concept of foreign sovereign immunity and the emerging rules for the immunity of foreign officials.

As you read these materials, try to assess the utility of the Alien Tort Statute and Torture Victim Protection Act, and for whom they might be most useful. Consider also the appropriate role of immunity principles in the international human rights context – are the arguments stronger or weaker for government or individual immunity?

B. THE ALIEN TORT STATUTE

1. Introduction

Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 85. District Courts; Jurisdiction

§ 1350. Alien's Action for Tort.

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Notes and Questions

1. The Alien Tort Statute (sometimes referred to as the Alien Tort Claims Act) was part of the Judiciary Act of 1789, the statute that set up the federal judicial system. There is no legislative history for the statute, and Congress's purpose in enacting it is not entirely clear.

2. The statute states that the district courts have jurisdiction, but jurisdiction over what? The statute uses the word "tort," which suggests jurisdiction over a common law cause of action,

but it then qualifies that reference by requiring the tort to be a violation of treaties or the law of nations, which could mean that the cause of action must come from international law. The issue here is whether the Alien Tort Statute creates both jurisdiction and a cause of action, or whether it only creates jurisdiction, so that a plaintiff must look elsewhere for a cause of action. While ordinary common law claims supply causes of action, international law generally does not.

3. If the statute creates a cause of action, what are the elements of that cause of action? Is it as simple as (1) plaintiff must be an alien, (2) the conduct at issue must be a tort, and (3) the conduct must also violate the treaty or the law of nations?

What about existence of a duty, violation of that duty, and causation of some injury? Are all of these implicit in the word "tort"?

What about the "law of nations"? In light of the ambiguity that often surrounds customary international law, what suffices as an adequate allegation that conduct violates the law of nations? Should U.S. courts have the same ability to clarify and refine ambiguities in the law of nations as they do for the law of torts?

4. Remember that any statute that creates federal court jurisdiction must comply with Article III. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803) (holding that a different provision of the Judiciary Act violated Article III). Where does the Alien Tort Statute fit in Article III's catalog of federal court subject matter jurisdiction?

a. If an alien sues a citizen of a U.S. state, then diversity exists and there are no Article III issues.

b. What about a suit between two aliens? Diversity does not exist, but some suits might fall under the category of "Cases affecting Ambassadors, other public Ministers and Consuls."

c. Suits between aliens would be permissible if the ATS is consistent with Article III's authorization of federal question jurisdiction over cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"? Torts in violation of a treaty would qualify. What about torts in violation of the law of nations – does "laws of the United States" include customary international law? Commentators have split on this issue. *See also* Chapter Nine, § B2.

5. ATS suits involving treaties are almost certainly subject to the same limitations that apply to the use of § 1983 to enforce treaties. Most critical are the requirements that the treaty be self-executing and that it create individual rights. *See* Chapter Nine, § C; Lopez v. Wallace, 325 Fed. Appx. 782 (11th Cir. 2009) (§ 1350 does not provide a cause of action for treaties that do not create individually enforceable rights).

2. Judicial Implementation of the ATS

The Alien Tort Statute was rarely invoked for the first 190 years of its existence. During

that period, only two court decisions based jurisdiction on the statue, one in 1795 and one in 1961. Everything changed in 1980, when the U.S. Court of Appeals for the Second Circuit decided the following case.

a. *Filartiga*

FILARTIGA v. PENA-IRALA
630 F.2d 876 (2nd Cir. 1980)

Kaufman, Circuit Judge.

[Plainitiffs were citizens of Paraguay who sued another citizen of Paraguay, Americo Norberto Pena-Irala, over actions that took place in Paraguay.] The Filartigas * * * contend that on March 29, 1976, Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay. [They] claim that Joelito was tortured and killed in retaliation for his father's political activities and beliefs. * * *

[When they learned that Pena had entered the United States, the Filartigas] caused Pena to be served with a summons and civil complaint [which] alleged that Pena had wrongfully caused Joelito's death by torture and sought compensatory and punitive damages of $10,000,000. * * * The cause of action is stated as arising under "wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U. N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as 28 U.S.C. § 1350, Article II, sec. 2 and the Supremacy Clause of the U. S. Constitution. [The district court dismissed the complaint.]

II

Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, 28 U.S.C. § 1350[.] * * * Since appellants do not contend that their action arises directly under a treaty of the United States, a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. * * *

[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796) (distinguishing between "ancient" and "modern" law of nations).

The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law. * * *[15]

[15] The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, "The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do

Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. Accordingly, we must conclude that the dictum in [an earlier Second Circuit case], to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state," is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. We therefore turn to the question whether the other requirements for jurisdiction are met.

III

Appellee submits that even if the tort alleged is a violation of modern international law, federal jurisdiction may not be exercised consistent with the dictates of Article III of the Constitution. * * *

It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. * * * Here, where in personam jurisdiction has been obtained over the defendant, the parties agree that the acts alleged would violate Paraguayan law, and the policies of the forum are consistent with the foreign law, state court jurisdiction would be proper. Indeed, appellees conceded as much at oral argument.

[We] proceed to consider whether the First Congress acted constitutionally in vesting jurisdiction over "foreign suits" alleging torts committed in violation of the law of nations. A case properly "aris(es) under the . . . laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972). The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III. * * *

As ratified, the judiciary article contained no express reference to cases arising under the law of nations. Indeed, the only express reference to that body of law is contained in Article I, sec. 8, cl. 10, which grants to the Congress the power to "define and punish . . . offenses against the law of nations." Appellees seize upon this circumstance and advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress. * * * As John Jay wrote in The Federalist No. 3, "Under the national government, treaties and articles of treaties, as well as the laws

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States defend their violations by claiming that they are above the law." J. Brierly, *The Outlook for International Law* 4-5 (Oxford 1944).

of nations, will always be expounded in one sense and executed in the same manner, whereas adjudications on the same points and questions in the thirteen states will not always accord or be consistent." Federal jurisdiction over cases involving international law is clear.

Thus, it was hardly a radical initiative for Chief Justice Marshall to state in *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815), that in the absence of a congressional enactment,[20] United States courts are "bound by the law of nations, which is a part of the law of the land." These words were echoed in *The Paquete Habana*, *supra*, 175 U.S. at 700: "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

The Filartigas urge that 28 U.S.C. § 1350 be treated as an exercise of Congress's power to define offenses against the law of nations. While such a reading is possible, *see* Lincoln Mills v. Textile Workers, 353 U.S. 488 (1957) (jurisdictional statute authorizes judicial explication of federal common law), we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law. The statute nonetheless does inform our analysis of Article III, for we recognize that questions of jurisdiction "must be considered part of an organic growth part of an evolutionary process," and that the history of the judiciary article gives meaning to its pithy phrases. The Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world therefore reinforces the result we reach today.

[I]n light of the foregoing discussion, there can be little doubt that this action is properly brought in federal court.[22] This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations. The paucity of suits successfully maintained under the section is readily attributable to the statute's requirement of alleging a "violation of the law of nations" at the jurisdictional threshold. Courts have, accordingly, engaged in a more searching preliminary review of the merits than is required, for example, under the more flexible "arising under" formulation. Thus, the narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue. * * *

IV

[The court briefly addressed three additional issues. First, on the question of what law would apply to the case, the court stressed the difference between "the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations, with the issue of the choice of law to be applied, which will be addressed at a later stage in the proceed-

[20] The plainest evidence that international law has an existence in the federal courts independent of acts of Congress is the long-standing rule of construction first enunciated by Chief Justice Marshall: "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." The Charming Betsy, 6 U.S. (2 Cranch), 34, 67 (1804), quoted in Lauritzen v. Larsen, 345 U.S. 571, 578 (1953).

[22] We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331. We prefer, however, to rest our decision upon the Alien Tort Statute, in light of that provision's close coincidence with the jurisdictional facts presented in this case.

ings. The two issues are distinct." The court suggested, for example, that Paraguayan law might apply. Second, the court dismissed Pena's claim that the Act of State doctrine barred the case. We will consider the Act of State doctrine in section D, below. Third, the court noted the possibility that the forum non conveniens doctrine could apply.]

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

Notes and Questions

1. Does the *Filartiga* court adequately address the question of federal subject matter jurisdiction over cases involving customary international law? The court seems to hold that CIL is automatically federal common law, with the result that, in the context of the ATS, any tortious violation of CIL is automatically actionable. In a footnote, the court also suggests that jurisdiction over ATS cases would also be appropriate under the general federal question statute, 28 U.S.C. § 1331. If that is true, isn't it also true that federal courts have § 1331 jurisdiction over all claims under CIL? What role does the ATS play? Is it just a remnant of the pre-1331 era?

