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JUDICIAL DEFERENCE AND THE UNREASONABLE VIEWS OF THE BUSH ADMINISTRATION

*Beth Stephens**

INTRODUCTION

U.S. courts have long held that executive branch views about a lawsuit's potential impact on foreign affairs are entitled to deference. Although the courts have emphasized that executive branch views are not binding, they rarely rejected them prior to the presidency of George W. Bush. This historically deferential approach took a dramatic turn during the Bush administration, when the executive branch informed the courts that a series of human rights cases against corporate defendants threatened U.S. foreign policy interests. Remarkably, the courts permitted most of the claims to proceed despite the administration's concerns.

These highly contested human rights cases were filed under the jurisdiction of the Alien Tort Statute ("ATS"),¹ which authorizes plaintiffs to seek civil remedies for egregious violations of international law.² The Bush administration adamantly opposed all ATS litigation as an interference in the foreign affairs powers of the executive branch. After losing a broad challenge to the interpretation of the ATS in the Supreme Court in 2004,³ the administration filed repeated submissions in corporate-defendant ATS cases, arguing that judicial involvement interferes with foreign policy.

Approximately fifty ATS cases have been filed against corporate defendants since a key 1996 decision upheld the concept of ATS corporate liability.⁴ The Bush administration filed letters or amicus briefs in ten of

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1. 28 U.S.C. § 1350 (2000).

2. For an overview of ATS litigation in general, see *infra* Part I.A and Appendix A.

3. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that the ATS grants federal courts jurisdiction over claims for widely accepted, clearly defined violations of international law).

4. For a discussion of the first corporate-defendant decision, *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), see Part I.B. This total does not include cases alleging claims arising out of World War II. Over half of the post-*Unocal*, non-World War II corporate-defendant cases have been dismissed. Three settled, one ended with a jury verdict for the plaintiff, and one ended with a jury verdict for the defendant. Fifteen are currently pending in the district courts and another nine are pending on appeal. For a list of ATS corporate-defendant cases and their current status, see Appendix B.

those cases,⁵ stating that the litigation could undermine important U.S. foreign policy interests, including national security. Prior to the Bush administration, courts dismissed most, if not all cases in which an administration filed a comparable objection. Of the eight ATS corporate-defendant cases in which the courts reached the issues raised by the Bush administration,⁶ however, they accepted the administration's foreign policy concerns in only two, allowing five to proceed and dismissing one on other grounds after expressly rejecting the administration's arguments.⁷ Moreover, one of the two cases in which the foreign policy concerns were accepted involved a contractor working with the U.S. government, a situation that is typically even more likely to trigger deference, and the other decision is still pending on appeal.⁸ This remarkable record is even more striking given that all of these cases were decided during the era of heightened concern about national security that followed the attacks of September 11, 2001.

The traditional standard of judicial deference to executive branch foreign policy concerns varies according to the underlying issue.⁹ The courts have held that some determinations are constitutionally committed

5. For a detailed review of the ten submissions, see Appendix C. In an eleventh case, *Estate of Rodriguez v. Drummond Co., Inc.*, in response to a request from the district court, the State Department submitted a letter stating that it did not have an opinion at that time as to whether the litigation would have an adverse impact on U.S. foreign policy interests. Letter from John B. Bellinger, Legal Advisor, Dep't of State, at 2, *Romero v. Drummond*, No. 03-0575 (Aug. 2, 2006). In two additional cases, executive branch submissions stated that the "state secrets" doctrine barred litigation of claims that private corporations had participated in the government's abuse and/or illegal rendition of secret detainees. See *El-Masri v. United States*, 479 F.3d 296, 301 (4th Cir. 2007); Memorandum of the United States in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment by the United States, at 22-23, *Mohamed v. Jeppesen Dataplan Inc.*, No. 07-2798 (N.D. Cal. Oct. 19, 2007), 2007 WL 3223297.

6. In *Bowoto v. Chevron Texaco Corp.*, No. 03-417580 (Cal. Super. Ct. filed Feb. 20, 2003), filed in state court in California, the judge has not yet responded to the narrow issue raised by the executive branch submission. See *infra* note 118. In another case, *Doe v. Unocal*, 963 F. Supp. 880, the parties settled before the court resolved the issues raised by the executive branch. For an explanation of the complicated history of the *Unocal* litigation, see *infra* note 32.

7. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008) (dismissing a suit by Vietnamese victims of herbicides used by the U.S. government during the Vietnam War after finding that the alleged actions did not violate international law norms recognized at that time). See discussion *infra* Part IV. B.

8. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (involving a U.S.-government-approved contract to sell bulldozers to Israel); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal 2005).

9. See *infra* Part II.

to the executive branch, including, for instance, whether a foreign government official is entitled to diplomatic immunity. On those issues, the courts follow the views of the executive branch with little or no scrutiny. In areas constitutionally assigned to the judiciary, however, such as statutory interpretation, courts do not defer.

Between these two extremes, difficult deference questions often arise when a court considers whether it should refrain from deciding a case otherwise properly within its jurisdiction because the executive branch claims that judicial resolution will interfere with foreign policy.¹⁰ The courts often defer to such opinions, but stress that they are not bound to follow those views. The courts have not, however, clearly articulated a standard to guide their evaluation of the deference due to executive branch submissions.

In this Article, I derive a standard from the language of past decisions that explains, in part, the failings of the recent executive branch submissions. In order to merit deference, an administration submission must: (1) articulate the relevant policy interests; (2) explain how the litigation could harm those interests; (3) tie the anticipated harm to one of the recognized foreign policy justiciability doctrines; and finally, (4) offer explanations that are reasonable, drawing conclusions that are well-founded and supported by the facts. The Bush administration corporate-defendant submissions have failed to satisfy this basic test.

I begin in Part I with a history of the ATS and a review of the corporate-defendant ATS cases. In Part II, I discuss the precedents guiding deference to the foreign policy views of the executive branch and then articulate a standard that captures what the courts have held about foreign policy deference. Part III summarizes prior administration submissions in ATS suits, while Part IV offers a detailed analysis of Bush administration submissions in corporate-defendant ATS cases, along with the courts' responses to them. Part V analyzes flaws in the submissions, including both exaggerated claims that the cases could have catastrophic consequences and faulty economic arguments, that help explain the negative reception they have received.

10. These cases are usually decided through application of the political question doctrine, the act of state doctrine, or comity. *See infra* Part II.A.

I. THE ALIEN TORT STATUTE

A. From 1789 through Filártiga and the Post-Filártiga Individual Defendant Cases

The ATS was enacted in 1789 as a section of the First Judiciary Act, the statute that established the judicial framework for the newly inaugurated federal government. The ATS reads in full: “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.”¹¹ Although there are no surviving records of the origins of the statute, modern historians have pieced together a likely explanation of its genesis.¹² In the period between independence and the drafting of the Constitution, the federal government faced several international crises in which foreign governments complained vehemently about violations of the law of nations, particularly attacks on diplomats. Under the Articles of Confederation, the federal government had no power to address these wrongs, although it bore full responsibility for managing the confrontations with the European powers that ensued. The Constitution strengthened the foreign affairs powers of the federal government. The ATS, enacted by the first Congress, was one of several efforts to codify federal supervision over issues impacting foreign relations.¹³

Largely overlooked in the nineteenth and early twentieth centuries, the statute regained prominence in 1980, when the Second Circuit relied on it in *Filártiga v. Peña-Irala*.¹⁴ *Filártiga* was filed by the relatives of a young man tortured to death in Paraguay after they discovered his Paraguayan torturer living in New York City. Their civil lawsuit relied on the ATS, asserting that torture constituted a “tort . . . in violation of the law of nations.”¹⁵ The administration of President Jimmy Carter strongly supported that view in a joint brief filed by the Departments of State and Justice.¹⁶ The Second Circuit agreed, holding that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights” and therefore triggers federal court jurisdiction under the ATS.¹⁷

11. 28 U.S.C. § 1350 (2000); *see also* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73.

12. This history was summarized by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716–20 (2004).

13. *Id.* at 715–17.

14. 630 F.2d 876 (2d Cir. 1980).

15. *Id.* at 880.

16. Memorandum for the United States as Amicus Curiae at 12–24, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146.

17. 630 F.2d at 878.

Although approximately 185 human rights lawsuits have been filed since *Filártiga*, the majority have been dismissed, most often for failure to allege a violation of an actionable international norm or because of the immunity of the defendants.¹⁸ Most of the successful cases involve an egregious violation of international norms such as genocide, torture, summary execution, disappearance, war crimes, or crimes against humanity. Defendants have included those with command responsibility for abuses as well as direct perpetrators. For example, thousands of victims of Ferdinand Marcos' repressive regime in the Philippines won a judgment against Marcos' estate for torture, executions, and disappearances.¹⁹ A group of indigenous Guatemalans won a judgment against General Hector Gramajo for torture and executions.²⁰ Survivors of abuses and relatives of deceased victims have filed lawsuits against the former military leaders of Argentina, El Salvador, Haiti, and Ethiopia, among others.²¹

In 2004, the Supreme Court upheld the application of the ATS to modern human rights litigation in *Sosa v. Alvarez-Machain*.²² *Sosa* involved the kidnapping and detention of Humberto Alvarez-Machain, who was suspected (but later acquitted) of involvement in the murder of a U.S. drug enforcement agent.²³ Although the Court rejected Alvarez's claim of arbitrary detention, it upheld ATS jurisdiction over widely accepted, clearly defined violations of international law. The Court cited prior ATS decisions with approval, noting that their reasoning was "generally consistent" with the approach adopted by *Sosa*.²⁴

B. Corporate Defendant ATS Cases

Until the mid-1990s, ATS cases generally targeted former officials of recognized governments who were acting under color of official author-

18. See Appendix A. For a comprehensive analysis of modern human rights litigation; see also BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 12–25 (2d ed. 2008).

19. *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

20. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

21. See, e.g., *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (upholding a jury verdict against two former military leaders of El Salvador); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (upholding verdict against Ethiopian military official); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (entering judgment against the former head of the military government of Haiti); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *on reconsideration* 694 F. Supp. 707 (N.D. Cal. 1988) (denying motion to dismiss an ATS suit against a former Argentine general).

22. 542 U.S. 692 (2004).

23. *Id.* at 697–98.

24. *Id.* at 732.

ity when they committed human rights abuses. In *Kadic v. Karadzic*, filed in 1993, victims of genocidal ethnic cleansing in Bosnia-Herzegovina sued the leader of the unrecognized Bosnian-Serb regime for genocide, war crimes, crimes against humanity, torture, and summary execution.²⁵ The district court dismissed the complaint, holding that international law applied only to officials of recognized governments.²⁶ The Second Circuit reversed, stating that non-state actors could be held liable for human rights abuses in two circumstances.²⁷ First, the *Kadic* court recognized that some international law violations do not require state action.²⁸ The international law definitions of genocide and slavery, for example, apply to private actors as well as government officials.²⁹ Second, the court held that a private party can be held liable for a human rights violation that does require state action when it acts in concert with a state actor.³⁰ The court pointed to the extensive U.S. jurisprudence on “color of law” as a guide for determining when a private actor can be held to have acted in concert with a state actor.³¹

Although *Kadic* concerned an individual defendant, its holding applies equally to ATS claims against corporate defendants, either when a private corporation commits one of the abuses that does not require state action or when it acts in concert with government officials to commit a violation that does. *Doe v. Unocal* invoked this theory in its claims against a corporation involved in the construction of a gas pipeline across Burma.³² Plaintiffs, Burmese villagers, had suffered executions, forced

25. 70 F.3d 232 (2d Cir. 1995).

26. *Id.* at 237.

27. *Id.* at 236. The court also held in the alternative that Karadzic had acted under color of law of his de facto regime. *Id.* at 244–45.

28. *Id.* at 239–44.

29. *Id.* at 239, 241–42; Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (“Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”); Slavery Convention art. I(2), Sept. 25, 1926, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927).

30. 70 F.3d at 245.

31. *Id.*

32. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891 (C.D. Cal. 1997). *See also* Nat’l Coalition Gov’t of Burma v. Unocal Corp., 176 F.R.D. 329 (C.D. Cal. 1997) (denying motion to dismiss); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (granting defendants’ motion for summary judgment), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002) (reversing summary judgment and remanding for trial), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003). In December 2004, before a scheduled argument of the rehearing en banc, the parties announced a settlement and dismissed all claims. Neither side would disclose details of the settlement. *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6. *See also* *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir.

labor, and torture, including rape. They alleged that Unocal and its partners hired the Burmese military to provide security and other support, knowing that the military was likely to commit human rights abuses. The district court denied a motion to dismiss, holding that a corporation can be held liable for participating in a joint venture with a government that commits such abuses. Although the case was later dismissed on a motion for summary judgment,³³ a panel of the Ninth Circuit reversed, holding that a corporation could be held liable for aiding and abetting a human rights violation if it provided “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.”³⁴

Later cases have consistently held that corporations can be held liable for human rights abuses through ATS litigation, although some of the cases have been dismissed on other grounds.³⁵ The circuit courts and most district courts have also agreed that corporations can be held liable for aiding and abetting human rights violations.³⁶ However, the courts have yet to agree on the proper standard for determining such liability. The *Unocal* panel decision relied on international law to hold that a corporate defendant could be held liable if it provided “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.”³⁷ In a concurring opinion, Judge Reinhardt rejected the use of international standards and urged that federal common law

2005) (post-settlement order granting the parties’ stipulated motion to dismiss and vacating the district court decision on the motion for summary judgment).

33. *Doe v. Unocal Corp.*, 395 F.3d 932, 942–45 (9th Cir. 2002).

34. *Id.* at 951, 947–53 (holding as well that the district court had applied an improperly high standard for corporate aiding and abetting liability).

35. *See, e.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (dismissed as a political question) (appeal pending); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (motion for summary judgment granted) (appeal pending); *Bowoto v. Chevron Corp.*, No. 99-02506, slip op. (N.D. Cal. Aug. 14, 2007) and *Bowoto v. Chevron Texaco Corp.*, No. 03-417580 (Cal. Super. Ct. filed Feb. 20, 2003) (claims for events occurring in Nigeria pending in federal and state trial courts); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000) (claims for events in Nigeria pending in district court).

36. *See Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff’d due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), *reh’g granted*, 499 F.3d 923 (9th Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247–48 (11th Cir. 2005); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003). For full history of the *Unocal* case, *see supra* note 32. *But see Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005).