2. Does the court's citation in a footnote to the *Charming Betsy* canon add anything to the jurisdictional analysis?

3. What about the requirement of a cause of action? Under the court's analysis, where does it come from? Is the court suggesting that the existence of a federal common law rule necessarily implies a cause of action to enforce that rule? Or is the cause of action specific to the international context? Or, even more narrowly, is it specific to international law violations that are also transitory torts? (If a tort is transitory, a court may adjudicate the claim even if the conduct has no connection to the forum, so long as it can obtain jurisdiction over the defendant.)

4. If ATS cases are a form of transitory tort, what follows from that conclusion? Is it really the case that an alien accused of violating another alien's international human rights in another country can be sued in the United States on the basis that the conduct was a tort and that most torts are transitory? Perhaps the answer is yes, but with strings attached. *See* Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. Irvine

L. Rev. (forthcoming 2013) (arguing that, "following the model of transitory torts, U.S. courts are most justified in exercising jurisdiction over non-frivolous allegations that the defendant (or the defendant's agents) violated universally recognized prohibitions on conduct when the claimant cannot seek meaningful redress against the defendant in the state where the conduct occurred").

5. What are the elements of an ATS claim after *Filartiga*? It appears that plaintiff (1) must be an alien, (2) must allege a tort that (3) is also a violation of a treaty or the law of nations, with the caveat that where the tort is a violation of the law of nations, the law at issue must be clear.

6. Consider the court's final paragraph. Does it overstate the role of courts, or does it simply take account of developments in international law that can also claim universal, or at least extremely widespread, normative support?

b. Post-*Filartiga* Developments

After *Filartiga*, ATS cases proliferated in the lower federal courts. One of the most significant early cases is *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). The plaintiffs were "survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel in March 1978." They sued the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America, alleging that "defendants were responsible for multiple tortious acts in violation of the law of nations, treaties of the United States, and criminal laws of the United States, as well as the common law."

The district court dismissed for lack of subject matter jurisdiction under the ATS, and the D.C. Circuit affirmed in a per curiam opinion, with each judge writing a separate concurrence. Judge Edwards's opinion embraced *Filartiga* but also expanded on the earlier decision's analysis. He observed that international law rarely deals with causes of action, because it is up to each state to decide how to implement its international law obligations. Section 1350, he therefore concluded, applies whether or not the plaintiff can identify an international law cause of action. All the plaintiff has to do is identify a violation of one of the "definable, universal and obligatory norms" of the law of nations. That is because the statute is not only jurisdictional but also "itself provides a right to sue for alleged violations of the law of nations." Judge Edwards also presented an alternative theory, which he perceived as less desirable, under which § 1350 would allow "an alien to bring a common law tort action in federal court without worrying about jurisdictional amount or diversity, as long as a violation of international law is also alleged." Nonetheless, he concurred in affirming the dismissal on the ground that the law of nations did not apply to non-state actors in the same way that it applied to states (and he minimized the role of Libya in the events at issue).

In his separate opinion, Judge Bork outlined a very different theory of the ATS. He stressed that "[n]either the law of nations nor any of the relevant treaties provides a cause of action that appellants may assert in courts of the United States." Nor did he find a cause of action in the text of the ATS. Finally, because of separation of powers concerns relating to foreign rela-

tions, he declared that the court "should not, in an area such as this, infer a cause of action not explicitly given."

On the issue of customary international law, its possible status as federal common law, and its relationship to federal court jurisdiction, Judge Bork argued that "[t]o say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts. It is not to say that, like the common law of tort or contract, for example, by itself it affords individuals the right to ask for judicial relief." On the meaning of the ATS, he declared,

> It will not do simply to assert that the statutory phrase, the "law of nations," whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules. It will not do because the result is contrary not only to what we know of the framers' general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs.
>
> What little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations. A broad reading of section 1350 runs directly contrary to that desire. It is also relevant to a construction of this provision that until quite recently nobody understood it to empower courts to entertain cases like this one or like *Filartiga*. * * *
>
> * * * It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover. That problem is not avoided by observing that the law of nations evolves. It is one thing for a case like *The Paquete Habana* to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation with which we are at war. It is another thing entirely, a difference in degree so enormous as to be a difference in kind, to find that a rule has evolved against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. The latter assertion raises prospects of judicial interference with foreign affairs that the former does not.

Judge Bork concluded that the most plausible purpose for the statute was to address the three "principal offenses against the law of nations" identified by William Blackstone: "1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy." He asserted that allowing such claims but not others would facilitate "the redress of aliens' grievances" and "would tend to ease rather than inflame relations with foreign nations."[11]

Over the next 20 years, federal courts generally sided with *Filartiga* and Judge Edwards

[11] The third opinion, by Judge Robb, concluded that the case was barred by the political question doctrine.

rather than with Judge Bork, although some courts took account of Bork's concerns. For example, in *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), the court made several important rulings. First, it adopted *Filartiga*'s holding that an ATS claim requires only "a claim by an alien, a tort, and a violation of international law." Second, the court held that in ATS actions, there are "no limitations as to the citizenship of the defendant, or the locus of the injury." In other words, the ATS vests federal courts with a jurisdiction that includes cases that have no connections whatsoever with the United States (a ruling that was implicit in *Filartiga* as well).

Third, the court refined *Filartiga*'s holding that, because international law is federal common law, ATS cases arise under federal law. The *Trajano* court suggested that ATS cases arise under federal law for two reasons. The first began with the court's observation that many ATS cases will also involve claims of immunity under the Foreign Sovereign Immunities Act. "Because federal courts must first determine whether foreign sovereigns or individual officials are immune before allowing suit to proceed, 'a suit against a foreign state under [the FSIA] necessarily raises questions of substantive federal law at the outset, and hence clearly arises under federal law, as that term is used in Art. III.'" In an ATS case, the court continued, the same principle applies: "Only individuals who have acted under official authority or under color of such authority may violate international law, and proceeding against such individuals necessarily implicates sovereign immunity."[12] The second basis for jurisdiction rested on the conclusion that "the law of nations is part of federal law," but the court did not end its jurisdictional analysis with that point. Rather, perhaps with Judge Bork's objections in mind, the court said that a court "must decide whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it was violated in the particular case."

The *Trajano* court also responded to Judge Bork's objection that international law does not create causes of action. The court held that "the cause of action [in an ATS case] comes from municipal tort law and not from the law of nations or treaties of the United States." This holding was not influential, even in the Ninth Circuit, which ultimately embraced Judge Edwards' position from *Tel-Oren*. *See* In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994) (holding the ATS itself "creates a cause of action for violations of specific, universal and obligatory human rights standards").

Another important decision is *Kadic* v. *Karadžić*, 70 F.3d 232 (2nd Cir. 1995), in which the Second Circuit confronted the question "whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; [and] if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action." There was some ambiguity about whether the defendant – the President of the largely unrecognized Republic of Srpska – was a state actor. The court rejected the idea that international law applies only to state action (and thereby rejected Judge Edward's similar conclusion in *Tel-Oren*). "Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."

[12] This holding has since become problematic in two ways. First, the Supreme Court's subsequent decision in *Samantar v. Yousef*, below, held that individual officials cannot claim immunity under the Foreign Sovereign Immunities Act. Whether common law immunity claims satisfy Article III arising under jurisdiction is an open question. Second, the Second Circuit ruled in *Kadic* v. *Karadžić*, discussed immediately below, that it is sometimes possible for a private person to violate international law and thus be subject to suit under the ATS.

The court cited piracy as a longstanding example and went on to include genocide, "acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities," and other violations of international humanitarian law" in that category as well. The court thus expanded the categories of defendants and conduct that fall within the ATS. But the court also stated that "torture and summary execution – when not perpetrated in the course of genocide or war crimes – are proscribed by international law only when committed by state officials or under color of law."

On the issue of jurisdiction, the *Kadic* court sidestepped the plaintiffs' argument – and backed away from *Filartiga*'s suggestion – that 28 U.S.C. § 1331 provides federal subject matter jurisdiction in addition to § 1350. It referred to "the settled proposition that federal common law incorporates international law," but it was unwilling to say that "violations of international law 'arise under' the laws of the United States for purposes of jurisdiction under section 1331."

These cases provide only a taste of the first two decades of ATS litigation. More important than further details, however, is the fact that, in 2004, the Supreme Court broke its silence on the meaning of the Alien Tort Statute.

SOSA v. ALVAREZ-MACHAIN

542 U.S. 692 (2004)

Justice Souter delivered the opinion of the Court. * * *

[Acting on behalf of the U.S. Drug Enforcement Administration, a group of people, including defendant Sosa, kidnapped Humberto Alvarez-Machain in Mexico and brought him to the United States, where he was arrested for the torture and murder of a DEA agent, Enrique Camarena-Salazar. "Based in part on eyewitness testimony, DEA officials in the United States came to believe that [Alvarez, who was a physician], was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture." The criminal charges against Alvarez were dismissed at trial in 1992, when the District Court granted Alvarez's motion for a judgment of acquittal.

[After returning to Mexico, Alvarez sued Sosa and several other people, claiming damages under the ATS for a violation of the law of nations. The district court granted summary judgment to Alvarez and awarded him $25,000 in damages. The Ninth Circuit affirmed in an en banc opinion, stating that the ATS "not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." The court found that Alvarez's arrest was a tort in violation of international law based on its conclusion that there is a "clear and universally recognized norm prohibiting arbitrary arrest and detention."]

III

[Sosa] argues (as does the United States supporting him) that there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action. Although we agree the statute is in terms only jurisdictional, we think that at the time

of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. We do not believe, however, that the limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.

A

* * * Alvarez says that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law. We think that reading is implausible. As enacted in 1789, the ATS gave the district courts "cognizance" of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law. *See, e. g.*, The Federalist No. 81 (A. Hamilton) (using "jurisdiction" interchangeably with "cognizance"). The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature. Nor would the distinction between jurisdiction and cause of action have been elided by the drafters of the Act or those who voted on it. In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.

But holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era. Sosa would have it that the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. *Amici* professors of federal jurisdiction and legal history take a different tack, that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time. We think history and practice give the edge to this latter position.

1

"When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." Ware v. Hylton, 3 Dall. 199, 281 (1796) (Wilson, J.). In the years of the early Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other[.] * * * This aspect of the law of nations thus occupied the executive and legislative domains, not the judicial.

The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor. To Blackstone, the law of nations in this sense was implicated "in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry . . .; [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills." The law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation. And it was the law of nations in this sense that

our precursors spoke about when the Court explained the status of coast fishing vessels in wartime grew from "ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law. . . ." The Paquete Habana, 175 U.S. 677, 686 (1900).

There was, finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.

2

Before there was any ATS, a distinctly American preoccupation with these hybrid international norms had taken shape owing to the distribution of political power from independence through the period of confederation. The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished," J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893), and in 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against such as are in amity . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] "infractions of treaties and conventions to which the United States are a party." The resolution recommended that the States "authorise suits . . . for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." Apparently only one State acted upon the recommendation, but Congress had done what it could to signal a commitment to enforce the law of nations.

Appreciation of the Continental Congress's incapacity to deal with this class of cases was intensified by the so-called Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia. Congress called again for state legislation addressing such matters, and concern over the inadequate vindication of the law of nations persisted through the time of the Constitutional Convention. During the Convention itself, in fact, a New York City constable produced a reprise of the Marbois affair and Secretary Jay reported to Congress on the Dutch Ambassador's protest, with the explanation that "'the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases.'"

The Framers responded by vesting the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls," U. S. Const., Art. III, § 2, and the First Congress followed through. The Judiciary Act reinforced this Court's original jurisdiction over suits brought by diplomats, see 1 Stat. 80, ch. 20, § 13, created alienage jurisdiction, § 11, and, of course, included the ATS, § 9.

3

Although Congress modified the draft of what became the Judiciary Act, it made hardly any changes to the provisions on aliens, including what became the ATS. There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section. * * * [D]espite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive.

Still, the history does tend to support two propositions. First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect. Consider that * * * the First Congress was attentive enough to the law of nations to recognize certain offenses expressly as criminal, including the three mentioned by Blackstone. *See* An Act for the Punishment of Certain Crimes Against the United States, § 8, 1 Stat. 113-114 (murder or robbery, or other capital crimes, punishable as piracy if committed on the high seas), and § 28, *id.,* at 118 (violation of safe conducts and assaults against ambassadors punished by imprisonment and fines described as "infract[ions of] the law of nations"). It would have been passing strange for * * * Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action. There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.

The second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors, see *id.,* at 118; violations of safe conduct were probably understood to be actionable, *ibid.,* and individual actions arising out of prize captures and piracy may well have also been contemplated, *id.,* at 113-114. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims. As Blackstone had put it, "offences against this law [of nations] are principally incident to whole states or nations," and not individuals seeking relief in court. * * *

B

* * * In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

IV

We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga* v. *Pena-Irala,* 630 F.2d 876 (CA2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to 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 we have recognized. This requirement is fatal to Alvarez's claim.

A

A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute. First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms. When § 1350 was enacted, the accepted conception was of the common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created. [This is most likely to be true when questions of international law arise;] a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.

Second, along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), was the watershed in which we denied the existence of any federal "general" common law, which largely withdrew to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly. Elsewhere, this Court has thought it was in order to create federal common law rules in interstitial areas of particular federal interest. And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.

Third, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. The creation of

a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly. While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.

Fourth, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.

The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. It is true that a clear mandate appears in the Torture Victim Protection Act of 1991, providing authority that "establish[es] an unambiguous and modern basis for" federal claims of torture and extrajudicial killing. But that affirmative authority is confined to specific subject matter, and although the legislative history includes the remark that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," Congress as a body has done nothing to promote such suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.

B

* * * All Members of the Court agree that § 1350 is only jurisdictional. We also agree, or at least Justice Scalia does not dispute, that the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority. Justice Scalia concludes, however, that two subsequent developments should be understood to preclude federal courts from recognizing any further international norms as judicially enforceable today, absent further congressional action. As described before, we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of

human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, *see* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), that federal courts have no authority to derive "general" common law.

Whereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. *Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. * * * It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

* * * The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga* v. *Pena-Irala,* 630 F.2d 876 (CA2 1980), and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in *Tel-Oren* v. *Libyan Arab Republic,* 726 F.2d 774 (CADC 1984). Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail. *See supra* (discussing the Torture Victim Protection Act).

While we agree with Justice Scalia to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.[19]

C

We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and for this action it suffices to look to the historical antecedents. Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges

[19] Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350). Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after *Erie*, as a more expansive common law power related to 28 U.S.C. § 1331 might not be.

who faced the issue before it reached this Court. *See Filartiga*, *supra*, at 890 ("[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – hostis humani generis, an enemy of all mankind"); *Tel-Oren*, *supra*, at 781 (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions – each of which violates definable, universal and obligatory norms"); *see also* In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). And the determination whether a norm is sufficiently definite to support a cause of action[20] should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.[21]

Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.

> "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The Paquete Habana, 175 U.S., at 700.

To begin with, Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion. He says that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (Declaration). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not of its own force impose obligations as a matter of international law. And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law. He instead attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law.

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[20] A related consideration 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.

[21] This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. We would certainly consider this requirement in an appropriate case. Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. [Where the United States takes a position on the foreign relations ramifications of a case], 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.

Here, it is useful to examine Alvarez's complaint in greater detail. As he presently argues it, the claim does not rest on the cross-border feature of his abduction. [The Court of Appeals] relied on the conclusion that the law of the United States did not authorize Alvarez's arrest, because the DEA lacked extraterritorial authority * * * and because [the Federal Rules of Criminal Procedure] limited the warrant for Alvarez's arrest to "the jurisdiction of the United States." It is this position that Alvarez takes now: that his arrest was arbitrary and as such forbidden by international law not because it infringed the prerogatives of Mexico, but because no applicable law authorized it.

Alvarez thus invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. Whether or not this is an accurate reading of the Covenant, Alvarez cites little authority that a rule so broad has the status of a binding customary norm today.[27] He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under 42 U.S.C. § 1983, and *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), that now provide damages remedies for such violations. It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

Alvarez's failure to marshal support for his proposed rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States [§ 702] (1986), which says in its discussion of customary international human rights law that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." Although the Restatement does not explain its requirements of a "state policy" and of "prolonged" detention, the implication is clear. Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. Even the Restatement's limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law.

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[27] [The Court noted that Alvarez relied on "a survey of national constitutions, a case from the International Court of Justice, and some authority drawn from the federal courts." It declared that "[n]one of these suffice." With respect to authority from the federal courts, the Court stated that, "to the extent it supports Alvarez's position, it reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today."]

Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.[29] Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise. It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy. * * *

Justice Scalia, with whom The Chief Justice and Justice Thomas join, concurring in part and concurring in the judgment. * * *

II

* * * The Court's detailed exegesis of the ATS conclusively establishes that it is "a jurisdictional statute creating no new causes of action." * * * [This conclusion is] enough to dispose of the present case in favor of petitioner Sosa. None of the exceptions to the general rule against finding substantive lawmaking power in a jurisdictional grant apply. *Bivens* provides perhaps the closest analogy. That is shaky authority at best, but at least it can be said that *Bivens* sought to enforce a command of our *own* law – the *United States* Constitution. In modern international human rights litigation of the sort that has proliferated since *Filartiga* v. *Pena-Irala,* 630 F.2d 876 (CA2 1980), a federal court must first *create* the underlying federal command. But "the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law." Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 Va. J. Int'l L. 513, 519 (2002). * * *

III

The analysis in the Court's opinion departs from my own in this respect: After concluding in Part III that "the ATS is a jurisdictional statute creating no new causes of action," the Court addresses at length in Part IV the "good reasons for a restrained conception of the *discretion* a federal court should exercise in considering a new cause of action" under the ATS. By framing the issue as one of "discretion," the Court skips over the antecedent question of authority. This neglects the "lesson of *Erie,*" that "grants of jurisdiction alone" (which the Court has acknowledged the ATS to be) "are not themselves grants of lawmaking authority." Meltzer, *supra,* at 541. On this point, the Court observes only that no development between the enactment of the ATS (in 1789) and the birth of modern international human rights litigation under that statute (in 1980) "has categorically *precluded* federal courts from recognizing a claim under the law of nations as an element of common law." This turns our jurisprudence regarding federal common law on its head. The question is not what case or congressional action *prevents* federal courts from applying the law of nations as part of the general common law; it is what *authorizes* that peculiar exception from *Erie*'s fundamental holding that a general common law *does not ex-*

[29] It is not that violations of a rule logically foreclose the existence of that rule as international law. *Cf.* Filartiga v. Pena-Irala, 630 F.2d 876, 884, n.15 (CA2 1980) ("The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law"). Nevertheless, that a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed.

ist.

The Court would apparently find authorization in the understanding of the Congress that enacted the ATS, that "district courts would recognize private causes of action for certain torts in violation of the law of nations." But as discussed above, that understanding rested upon a notion of general common law that has been repudiated by *Erie.* * * *[*]

Because today's federal common law is not our Framers' general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law. The Court masks the novelty of its approach when it suggests that the difference between us is that we would "close the door to further independent judicial recognition of actionable international norms," whereas the Court would permit the exercise of judicial power "on the understanding that the door is still ajar subject to vigilant doorkeeping." The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. Federal common law is a *new* door. The question is not whether that door will be left ajar, but whether this Court will open it. * * *

To be sure, today's opinion does not itself precipitate a direct confrontation with Congress by creating a cause of action that Congress has not. But it invites precisely that action by the lower courts[.] * * * In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives. One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the reasoning of "many of the courts and judges who faced the issue before it reached this Court," including the Second and Ninth Circuits.

The Ninth Circuit brought us the judgment that the Court reverses today. Perhaps its decision in this particular case, like the decisions of other lower federal courts that receive passing attention in the Court's opinion, "reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today." But the verbal formula it applied is the same verbal formula that the Court explicitly endorses. *Compare ante* (quoting In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (CA9 1994), for

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[*] The Court conjures the illusion of common-law-making continuity between 1789 and the present by ignoring fundamental differences. The Court's approach places the law of nations on a federal-law footing unknown to the First Congress. At the time of the ATS's enactment, the law of nations, being part of general common law, was *not* supreme federal law that could displace state law. By contrast, a judicially created federal rule based on international norms *would be* supreme federal law. Moreover, a federal-common-law cause of action of the sort the Court reserves discretion to create would "arise under" the laws of the United States, not only for purposes of Article III but also for purposes of *statutory* federal-question jurisdiction.

The lack of genuine continuity is thus demonstrated by the fact that today's opinion renders the ATS unnecessary for federal jurisdiction over (so-called) law-of-nations claims. If the law of nations can be transformed into federal law on the basis of (1) a provision that merely grants jurisdiction, combined with (2) some residual judicial power (from whence nobody knows) to create federal causes of action in cases implicating foreign relations, then a grant of federal-question jurisdiction would give rise to a power to create international-law-based federal common law just as effectively as would the ATS. This would mean that the ATS became largely superfluous as of 1875, when Congress granted general federal-question jurisdiction subject to a $500 amount-in-controversy requirement, and entirely superfluous as of 1980, when Congress eliminated the amount-in-controversy requirement.

the proposition that actionable norms must be "'specific, universal, and obligatory'"), *with* [the lower court opinion in *Sosa*,] 331 F.3d 604, 621 (CA9 2003) (en banc) (finding the norm against arbitrary arrest and detention in this action to be "universal, obligatory, and specific"); *id.,* at 619 ("[A]n actionable claim under the [ATS] requires the showing of a violation of the law of nations that is specific, universal, and obligatory" (internal quotation marks omitted)). Endorsing the very formula that led the Ninth Circuit to its result in this action hardly seems to be a recipe for restraint in the future.

The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches. *Kadic* v. *Karadžić,* 70 F.3d 232 (CA2 1995), provides a case in point. One of the norms at issue in that case was a norm against genocide set forth in the Convention on the Prevention and Punishment of the Crime of Genocide. The Second Circuit held that the norm was actionable under the ATS after applying Circuit case law that the Court today endorses. The Court of Appeals then did something that is perfectly logical and yet truly remarkable: It dismissed the determination by Congress and the Executive that this norm should *not* give rise to a private cause of action. We *know* that Congress and the Executive made this determination, because Congress inscribed it into the Genocide Convention Implementation Act of 1987, a law signed by the President attaching criminal penalties to the norm against genocide. The Act, Congress said, shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." Undeterred, the Second Circuit reasoned that this "decision not to create a *new* private remedy" could hardly be construed as *repealing* by implication the cause of action supplied by the ATS. Does this Court truly wish to encourage the use of a jurisdiction-granting statute with respect to which there is "no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; [and] no record even of debate on the section," to override a clear indication from the political branches that a "specific, universal, and obligatory" norm against genocide is *not* to be enforced through a private damages action? Today's opinion leads the lower courts right down that perilous path. * * *

[Justice Ginsburg's concurrence is omitted.]

Justice Breyer, concurring in part and concurring in the judgment.

* * * I would add one further consideration. Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help ensure that "the potentially conflicting laws of different nations" will "work together in harmony," a matter of increasing importance in an ever more interdependent world. Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.

These comity concerns normally do not arise (or at least are mitigated) if the conduct in question takes place in the country that provides the cause of action or if that conduct involves that country's own national – where, say, an American assaults a foreign diplomat and the diplo-

mat brings suit in an American court. They do arise, however, when foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm.

Since different courts in different nations will not necessarily apply even similar substantive laws similarly, workable harmony, in practice, depends upon more than substantive uniformity among the laws of those nations. * * * Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. That subset includes torture, genocide, crimes against humanity, and war crimes. * * *

Taking these matters into account, as I believe courts should, I can find no similar procedural consensus supporting the exercise of jurisdiction in these cases. That lack of consensus provides additional support for the Court's conclusion that the ATS does not recognize the claim at issue here – where the underlying substantive claim concerns arbitrary arrest, outside the United States, of a citizen of one foreign country by another.

Notes and Questions

1. The majority refers to the debate between Judges Bork and Edwards in *Tel-Oren*. Which side of that debate does the court choose?

2. How does Justice Breyer's concurrence differ from the majority?

3. The Court holds that the ATS is only a jurisdictional statute and does not create a cause of action – which means that it overturns several lower court decisions. But the Court goes on to say that courts can recognize causes of action in certain circumstances – where the claim is as established as the original claims that the ATS was adopted to address. How convincing is this part of the majority opinion? On the one hand, the Court holds that the statute is jurisdictional and details numerous reasons to be cautious in applying the ATS. On the other hand, it endorses the creation of federal common law causes of action for human rights claims. How can a lower court be true to all of this?

4. The Court also suggested additional limitations on the reach of the ATS. In footnotes, its discusses the possibilities of requiring exhaustion of remedies outside the United States and or deferring to the Executive Branch's views in particular cases. Justice Breyer also suggested a comity-based restriction on the reach of the ATS. Do these additional limitations provide a reasonable scope for the statute, or do they support Justice Scalia's view that the federal courts should refuse to recognize ATS causes of action until Congress provides clearer guidance?

5. Two of the most important issues in ATS litigation after *Sosa* are the possibility of aiding and abetting liability, and whether corporations can be liable for violations of international law. The lower courts have advanced different views on these issues, and the Supreme Court is currently considering these issues, with a decision expected in June 2013.

6. Another issue that often arises in ATS litigation is whether the federal court has personal jurisdiction over the defendant(s). In *Filartiga*, personal jurisdiction was not an issue because there was personal service of process in New York. But what if personal service is not possible? In most ATS cases, the conduct has taken place in another country. If one or more of the defendants are U.S. citizens or entities, there almost certainly will be some forum within the United States that has personal jurisdiction over at least one defendant. But many of the potential defendants in ATS cases are citizens of other countries and likely will not have minimum contacts with a U.S. jurisdiction. Foreign corporations often do business or have subsidiaries in the United States – do those connections suffice for specific personal jurisdiction under the *International Shoe* standard? For general personal jurisdiction under the *Goodyear* standard?