37. 395 F.3d at 951.

standards be applied, although he found that federal common law would arrive at a similar standard.³⁸

More recently, the two judge majority in *Khulumani v. Barclay National Bank Ltd.* agreed that the ATS encompasses aiding and abetting claims, but disagreed on both the source and the substance of the standard.³⁹ Judge Katzmann found that the aiding and abetting standard was governed by international law, which he found required a showing that the defendant both “provides practical assistance to the principal which has a substantial effect on the perpetration of the crime” and “does so with the purpose of facilitating the commission of that crime.”⁴⁰ In contrast, Judge Hall concluded that the standard was governed by federal common law.⁴¹ Looking at the *Restatement (Second) of Torts* for guidance, he found that the aiding and abetting standard required knowing, substantial assistance to the commission of a violation.⁴² Thus, both the appropriate source of the aiding-and-abetting standard and its content remain unresolved.

The Bush administration submitted its views to the courts in many of the corporate-defendant human rights cases, arguing that each case raised significant foreign policy concerns. The degree of deference due to those views has been a key issue in the litigation.

II. FOREIGN AFFAIRS DEFERENCE

A. An Overview

Litigation that touches on foreign affairs raises difficult constitutional questions, shaped by two often-contradictory principles. At one extreme, as the Supreme Court stated emphatically in *Oetjen v. Central Leather Company*, “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government.”⁴³ As a result, the courts are sensitive to the executive branch’s concerns about the foreign policy implications of pending cases.⁴⁴

38. *Id.* at 970 (Reinhardt, J., concurring).

39. 504 F.3d at 260.

40. *Id.* at 277 (Katzmann, J., concurring).

41. *Id.* at 284 (Hall, J., concurring).

42. *Id.* at 288. Judge Hall found that the standard should also include the additional *Restatement* bases for liability: encouraging, contracting, soliciting, or facilitating a violation. *Id.* at 288–89.

43. 246 U.S. 297, 302 (1918).

44. The Department of Justice is authorized by statute to submit the executive branch’s view of pending litigation to the courts. 28 U.S.C. § 517 (2008). Submissions

However, the Court has also repeatedly emphasized that the judiciary must exercise independent judgment in cases properly before the courts, even if the issues involve foreign affairs. Thus, the Court has stated that, “despite the broad statement in *Oejten* . . . it cannot of course be thought that ‘every case or controversy which touches foreign relations lies beyond judicial cognizance.’”⁴⁵ In the memorable words of Justice Douglas, unquestioning deference to executive branch views in a case implicating foreign affairs would render the court “a mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others’.”⁴⁶

The degree of deference afforded to executive branch views depends on the subject at issue in the case, and, in particular, on whether that matter is clearly assigned by the Constitution to one of the branches of government. In a narrow set of cases involving recognition of diplomats, heads of states, and foreign governments, executive branch views are generally final.⁴⁷ Courts have found that such decisions require factual determinations that are delegated to the president as part of the executive branch’s power to “receive Ambassadors and other public Ministers.”⁴⁸

At the other end of the deference spectrum, the Court has held that the Constitution assigns to the courts the interpretation of statutes. As the Court said in *Republic of Austria v. Altmann*, issues of statutory interpretation are “well within the province of the Judiciary”⁴⁹ and the views of the executive branch “merit no special deference.”⁵⁰ The Court declined to defer to the executive branch in that case, even though the statute at

can be in the form of an amicus brief, a statement of interest, a letter, or a declaration. There is no public explanation for which format is used in particular cases. When the State Department writes a letter detailing its view of a case, it is often submitted to the court attached to a Statement of Interest filed by the Justice Department.

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

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

47. *See, e.g., Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (holding that if a suggestion of immunity is filed, it is the “court’s duty” to surrender jurisdiction); *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 627 (7th Cir. 2004) (“[T]he immunity of foreign leaders remains the province of the Executive Branch.”).

48. U.S. CONST. art. II, § 3. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 43 (2d ed. 1996) (“It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government . . .”).

49. 541 U.S. 677, 701 (2004) (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)).

50. *Id.*

issue, the Foreign Sovereign Immunities Act, concerned foreign affairs and diplomatic relations.⁵¹

The most difficult deference decisions arise in cases involving foreign policy concerns traditionally considered within the constitutional powers of the executive and legislative branches.

Three ill-defined and contentious doctrines—the political question doctrine, the act of state doctrine, and comity—determine whether a case otherwise properly within a court's jurisdiction should be dismissed because of the foreign affairs implications of the litigation.

The political question doctrine directs the courts to decline to decide a case otherwise properly presented for resolution because the dispute presents issues constitutionally assigned to the political branches of the government.⁵² The Supreme Court in *Baker v. Carr* listed the six factors that may trigger the doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁵³

The act of state doctrine instructs the courts to dismiss a case that intrudes on the legal authority of a foreign sovereign when the case requires the court to “declare invalid the official act of a foreign sovereign per-

51. *Id.* at 700–02. As the Court emphasized in *Japan Whaling Ass'n v. American Cetacean Society*:

We are cognizant of the interplay between these [statutes] and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

478 U.S. 221, 230 (1986).

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

53. *Id.*

formed within its own territory” in “the absence of a treaty or other unambiguous agreement regarding controlling legal principles.”⁵⁴

Comity refers to a discretionary decision to defer to the rules of the foreign country in a case posing a conflict between U.S. law and foreign law.⁵⁵

Recently, the Supreme Court muddied the analysis by referring, without explanation, to “a policy of case-specific deference to the political branches.”⁵⁶ The Court cited *Republic of Austria v. Altmann*, which stated that, in some circumstances, the State Department’s opinion on the implications of exercising jurisdiction over a particular case “might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”⁵⁷ Courts and commentators generally agree that “case-specific deference” must be an application of the political question, act of state, or comity doctrines, and not an offhanded creation of a new doctrine.⁵⁸

54. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 428 (1964) (dismissing a dispute that turned on the validity of the Cuban government’s expropriation of private property). *See also* *W.S. Kirkpatrick & Co. v. Env’tl. Tectonics*, 493 U.S. 400 (1990) (rejecting a motion for dismissal of an action alleging that a company obtained contract from the Nigerian government through bribery of Nigerian officials, holding that the act of state doctrine does not require dismissal of claim that might “embarrass” foreign governments).

55. Analysis of comity is confused by the fact that several doctrines are often lumped together under that label. *See* Michael D. Ramsey, *Escaping “International Comity,”* 83 *IOWA L. REV.* 893, 897 (1998) (stating that “comity” is used to refer to at least four separate doctrines: “(1) recognition of foreign judgments; (2) interpretation of foreign law; (3) limits on extraterritorial reach of U.S. law; and (4) enforcement of foreign law”).

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

57. 541 U.S. 677, 702 (2004).

58. *See* *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254, 262 n.10 (2d Cir. 2007) (per curiam), *aff’d due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919) (noting that “[t]he parties agree that *Sosa*’s reference to ‘case-specific deference’ implicates either the political question or international comity doctrine”); *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 69 (2d Cir. 2005) (stating that case-specific deference “has long been established under the prudential justiciability doctrine known as the ‘political question doctrine’”); *Joo v. Japan*, 413 F.3d 45, 49 (D.C. Cir. 2005) (interpreting “case-specific deference” as a lens through which to apply the political question doctrine); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1291 (N.D. Cal. 2004) (analyzing the Supreme Court’s reference to case-specific deference and concluding that “The act of state doctrine embodies these same concerns, and thus consideration may properly be given to it in the cases at bar”). *See also* *Separation of Powers—Foreign Sovereign Immunity—Second Circuit Uses Political Question Doctrine to Hold Claims Against Austria Nonjusticiable Under Foreign Sovereign Immunity Act—Whiteman v. Dorotheum GMBH & Co.*, 431 F.3d 57 (2d Cir. 2006), 119 *HARV. L. REV.* 2292, 2297 (2006) (rejecting the concept of “a new doctrine of deference” and concluding that the Supreme Court’s comments “are

The Court has emphasized that these doctrines must be applied with care to avoid the unconstitutional rejection of cases that are properly within the powers of the judicial branch. The Court warned that:

The doctrine of which we treat is one of “political questions,” not one of “political cases.” The courts cannot reject as “no law suit” a bona fide controversy as to whether some action denominated “political” exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging.⁵⁹

Where the administration argues that a particular case could interfere with executive branch foreign policies, the courts must assess the claims in light of the specific requirements of the relevant foreign affairs doctrines.

In cases that potentially trigger one of these doctrines, the views of the executive branch receive respectful consideration but are not dispositive. In a case involving property expropriations in Cuba at the height of the Cold War, for example, the Supreme Court refused to follow the administration’s views as to the applicability of the act of state doctrine.⁶⁰ Justice Powell noted that separation of powers concerns limit the deference that the judiciary can constitutionally grant to administration views: “I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive’s permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.”⁶¹ Justice Brennan also recognized that the executive branch has limited authority over the interpretation of the constitutionally assigned judicial power, observing that “[t]he Executive Branch . . . cannot by simple stipulation change a political question into a cognizable claim.”⁶² Noting that six members of the Court shared his view on this point, Justice Brennan added, “the representations of the Department of State are entitled to weight for the light

better understood as confirming that existing discretionary doctrines should be applied vigilantly to protect the Executive’s constitutional foreign affairs prerogative”); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 466, 475 (2004) (describing the suggestion of case-by-case deference as “wholly unnecessary” in light of the availability of the political question and act of state doctrines).

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

60. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

61. *Id.* at 773 (Powell, J., concurring).

62. *Id.* at 788–89 (Brennan, J., dissenting).

they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative.”⁶³

In another case involving Cuba, *Regan v. Wald*, the Court deferred to the views of the administration, but only after considering the logical coherence of those views and the supporting evidence.⁶⁴ *Regan* challenged an executive order that prohibited U.S. citizens from spending money in Cuba; the executive branch maintained that rejecting the ban would undermine the U.S. foreign policy goal of denying Cuba access to foreign currency.⁶⁵ The Court concluded that the prohibition was justified by “the evidence presented to both the District Court and the Court of Appeals.”⁶⁶ Administration submissions may be entitled to less deference, however, if they are not consistent over time. In *Regan*, the Court noted that Presidents Kennedy, Carter, and Reagan had all agreed “that the continued exercise of [the currency restrictions] against Cuba is in the national interest.”⁶⁷ In a more recent decision, *American Insurance Ass’n v. Garamendi*, the Court also considered the logic underlying the administration’s claim that a state law would interfere with a national approach to insurance claims arising out of the Holocaust, concluding that “[t]he approach taken [by the executive branch] serves to resolve . . . several competing matters of national concern” at issue in the dispute.⁶⁸

The lower courts have also rejected any implication that the courts are required to follow executive branch guidance in cases impacting foreign affairs. As the Second Circuit explained in *Allied Bank International v. Banco Credito Agricola de Cartago*, the applicability of the act of state doctrine “may be guided but not controlled by the position, if any, articulated by the executive as to the applicability *vel non* of the doctrine to a particular set of facts. Whether to invoke the act of state doctrine is ultimately and always a judicial question.”⁶⁹ The Third Circuit promulgated a similar standard in *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, holding that the State Department’s legal conclusions regarding the act of state doctrine were “not controlling on the courts,” but that its “factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.”⁷⁰

63. *Id.* at 790 (Brennan, J., dissenting).

64. 468 U.S. 222, 238–39 (1984).

65. *Id.* at 243.

66. *Id.*

67. *Id.*

68. 539 U.S. 396, 422 (2003).

69. 757 F.2d 516, 521 n.2 (2d Cir. 1985).

70. 847 F.2d 1052, 1062 (3d Cir. 1988), *aff’d*, 493 U.S. 400 (1990).

Similarly, an executive branch claim that a case presents a political question is not controlling. In *Alperin v. Vatican Bank*, for instance, the Ninth Circuit stated that if “the State Department express[es] a view [on whether a case presents a political question], that fact would certainly weigh” in the court’s determination.⁷¹ In *Ungaro-Benages v. Dresdner Bank AG*, the Eleventh Circuit found an ATS suit justiciable over the objections of the executive branch, noting, “This statement of interest from the executive is entitled to deference A statement of national interest alone, however, does not take the present litigation outside of the competence of the judiciary.”⁷² The Second Circuit in *Kadic v. Karadzic* stated that “an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication.”⁷³

In *City of N.Y. v. Permanent Mission of India to the U.N.*, the court rejected the executive branch’s views as too vague and speculative: “[W]e find none of the cited issues, presented in a largely vague and speculative manner, potentially severe enough or raised with the level of specificity required to justify presently a dismissal on foreign policy grounds.”⁷⁴ Other cases have indicated that the court would reject arbitrary or unsupported executive branch views. In *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, for instance, the court found there was “no indication that [the executive branch submission] is an arbitrary or ad hoc directive.”⁷⁵ Similarly, the court in *Matimak Trading Co. v. Khalily* recognized that a “court might boggle at an ‘ad hoc, pro hac vice’ directive of the government.”⁷⁶

More recently, the Supreme Court has emphasized the importance of considering executive branch views in the context of the particular facts and parties involved in a case. In a case involving foreign sovereign immunity, the Court stated that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over *par-*

71. *Alperin v. Vatican Bank*, 410 F.3d 532, 556, 562 (9th Cir. 2005) (dismissing, under the political question doctrine, claims regarding war crimes committed by an enemy of the United States during World War II).

72. 379 F.3d 1227, 1236 (11th Cir. 2004). The claims were ultimately dismissed on comity grounds. *Id.* at 1237–40. See also *In Re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 380 (D.N.J. 2001) (noting that a “Statement of Interest is non-binding on the Court”).

73. 70 F.3d 232, 250 (2d Cir. 1995).

74. 446 F.3d 365, 377 n.17 (2d Cir. 2006), *aff’d*, *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007).

75. 860 F.2d 551, 556 (2d Cir. 1988).

76. 118 F.3d 76, 82 (2d Cir. 1997), *abrogated on other grounds*, *JPMorgan Chase Bank v. Traffic Stream*, 536 U.S. 88 (2002).

ticular petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”⁷⁷ Referring to the possibility of affording “case-specific deference to the political branches,” the Court in *Sosa* noted that in some cases “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.”⁷⁸

B. The Standard for Deference

It is difficult to glean from these cases a standard that articulates the deference due to an executive branch statement that a case will have a negative impact on U.S. foreign policy. At minimum, such statements are not definitive; the decisions state that much repeatedly. The cases discussed in the prior section state that the courts will be “guided but not controlled” by executive branch views⁷⁹ and reserve the right to reject views that are “vague” or “speculative.”⁸⁰ However, in appropriate cases, the courts give “serious weight,”⁸¹ “substantial respect,”⁸² and “respectful consideration”⁸³ to executive branch views. Capturing the inadequacy of these formulations, Justice Brennan stated that executive branch views are entitled to “weight for the light they shed”⁸⁴ — a circular statement indicating nothing about how a court will determine whether those views shed any light at all on the issues facing the court.