Note, too, that if a federal court cannot obtain personal jurisdiction over all defendants, issues could arise under the mandatory joinder rules of Federal Rule of Civil Procedure 19.

C. THE TORTURE VICTIM PROTECTION ACT

1. The Statute

The Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1992), is codified as a note to 28 U.S.C. § 1350 (the Alien Tort Statute):

> **Section 1. Short Title.**
>
> This Act may be cited as the 'Torture Victim Protection Act of 1991.'
>
> **Section 2. Establishment of Civil Action.**
>
> (a) *Liability*. An individual who, under actual or apparent authority, or color of law, of any foreign nation –
>
> > (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> >
> > (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.
>
> (b) *Exhaustion of Remedies*. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.
>
> (c) *Statute of Limitations*. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Section 3. Definitions.

(a) *Extrajudicial Killing*. For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) *Torture*. For the purposes of this Act –

> (1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> >
> > (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> >
> > (C) the threat of imminent death; or
> >
> > (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Notes and Questions

1. What does the TVPA accomplish as a matter of formal law? Consider the comments of the Second Circuit in *Kadic* v. *Karadžić*, 70 F.3d 232 (2nd Cir. 1995): "Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under

the general federal question jurisdiction of section 1331." In other words, the TVPA is almost the opposite of the ATS. Where the ATS is a jurisdictional statute, the TVPA is not. And where the ATS provides an opening (of still contested width) for the creation or recognition of causes of action, the TVPA expressly creates a cause of action for certain acts of torture and extrajudicial killing.

2. The TVPA is different from the ATS in two other important ways. First, the plaintiff does not have to be an "alien." Second, the defendant must act under color of foreign law.

3. What are the elements of a TVPA claim? Is it enough to allege that (1) an individual, (2) acting under actual or apparent authority or color of *foreign* law, (3) subjects an individual (4) to torture or extrajudicial killing?

What about the statute's exhaustion requirement – is that an element of the claim as well? The Senate report on the TVPA states that exhaustion is a defense and that the defendant has the burden of proving failure to exhaust. The report goes on to suggest that the plaintiff can easily overcome the defense: "in most instances the initiation of litigation under this section will be virtually prima facie evidence that the claimant has exhausted his or her remedies" and courts "should approach cases . . . with this assumption." S. Rep. No. 102-249 (1991). Does this amount to reading the exhaustion requirement out of the statute?

4. The statute provides reasonably good definitions of "torture" and "extrajudicial killing," and those definitions add further sub-elements to the claim. But the statute does not define any other terms. Here again, consider the words of the Second Circuit in *Kadic*:

> By its plain language, the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Legislative history confirms that this language was intended to "make[ ] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim," and that the statute "does not attempt to deal with torture or killing by purely private groups." In construing the terms "actual or apparent authority" and "color of law," courts are instructed to look to principles of agency law and to jurisprudence under 42 U.S.C. § 1983, respectively.

Are there any other terms or provisions in the TVPA that remain ambiguous? What about "individual" – does it limit liability under the statute to natural persons, or can other legal persons be sued? *See* Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012), below.

5. Does the TVPA displace the ATS? The House report on the TVPA states that it "would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under . . . section 1350." H.R. Rep. No. 102-367 (1991); *see also* S. Rep. No. 102-249 (1991). More specifically, both reports state that the statute would remove the doubts raised by Judge Bork's *Tel-Oren* concurrence with respect to torture claims and would also "enhance the remedy already available under section 1350" by extending it to "U.S. citizens who may have been tortured abroad." Does it make sense to allow suits that plead one count under

the TVPA (with § 1331 or § 1350 providing jurisdiction), and a second count that relies on the "law of nations" (with § 1350 providing jurisdiction), where both counts rely on the same conduct?

Regardless of how the two statutes overlap in the context of torture, the House and Senate reports agree that "[s]ection 1350 has other important uses and should not be replaced." Later on, both reports state that "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350." The House report goes on to say that § 1350 "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."

6. As we have seen, the ATS has generated constitutional objections to the scope of jurisdiction that it creates. Are there any legitimate constitutional objections to the TVPA? Jurisdiction is not an issue, because the statute only purports to create a cause of action. But two senators objected to the statute on the ground that it is not supported by any enumerated grant of authority to Congress. Although Congress has the power to "define and punish . . . Offenses against the Law of Nations," they maintained that it is unclear "whether that power extends to creating a civil cause of action in this country for disputes that have no factual nexus with the United States or its citizens." Do you think this objection has merit?

7. In addition to the goal of placing torture claims on a firmer footing, the Senate report also asserts that the statute "will carry out the intent of the Convention Against Torture . . . . The convention obligates state parties to adopt measure to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that by making sure that torturers and death squads will no longer have a safe haven in the United States." Congress generally has the power to implement a valid treaty. *See* Missouri v. Holland, 252 U.S. 416 (1920). The dissenting senators disputed the mandate of the CAT, claiming that it "requires countries to provide remedies for acts of torture which took place only within their own territory."

2. Judicial Interpretation of the TVPA

MOHAMAD v. PALESTINIAN AUTHORITY
132 S. Ct. 1702 (2012)

Justice Sotomayor delivered the opinion of the Court.[*] * * *

I

* * * Petitioners are the relatives of Azzam Rahim, who immigrated to the United States in the 1970's and became a naturalized citizen. In 1995, while on a visit to the West Bank, Rahim was arrested by Palestinian Authority intelligence officers. He was taken to a prison in Jericho, where he was imprisoned, tortured, and ultimately killed. The following year, the U.S. Department of State issued a report concluding that Rahim "died in the custody of [Palestinian Authority] intelligence officers in Jericho."

[*] Justice Scalia joins this opinion except as to Part III-B.

In 2005, petitioners filed this action against respondents, the Palestinian Authority and the Palestinian Liberation Organization, asserting, *inter alia,* claims of torture and extrajudicial killing under the TVPA. [The District Court dismissed and the U.S. Court of Appeals for the D.C. Circuit affirmed, holding that the word "individual" limits liability under the TVPA to natural persons.] We granted certiorari to resolve a split among the Circuits * * * and now affirm.

II

The TVPA imposes liability on individuals for certain acts of torture and extrajudicial killing. * * * It does not define "individual."

Petitioners concede that foreign states may not be sued under the Act – namely, that the Act does not create an exception to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.,* which renders foreign sovereigns largely immune from suits in U.S. courts. They argue, however, that the TVPA does not similarly restrict liability against other juridical entities. In petitioners' view, by permitting suit against "[a]n individual," the TVPA contemplates liability against natural persons *and* nonsovereign organizations (a category that, petitioners assert, includes respondents). We decline to read "individual" so unnaturally. The ordinary meaning of the word, fortified by its statutory context, persuades us that the Act authorizes suit against natural persons alone.

A

Because the TVPA does not define the term "individual," we look first to the word's ordinary meaning. As a noun, "individual" ordinarily means "[a] human being, a person." 7 Oxford English Dictionary 880 (2d ed. 1989); *see also, e.g.,* Random House Dictionary of the English Language 974 (2d ed. 1987) ("a person"); Webster's Third New International Dictionary 1152 (1986) ("a particular person") (hereinafter Webster's). After all, that is how we use the word in everyday parlance. * * * Evidencing that common usage, this Court routinely uses "individual" to denote a natural person, and in particular to distinguish between a natural person and a corporation.

Congress does not, in the ordinary course, employ the word any differently. The Dictionary Act instructs that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, *and* joint stock companies, *as well as* individuals." 1 U.S.C. § 1 (emphasis added). With the phrase "as well as," the definition marks "individual" as distinct from the list of artificial entities that precedes it.

In a like manner, federal statutes routinely distinguish between an "individual" and an organizational entity of some kind. Indeed, the very same Congress that enacted the TVPA also established a cause of action for U.S. nationals injured "by reason of an act of international terrorism" and defined "person" as it appears in the statute to include "any individual *or entity* capable of holding a legal or beneficial interest in property." Federal Courts Administration Act of 1992, 18 U.S.C. §§ 2333(a), 2331(3) (emphasis added).

B

This is not to say that the word "individual" invariably means "natural person" when used in a statute. Congress remains free, as always, to give the word a broader or different meaning. But before we will assume it has done so, there must be *some* indication Congress intended such a result. * * *

There are no such indications in the TVPA. * * * And the statutory context strengthens – not undermines – the conclusion that Congress intended to create a cause of action against natural persons alone. The Act's liability provision uses the word "individual" five times in the same sentence: once to refer to the perpetrator (*i.e.,* the defendant) and four times to refer to the victim. Only a natural person can be a victim of torture or extrajudicial killing. "Since there is a presumption that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence," it is difficult indeed to conclude that Congress employed the term "individual" four times in one sentence to refer to a natural person and once to refer to a natural person *and* any nonsovereign organization. *See also* § 3(b)(1) (using term "individual" six times in referring to victims of torture).