As these cases show, even when following the recommendations of the executive branch, the Supreme Court has reviewed the logic of those views and the supporting evidence, and has noted the importance of indications that the views are well-founded.⁸⁵ We can draw further guidance by focusing on courts’ analyses of two facets of administration submissions. First, the executive branch generally informs the court of the sub-

77. *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (citation omitted).

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

79. *Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 n.2 (2d Cir. 1985).

80. *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 377 n.17 (2d Cir. 2006), *aff’d*, *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007).

81. *Sosa*, 542 U.S. at 733 n.21.

82. *Env’tl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1062 (3d Cir. 1988), *aff’d*, 493 U.S. 400 (1990).

83. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

84. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 790 (1972) (Brennan, J., dissenting).

85. See discussion of *Regan v. Wald*, 468 U.S. 222 (1984), and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), *supra* text accompanying notes 64–68.

stance of the relevant foreign policy interests. On this, the courts are unlikely to raise any challenges; setting U.S. government foreign policy is clearly within the constitutional powers of the political branches. Second, the submission must explain how the litigation would harm those policy interests. Here, the courts are more likely to question administration assertions and to reject them if they do not appear logical or well-reasoned.⁸⁶ Executive branch views merit deference when they are logical and reasonable, that is, when their conclusions are well-founded and supported by the evidence provided.⁸⁷

The requirement that views must be reasonable in order to merit deference seems relatively uncontroversial, even to those who favor heightened judicial deference. For example, in a recent article about deference and foreign relations law, Professors Posner and Sunstein argued that the courts should afford heightened deference to the executive branch when interpreting legislation that touches upon foreign affairs; they noted repeatedly that their approach would—“of course”—only apply to reasonable executive branch views.⁸⁸ Similarly, in a dissenting opinion that was sharply critical of a district court’s failure to defer to administration views, Judge Kavanaugh also recognized this requirement: “It is not enough . . . for the Executive Branch merely to assert harm; rather, the harm must be explained—and explained reasonably.”⁸⁹ Of course, as in any evaluation of reasonableness, there will inevitably be differences of opinion. As a case in point, Judge Kavanaugh finds reasonable an executive submission I find to be patently unreasonable,⁹⁰ as discussed in Part IV.

86. For a similar effort to develop a standard to guide deference see Margarita S. Clarens, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT’L L. 415, 431 (2007) (stating that a reasonable explanation should include “the specific and foreseeable” harms that the litigation will inflict).

87. The two halves of this approach could collapse into one: one definition of “reasonable” is “supported or justified by fact or circumstance.” Merriam-Webster’s Dictionary of Law, Reasonable, <http://dictionary.reference.com/browse/reasonable>.

88. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1198 (2007) (“If the executive’s interpretation is unreasonable, of course, it will be invalid . . .”). Further refining the rule, Professors Jinks and Katyal attempt to add some traction to the standard, focusing on whether the executive branch has engaged in a “deliberative process” producing “reasoned analysis.” Derek Jinks & Neal Kuma Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1247–48 (2007).

89. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 362 (D.C. Cir. 2007) (Kavanaugh, J., dissenting).

90. *Id.*

These different factors combine to contribute to a proposed standard by which to evaluate administration views. In order to merit deference, an administration submission must (1) articulate the relevant policy interests; (2) explain how the litigation could harm those interests; (3) tie the anticipated harm to one of the recognized foreign policy justiciability doctrines; and finally, (4) the explanations offered must be reasonable, drawing conclusions that are well-founded and supported by the facts.

The reported cases indicate that, as of 2002, courts generally did defer to the executive branch's views that a case would have an impact on foreign policy. In 2002, a district court judge wrote: "[P]laintiffs have not cited, and the court has not found, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here."⁹¹ There may be unpublished cases prior to that date in which the court disregarded the views of the State Department, or published cases in which the court reached its decision without mentioning that the State Department had filed an objection. Nevertheless, it seems safe to conclude that, prior to the administration of George W. Bush, the courts rarely rejected an executive branch recommendation that a case should be dismissed under one of the justiciability doctrines because of its foreign policy implications.

In contrast, as developed below, the Bush administration's submissions in corporate-defendant ATS cases were rejected by the courts more often than they were followed. Those submissions combined many of the administration's more extreme views of the role of the executive branch in litigation touching on foreign affairs. The submissions also included exaggerated claims that human rights litigation would have catastrophic results. The courts have been remarkably consistent in rebutting these concerns. After a review of prior executive branch submissions in ATS litigation in Part III, Part IV analyzes the courts' remarkably skeptical reception of Bush administration submissions stating that corporate-defendant litigation would harm U.S. foreign policy interests.

III. EXECUTIVE SUBMISSIONS IN ATS CASES: THE FIRST TWENTY YEARS

Executive branch responses to litigation under the ATS from 1980 through 2000 varied from the strong support of the administrations of Presidents Jimmy Carter and Bill Clinton to the mixed views of the administrations of Presidents Ronald Reagan and George H.W. Bush.

91. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1192 (C.D. Cal. 2002).

Before ruling on the *Filártiga* appeal, the Second Circuit asked the State Department for its views on the case.⁹² In a joint submission on behalf of the Justice and State Departments, the Carter administration endorsed the plaintiffs' interpretation of the ATS, agreeing that the statute authorized the federal courts to assert jurisdiction over claims for violations of modern-day, evolving international law norms.⁹³ Far from raising concerns about potential interference with the executive branch's foreign affairs powers, the Carter administration concluded that ATS cases would strengthen U.S. foreign policy goals, even though "such suits unquestionably implicate foreign policy considerations."⁹⁴ The brief recognized that the judiciary plays an important role in many issues that affect foreign affairs: "[N]ot every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government."⁹⁵ The administration concluded that if human rights litigation in U.S. courts were limited to cases in which "an individual has suffered a denial of rights guaranteed to him as an individual by customary international law," there would be "little danger that judicial enforcement will impair our foreign policy efforts."⁹⁶

The next three administrations changed course several times. In *Trajano v. Marcos*, the Reagan administration filed a brief in support of the estate of Ferdinand Marcos, the former dictator of the Philippines, which argued that ATS jurisdiction included only those cases in which the U.S. government might in some way be held responsible for a violation of international law.⁹⁷ However, in a submission to the Supreme Court in *Tel-Oren v. Libyan Arab Republic*,⁹⁸ the Reagan administration expressed little concern about the *Filártiga* precedent and opposed Su-

92. Memorandum for the United States as Amicus Curiae at 1, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146.

93. *Id.* at 4.

94. *Id.* at 22-23.

95. *Id.* at 22 (citations omitted).

96. *Id.*

97. The administration defined those as cases in which (1) the tortfeasor was subject to U.S. jurisdiction at the time the tort was committed; (2) the United States could be accountable for the action; (3) Congress had passed a criminal statute defining the conduct as an offense against the law of nations; and (4) the federal statute provided a private right of action. Brief for the United States as Amicus Curiae, *Trajano v. Marcos* at 9-10, 26-27, 878 F.2d 1439 (9th Cir. 1989) (table disposition) (Nos. 86-2448, 86-15039).

98. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

preme Court review.⁹⁹ The administration argued that a grant of certiorari would be premature because of the divided opinions of the D.C. Circuit in that case and the possibility that the lower courts might clarify the “complex issues of federal jurisdiction, international law and statutory construction . . . without such review.”¹⁰⁰

The administration of President George H.W. Bush expressed opposition to the *Filártiga* doctrine in testimony before Congress,¹⁰¹ but did not file any submissions in ATS cases during its four years in office. The Torture Victim Protection Act (“TVPA”) was enacted during that administration.¹⁰² The statute creates an explicit cause of action for torture and extrajudicial executions. Despite misgivings about the impact of human rights litigation, President George H.W. Bush signed the TVPA and offered strong support for the goals of the statute:

These potential dangers, however, do not concern the fundamental goals that this legislation seeks to advance. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.¹⁰³

Under President Bill Clinton, the executive branch once again supported human rights litigation and the *Filártiga* interpretation of the ATS. In *Kadic v. Karadzic*, the Departments of State and Justice filed a joint Statement of Interest supporting federal jurisdiction over human rights claims and thereby rejecting the limitations proposed by the Reagan administration in *Marcos*.¹⁰⁴ In *Doe v. Unocal*, in response to a

99. Brief for the United States as Amicus Curiae at 19, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.D.C. 1984) (No. 83-2052).

100. *Id.* at 9.

101. During hearings on the Torture Victim Protection Act, administration representatives argued that the statute would improperly assert jurisdiction over actions which have no connection to the United States, risk provoking retaliatory lawsuits against U.S. officials, and involve individual litigants in foreign policy decisions. See *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Judiciary Comm.*, 101st Cong. 11–16 (1990) (statement of John O. McGinnis, Deputy Assistant Attorney General, Dep’t of Justice) & 22–29 (1990) (statement of David P. Stewart, Assistant Legal Advisor, Dep’t of State).

102. Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (codified as a note to the Alien Tort Statute, 28 U.S.C. § 1350).

103. Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465, 466 (Mar. 12, 1992).

104. Statement of Interest of the United States at 1–2, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

request from the district court, the Clinton administration stated that the litigation would not interfere with foreign affairs.¹⁰⁵

IV. THE BUSH ADMINISTRATION'S EXECUTIVE SUBMISSIONS AND THE JUDICIAL RESPONSE

The administration of President George W. Bush has adamantly opposed ATS litigation and the *Filártiga* doctrine. In an amicus brief filed in the appeal of *Doe v. Unocal*, the Department of Justice urged the Ninth Circuit to overrule several prior decisions adopting the *Filártiga* doctrine and argued that ATS claims interfered with "important foreign policy interests."¹⁰⁶ The administration submitted similar arguments in support of the petitioner in *Sosa v. Alvarez-Machain*, asserting that judicial consideration of any ATS human rights claim would be "incompatible" with the political branches' constitutional foreign affairs powers and thus would violate the constitutional separation of powers.¹⁰⁷ In rejecting this argument, the *Sosa* Court declined to adopt the executive branch's interpretation of the ATS without even referring to the sweeping constitutional claims in the administration's brief.

After these unsuccessful efforts to convince the courts to reject ATS litigation in toto, the administration sought to significantly restrict its reach, particularly as applied to corporate defendants.

A. The Bush Administration's Opposition to Corporate Cases

After the Supreme Court decision in *Sosa*, the Bush administration relied on several specific arguments aimed at blocking corporate-defendant cases. The administration argued that the courts should not permit claims by aliens for events that occur outside of the United States and should not recognize aiding and abetting liability under the ATS.¹⁰⁸ In addition,

105. Statement of Interest of the United States, Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112), *reprinted as* Exhibit A, *Nat'l Coal. Gov't*, 176 F.R.D. at 361-62.

106. Brief for the United States as Amicus Curiae at 4, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628). *See also* Supplemental Brief for the United States as Amicus Curiae at 11, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628). Submitted after the Supreme Court decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the brief argued that imposing aiding and abetting liability "could interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices."

107. Brief for the United States as Respondent Supporting Petitioner at 31-40, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

108. *See, e.g.*, Brief for the United States as Amicus Curiae at 2-3, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326).

the submissions asserted broadly that claims against corporations would deter investment and trade, triggering economic downturns that could have devastating consequences for the United States and its allies.¹⁰⁹

In *Doe v. Exxon Mobil Corp.*, for example, plaintiffs alleged that Exxon paid and directed members of the Indonesian military to commit acts of torture and murder in the course of protecting natural gas facilities in Aceh, Indonesia.¹¹⁰ The Department of State filed a letter stating that the lawsuit could endanger key U.S. interests, asserting that because Indonesia would perceive the lawsuit as “interference in its internal affairs,” it might decrease cooperation with the United States on a range of issues, including terrorism.¹¹¹ The letter claimed that the case would lead to decreased foreign investment in Indonesia and curtail investment opportunities for U.S. businesses.¹¹² The result would be to undermine Indonesia’s economic and political stability and the security of the entire region, thereby “risk[ing] a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.”¹¹³

In a similar tone, the administration objected to *Mujica v. Occidental Petroleum Corp.*, a lawsuit seeking to hold the defendant liable for the bombing of a village by the Colombian military.¹¹⁴ The administration expressed concern that such lawsuits could deter U.S. investment in Colombia, causing a downturn in Colombia’s economy and harming U.S. interests in Colombia and the region:

[S]uch downturns could damage the stability of Colombia, the Colombian government’s U.S.-supported campaigns against terrorists and narcotics traffickers, regional security, our efforts to reduce the amount of drugs that reach the streets of the United States, promotion of the rule of law and human rights in Colombia, and protection of U.S. persons, government facilities, and investments. Finally, reduced U.S. investment in Colombia’s oil industry may detract from the vital U.S.

109. See, e.g., Letter from William H. Taft, Legal Advisor, Dep’t of State at 2, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (No. 03-2860).

110. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005), *petition for cert. filed*, 76 U.S.L.W. 3050 (July 20, 2007) (No. 07-81).

111. Letter from William H. Taft, Legal Advisor, Dep’t of State at 3, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

112. *Id.* at 3–4.

113. *Id.* at 1.

114. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1168–69 (C.D. Cal. 2005) (appeal pending).

policy goal of expanding and diversifying our sources of imported oil.¹¹⁵

Administration views are discussed in more detail in the following section, along with the judicial responses.

B. Judicial Rejection of the Bush Administration Views

The judiciary has been remarkably skeptical of the administration's views in corporate-defendant cases. Leaving aside cases arising out of World War II, the executive branch has submitted views in ten ATS corporate-defendant cases.¹¹⁶ Although each of the cases involves distinguishable facts and slightly different U.S. government approaches, the scorecard is nevertheless striking: only two claims have been dismissed in response to the administration's foreign policy concerns, while one has been dismissed on other grounds, five have been permitted to proceed,¹¹⁷ one is still pending,¹¹⁸ and one settled before the court considered the administration's views.¹¹⁹ Moreover, one of the two cases in which the claims were dismissed on foreign policy grounds involved a U.S. government contractor.¹²⁰ Cases involving the U.S. government are the most likely to trigger concerns about judicial interference with the

115. Letter from William H. Taft, Legal Advisor, Dep't of State at 2, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (No. 03-2860).