It is also revealing that the Act holds perpetrators liable for extrajudicial killing to "any *person* who may be a claimant in an action for wrongful death." "Person," we have recognized, often has a broader meaning in the law than "individual" and frequently includes nonnatural persons. We generally seek to respect Congress' decision to use different terms to describe different categories of people or things. Our construction of "individual" to encompass solely natural persons credits Congress' use of the disparate terms; petitioners' construction does not. In sum, the text of the statute persuades us that the Act authorizes liability solely against natural persons.

III * * *

A

[Petitioners] claim that federal tort statutes uniformly provide for liability against organizations, a convention they maintain is common to the legal systems of other nations. We are not convinced, however, that any such "domestic and international presumption of organizational liability" in tort actions overcomes the ordinary meaning of "individual." It is true that "Congress is understood to legislate against a background of common-law adjudicatory principles." But Congress plainly can override those principles, and, as explained *supra,* the TVPA's text evinces a clear intent not to subject nonsovereign organizations to liability.[4]

We also decline petitioners' suggestion to construe the TVPA's scope of liability to con-

[4] Petitioners' separate contention that the TVPA must be construed in light of international agreements prohibiting torture and extrajudicial killing fails for similar reasons. Whatever the scope of those agreements, the TVPA does not define "individual" by reference to them, and principles they elucidate cannot overcome the statute's text. The same is true of petitioners' suggestion that Congress in the TVPA imported a "specialized usage" of the word "individual" in international law. There is no indication in the text of the statute or legislative history that Congress knew of any such specialized usage of the term, much less intended to import it into the Act.

form with other federal statutes that petitioners contend provide civil remedies to victims of torture or extrajudicial killing. None of the three statutes petitioners identify employs the term "individual" to describe the covered defendant, and so none assists in the interpretive task we face today. *See* 42 U.S.C. § 1983; 28 U.S.C. §§ 1603(a), 1605A(c); 18 U.S.C. §§ 2333, 2334(a)-(b), 2337. The same is true of the Alien Tort Statute, so it offers no comparative value here regardless of whether corporate entities can be held liable in a federal common-law action brought under that statute. Finally, although petitioners rightly note that the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing, it does not follow (as petitioners argue) that the Act embraces liability against nonsovereign organizations. An officer who gives an order to torture or kill is an "individual" in that word's ordinary usage; an organization is not.

B

[The Court rejected petitioners' claim "that legislative history supports their broad reading of 'individual.'" In addition, although "reliance on legislative history is unnecessary in light of the statute's unambiguous language," the Court also concluded that the relevant legislative history "confirms what we have concluded from the text alone."]

C

Petitioners' final argument is that the Act would be rendered toothless by a construction of "individual" that limits liability to natural persons. They contend that precluding organizational liability may foreclose effective remedies for victims and their relatives for any number of reasons. Victims may be unable to identify the men and women who subjected them to torture, all the while knowing the organization for whom they work. Personal jurisdiction may be more easily established over corporate than human beings. And natural persons may be more likely than organizations to be judgment proof. Indeed, we are told that only two TVPA plaintiffs have been able to recover successfully against a natural person – one only after the defendant won the state lottery.

We acknowledge petitioners' concerns about the limitations on recovery. But they are ones that Congress imposed and that we must respect. * * *

[Justice Breyer's concurring opinion is omitted.]

Notes and Questions

1. *Mohamad* holds that only natural persons can be sued under the TVPA: corporations, associations, and other groups or organizations are not proper defendants under the statute. Other issues, however, remain.

2. One important set of issues involves the relationship between the ATS and TVPA. Courts have split on whether the TVPA displaces the ATS for claims involving torture and extrajudicial killing. Courts have also struggled with the questions whether the TVPA's statute of

limitations and exhaustion requirements should apply in some or all ATS cases.

3. Other issues in the lower courts include such things as when it is possible to toll the statute of limitations, whether punitive damages are available, whether aiding and abetting liability is available, and personal jurisdiction.

D. IMMUNITY DEFENSES AND THE ACT OF STATE DOCTRINE

1. Foreign Government Immunity

a. Background

> As early as the sixteenth century, international legal scholars recognized the personal immunity of individual sovereigns, such as kings and queens, as well the immunity of ambassadors. However, it was not until the nineteenth century, after the appearance of the modern nation-state, that the foreign state immunity doctrine emerged. * * * Over the course of the nineteenth and twentieth centuries, the foreign state immunity doctrine evolved in three ways. First, the scope of the doctrine evolved [to include] claims against foreign states in general. But it also narrowed, as states increasingly adopted a doctrine of restrictive immunity. According to the restrictive theory, a distinction is made between a state's public or sovereign acts (*jure imperii*) and its private or commercial acts (*jure gestionis*), and immunity is provided only for claims arising out of the former. * * * Today, the restrictive approach predominates.
>
> Second, it is generally acknowledged that foreign state immunity has become a rule of customary international law, primarily through the gradual accumulation of state practice in the form of domestic court decisions and legislation. There is a view, held by some scholars and at least implicitly reflected in the decisions of the U.S. Supreme Court, that foreign state immunity is not a rule of international law, but rather a product of comity granted by a state in its discretion to a foreign state. * * * However, the view that foreign state immunity is a rule of international law – having been adopted by the International Law Commission and the International Court of Justice – is the dominant, if not uncontested, view today.
>
> Third, although there so far is no generally applicable treaty is in force regarding foreign state immunity, there has been a move toward codification – domestically, regionally and internationally. Domestic codifications include the U.S. Foreign Sovereign Immunities Act of 1976, the United Kingdom State Immunity Act of 1978, the Canadian State Immunity Act of 1982 and the Australian Foreign States Immunities Act of 1985. Regionally, the European Convention on State Immunity was adopted by the Committee of Ministers of the Council of Europe in 1972, entered into force in 1976, and has been ratified by eight states. And in 2004, the United Nations General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was drafted by the International Law Commission. Thirteen states have ratified the Convention, but it has not yet entered into force. Nevertheless, the Convention is widely viewed as

evidence of the customary international law of foreign state immunity.

Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access* at 5, 8-11 (unpublished manuscript, Aug. 31, 2012).

Whytock notes that the International Court of Justice has held that foreign state immunity is a rule of customary international law. The Court made that ruling in *Jurisdictional Immunities of the State (Germany v. Italy)*, No. 143 (2012):

> 57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

In keeping with international law, the United States recognizes the sovereign immunity of foreign governments in United States courts. For much of the country's history, foreign state immunity was a matter of common law. As Whytock observes, foreign state immunity is now codified in the Foreign Sovereign Immunities Act. This passage from *Samantar v. Yousef*, 130 S. Ct. 2278 (2010), provides a succinct history of the doctrine in the United States:

> The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976. [I]n *Schooner Exchange v. McFaddon,* 7 Cranch 116 (1812), "Chief Justice Marshall concluded that . . . the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns." The Court's specific holding in *Schooner Exchange* was that a federal court lacked jurisdiction over "a national armed vessel . . . of the emperor of France," but the opinion was interpreted as extending virtually absolute immunity to foreign sovereigns as "a matter of grace and comity."
>
> Following *Schooner Exchange,* a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels. Under that procedure, the diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department. If the request was granted, the district court surrendered its jurisdiction. But "in the absence of recognition of the immunity by the Department of State," a district court "had authority to decide for itself whether all the requisites for such immunity existed." In making that decision, a district court inquired "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." Although cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign of-

ficial asserted immunity.

> Prior to 1952, the State Department followed a general practice of requesting immunity in all actions against friendly sovereigns, but in that year the Department announced its adoption of the "restrictive" theory of sovereign immunity. [*See*] Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-985 (1952). Under this theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." This change threw "immunity determinations into some disarray," because "political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'"
>
> Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976. Section 1602 describes the Act's two primary purposes: (1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding "claims of foreign states to immunity" from the State Department to the courts. After the enactment of the FSIA, the Act – and not the pre-existing common law – indisputably governs the determination of whether a foreign state is entitled to sovereign immunity. * * *

Put even more succinctly, for suits against foreign governments, the Foreign Sovereign Immunities Act [FSIA] provides the relevant law. As the following excerpt makes clear, the FSIA is long and complex, particularly with respect to the exceptions from immunity that it creates.

b. The Foreign Sovereign Immunities Act

Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 85. District Courts; Jurisdiction

§ 1330. Actions Against Foreign States

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title. * * *

Chapter 97. Jurisdictional Immunities of Foreign States

§ 1602. Findings and Declaration of Purpose.