116. For a detailed description of the ten submissions, see Appendix C.

117. The administration fared slightly better in the district courts than in the circuit courts: In two cases, the district courts granted motions to dismiss, which were then overturned on appeal. *See Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *rev'd by* 487 F.3d 1193 (9th Cir. 2007), *reh'g granted*, 499 F.3d 923 (9th Cir. 2007); *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *rev'd*, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

118. In the pending action, a state court case, *Bowoto v. Chevron Corp.*, the judge asked the State Department's views as to the impact of the case on U.S. foreign policy. Statement of Interest of the United States at 1, *Bowoto v. Chevron, Corp.*, No. 03-417580 (Super. Ct. Cal. May 29, 2007). The State Department submission addresses only a narrow issue, asking that the court refrain from granting injunctive relief that would require that the defendant comply with the voluntary corporate code of conduct developed by the executive branch. *Id.* at 2, 5-7. The court has not ruled on that issue. In a parallel federal court action, the judge declined defendant's request that the court seek the executive branch's views on the litigation. *Bowoto v. ChevronTexaco Corp.*, No. 99 Civ. 2506, at 3-5 (N.D. Cal. July 30, 2004) (Order Denying Motion for Court to Request Views).

119. For citations to the various decisions in *Doe v. Unocal* and the procedural history of the case, see *supra* note 32.

120. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (involving a U.S.-government-approved contract to sell bulldozers to Israel).

powers of the executive branch. In another government contractor case, *In re Agent Orange*, the district court rejected most of the administration's arguments and held that the claims were justiciable, but found that the acts alleged did not constitute a war crime at the time they occurred.¹²¹ Thus, the courts have accepted the executive branch's views in only one of the corporate-defendant cases that did not involve a U.S. government contractor. That case, *Mujica v. Occidental*, is still pending on appeal to the Ninth Circuit.¹²² This record is all the more remarkable considering that a district court judge in 2002 stated that she was unable to find a single case in which the courts had allowed a case to proceed in the face of a formal statement of concern from the State Department.¹²³

The five cases in which the courts have permitted at least some claims to proceed over the objections of the administration are worth exploring in more detail.

1. *Arias v. DynCorp*

In *Arias v. DynCorp*,¹²⁴ in which a claim was brought for injuries caused when pesticides sprayed in Colombia drifted across the border into Ecuador, the executive branch submitted a detailed, eleven-page declaration stating in strong terms that the litigation "pose[d] grave risks to U.S. national security interests, foreign policy objectives and diplomatic relations in the Andean Region."¹²⁵ The submission offers a stark warning about the dangers of the litigation:

The *Arias* plaintiffs challenge an aerial drug eradication program that has been repeatedly authorized by the executive and legislative branches after extensive deliberation as a key element in U.S. counter-narcotics strategy. Any disruption of this program would cripple United States efforts to stem the flow of narcotics into this country, provide a financial boon to international terrorist organizations that have targeted U.S. interests, and significantly undermine the prospects of strong and

121. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008) (dismissing a suit by Vietnamese victims of herbicides used by the U.S. government during the Vietnam War after finding that the alleged actions did not violate international law norms recognized at that time).

122. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194–95 (C.D. Cal. 2005).

123. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1192 (C.D. Cal. 2002).

124. 517 F. Supp. 2d 221 (D.D.C. 2007).

125. Declaration of Rand Beers, Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs Regarding Potential Impact of *Arias* Litigation on the United States National Security and Foreign Policy Interests at 10, *Arias v. DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1980).

stable relations between the United States and Colombia and other Andean nations. The stakes are high.¹²⁶

Nevertheless, the court refused to dismiss the case, holding that the claim did not challenge executive branch foreign policies or the implementation of those policies, because “the intended means of executing the policy in this case did not include the acts challenged here, which plaintiffs allege were specifically prohibited by the plan.”¹²⁷

2. *Doe v. Exxon Mobil Corp.*

In *Doe v. Exxon Mobil Corp.*, Indonesian villagers sued for injuries inflicted by a company security force comprised of members of the Indonesian military.¹²⁸ The State Department stated that the lawsuit would lead Indonesia to decrease cooperation on counter-terrorism initiatives¹²⁹ and could undermine the country’s economic and political stability, affecting the security of the entire region and thereby “risk[ing] a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.”¹³⁰ Although the district court dismissed the federal law claims, it refused to dismiss the state common law tort claims, holding that carefully controlled litigation and discovery would avoid interference with Indonesia’s sovereign interests.¹³¹ Defendants sought a writ of mandamus from the D.C. Circuit, which the Circuit denied.¹³²

126. *Id.* at 10–11.

127. 517 F. Supp. 2d at 225. The court permitted the plaintiffs to depose the administration official who submitted the declaration. Deposition of Rand Beers, *Arias v. Dyn-corp*, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1980).

128. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005).

129. Letter from William H. Taft, Legal Advisor, Dep’t of State at 3, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

130. *Id.* at 1. The letter observed, however, that “[j]ts assessment [was] ‘necessarily predictive and contingent on how the case’” proceeded, including the “intrusiveness of discovery” and the extent to which the case required “judicial pronouncements on the official actions of the [Government of Indonesia] with respect to the conduct of its military activities in Aceh.” *Id.* at 2 n.1.

131. 393 F. Supp. 2d at 28–29. The court accepted that adjudication of the international law claims of genocide and crimes against humanity would require an assessment of “whether the Indonesian military was engaged in a plan allegedly to eliminate segments of the population,” which “would be an impermissible intrusion in Indonesia’s internal affairs” and would “require[] the court to evaluate the policy or practice of the foreign state,” and dismissed those claims, while permitting the state law claims to proceed. *Id.* at 25, 28–29.

132. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3050 (July 20, 2007) (No. 07-81). Judge Kavanaugh, who served as a

3. *Khulumani v. Barclay National Bank, Ltd.*

In *Khulumani v. Barclay National Bank, Ltd.*, South Africans filed three lawsuits against dozens of corporations for damages stemming from the defendants' operations in South Africa during the Apartheid regime.¹³³ The executive branch filed a Statement of Interest in the district court, accompanied by a letter from the South African government asserting that adjudication of these cases would interfere with South Africa's reconciliation process.¹³⁴ The case was mentioned repeatedly in the Supreme Court briefing in the *Sosa* case, with the U.S. government, *Sosa* himself, and the amici writing in his support all portraying the case as an example of the foreign policy problems triggered by human rights litigation.¹³⁵ The *Sosa* decision included a footnote mentioning the possibility of applying "a policy of case-specific deference to the political branches" to the Apartheid cases:

The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." . . . The United States has agreed. . . . In such cases, 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.¹³⁶

The district court dismissed because it found that aiding and abetting liability was not actionable under the ATS.¹³⁷ On appeal, the administration submitted a brief urging that the Second Circuit affirm the lower court's rejection of aiding and abetting liability and arguing against recognition of extraterritorial claims under the ATS.¹³⁸ The Second Circuit reversed the dismissal, holding that aiding and abetting liability does trigger ATS jurisdiction, and remanded to the district court with instruc-

legal advisor to President Bush before his appointment to the D.C. Circuit, filed a strongly worded dissent. *Id.* at 357 (Kavanaugh, J., dissenting).

133. 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

134. *Id.* at 298 (Korman, J., concurring in part and dissenting in part).

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

136. *Id.*

137. *Khulumani*, 504 F.3d at 260.

138. Brief of the United States as Amicus Curiae at 3-4, *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326).

tions to permit plaintiffs to file an amended complaint.¹³⁹ Given the likelihood of an amended complaint, the court refused to reach the political question issues, rejecting the argument that the Supreme Court's *Sosa* footnote required dismissal of the suit.¹⁴⁰ In their separate concurring opinions, neither of the two judges in the majority even discussed the executive branch's argument that recognition of aiding and abetting liability would constitute an unconstitutional interference with the foreign policy powers of the executive branch. The dissent argued that the panel should have dismissed the claim as a political question, based on the objections of the U.S. and South African governments and the concerns expressed by the Supreme Court.¹⁴¹

4. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, residents of southern Sudan sued a Canadian corporation, seeking compensation for genocide, crimes against humanity, and other violations of international law.¹⁴² The State Department submitted a letter to the court that attached a diplomatic note from the Canadian government stating that the litigation infringed on the foreign relations of Canada.¹⁴³ The U.S. letter stated that the State Department shared the Canadian government's concerns and urged the court to take a narrow view of the ATS in order to avoid such conflicts.¹⁴⁴ The letter also stated the department's concerns about the dangers of taking an expansive interpretation of ATS jurisdiction.¹⁴⁵ The district court rejected the views of both the U.S. and Canadian governments, finding the Canadian government's expressed concerns unpersuasive because there was no showing that the pending litigation would interfere with Canada's foreign policy:

While this Court may not question either the accuracy of the description of Canada's foreign policy in its Letter, or the wisdom and effectiveness of that foreign policy, it remains appropriate to consider the degree to which that articulated foreign policy applies to this litigation.

139. 504 F.3d at 261.

140. *Id.* at 262–63, 263 n.14.

141. 504 F.3d at 295–98 (Korman, J., concurring in part, dissenting in part) (discussing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)).

142. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (granting motion for summary judgment) (appeal pending).

143. *Statement of Interest of the United States at 2, Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (No. 01-9882).

144. Letter from William H. Taft, Legal Advisor at 2–3, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (No. 01-9882).

145. *Id.* at 3.

. . . While there is no requirement that a government's letter must support its position with detailed argument . . . dismissal is only warranted as a matter of international comity where the nexus between the lawsuit and that foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public's interest in vindicating the values advanced by the lawsuit. Even giving substantial deference to the Canada Letter, *Talisman* has not shown that dismissal of this action is appropriate.¹⁴⁶

The case was later dismissed on a motion for summary judgment; an appeal of that dismissal is currently pending.

5. *Sarei v. Rio Tinto, PLC*

In *Sarei v. Rio Tinto, PLC*, residents of Papua New Guinea brought an ATS action against an international mining company alleging international law violations in connection with the operation of a copper mine.¹⁴⁷ The State Department filed a Statement of Interest ("SOI") stating that the litigation "would risk a potentially serious adverse impact on the peace process [in Papua New Guinea], and hence on the conduct of our foreign relations."¹⁴⁸ The submission attached a letter from the government of Papua New Guinea stating its objections to the litigation.¹⁴⁹ The district court dismissed the claim in deference to the views of the executive branch.¹⁵⁰ On appeal, the Ninth Circuit reversed.¹⁵¹ The court noted that, although it would give the government's views "serious weight," those views would not be controlling: "Ultimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding."¹⁵² The court concluded that the case did not trigger any of the factors requiring dismissal under the political question doctrine:

The State Department explicitly did *not* request that we dismiss this suit on political question grounds, and we are confident that proceeding does not express any disrespect for the executive, even if it would pre-

146. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846, at *6-7 (S.D.N.Y. Aug. 30, 2005).

147. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1198 (9th Cir. 2007), *reh'g granted*, 499 F.3d 923 (9th Cir. 2007).

148. Letter from William H. Taft, IV, Legal Advisor, Dep't of State at 2, *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (No. 00-11695).

149. *Id.* at 2-3.

150. *Sarei*, 487 F.3d at 1199.

151. *Id.* at 1297.

152. *Id.* at 1224.

fer that the suit disappear. Nor do we see any “unusual need for unquestioning adherence” to the SOI’s nonspecific invocations of risks to the peace process. And finally, given the guarded nature of the SOI, we see no “embarrassment” that would follow from fulfilling our independent duty to determine whether the case should proceed. We are mindful of *Sosa*’s instruction to give “serious weight” to the views of the executive, but we cannot uphold the dismissal of this lawsuit solely on the basis of the SOI.¹⁵³

C. Judicial Scrutiny of Administration Claims in ATS Cases

Although each of these lawsuits raises distinct issues, it is striking that the court in each case ignored or rejected the argument that the very existence of the lawsuit interfered with foreign policy interests. The courts analyzed the administration’s submissions through the lens of one or more of the three doctrines governing decisions to dismiss based on foreign affairs concerns and applied the requirements of those doctrines with great care. The decisions confirm that administration concerns about the foreign policy implications of a lawsuit do not necessarily require dismissal. Moreover, in these cases, the courts chose to parse the logic of the administration’s claims, often concluding that the concerns that the executive branch expressed did not support the conclusion that the litigation would interfere with executive branch foreign affairs powers. Do these holdings comply with the Supreme Court’s guidance? Yes, in that the Court, in the cases discussed above, has stated that the courts must review the factual and logical underpinnings of the executive branch’s views. If not, the independence of the judicial branch would be undermined, with the courts relegated to the unconstitutional role of merely following the executive branch’s instructions in any case touching upon foreign affairs.

Are these holdings consistent with the standard I developed from past cases? Yes, in that the executive branch submissions fail the test on multiple grounds. The first prong of the test requires that the administration articulate the relevant policy interest. This prong is the least problematic: the courts have accepted the executive branch’s stated interest in fighting

153. *Id.* at 1206–07. The Ninth Circuit granted a rehearing en banc, *id.* at 1196–97, but did not consider the issues raised in the State Department letter because the government of Papua New Guinea had reversed its position on the litigation and the executive branch had informed the court that the litigation no longer raised foreign policy concerns. *See* Brief for the United States as Amicus Curiae Supporting Panel Rehearing or Rehearing En Banc at 14 n.3, *cited in Sarei*, 487 F.3d at 1206 n.14 (“[A]fter noting that the SOI was based on concerns in 2001 ‘which are different from the interests and circumstances that exist today’ the government expressly declines to endorse a dismissal of this case based on the SOI.”).

terrorism and drug trafficking and promoting the stability of allied governments. The second prong, however, requires that the administration explain how the litigation could harm those interests, and the courts have repeatedly found that the corporate-defendant submissions fail this step. In *Arias v. Dyncorp*, for example, the court concluded that that acts challenged in the lawsuit—spraying pesticides in the wrong country—would not contribute to the executive branch’s stated foreign policy goals.¹⁵⁴ Similarly, the *Exxon Mobil* court found that the state claims could continue without threatening the policy interests asserted by the administration.¹⁵⁵ And in *Talisman*, the court stated explicitly that the Canadian government had not demonstrated a nexus between the lawsuit and that nation’s foreign policy.¹⁵⁶

The executive branch submissions analyzed here also fail the third prong in that they do not link the harms they discuss to the recognized justiciability doctrines. They repeatedly overstate those doctrines, claiming that lawsuits should be dismissed because of any foreign policy implications, rather than applying the strict standards set forth by the Supreme Court precedents.

Finally, the submissions fail the last prong, the requirement that the arguments must be reasonable and draw conclusions that are well-founded and supported by the facts. Although the courts do not explicitly label the executive branch submissions as unreasonable or not well-founded, they repeatedly criticize the failure to connect the reality of the litigation at issue with the dangers predicted by the administration. They find that the alleged consequences lack supporting evidence. Indeed, the conclusion seems inevitable: the courts do not defer to these administration views because they are only obligated to defer to the “reasonable” views of the executive branch—and the courts find the views of the Bush administration to be unreasonable.

V. THE LIMITS OF DEFERENCE: JUDICIAL REJECTION OF UNREASONABLE EXECUTIVE BRANCH VIEWS

This review of judicial responses to Bush administration views reveals that, in a remarkable reversal of past practice, the federal courts have permitted a string of lawsuits to proceed despite the Bush administration’s assertions that the cases would interfere with U.S. foreign policy interests. The startling shift in the courts’ responses to executive submis-

154. *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 225–26 (D.D.C. 2007).

155. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28–29 (D.D.C. 2005).

156. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 682–83 (S.D.N.Y. 2005).

sions indicates that the courts do not find the submissions convincing: the Bush administration has failed the reasonableness test. Several shortcomings in the Bush administration approach led the judiciary to refuse to defer to administration views: excessive claims for deference, exaggerated predictions of harm, ill-supported economic claims, and a perceived bias towards corporate interests.

A. Excessive Claims for Deference

The Bush administration overstated its powers, pushing for deference in areas traditionally viewed by the courts as within their purview. The Justice Department entered the ATS debate with a brief arguing that ATS litigation as a whole interfered with executive branch foreign affairs powers—and claiming that the courts should defer to this interpretation of the statute.¹⁵⁷ The administration also claimed the right to dictate to the courts the proper interpretation of the treaties and customary international law norms at issue in ATS cases.¹⁵⁸ In *Sosa*, the Supreme Court rejected the administration's views about the proper interpretation of the ATS and declined to defer to its views of the treaties and customary international law at issue, thus rejecting both the substance of the administration's arguments and its claim to deference on these issues.¹⁵⁹ The Supreme Court and the lower courts rejected similar deference claims in other high profile cases.¹⁶⁰ These excessive claims to deference have undermined the administration's credibility.

B. Exaggerated Predictions of Harm

The administration relied on arguments that were of questionable validity—or even patently absurd. In a globalized world in which litigants and courts have independent access to information about foreign governments and the role of the United States, the courts can more easily dismiss such arguments.

In corporate-defendant ATS cases, the administration claimed that the litigation could trigger instability that might impact a wide range of vital U.S. interests, including efforts to combat terrorism and the drug trade

157. See Brief for the United States as Amicus Curiae at 19–20, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

158. *Id.*

159. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

160. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

and to promote regional security around the world.¹⁶¹ At a time when lawsuits are routinely filed against multinational corporations for many different claims, it seems preposterous to assert that a single lawsuit could trigger such exaggerated harms.

In *Doe v. Exxon Mobil*, for example, plaintiffs sought compensation for murder, torture, sexual assault, battery, false imprisonment, and other torts committed by the defendant's security forces.¹⁶² The State Department submission starts with the reasonable assertion that Indonesia might view the lawsuit as an "'interference' in its internal affairs."¹⁶³ It then suggests that Indonesia might respond by curtailing cooperation with the United States, thereby undermining U.S. counter-terrorism initiatives.¹⁶⁴ The letter also suggests that the litigation might worsen economic conditions in Indonesia, "breed[ing] instability" that could "create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists"¹⁶⁵ and could also "impact on the security" of Australia, Thailand, and other countries in the region.¹⁶⁶ An economic downturn in Indonesia might also make it difficult for the government to hire the professional personnel it needs to make progress in "promoting regional stability, countering ethnic and sectarian violence, [and] combating piracy, trafficking of persons, smuggling, narcotics trafficking, and environmentally unsustainable levels of fishing and logging."¹⁶⁷

Plaintiffs responded to this letter with an expert affidavit debunking the administration's parade of horrors.¹⁶⁸ The affidavit noted that since Indonesia cooperates with the United States in fighting terrorism "because it is in its own national interest to do so," it has continued to do so despite repeated U.S. criticism of its human rights record.¹⁶⁹

161. See *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20, 22–23 (D.D.C. 2005).

162. *Id.* at 24.

163. Letter from William H. Taft, Legal Advisor, Dep't of State, at 3, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

164. *Id.*

165. *Id.* at 4.

166. *Id.* at 5.

167. *Id.*

168. Affidavit of Harold Hongju Koh, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

169. Plaintiffs offered this alternative view through an affidavit from Harold Hongju Koh, the Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton Administration. *Id.* at 5 (stating that both the executive branch and Congress have "consistently maintained that an honest and public scrutiny of Indonesia's human rights record that truthfully chronicles military and police abuses does not inappropriately intrude into Indonesian sovereignty or interfere with United States foreign policy toward Indonesia").

Similarly, *Mujica v. Occidental Petroleum Corp.* involved a raid on a village, during which cluster bombs were dropped on villagers resulting in the deaths of seventeen civilians, including children.¹⁷⁰ The Colombian government acknowledged that the bombing was unlawful and began a criminal investigation of those involved, and the U.S. government suspended economic assistance to the unit responsible for the bombing.¹⁷¹ Plaintiffs alleged that the raid was carried out by both military and civilian security agents acting on behalf of the defendants.¹⁷² The State Department letter in the case began with the reasonable suggestion that the courts of Colombia, if they could handle the case fairly, would be a preferable forum for a dispute about an atrocity that occurred in Colombia.¹⁷³ It also made the somewhat plausible assertion that the Colombian government would see parallel proceedings in the United States as “intrusive,” attaching a letter from the Colombian Ministry of Foreign Relations stating that “any decision in this case may affect the relations between Colombia and the [United States].”¹⁷⁴

From this plausible beginning, the submission advanced a series of inflated claims. According to the executive branch, the economic repercussions of this single lawsuit seeking damages for an atrocity that had been condemned by both the U.S. and Colombian governments could be so grave that the lawsuit could undermine the stability of Colombia and of the region, weaken efforts to fight terrorists and drug traffickers, increase drug trafficking to the United States, endanger U.S. citizens in Colombia, and hinder the U.S. goal of achieving energy independence.¹⁷⁵

170. *Mujica v. Occidental Petroleum Corp.*, 382 F. Supp. 2d 1164 (C.D. Cal. 2005).

171. Letter from William H. Taft, Legal Advisor, Dep't of State at 1–2, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (No. 03-2860).

172. 382 F. Supp. 2d at 1168.

173. Letter from William H. Taft, Legal Advisor, Dep't of State at 1, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (No. 03-2860). The submission does not, however, explore the extensive evidence indicating that fair proceedings are not possible in Colombia.

174. *Id.* at 2. The letter did not address the likelihood that the Colombian government had little interest in actually investigating the incident or punishing those responsible.

175. *Id.* at 2. The district court dismissed the *Mujica* complaint in a decision that is pending on appeal to the Ninth Circuit. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1168 (C.D. Cal. 2005), *appeal docketed*, No. 05-56056 (9th Cir. July 21, 2005). But in its decision, the lower court did not rely on the executive's exaggerated claims that litigation of the case could endanger U.S. national security and the security of the entire Andean region. That is, the court implicitly rejected as unreasonable the executive branch's broad claims. Instead, the court focused on the factors relevant to the political question doctrine and found one narrow conflict. The court noted that “the Executive has indicated that it wishes to pursue non-judicial methods of remedying the wrongs committed in Santo Domingo.” *Id.* at 1194 n.25. As a result, it concluded that “[f]urther

The cascading lists of catastrophic consequences in both the *Exxon Mobil* and *Mujica* letters are not just unreasonable. They are patently absurd. Given that litigants, experts, and the judges themselves have access today to a wide range of information about each of the topics mentioned in these letters, the courts may be more willing than previously to question the administration's unsupported conclusions.

The implausibility of these arguments is underscored by the fact that prior administrations did not suggest that human rights litigation in U.S. courts would pose a threat to U.S. national security. Furthermore, when the Bush administration has raised concerns about the economic impact of U.S. litigation in other areas, the tone of its submissions is measured and, therefore, more credible. In an amicus brief in a case concerning enforcement of antitrust measures, the Bush administration explained that U.S. allies viewed some civil antitrust litigation in U.S. courts as "inappropriate," leading to "tension with our trading partners."¹⁷⁶ These tensions, the amicus brief suggests, might "undermine the cooperative relationships that this Nation's antitrust agencies have forged with their foreign counterparts in recent years," leading to less effective international enforcement efforts.¹⁷⁷ The brief limits its rhetoric to the reasonable dangers to antitrust enforcement, with no allegation that tensions with our trading partners might lead to a cascading series of uncontrollable economic, political, and military harms.

C. Ill-Supported Economic Claims

The executive branch submissions argue that civil lawsuits against corporations for abuses committed in foreign countries trigger severe economic consequences that undermine U.S. government policies.

1. Deterrence of U.S. Foreign Investment

The administration's economic arguments rely on the unexplored assumption that ATS litigation will deter U.S.-based corporations from investing in countries with troubled human rights records. The argument assumes that diminished investment by U.S. business will then trigger several undesirable results: economic stagnation in the foreign country,

adjudication of this case would constitute disagreement with this prior foreign policy decision." *Id.* If the Ninth Circuit follows the approach to executive branch submissions adopted by the *Sarei* panel, 487 F.3d 1193 (9th Cir. 2007), it is likely to reverse this dismissal.

176. Brief for the United States as Amicus Curiae Supporting Petitioners at 21–22, *F. Hoffmann-La Roche Ltd., v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724).

177. *Id.* at 22.

reduced profits for U.S. companies, and replacement of U.S. corporations with investors from other countries who are both less economically efficient and more likely to abuse human rights.

Most ATS cases, however, involve the extractive industries. Corporations that are involved in extracting natural resources such as oil, gas, and minerals cannot choose where to invest.¹⁷⁸ Economic analysis of the impact of tort litigation on trade and investment often makes the mistake of assuming that corporations can freely enter and exit the relevant market, an assumption that does not apply to the extractive industries.¹⁷⁹ Corporations that have already made a significant investment in oil, gas, or mining operations in a foreign country are unlikely to abandon that investment in the face of liability suits. Nor are they likely to be replaced by corporations with lower costs: once they have begun their operations, they are likely to maintain a significant advantage over competitors that are not already heavily invested in the particular locale.¹⁸⁰

It is also possible that corporations considering investments in foreign countries will adopt policies designed to deter complicity in gross human rights violations. When the issues are as stark as genocide and torture, non-economic factors may have some influence; basic decency suggests that some percentage of corporations would prefer to avoid providing knowing, substantial support of genocide and torture.¹⁸¹ In any event, if

178. In the memorable words of Vice President Dick Cheney, "The problem is that the good Lord didn't see fit to always put oil and gas resources where there are democratic governments." *Halliburton's Cheney Sees Worldwide Opportunities, Blasts Sanctions*, PETROLEUM FINANCE WEEK (Apr. 1, 1996), quoted in Richard Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. (forthcoming 2008) (manuscript at 1, on file with Author).

179. See, e.g., Alan O. Sykes, *Transnational Tort Litigation as a Trade and Investment Issue* (Stanford Law Sch. and Economics Olin Working Paper No. 331, 2007), available at <http://ssrn.com/abstract=956668>. Sykes concludes that imposing higher tort obligations on some, but not all, multinational corporations will increase the costs of the most efficient, lowest cost firms, and that they will be replaced by less efficient, higher cost companies that have lower tort standards. *Id.* at 27. He includes ATS claims in this analysis. *Id.* at 4. Sykes' analysis, however, explicitly assumes free entry and exit into the market, *id.* at 16, despite the fact that almost all of his human rights examples concern the extractive industry. *Id.* at 29-31.

180. See *id.* at 23 n.20 (Sykes acknowledges that his conclusions may not apply if companies facing higher standards maintain their cost advantage even with the extra costs imposed by those standards.)

181. As Sykes notes, "competitors may gain little cost advantage if their own ethical principles lead them to refrain from similar behavior." *Id.* at 31. Moreover, he concludes that egregious human rights abuses "may present instances in which a welfarist perspective is simply unpersuasive, involving alleged conduct that many observers believe should be sanctioned irrespective of the economic consequences." *Id.* See also Jack L.

U.S. business executives see lucrative investment opportunities in countries governed by abusive regimes, they might first seek ways to avoid complicity in abuses, rather than forgoing profitable investments.

The executive branch assumes that the risk of human rights liability will lead U.S. corporations to divest because such liability will impose significant additional costs, putting U.S. business at a competitive disadvantage.¹⁸² But the costs of ATS litigation are relatively minor compared to the profit potential in overseas markets. In addition, with increased international focus on human rights abuses and corporate responsibility, corporations might find that rights-protective policies provide a competitive edge. A special report in the *Economist* in early 2008 reached exactly this conclusion about corporate social responsibility programs: “[D]one badly, [corporate social responsibility] is often just a figleaf and can be positively harmful. Done well, though, it is not some separate activity that companies do on the side, a corner of corporate life reserved for virtue: it is just good business.”¹⁸³

2. Undercutting U.S. Constructive Engagement

The administration also asserts that human rights lawsuits undermine the executive branch’s decision to use “constructive engagement” to promote reform. In an argument repeated in several corporate-defendant cases, the executive branch asserts that the “policy determination of whether to pursue a constructive engagement policy is precisely the type of foreign affairs question that is constitutionally vested in the Executive Branch and over which the courts lack institutional authority and ability to decide.”¹⁸⁴ This statement by itself is uncontroversial. The administration proceeds, however, to a less obvious assertion that ATS accountability undermines the policy of constructive engagement, defined as U.S. efforts “to promote active economic engagement as a method of encour-

Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1146 (2007) (complaining that “ATS suits function in effect as a discriminatory tax on U.S. corporations that operate in foreign jurisdictions,” but recognizing that “[t]his burden may seem of little moment when claims of ethnic cleansing, genocide, torture, and the like are at stake”).

182. See Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 352 (1994) (stating that litigation against U.S. corporations for abuses committed in other countries “places our companies at a world-wide competitive disadvantage”).

183. Corporate Social Responsibility: Just Good Business, THE ECONOMIST, Jan. 17, 2008, http://www.economist.com/business/displayStory.cfm?story_id=10491077.