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter. * * *

§ 1603. Definitions.

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a Foreign State from Jurisdiction.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the

United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General Exceptions to the Jurisdictional Immunity of a Foreign State.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if

(A) the arbitration takes place or is intended to take place in the United States,

(B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,

(C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state * * *

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state.

(a) *In General*. –

(1) No immunity. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard. – The court shall hear a claim under this section if

(A) (i) (I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and * * * either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; * * *

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred[, a U.S. national, a service member, or a U.S. government employee]; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; * * *

(c) *Private Right of Action*. – A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to [a U.S. national, a service member, a U.S. government employee, or the legal representative of a person in one of these categories] for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) *Additional Damages*. – After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based. * * *

§ 1606. Extent of Liability.

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

Notes and Questions

1. Where it applies, the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in federal court." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989). Among other things, this means that the FSIA applies to ATS and TVPA cases against foreign states.

2. Note the breadth of the exceptions to foreign state immunity. States may waive immunity – as they frequently do in financial transactions – and they can be sued for commercial activities whether or not they waive immunity. The tort exception is also important, although it only applies to injuries that occur in the United States.

3. Separate from the FSIA is the common law "act of state" doctrine, which holds that the courts of one country will not assess the validity of a foreign government's acts. According to the Supreme Court, this doctrine has "'constitutional' underpinnings, namely separation of powers doctrine." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The Court explained that the doctrine "expresses the strong sense of the Judicial Branch that is engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's

pursuit of goals both for itself and for the community of nations as a whole in the international sphere."

The doctrine also has a strong federalism component. Because of federal supremacy in the field of foreign relations, the question of when and how the doctrine applies is one of federal law. As the Court said in *Sabbatino*, "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering relationships with other members of the international community must be treated exclusively as an aspect of federal law."

Importantly – and again, as made clear in *Sabbatino* – the federal law nature of the doctrine means that it can apply even when customary international law would not prohibit judicial inquiry into another country's actions.

4. Federal courts have generally held that the act of state doctrine does not apply to suits challenging violations of fundamental human rights. In *Filartiga*, the Second Circuit stated: "we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority." The Second Circuit reaffirmed those sentiments in its *Kadic* decision.

2. Officials of Foreign Governments

a. Background

As the excerpt from *Samantar*, above, indicates, immunity claims by foreign officials in the pre-FSIA era fell within the common law, including the "two-step procedure" through which defendants requested suggestions of immunity from the State Department.

After passage of the FSIA, several circuit courts held that its provisions apply in suits against foreign officials, on the theory that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly," such that "allow[ing] unrestricted suits against individual foreign officials acting in their official capacities . . . would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990).

These rulings had important consequences for litigation under the Alien Tort Statute and the Torture Victim Protection Act. As the Ninth Circuit noted, if the FSIA applies to individual officials, then "the FSIA trumps the Alien Tort Statute when a foreign state or, in this circuit, an individual acting in her official capacity, is sued." Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992). Courts operating under the rule that the FSIA applies to individual officials had to determine whether the official was acting in his or her official capacity, which in turn raised the question whether, if the conduct at issue included serious human rights abuses, such conduct could

ever be taken in an official capacity.

b. *Samantar v. Yousef* and Its Aftermath

SAMANTAR v. YOUSEF
130 S. Ct. 2278 (2010)

Justice Stevens delivered the opinion of the Court. * * *

From 1980 to 1986 petitioner Mohamed Ali Samantar was the First Vice President and Minister of Defense of Somalia, and from 1987 to 1990 he served as its Prime Minister. [He fled Somalia in 1991 and took up residence in the United States.] Respondents are natives of Somalia who allege that they, or members of their families, were the victims of torture and extrajudicial killings during those years. They seek damages from petitioner based on his alleged authorization of those acts. The narrow question we must decide is whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act) provides petitioner with immunity from suit based on actions taken in his official capacity. We hold that the FSIA does not govern the determination of petitioner's immunity from suit.

I

* * * Respondents' complaint sought damages from petitioner pursuant to the Torture Victim Protection Act of 1991 and the Alien Tort Statute. * * *

Respondents filed their complaint in November 2004, and petitioner promptly moved to dismiss. The District Court stayed the proceedings to give the State Department an opportunity to provide a statement of interest regarding petitioner's claim of sovereign immunity. * * * In 2007, having received no response from the State Department, the District Court reinstated the case on its active docket. The court concluded that it did not have subject-matter jurisdiction and granted petitioner's motion to dismiss.

The District Court's decision rested squarely on the FSIA. The FSIA provides that a "foreign state shall be immune from the jurisdiction" of both federal and state courts except as provided in the Act, 28 U.S.C. § 1604, and the District Court noted that none of the parties had argued that any exception was applicable. Although characterizing the statute as silent on its applicability to the officials of a foreign state, the District Court followed appellate decisions holding that a foreign state's sovereign immunity under the Act extends to "'an individual acting in his official capacity on behalf of a foreign state,'" but not to "'an official who acts beyond the scope of his authority.'" The court rejected respondents' argument that petitioner was necessarily acting beyond the scope of his authority because he allegedly violated international law.[3]

The Court of Appeals reversed [and rejected] "the majority view" among the Circuits that "the FSIA applies to individual officials of a foreign state." * * * We granted certiorari. * * *

[3] Because we hold that the FSIA does not govern whether an individual foreign official enjoys immunity from suit, we need not reach respondents' argument that an official is not immune under the FSIA for acts of torture and extrajudicial killing. * * *

III

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" except as provided in the Act. * * *

The term "foreign state" on its face indicates a body politic that governs a particular territory. In § 1603(a), however, the Act establishes that "foreign state" has a broader meaning, by mandating the inclusion of the state's political subdivisions, agencies, and instrumentalities. Then, in § 1603(b), the Act specifically delimits what counts as an agency or instrumentality. Petitioner argues that either "foreign state" or "agency or instrumentality" could be read to include a foreign official. Although we agree that petitioner's interpretation is literally possible, our analysis of the entire statutory text persuades us that petitioner's reading is not the meaning that Congress enacted.

We turn first to the term "agency or instrumentality of a foreign state." It is true that an individual official could be an "agency or instrumentality," if that term is given the meaning of "any thing or person through which action is accomplished." But Congress has specifically defined "agency or instrumentality" in the FSIA, and all of the textual clues in that definition cut against such a broad construction.

First, the statute specifies that "'agency or instrumentality . . .' means any *entity*" matching three specified characteristics, and "entity" typically refers to an organization, rather than an individual. *See, e.g.,* Black's Law Dictionary 612 (9th ed.2009). Furthermore, several of the required characteristics apply awkwardly, if at all, to individuals. The phrase "separate legal person, corporate or otherwise" could conceivably refer to a natural person, solely by virtue of the word "person." But the phrase "separate legal person" typically refers to the legal fiction that allows an entity to hold personhood separate from the natural persons who are its shareholders or officers. It is similarly awkward to refer to a person as an "organ" of the foreign state. And the third part of the definition could not be applied at all to a natural person. A natural person cannot be a citizen of a State "as defined in section 1332(c) and (e)," because those subsections refer to the citizenship of corporations and estates. Nor can a natural person be "created under the laws of any third country." Thus, the terms Congress chose simply do not evidence the intent to include individual officials within the meaning of "agency or instrumentality."[9]

Petitioner proposes a second textual route to including an official within the meaning of "foreign state." He argues that the definition of "foreign state" in § 1603(a) sets out a nonexhaustive list that "includes" political subdivisions and agencies or instrumentalities but is not so limited. It is true that use of the word "include" can signal that the list that follows is meant to be illustrative rather than exhaustive. And, to be sure, there are fewer textual clues within § 1603(a) than within § 1603(b) from which to interpret Congress' silence regarding foreign officials. But even if the list in § 1603(a) is merely illustrative, it still suggests that "foreign state" does not encompass officials, because the types of defendants listed are all entities. *See* Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923) ("[A] word may be known by the company it

[9] Nor does anything in the legislative history suggest that Congress intended the term "agency or instrumentality" to include individuals. On the contrary, the legislative history, like the statute, speaks in terms of entities. * * *

keeps").