184. Brief of the United States as Amicus Curiae at 14, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326).

aging reform and gaining leverage.”¹⁸⁵ As explained at length in a forthcoming article, the administration does not support its far-from-obvious conclusion that litigation undermines constructive engagement.¹⁸⁶ To the contrary, litigation might well complement a constructive engagement approach. Constructive engagement is based on the assumption that U.S.-based corporate investors will promote human rights and democracy.¹⁸⁷ A corporation that is complicit in genocide, summary execution, or torture offers nothing to the pursuit of constructive engagement, because its “engagement” is not “constructive.”

The executive submissions assert that holding corporations accountable for human rights abuses will discourage companies committed to protecting human rights from investing in abusive regimes,¹⁸⁸ but it makes no effort to explain why this is true. Rather, such accountability levels the playing field for those who are truly committed to constructive engagement.

D. A Perceived Bias Toward Corporate Interests

Finally, the Bush administration was from the start viewed as closely allied with corporate interests. As a result, the courts may well have considered the (questionable) submissions in corporate-defendant cases with extra suspicion. The tone of those submissions only fuels the concern that they are an effort to protect the interests of the administration’s corporate allies, rather than a reflection of well-reasoned foreign policy concerns.

* * * *

In summary, the views that the Bush administration has offered in corporate-defendant human rights cases were not reasonable because their conclusions were not well-connected to the established doctrines, were not well-founded, and failed to provide supporting evidence. The result was not surprising: the courts refused to defer to their unreasonable concerns.

185. *Id.* See also Brief for the United States as Amicus Curiae at 9, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

186. Herz, *supra* note 178 (manuscript at 3, on file with Author).

187. “Engagement theory assumes that companies will, through example and interaction, convey democratic values.” *Id.* at 1 (article abstract).

188. See *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 297 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part).

CONCLUSION

U.S. judges are keenly aware of their constitutional obligation to respect the foreign affairs powers of the executive branch. They are equally concerned with their constitutional obligation to exercise independent judgment when determining whether they should dismiss cases that are otherwise properly before them because of foreign affairs concerns raised by the executive branch. In a remarkable break from recent history, the courts have rejected a significant number of Bush administration suggestions that corporate-defendant ATS cases endanger U.S. foreign policy. A close look at those cases makes clear that the shift is not the result of a change in the way the courts have exercised their authority, but rather a judicious recognition that the Bush administration views are unreasonable, and therefore undeserving of deference.

APPENDIX A

OVERVIEW OF ALIEN TORT STATUTE CASES, 1789–PRESENT

Before the Second Circuit's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), twenty-one reported cases alleged jurisdiction under the Alien Tort Statute ("ATS"), with only two upholding the claims.¹⁸⁹ Since *Filártiga*, approximately 185 cases have been litigated under the Alien Tort Statute ("ATS") or the closely related Torture Victim Protection Act ("TVPA"). A large majority of the post-*Filártiga* cases—about 123—have been finally dismissed, most often because of the immunity of the defendants or the failure to state an actionable violation of international law. Another nineteen have been dismissed but are currently on appeal. Approximately twenty-four have resulted in settlements or judgments for the plaintiffs and nineteen are currently pending.

These numbers are not exact because some cases may not appear on public databases and many cases assert claims on multiple grounds. The totals are also misleading in that they include all identifiable cases *asserting* an ATS claim, including many in which the claim is clearly unfounded. Several cases, for example, were filed under the ATS on behalf of a U.S. citizen, despite the statute's explicit limitation to claims by aliens. Others assert violations of domestic law that clearly do not satisfy the statute's requirement of a tort "committed in violation of the law of nations."

These totals do not include cases filed under the Foreign Sovereign Immunities Act of 1976 exception for claims against "state sponsors of terrorism,"¹⁹⁰ or the Anti-Terrorism and Effective Death Penalty Act of 1996,¹⁹¹ although such cases often include ATS or TVPA claims. The tally also does not include cases arising out of injuries inflicted during World War II because they raise distinct issues.¹⁹²

189. For a list of the pre-*Filártiga* cases, see Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4–5 nn.15–17 (1985).

190. 28 U.S.C. § 1605A (2008) (formerly codified at 28 U.S.C. § 1605(a)(7)).

191. 18 U.S.C. §§ 2331–2339C (2008).

192. World War II cases arise out of wartime acts committed over sixty years ago; moreover, the U.S. government entered into peace agreements that are often interpreted as governing claims for compensation. As a result, issues concerning the statute of limitations, standing to sue, act of state, and political question are often quite different from those arising from more recent events. See generally STEPHENS, *supra* note 18, at 543–50 (discussing issues that arise in human rights litigation based upon historical injustices).

Pre-*Filártiga* (1789–1980): 21 Cases

From 1789, when the ATS was enacted, until the *Filártiga* decision in 1980, twenty-one cases asserted jurisdiction under the ATS, resulting in two judgments for plaintiffs.

From *Filártiga* to *Sosa* (1980–2004): 81 Cases

From 1980 to 2004, approximately eighty-one cases asserted jurisdiction under the ATS or the TVPA, resulting in one settlement, eleven judgments for plaintiffs, and sixty-nine dismissals.

Post-*Sosa* (2004–2008): 104 Cases

From the time of the 2004 *Sosa* decision until January 2008, the federal courts issued decisions in approximately 104 cases asserting jurisdiction under the ATS or the TVPA, with the following results:

Settlement	4	
Judgment For Plaintiff	8	
Dismissed	73	
Final	54	
On Appeal	19	
Pending in a District Court	19	
Survived Preliminary Motions	12	
No Decision Yet	7	

Post-*Sosa* Cases by Defendants

Approximately one third of the post-*Sosa* cases involve claims against the U.S. government, U.S. or local government officials, and/or U.S. government contractors. All of the ATS and TVPA cases against the U.S. government or its employees have been dismissed, although one pending case against a government contractor did survive a preliminary motion to dismiss.¹⁹³

193. *Ibrahim v. Titan Corp.*, Nos. 04-1248, 05-1165, 2007 WL 3274784 (D.D.C. Nov. 6, 2007) (claim for mistreatment of prisoners held by the U.S. military). The decision addresses consolidated suits against two contractors—Titan Corporation and CACI Premier Technologies. *Id.* at 1. The district court dismissed the claim against Titan Corporation, which provided interpreters to the U.S. military, but denied the motion to dismiss the claims against CACI, which provided interrogators to the U.S. military. *Id.* at 1, 9. The court had earlier dismissed the international law claims against both defendants,

Approximately one third of the post-*Sosa* cases involve corporate defendants. Of the remaining post-*Sosa* cases, those against foreign governments have been dismissed on the basis of foreign sovereign immunity. Many cases have been dismissed for failure to allege an actionable violation of international law.

Only about ten percent of the post-*Sosa* cases—about a dozen—fall into the mold of the *Filártiga* case, in which an individual sues an individual defendant who is present in the United States alleging a human rights violation that occurred outside of the United States. All but one of the cases resulting in final judgments for plaintiffs were from this individual-defendant category.¹⁹⁴

permitting only state law tort claims to proceed. *Id.* In a handful of the cases included in these numbers, the courts have similarly dismissed the federal law claims but permitted the cases to proceed as diversity actions seeking state tort remedies. *See, e.g., Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28–29 (D.D.C. 2005).

194. The exception is *Jama v. Esmor Corr. Serv.* (No. 97-03093), 2008 WL 724337 (D.N.J. Dec. 7, 2007), in which a jury returned a verdict for the plaintiff. *Id.* at 1. Several additional plaintiffs settled shortly before trial. *Id.*

APPENDIX B
CORPORATE DEFENDANT HUMAN RIGHTS CASES

In 1997, *Doe v. Unocal Corp.* found that a corporation could be held liable under the ATS for certain claims, including those that do not require state action (e.g., genocide, slavery, and war crimes) and those in which the corporate defendant is complicit in violations committed by state actors.¹⁹⁵ All twenty-four corporate-defendant ATS cases decided prior to *Unocal* were dismissed. Post-*Unocal*, approximately fifty-two international human rights cases involving corporate defendants have been litigated (not including cases addressing abuses committed during World War II, which raise unique issues). Of the fifty-two, thirty-three have been dismissed (appeals of nine of the dismissals are still pending), fifteen are still pending in a federal trial court, three have settled, and in one, a jury returned a verdict for the plaintiff. Of the fifteen pending cases, nine have survived preliminary motions to dismiss, although in three of those, all of the international law claims have been dismissed (state law claims are still pending). One dismissal has been reversed and remanded to the district court. The remaining five cases were filed recently and await rulings on preliminary motions.

The table below provides data on the principle dispositions of ATS human rights cases with corporate defendants. A list of all of the cases, with citations, follows the table.

Note that cases with numerous defendants are included if one of the defendants is a corporation. Cases arising out of related events are counted as a single case, including, for instance, multiple cases arising out of the attacks of September 11, 2001, and multiple cases seeking damages from firms based on their involvement with the Apartheid regime in South Africa. The nine cases against corporations stemming from World War II are treated as a separate category because the issues they raise are so distinct. Keep in mind that any count is tentative, given that it may omit claims that are filed and dismissed without appearing on public databases. Many of the dismissed cases on this list failed because they were filed with no arguable international human rights violation.¹⁹⁶

195. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

196. *See, e.g., Ganguly v. Charles Schwab & Co., Inc.*, 2004 WL 213016, at *6-7 (S.D.N.Y. Feb. 4, 2004), *aff'd*, 142 Fed. Appx. 498 (2d Cir. 2004) (foreign investor seeking to hold brokerage firm liable for losses failed to allege any violation of international law).

Total Corporate Defendant Cases 1960 to Present (85)			
Pre-<i>Unocal</i> (pre-1996) (24)			
Pre- <i>Filártiga</i> (pre-1980)	Dismissed	12	
Post- <i>Filártiga</i> and Pre- <i>Unocal</i> (1980–1996)	Dismissed	12	
Post-<i>Unocal</i> (post-1996) (61)			
World War II Claims			9
Non-World War II Claims			52
	Verdict for Plaintiff	1	
	Settled	3	
	Dismissed Total	33	
	On Appeal	9	
	Final	24	
	Pending		15
	Survived Preliminary Motion	6	
	Federal Action Dismissed, State Law Claim Pending	3	
	Dismissal Reversed and Remanded	1	
	Decision Pending	5	

The following lists provide citations for each of the cases tabulated above. For cases with multiple decisions, citations are to the decision dismissing the case, the latest significant decision, or the latest decision from an appellate court. Cases are listed in chronological order within each category, starting with the earliest decisions.

Pre-*Filártiga* (1960–1979)—All Dismissed (12)

Khedivial Line v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960)

Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963)

Upper Lakes Shipping Ltd. v. Int'l Longshoremen's Assn., 293 F. Supp. 207 (S.D.N.Y. 1963)
 Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir. 1964)
 Damaskinos v. Societa Navigacion InterAm., 255 F. Supp. 919 (S.D.N.Y. 1966)
 Valanga v. Metro. Life Ins. Co., 259 F. Supp. 324 (E.D. Pa. 1966)
 Abiodun v. Martin Oil Serv. Inc., 475 F.2d 142 (7th Cir. 1973)
 IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975)
 Papageorgiou v. Lloyds of London, 436 F. Supp. 701 (E.D. Pa. 1977)
 Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978)
 Akbar v. New York Magazine Co., 490 F. Supp. 60 (D.D.C.1980)
 Soultanoglou v. Liberty Trans. Co., No. 75-2259, 1980 U.S. Dist. LEXIS 9177 (S.D.N.Y.)

Filártiga to Unocal (1980–1996)—All Dismissed (12)

Canadian Transport Co. v. United States, 663 F.2d 1081 (D.C. Cir. 1980)
 Trans-Continental Inv. Corp. v. Bank of Commonwealth, 500 F. Supp. 565 (C.D. Cal.1980)
 B.T. Shanker Hedge v. British Airways, No. 82-1410, 1982 U.S. Dist. LEXIS 16469 (N.D. Ill.)
 De Wit v. KLM Royal Dutch Airlines, 570 F. Supp. 613 (S.D.N.Y. 1983)
 Canadian Overseas Ores Ltd. v. Compania de Acero, 727 F.2d 274 (2d Cir. 1984)
 Munusamy v. McClelland Eng'r, Inc., 579 F. Supp. 149 (E.D. Tex. 1984)
 Tamari v. Bache & Co., 730 F.2d 1103 (7th Cir. 1984)
 Jaffe v. Boyles, 616 F. Supp. 1371 (W.D.N.Y. 1985)
 Carmichael v. United Tech. Corp., 835 F.2d 109 (5th Cir. 1988)
 Jones v. Petty-Ray Geophysical Geosource, Inc., 722 F. Supp. 343 (S.D. Tex. 1989)
 Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991)
 Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995)

Post-Unocal Cases (Post-1996)

World War II Cases (9)

Burger-Fischer v. DeGussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999)
 Friedman v. Bayer Corp., No. 99-3675, 1999 WL 33457825 (E.D.N.Y. Dec. 15, 1999)
 Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999)
 Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000)
 Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004)

Abrams v. Société Nationale des Chemins de Fer, 389 F.3d 61 (2d Cir. 2004)
Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005)
Arndt v. UBS AG, 342 F. Supp. 2d 132 (E.D.N.Y. 2005)
Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003) (consolidated with
In Re WWII Era Japanese Forced Labor, 114 F. Supp. 2d 939 (N.D. Cal. 2000))

Non-World War II Cases Organized By Status (52)

Jury Verdict for One Plaintiff/Other Plaintiffs Settled (1)

Jama v. Esmor Corr. Serv., Civ. No. 97-03093, 2008 WL 724337 (D.N.J. Dec. 7, 2007)

Settled (3)

Does v. The Gap, Inc., No. 01-0031, 2003 WL 22997250 (D. N.Mar. I. Sept. 11, 2003)
Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005)
Xiaoning v. Yahoo! Inc., Civ. No. 07-02151 (N.D. Cal. Nov. 9, 2007)

Pending in District Court, International Claims Survived Preliminary Motions (6)

Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000)
In Re Terrorist Attacks on Sept. 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005)
Bowoto v. Chevron Corp., No. 99-02506, 2007 WL 2349341 (N.D. Cal. Aug. 14, 2007)
Arias v. Dyncorp, 517 F. Supp. 2d 221 (D.D.C. 2007)
Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007)
Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007)

Pending in District Court, International Claims Dismissed but State Claims Pending (3)

Bigio v. Coca-Cola Co., 448 F.3d 176 (2d Cir. 2006)
Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3050 (U.S. July 20, 2007) (No. 07-81)
Ibrahim v. Titan Corp. & CACI, Nos. 04-1248, 05-1165, 2007 WL 3274784 (D.D.C. Nov. 6, 2007)

Pending in District Court (Dismissal Reversed on Appeal) (1)

Khulumani v. Barclay Nat. Bank Ltd. (*In re* So. Afr. Apartheid Litig.), 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919)

Pending in District Court, No Decision Yet (5)

Doe v. Nestle, Civ. No. 05-5133 (C.D. Cal., filed July 14, 2005)
Shiguago et al. v. Occidental Petroleum Co., No. 06-4982 (C.D. Cal., filed Aug. 10, 2006)
Carrizosa v. Chiquita Brands Intern., Inc., No. 07-60821, 2007 WL 3458987 (S.D. Fla. Nov. 14, 2007)
In re: Chiquita Brands Int'l, Inc., 536 F. Supp. 2d 1371, (MDL 2008).
Mohamed v. Jeppesen Dataplan Inc., No. 07-2798 (N.D. Cal. filed May 30, 2007).
Estate of Atban v. Blackwater USA, No. 07-01831 (D.D.C. filed Oct. 11, 2007)

Dismissed, on Appeal (8)

Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005)
Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005)
Turedi v. Coca-Cola Co., 460 F. Supp. 2d 507 (S.D.N.Y. 2006)
In re Sinaltrainal Litig., 474 F. Supp. 2d 1273 (S.D. Fla. 2006)
Doe v. Walmart Stores, Inc., Civ. No. 05-7307 (C.D. Cal. April 2, 2007)
Bauman v. Daimlerchrysler AG, No. 04-00194, 2007 WL 486389 (N.D. Cal. Feb. 12, 2007)
Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) (rehearing en banc pending)
Aldana v. Del Monte Fresh Produce, N.A., Inc., No. 01-3399, 2007 WL 3054986 (S.D. Fla. Oct. 16, 2007)

Lost After Jury Trial, on Appeal (1)

Estate of Rodriguez v. Drummond Co., No. 7:02-00665 (N.D. Ala. July 26, 2007)

Dismissed, Final (24)

In Re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd on other grounds*, Vietnam Ass'n for Victims of Agent Orange v. Dow, 517 F.3d 104 (2d Cir. 2008)

- Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (see also *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002))
- Belgrade v. Sidex Int. Furniture Corp. 2 F. Supp. 2d 407 (S.D.N.Y. 1998)
- Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999)
- Wong-Opasi v. Tenn. State Univ., 229 F.3d 1155 (Table) (6th Cir. 2000)
- Empagran S.A. v. F. Hoffman-La Roche, Ltd., No. 00-1686, 2001 WL 761360 (D.D.C. June 7, 2001)
- Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620 (S.D.N.Y. 2001)
- Mendonca v. Tidewater, Inc., 159 F. Supp. 2d 299 (E.D. La. 2001)
- Robert v. Bell Helicopter Textron, Inc., No. 01-1576, 2002 WL 1268030 (N.D. Tex. May 31, 2002)
- Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003)
- United Bank for Africa PLC v. Coker, No. 94-0655, 2003 WL 22741575 (S.D.N.Y. Nov. 18, 2003)
- Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192 (D.C. Cir. 2004)
- Hereros v. Deutsche Afrika-Linien Gmbh & Co., 232 Fed. Appx. 90 (3d Cir. 2007)
- Maugein v. Newmont Mining Corp., 298 F. Supp. 2d 1124 (D.Colo. 2004)
- Ganguly v. Charles Schwab & Co., Inc., No. 04-1742, 2005 WL 1772659 (2d Cir. July 25, 2005)
- Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495 (S.D.N.Y. 2005)
- Abdullahi v. Pfizer, Inc., No. 01-8118, 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2005)
- Brooks-McCollum *ex rel.* Emerald Ridge Serv. Corp. v. Emerald Ridge Serv. Corp. Bd. of Dir., 166 Fed. Appx. 618 (3d Cir. 2006)
- Frazer v. Chicago Bridge and Iron, 2006 WL 801208 (S.D. Tex. Mar. 27, 2006)
- Bano v. Union Carbide Corp., 198 Fed. Appx. 32 (2d Cir. 2006)
- Stutts v. De Dietrich Group, No. 03-4058, 2006 WL 1867060 (E.D.N.Y. June 30, 2006)
- Keating-Traynor v. Westside Crisis Ctr., No. 05-04475, 2006 WL 1699561 (N.D. Cal. June 16, 2007)
- Torrez v. Corr. Corp. of Am., No. 07-1551, 2007 WL 3046153 (D. Ariz. Oct. 16, 2007)
- Chen v. China Ctr. Television, No. 06-414, 2007 WL 2298360 (S.D.N.Y. Aug. 9, 2007)
- El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007)
- Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007)

APPENDIX C

EXECUTIVE BRANCH SUBMISSIONS IN CORPORATE DEFENDANT CASES

This Appendix features non–World War II corporate-defendant ATS cases in which the U.S. government has submitted a letter, statement of interest, declaration, or amicus brief. The following provides a list of cases with citations and summaries.

1. *Arias v. DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007)

Plaintiffs sued DynCorp for physical harm and property damage caused when pesticides sprayed in Colombia, pursuant to a contract with the U.S. government to eradicate cocaine and heroine farms in Colombia, drifted across the border into Ecuador. The court dismissed the claim for torture but denied the motions to dismiss and for summary judgment on the additional international law claims.¹⁹⁷

The administration submitted a declaration from the Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs that stated that the litigation posed a national security risk: “United States counter-narcotics policy in Columbia and the Andean Region is a product of a complicated U.S. national security and foreign policy objectives that cannot be addressed in any private litigation.”¹⁹⁸ A strongly worded, detailed, eleven-page declaration asserted that the litigation “poses grave risks to U.S. national security interests, foreign policy objectives and diplomatic relations in the Andean Region.”¹⁹⁹ The declaration stated that:

The *Arias* plaintiffs challenge an aerial drug eradication program that has been repeatedly authorized by the executive and legislative branches after extensive deliberation as a key element in U.S. counter-narcotics strategy. Any disruption of this program would cripple United States efforts to stem the flow of narcotics into this country, provide a financial boon to international terrorist organizations that have targeted U.S. interests, and significantly undermine the prospects of strong and stable relations between the United States and Colombia and other Andean nations. The stakes are high.²⁰⁰

197. *Arias v. DynCorp*, 517 F. Supp. at 230–31.

198. Declaration of Rand Beers, Assistant Secretary of State for the Bureau of Int’l Narcotics and Law Enforcement Affairs Regarding Potential Impact of *Arias* Litigation on the United States Nat’l Sec. and Foreign Policy Interests at 1–2, *Arias v. DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1980).

199. *Id.* at 10.

200. *Id.* at 10–11.

The court refused to dismiss the case, holding that the claim did not challenge the executive branch foreign policies or the implementation of those policies, because “the intended means of executing the policy in this case did not include the acts challenged here, which plaintiffs allege were specifically prohibited by the plan.”²⁰¹

2. *Bowoto v. Chevron*, Civ. No. 03-417580 (Cal. Super. Ct. filed Feb. 20, 2003)

Nigerian plaintiffs filed both federal and state lawsuits seeking injunctive relief and damages for a series of military attacks on civilians in Nigeria, claiming that the defendant was liable for injuries inflicted by the government security forces. In the state court action, the judge requested the views of the State Department. But the federal court declined the defendant’s request that it seek the views of the executive branch.²⁰²

The administration filed a Statement of Interest²⁰³ in the state case limited to one issue, stating that the court should not issue an injunction ordering the defendant to comply with the Voluntary Principles on Security and Human Rights because such an order “could have a chilling effect on the continued participation of corporate entities in this effort and, thus, would interfere with an important foreign policy initiative of the Federal Government.”²⁰⁴

The state court has not yet ruled on the issue raised by the submission.

3. *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007)

The family of a peace activist who was run over and killed by a military bulldozer in the Gaza Strip and a number of Palestinians who lived in the Gaza Strip and West Bank brought this action against the manufacturer of bulldozers used by Israeli Defense Forces to destroy homes of Palestinians. The district court granted a motion to dismiss, which was upheld by the Ninth Circuit on political question grounds.²⁰⁵

201. *Arias*, 517 F. Supp. 2d at 225.

202. Letter of John B. Bellinger, Legal Advisor, Dep’t of State, attached to Statement of Interest of the United States at 1, *Bowoto v. Chevron Corp.*, No. 03-417580 (Super. Ct. Cal. May 29, 2007); *Bowoto v. Chevron Texaco Corp.*, No. 99 Civ. 2506, at 3–5 (N.D. Cal. July 30, 2004) (Order Denying Motion for Court to Request Views).

203. Statement of Interest of the United States, *Bowoto v. Chevron Corp.*, No. 03-417580 (Super. Ct. Cal. May 29, 2007).

204. *Id.* at 2.

205. *Corrie v. Caterpillar*, 503 F.3d 974, 997 (9th Cir. 2007).

The executive branch filed an amicus curiae brief in the appeal,²⁰⁶ arguing against extraterritorial application of the ATS and against recognition of ATS aiding and abetting liability, and asserting that the claims in this case would interfere with executive branch foreign policies. The executive branch urged the courts to be “very hesitant” to recognize ATS claims by foreign citizens for abuses committed outside the United States.²⁰⁷ It stated that:

The adoption of an aiding-and-abetting rule . . . would in numerous . . . circumstances . . . implicate and limit the United States’ foreign policy prerogatives. One important policy option for dealing with a foreign country is to promote active economic engagement in that country as a method of encouraging reform and gaining leverage with that country. The determination whether to pursue such a policy is the type of foreign affairs question constitutionally vested in the Executive Branch. . . . Judicial imposition of aiding-and-abetting liability under Section 1350 would undermine the Executive’s ability to employ economic engagement as an effective tool for foreign policy.²⁰⁸

Aiding and abetting liability, the executive branch argued, would “spur more lawsuits, resulting in greater diplomatic friction,” and “[s]erious diplomatic friction can lead to a lack of cooperation with the United States Government on important foreign policy objectives.”²⁰⁹

It also warned that “[p]ermitting this type of suit to proceed would directly challenge the national security determination of the political branches to fund” sales of defense articles to select countries and “necessarily implicate the foreign policy” decision to provide funding to Israel for these sales.²¹⁰

The Ninth Circuit dismissed on the basis of the political question doctrine, but did not reach the other issues raised by the executive branch.

4. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3050 (Jul 20, 2007) (No. 07-81)

Indonesian villagers brought suit against Exxon for injuries caused by a company security force comprised of members of the Indonesian military.

206. Brief of the United States as Amicus Curiae in support of Affirmance, *Corrie v. Caterpillar*, No. 05–036210 (9th Cir. Aug. 11, 2006).

207. *Id.* at 5.

208. *Id.* at 16–17 (citations omitted).

209. *Id.* at 18.

210. *Id.* at 27.

The State Department filed a letter²¹¹ with the court stating that Indonesia would perceive the lawsuit as “interference” in its internal affairs, and it would therefore decrease cooperation with the United States on a range of issues, including counter-terrorism initiatives.²¹² The letter suggested that the case would lead to decreased foreign investment in Indonesia, which could undermine the stability of the Indonesian government, and that an unstable Indonesia “could create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists.”²¹³ Specifically, the State Department predicted that if U.S. corporations pulled out in response to litigation, business competitors from other nations might take their place,²¹⁴ and that adjudication of the case could undermine Indonesia’s economic and political stability and the security of the entire region, thereby “risk[ing] a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.”²¹⁵ However, the letter acknowledged that these views were speculative, based on problems that might develop during the course of the lawsuit: “Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation,” including the “intrusiveness of discovery” and the extent to which the case required “judicial pronouncements on the official actions of the [Government of Indonesia] with respect to the conduct of its military activities in Aceh.”²¹⁶

The district court dismissed the federal law claims, but refused to dismiss the state common law tort claims, although it imposed limits on discovery designed to avoid intrusion into Indonesian sovereignty.²¹⁷ Defendants sought a writ of mandamus from the D.C. Circuit; the circuit denied the request.²¹⁸ The court stated:

We disagree with Exxon’s contention that there is a conflict between the views of the State Department and those of the district court. . . . [T]he State Department [letter] noted that adjudication of the plaintiffs’ claims would “risk a potentially serious adverse impact on significant interests of the United States.” However, the letter also con-

211. Letter from William H. Taft, Legal Advisor, Dep’t of State, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

212. *Id.* at 2–3.

213. *Id.* at 3–4.

214. *Id.* at 3.

215. *Id.* at 1.

216. *Id.* at 2 n.1.

217. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 29–30 (D.D.C. 2005).

218. 473 F.3d 345, 354 (D.D.C. 2007).

tained several important qualifications. It noted that the effects of this suit on U.S. foreign policy interests “cannot be determined with certainty.” Moreover, the letter stated that its assessment of the litigation was “necessarily predictive and contingent on how the case might unfold in the course of litigation.” Most importantly, the State Department emphasized that whether this case would adversely affect U.S. foreign policy depends upon “the nature, extent, and intrusiveness of discovery.” We interpret the State Department’s letter not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department’s concerns. . . . Thus, we need not decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question.²¹⁹

Judge Kavanaugh, who served as a legal advisor to President Bush before being appointed to the D.C. Circuit, dissented.

5. *Doe v. Unocal*, 403 F.3d 708 (9th Cir. 2005)

Burmese citizens sued seeking damages for human rights violations committed by the Burmese military in furtherance of a joint natural gas pipeline project. A panel of the Ninth Circuit reversed the district court’s dismissal of the claims, holding that plaintiffs had sufficient evidence that the defendant bore legal responsibility for its involvement in the abuses.²²⁰ The Ninth Circuit then agreed to a hearing en banc, but the parties settled and the case was dismissed.²²¹

The U.S. government filed amicus briefs in May 2003 and August 2004,²²² arguing that ATS claims involved the judiciary in “matters that by their nature should be left to the political [b]ranches”²²³ because foreign affairs “are of a kind for which the Judiciary has neither the apti-

219. *Id.* at 354. Judge Kavanaugh rejected the majority’s reading of the State Department’s views as ambiguous, stating that “the State Department unambiguously stated to the District Court that, for multiple reasons, ‘adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.’” *Id.* at 363 (Kavanaugh, J., dissenting).

220. *Doe v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002). For the full procedural history of the case, see *supra* note 32.

221. *Unocal*, 395 F.3d 978 (9th Cir. 2003); *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (post-settlement order granting the parties’ stipulated motion to dismiss and vacating the district court decision on the motion for summary judgment).

222. Brief for the United States, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); Supplemental Brief for the United States as Amicus Curiae, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

223. Brief for the United States as Amicus Curiae at 4, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

tude, facilities nor responsibility.”²²⁴ The government made the following statements in support of their position:

Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation’s foreign affairs. In the view of the United States, the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.²²⁵

....