Moreover, elsewhere in the FSIA Congress expressly mentioned officials when it wished to count their acts as equivalent to those of the foreign state, which suggests that officials are not included within the unadorned term "foreign state." *Cf.* Kimbrough v. United States, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms"). * * *

Other provisions of the statute also point away from reading "foreign state" to include foreign officials. Congress made no express mention of service of process on individuals in § 1608(a), which governs service upon a foreign state or political subdivision. Although some of the methods listed could be used to serve individuals – for example, by delivery "in accordance with an applicable international convention," § 1608(a)(2) – the methods specified are at best very roundabout ways of serving an individual official. Furthermore, Congress made specific remedial choices for different types of defendants. By adopting petitioner's reading of "foreign state," we would subject claims against officials to the more limited remedies available in suits against states, without so much as a whisper from Congress on the subject. (And if we were instead to adopt petitioner's other textual argument, we would subject those claims to the different, more expansive, remedial scheme for agencies). The Act's careful calibration of remedies among the listed types of defendants suggests that Congress did not mean to cover other types of defendants never mentioned in the text.

* * * Reading the FSIA as a whole, there is nothing to suggest we should read "foreign state" in § 1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted.[12] The text does not expressly foreclose petitioner's reading, but it supports the view of respondents and the United States that the Act does not address an official's claim to immunity.

IV

Petitioner argues that the FSIA is best read to cover his claim to immunity because of its history and purpose. As discussed at the outset, one of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law. We have observed that a related purpose was "codification of international law at the time of the FSIA's enactment" and have examined the relevant common law and international practice when interpreting the Act. Because of this relationship between the Act and the common law that it codified, petitioner argues that we should construe the FSIA consistently with the common law regarding individual immunity, which – in petitioner's view – was coextensive with the law of state immunity and always immunized a foreign official for acts taken on behalf of the foreign state. Even reading the Act in light of Congress' purpose of codifying *state* sovereign immunity, however, we do not think that the Act codified the common law with respect to the immunity of individual officials.

[12] Nor is it the case that the FSIA's "legislative history does not even hint of an intent to exclude individual officials." The legislative history makes clear that Congress did not intend the FSIA to address position-based individual immunities such as diplomatic and consular immunity. It also suggests that general "official immunity" is something separate from the subject of the bill.

The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that clearly covers a field formerly governed by the common law. But the canon does not help us to decide the antecedent question whether, when a statute's coverage is ambiguous, Congress intended the statute to govern a particular field – in this case, whether Congress intended the FSIA to supersede the common law of official immunity.[14]

Petitioner argues that because state and official immunities are coextensive, Congress must have codified official immunity when it codified state immunity. But the relationship between a state's immunity and an official's immunity is more complicated than petitioner suggests, although we need not and do not resolve the dispute among the parties as to the precise scope of an official's immunity at common law. The very authority to which petitioner points us, and which we have previously found instructive, states that the immunity of individual officials is subject to a caveat not applicable to any of the other entities or persons[15] to which the foreign state's immunity extends. The Restatement [(Third) of the Foreign Relations Law of the United States] provides that the "immunity of a foreign state . . . extends to . . . any other public minister, official, or agent of the state with respect to acts performed in his official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state.*" Restatement § 66 (emphasis added). And historically, the Government sometimes suggested immunity under the common law for individual officials even when the foreign state did not qualify. There is therefore little reason to presume that when Congress set out to codify state immunity, it must also have, *sub silentio,* intended to codify official immunity.

Petitioner urges that a suit against an official must always be equivalent to a suit against the state because acts taken by a state official on behalf of a state are acts of the state. We have recognized, in the context of the act of state doctrine, that an official's acts can be considered the acts of the foreign state, and that "the courts of one country will not sit in judgment" of those acts when done within the territory of the foreign state. Although the act of state doctrine is distinct from immunity, and instead "provides foreign states with a substantive defense on the merits," we do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity. But it does not follow from this premise that Congress intended to codify that immunity in the FSIA. It hardly furthers Congress' purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims" to lump individual officials in with foreign states without so much as a word spelling out how and when individual officials are covered.

Petitioner would have a stronger case if there were any indication that Congress' intent to

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[14] We find similarly inapposite petitioner's invocation of the canon that a statute should be interpreted in compliance with international law, *see* Murray v. Schooner Charming Betsy, 2 Cranch 64, 118 (1804), and his argument that foreign relations and the reciprocal protection of United States officials abroad would be undermined if we do not adopt his reading of the Act. Because we are not deciding that the FSIA bars petitioner's immunity but rather that the Act does not address the question, we need not determine whether declining to afford immunity to petitioner would be consistent with international law.

[15] The Restatement does not apply this caveat to the head of state, head of government, or foreign minister. *See* Restatement § 66. Whether petitioner may be entitled to head of state immunity, or any other immunity, under the common law is a question we leave open for remand. We express no view on whether Restatement § 66 correctly sets out the scope of the common law immunity applicable to current or former foreign officials.

enact a comprehensive solution for suits against states extended to suits against individual officials. But to the extent Congress contemplated the Act's effect upon officials at all, the evidence points in the opposite direction. As we have already mentioned, the legislative history points toward an intent to leave official immunity outside the scope of the Act. *See* n.12, *supra.* And although questions of official immunity did arise in the pre-FSIA period, they were few and far between. The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA. The FSIA was adopted, rather, to address "a modern world where foreign state enterprises are every day participants in commercial activities," and to assure litigants that decisions regarding claims against states and their enterprises "are made on purely legal grounds." We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.[19]

Finally, our reading of the FSIA will not "in effect make the statute optional," as some Courts of Appeals have feared, by allowing litigants through "artful pleading . . . to take advantage of the Act's provisions or, alternatively, choose to proceed under the old common law." Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law. And not every suit can successfully be pleaded against an individual official alone.[20] Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. Rule Civ. Proc. 19(a)(1)(B). If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law. Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest.

* * * [T]his case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is properly governed by the common law because it is not a claim against a foreign state as the Act defines that term. * * *

[The concurring opinions of Justices Alito, Thomas, and Scalia, all of which discuss the majority's reliance on legislative history, are omitted.]

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[19] The FSIA was introduced in accordance with the recommendation of the State Department. The Department sought and supported the elimination of its role with respect to claims against foreign states and their agencies or instrumentalities. But the Department has from the time of the FSIA's enactment understood the Act to leave intact the Department's role in official immunity cases.

[20] Furthermore, a plaintiff seeking to sue a foreign official will not be able to rely on the Act's service of process and jurisdictional provisions. Thus, a plaintiff will have to establish that the district court has personal jurisdiction over an official without the benefit of the FSIA provision that makes personal jurisdiction over a foreign state automatic when an exception to immunity applies and service of process has been accomplished in accordance with 28 U.S.C. § 1608. *See* § 1330(b).

Notes and Questions

1. Viewed from the perspective of domestic civil rights litigation under 42 U.S.C. § 1983, *Bivens*, and *Ex parte Young*, doesn't *Samantar* make perfect sense? Plaintiffs can bring what are, in effect, individual capacity suits for damages against foreign officials. What difference, if any, should the international context make? Put differently, is there a good argument that a foreign official's attempt to claim the protection of sovereign immunity should not be treated the same as a state or federal official's effort to do the same thing? (And, to return to the first question in this note, if you conclude that all officials should be treated the same, should they all be able to claim sovereign immunity, or not?)

2. If *Samantar* came out the other way, and the FSIA applied to suits against individuals, when would it be possible to file suit under the ATS or TVPA against non-U.S. individuals? Does the existence of those statutes suggest an appropriate stance towards the immunity provisions of the FSIA?

3. If federal common law governs foreign official immunity after *Samantar*, where does the content of that common law come from? Is it derived from customary international law? Customary international law appears to confer status immunity on certain kinds of officials, such as heads of state and diplomats. It also confers conduct immunity to officials who act on behalf of the state and whose actions are in furtherance of their duties. If these are the international law rules, and if they inform the common law rules to be applied in U.S. courts, how much will the results in these cases differ from the results that would obtain if the FSIA applied to officials?

4. What exactly is the role of the State Department in suits against foreign officials after *Samantar*? The State Department suggested in the remand proceedings that *Samantar* was not entitled to immunity. Can or should the federal courts second guess such a determination?

5. On remand in *Samantar*, the Fourth Circuit provided at least partial answers to the questions in notes 3 & 4. It held that the State Department's determination of status-based immunity – such as the immunity ordinarily accorded a head of state – should receive absolute deference. But the court also held that the State Department's determinations with respect to conduct-based immunity for official acts should receive less deference. Instead of being "controlling" on the courts, such determinations "carr[y] substantial weight." Finally, the court held that conduct-based immunity does not extend to violations of fundamental human rights norms (jus cogens). Whether other federal courts will follow these holdings remains to be seen.

For discussion of the *Samantar* remand, see William S. Dodge, *Making Sense of the Fourth Circuit's Decision in Samantar*, Opinio Juris, http://opiniojuris.org/2012/11/03/making-sense-of-the-fourth-circuits-decision-in-samantar/ (Nov. 12, 2012). For broader discussion of the content of common law immunity doctrines for foreign officials, see the recent writings of Chimène Keitner.