[T]he types of claims being asserted today under the ATS are fraught with foreign policy implications . . . [which have] serious implications for our current war against terrorism, and permit[] ATS claims to be asserted against our allies in that war²²⁶ . . . [and against] the United States itself in connection with its efforts to combat terrorism.²²⁷

....

[T]he ATS thus places the courts in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement.²²⁸

The Supplemental Brief makes the additional argument that embracing “aiding and abetting” liability for ATS claims creates economic uncertainty that could hamper the government’s ability to “promote active economic engagement as a method of encouraging reform and gaining leverage,” deterring businesses from investments because of uncertainty concerning private liability and protracted litigation.²²⁹ The Supplemental Brief also argued that there would be negative consequences for the executive branch’s ability to advance its diplomatic agenda.²³⁰

Adopting aiding and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices. The selection of the appropriate tools, and the proper balance between rewards and sanctions,

224. *Id.* at 21.

225. *Id.* at 3–4.

226. *Id.* at 22.

227. *Id.* at 22.

228. *Id.* at 23.

229. Supplemental Brief for the United States as Amicus Curiae at 11, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

230. *Id.*

requires policymaking judgment properly left to the federal political branches.²³¹

In addition, the government argued that ATS suits against corporate defendants based on aiding and abetting liability “would inevitably lead to greater diplomatic friction” and “trigger foreign government protests,”²³² and that “[t]his can and already has led to a lack of cooperation on important foreign policy objectives.”²³³

Finally, ATS aiding and abetting liability can deter “the free flow of trade and investment” in other countries and in the United States.²³⁴

The Ninth Circuit sitting en banc did not resolve these issues because the parties settled the cases.

6. *In Re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd on other grounds*, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008)

Vietnamese citizens who were harmed by Agent Orange and similar herbicides manufactured by the defendants and used by the U.S. military during the Vietnam War sued for damages, alleging that the use of the toxic chemical constituted a war crime.

The extensive Statement of Interest filed in the district court argued that adjudication of the claims would intrude on the president’s constitutional power to conduct war, the use of Agent Orange did not violate international law norms at the time, and the defendants were protected by the government contractor defense.²³⁵ The submission also argued that the courts should defer to the executive branch’s determination that the acts at issue did not violate international law.²³⁶ These arguments were repeated in an amicus brief on appeal to the Second Circuit.²³⁷

The district court rejected the argument that the claim was nonjusticiable, but agreed that the use of Agent Orange in the 1960s did not violate a clearly established international law norm.²³⁸ The Second Circuit affirmed the dismissal, agreeing that the plaintiffs had not established a

231. *Id.* at 14–15.

232. *Id.* at 15–16.

233. *Id.* at 16.

234. *Id.*

235. Statement of Interest of the United States, *In re Agent Orange Prod. Liab. Litig.*, MDL 381, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (No. 04-400).

236. *In Re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7, 43–44 (E.D.N.Y. 2005).

237. Brief of the United States as Amicus Curiae at 16–22, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008) (No. 05-1953).

238. *In re Agent Orange*, 373 F. Supp. 2d at 105.

violation of the law at the relevant time; the appellate court did not reach other issues decided by the district court, including justiciability under the political question doctrine.

7. *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919)

South Africans brought three lawsuits against dozens of corporations for damages stemming from the defendants' operations in South Africa during the Apartheid regime.

The executive branch filed a letter in the district court²³⁹ accompanied by a declaration from the South African government that asserted that adjudication of these cases would interfere with South Africa's chosen means to respond to past wrongs and would discourage needed investment.²⁴⁰ The executive branch statement concurred in this assessment, asserting that the lawsuit would cause tension between the United States and South Africa and hamper the policy of encouraging positive change in developing countries through economic investment.²⁴¹

The district court declined to reach the political question issues, dismissing the case instead because it found that aiding and abetting liability was not actionable under the ATS.²⁴² On appeal, the administration submitted a brief urging that the Second Circuit affirm the lower court's rejection of aiding and abetting liability as well as urging caution in recognizing extraterritorial claims under the ATS.²⁴³ The brief argued that recognizing "aiding and abetting" liability would interfere with the executive branch's ability to employ policy options in repressive regimes, such as "active economic engagement as a method of encouraging re-

239. Letter of William H. Taft IV, Legal Adviser, Dep't of State, *In re* South African Apartheid Litigation, MDL No. 1499 (Oct. 30, 2003), *cited in* *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919) (Korman, J., concurring in part and dissenting in part).

240. 504 F.3d at 300.

241. *Id.* at 297.

242. *In re* S. Afr. Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *rev'd*, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.* *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

243. Brief of the United States as Amicus Curiae at 2, 27, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326).

form and gaining leverage,”²⁴⁴ which would constitute an unconstitutional interference in the powers of the executive branch:

The policy determination whether to pursue constructive engagement policy is precisely the type of foreign affairs question that is constitutionally vested in the Executive Branch and over which the courts lack institutional authority and ability to decide The selection of the appropriate tools, and the proper balance between rewards and sanctions, requires difficult policymaking judgments that can be rendered only by the political branches.²⁴⁵

The Second Circuit reversed, holding that aiding and abetting liability does trigger ATS jurisdiction, and remanded with instructions to permit plaintiffs to file an amended complaint. Given the likelihood of an amended complaint, the circuit refused to reach the political question issues. The Supreme Court affirmed the decisions for lack of a quorum, after four of the justices recused themselves.²⁴⁶

8. *Mujica v. Occidental*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (appeal pending)

Colombian citizens brought an action against an oil company and private security firm to recover for their personal injuries and for the deaths of family members during a bombing of the village by the Colombian military.

The State Department submitted a letter²⁴⁷ asserting that the litigation “will have an adverse impact on the foreign policy interests of the United States,” given that the legal proceedings against the Colombian government involving the underlying incidents were then-pending in the Colombian legal system.²⁴⁸ The letter warned that “[d]uplicative proceedings in U.S. courts second-guessing [Colombia’s actions] may be seen as unwarranted and intrusive” by the Colombian government, and may have “negative consequences” for U.S. relations with Colombia.²⁴⁹ In addition, lawsuits such as this one could deter U.S. investment in Colombia, which

244. *Id.* at 13.

245. *Id.* at 14, 16–17.

246. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff’d due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

247. Letter from William H. Taft, Legal Advisor, Dep’t of State, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (No. 03-2860).

248. *Id.* at 1.

249. *Id.* at 2.

could harm Colombia's economy as well as negatively impact U.S. interests in Colombia and the region.²⁵⁰

[S]uch downturns could damage the stability of Colombia, the Colombian government's U.S.-supported campaigns against terrorists and narcotics traffickers, regional security, our efforts to reduce the amount of drugs that reach the streets of the United States, promotion of the rule of law and human rights in Colombia, and protection of U.S. persons, government facilities, and investments. Finally, reduced U.S. investment in Colombia's oil industry may detract from the vital U.S. policy goal of expanding and diversifying our sources of imported oil.²⁵¹

The State Department letter attached a letter from the Colombian government stating that the case could affect relations between Colombia and the United States.²⁵²

The district court dismissed based on the political question doctrine, holding that permitting the case to go forward would express lack of respect for the executive branch's preferred approach to the underlying incident and relations with Colombia in general, and would contradict the executive branch's foreign policy decision to handle this matter through non-judicial means.²⁵³ That decision is currently on appeal.

9. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (granting motion for summary judgment) (appeal pending)

Residents of southern Sudan sued a Canadian corporation seeking compensation for genocide, crimes against humanity, and other violations of international law.

The State Department sent a Statement of Interest to the court with a diplomatic letter from the Canadian government attached that stated that the litigation infringed on the foreign relations of Canada and would have a "chilling effect" on Canadian firms engaged in Sudan.²⁵⁴ The U.S. Statement of Interest stated that it shared the Canadian government's concerns and urged the court to take a narrow view of the ATS in order

250. *Id.*

251. *Id.*

252. *Id.*

253. *Mujica v. Occidental*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005) (appeal pending).

254. Statement of Interest of the United States with attached Letter from Government of Canada at 4, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (No. 01-9882).

to avoid such conflicts.²⁵⁵ The letter also expressed the department's concerns about the dangers of taking an expansive interpretation of ATS jurisdiction and attached a copy of the Justice Department's brief in *Doe v. Unocal Corp.*²⁵⁶

The district court rejected the views of both the U.S. and Canadian governments, finding the Canadian government's expressed concerns unpersuasive because there was no showing that the pending litigation would interfere with Canada's foreign policy. The court opined that:

While this Court may not question either the accuracy of the description of Canada's foreign policy in its Letter, or the wisdom and effectiveness of that foreign policy, it remains appropriate to consider the degree to which that articulated foreign policy applies to this litigation. . . . This lawsuit does not concern a Canadian company exporting to and engaged in trade with the Sudan, but a Canadian company operating in the Sudan as an oil exploration and extraction business. Moreover, the allegations in this lawsuit concern participation in genocide and crimes against humanity, not trading activity. While there is no requirement that a government's letter must support its position with detailed argument, where the contents of the letter suggest a lack of understanding about the nature of the claims in the ATS litigation, a court may take that into account in assessing the concerns expressed in the letter.

. . .

. . . [W]hile a court may decline to hear a lawsuit that may interfere with a State's foreign policy, particularly when that foreign policy is designed to promote peace and reduce suffering, dismissal is only warranted as a matter of international comity where the nexus between the lawsuit and that foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public's interest in vindicating the values advanced by the lawsuit. Even giving substantial deference to the Canada Letter, Talisman has not shown that dismissal of this action is appropriate.²⁵⁷

The court concluded that there was no showing that the pending litigation would interfere with Canada's foreign policy.²⁵⁸ The judge declined to defer to the position taken in the Statement of Interest and noted that the United States and other countries "retain a compelling interest in the

255. *Id.* at 2.

256. *Id.* at 2-4.

257. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846, at *6-7 (S.D.N.Y. Aug. 30, 2005).

258. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 682-83 (S.D.N.Y. 2006).

application of the international law proscribing atrocities such as genocide and crimes against humanity.”²⁵⁹

The case was later dismissed on a motion for summary judgment; appeal of that dismissal is currently pending.

10. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) (rehearing en banc granted)

Residents of Papua New Guinea (“PNG”) brought an ATS action against an international mining company, alleging that they and their family members were victims of international law violations in connection with operation of a copper mine in PNG.²⁶⁰

The State Department filed a letter that described the peace and reconciliation process in PNG and stated that the ongoing litigation “would risk a potentially serious adverse impact on the peace process and hence on the conduct of our foreign relations.”²⁶¹ The State Department letter cites an attached letter from the government of PNG stating its objections to the litigation.²⁶²

The district court dismissed the claim in deference to the views of the executive branch. On appeal, the Ninth Circuit reversed, noting that although the judiciary should give “serious weight” to the views of the executive branch, the court was not bound to dismiss a case in the face of the executive branch’s foreign policy concerns.²⁶³ The court noted that the State Department had not specifically requested that the case be dismissed, and found the executive branch’s “guarded” comments an insufficient basis to do so.²⁶⁴ “Ultimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding.”²⁶⁵ The court stated that:

[T]his case presents claims that relate to a foreign conflict in which the United States had little involvement (so far as the record demonstrates), and therefore that merely “touch[] foreign relations.” . . . When we take the [Statement of Interest (“SOI”)] into consideration and give it “serious weight,” we still conclude that a political question is not presented. Even if the continued adjudication of this case does present

259. *Talisman*, 2005 WL 2082846 at *7.

260. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007).

261. Letter from William H. Taft, Legal Advisor, Dep’t of State at 2, *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (No. 00-11695).

262. *Sarei*, 487 F.3d at 1199.

263. *Id.* at 1205–07.

264. *Id.* at 1206–07.

265. *Id.* at 1205.

some risk to the Bougainville peace process, that is not sufficient to implicate the . . . *Baker* factors The State Department explicitly did *not* request that we dismiss this suit on political question grounds, and we are confident that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear. Nor do we see any “unusual need for unquestioning adherence” to the SOI’s nonspecific invocations of risks to the peace process. And finally, given the guarded nature of the SOI, we see no “embarrassment” that would follow from fulfilling our independent duty to determine whether the case should proceed. We are mindful of *Sosa*’s instruction to give “serious weight” to the views of the executive, but we cannot uphold the dismissal of this lawsuit solely on the basis of the SOI.²⁶⁶

The Ninth Circuit granted a hearing en banc, but at that point the PNG government had reversed its position on the litigation and the State Department informed the court that it no longer sought dismissal based on the foreign policy concerns expressed in its earlier letter.²⁶⁷

11. *Estate of Rodriguez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003)

In a case alleging that a U.S.-based company was legally liable for the murders of Colombian union members by Colombian paramilitary groups, the court asked the State Department whether the executive branch was aware of the pending litigation and whether it had made a decision not to intervene.²⁶⁸ The Department of State replied that it was aware of the case, but “does not routinely involve itself in district court cases to which the United States is not a party,” so that “no inference should be drawn about the Department’s views regarding a particular case in which it has not participated, or as to questions which it has not addressed.”²⁶⁹ The submission then states that the Department “does not have an opinion at this time as to whether continued adjudication of this matter will have an adverse impact on the foreign policy interest of the United States.”²⁷⁰ The letter then notes its interpretation of the Supreme Court’s decision in *Sosa* that narrowed the applicability of the ATS in

266. *Id.* at 1206–07.

267. See Brief for the United States as Amicus Curiae Supporting Panel Rehearing or Rehearing En Banc at 14 n.3, quoted in *Sarei*, 487 F.3d at 1206 n.14 (“[A]fter noting that the SOI was based on concerns in 2001 ‘which are different from the interests and circumstances that exist today’ the government expressly declines to endorse a dismissal of this case based on the SOI.”).

268. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

269. Letter from John B. Bellinger, Legal Advisor, Dep’t of State, at 2, *Romero v. Drummond*, No. 03-0575 (N.D. Ala. Aug. 2, 2006).

270. *Id.*

several cases; the letter was forwarded to the court by the Department of Justice, which reiterated those concerns and attached a copy of the brief the department filed in the *Khulumani* case.²⁷¹

The court entered judgment for the defendants after a jury trial.²⁷² An appeal is pending.

271. *Id.*; Statement of Interest of the United States, at 2, *Romero v. Drummond*, No. 03-0575 (N.D. Ala. Aug. 2, 2006).

272. Order Dismissing Case In Accordance with Jury Verdict, *Rodriquez v. Drummond*, No. 02-00665 (July 30, 2007).