INTERNATIONAL & NATIONAL SECURITY LAW

THE ALIEN TORT CLAIMS ACT: ARE AMERICA'S COURTS THE WORLD'S POLICEMEN?

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MS. WILSON: I am Margaret Wilson. I am happy to be here to moderate this panel on what may be the most obscure topic to be discussed at the Federalist Society convention this time, but maybe the most fun. We are here to discuss something so controversial that our panelists can't even agree on what it is called. Some of them call it the Alien Tort Claims Act. Others insist that it is the Alien Tort Statute.

I'll try to be moderate and not take a position, and call it the Act or the Statute. If I lapse into actually taking one side of the other, please forgive me. But I think it will be a lively, invigorating discussion and may border a little more on *Crossfire* than some of the other panels you have seen.

This is a topic gaining in popularity, importance and influence. It is a short little statute that was enacted in 1789 as part of the Judiciary Act but really didn't see the light of day until about 1980.

It is very short. Here's what it says. "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." That's it.

We are very fortunate to have our highly qualified and passionate panel here today. We have with us Professor Curtis Bradley of the UVA Law School. He's written papers and has studied this topic extensively.

Beth Stephens, Associate Professor at Rutgers Law School is actually an author of a book on this subject that I helped cram to moderate this panel.

We have Hamish Hume, who is with Cooper & Kirk, and has actually litigated in this area.

Andy Vollmer with Wilmer Cutler, has also actually practiced in the area.

And finally, John Yoo, who is with the Justice Department ,Office of Legal Counsel. He is a Deputy Assistant Attorney General.

I think you will hear all points of view, I hope, on this undeveloped but exciting area of the law. I am going to give about eight to ten minutes to each panelist, to discuss what they want to discuss about the Act. Then we'll have a little bit of rebuttal, then questions.

Just as kind of a foreshadowing, I think that some of the issues that you'll hear them talk about are:

Whether a private right of action is granted by the Act; what is the law of nations; what are the benefits, cost and risks of implementing this Act; its relationship to Article 3 of the Constitution; some separation of powers issues and the impact of this Act on U.S. foreign policy; the justiciability of the Act and whether, really, it is in fact a political question; the appropriateness and effectiveness of civil damages in the context of this type of tort; the increasing use of the statute against multi-national corporations and the interplay with the Act's first cousin, I guess, enacted in 1992, which is the Torture Victims Protection Act; what this Act may mean in the current world climate and our war on terrorism — is it the same? Is it different? Will we see more of it? And finally, leading up to the $64,000 question on your brochure, should the U.S. courts be the world's policemen?

With that, I will turn it over to Beth Stephens, who can tell us about her perspective of the Act, the Statute, from, for lack of a better term plaintiff' 's perspective.

Thank you.

PROFESSOR STEPHENS: Thank you. That was rather a tall order for eight to ten minutes.

I'm not sure I can address any of those topics in eight to ten minutes, so I'll confine myself to more general policy issues — the good, as I see it, of the Alien Tort Claims Act and the general practice of permitting victims of human rights abuses to sue in U.S. courts for human rights abuses against a variety of defendants.

The statute has been used in this way for just over 20 years, since a Second Circuit decision in *Filartiga* interpreted the statute as permitting an alien plaintiff to sue for a violation of the law of nations, torture, against a defendant who, in that case, was a police officer personally responsible for and personally engaged in the torture. The events happened in Paraguay. One of the plaintiffs and the defendant were in the United States at the time the lawsuit was filed.

I should add the disclaimer that I have worked on many of the cases that I will talk about and that will be talked about today, in various forms — as a field investigator at one point, largely as counsel for plaintiff, occasionally as

amicus or consultant. And I'm always on the plaintiff's side.

My general approach is to argue that the line of cases that have developed since the *Filartiga* case under the statute, and a couple of more recent statutes enacted by Congress, are legally correct and, as a policy matter, positive developments both for U.S. domestic law and international law.

There are no untoward foreign policy implications from these cases. There may occasionally be rubs and frictions, but no more than we see in the general line of litigation and the general problems caused by U.S. citizens traveling around the world, sometimes making trouble and sometimes getting into trouble. The cases fall comfortably within the structure of our judicial system and of our federal government in terms of separation of powers.

None of these issues I'll be able to go into today, although I can answer questions about them if people are particularly interested.

Finally, as a policy matter, the cases do make a significant contribution to the international drive to hold accountable the various actors who commit human rights abuses. I don't claim that any one case individually necessarily is a breakthrough, or even that the sum total makes a major change in the international human rights situation. But they contribute to a movement that is underway around the world and have made a significant contribution to that movement.

I'll address some of the policy issues in more detail by distinguishing among the different kinds of cases based on different kinds of defendants. The earliest cases did involved individual plaintiffs suing individuals. Some, as in *Filartiga*, sued the actual torturer.

In one of my cases, I represented three Ethiopian women who had been tortured as part of the Red Terror, in the Marxist dictatorship in Ethiopia, when they were in their late teenage years. All three of them had made their way to the United States or Canada. One of them was working as a waitress in a hotel in Atlanta when she turned a corner and ran into the new bellboy in the hotel, who was the man who had tortured her in Ethiopia.

She called around to some people to see if there was anything she could do and was eventually referred to my office. We filed a lawsuit against him on behalf of these three women, who had all been personally tortured by him. He defended himself at trial. We got a judgment — an uncollectible judgment. He does not have the assets.

But the impact on these three women was striking, the effect of being able to face him in court in a position in which they were not powerless, to tell their stories and have their stories heard. And he was living in the United States. That case falls rather non-controversially within the structure of the kinds of things that our legal system is familiar with.

Later cases went against other categories of individuals — commanders being held responsible for actions committed by subordinates. And then in the last few years, there has been an increasing number of cases filed by individuals against U.S. corporations for actions taken abroad. Some of those involve allegations of torture', executions , even genocide in one of the cases, although that case was dismissed for failure to actually establish the claim of genocide. Others include environmental harm rising to the level of the destruction of the livability or sustainability of areas, in Ecuador, in particular, and Indonesia. One of the cases involves Burmese who are suing the California oil company, Unocal, for torture and other abuses committed by security forces working in tandem with Unocal and the Burmese military government.

These categories of cases could have been filed in state courts. For example, the Ethiopian women could have sued for the tort of assault and battery in state court. They're in federal court based on the jurisdiction granted by the Alien Tort Claims Act. Some of them might have been in federal court under diversity jurisdiction.

The Unocal case has now been dismissed by the federal court on a summary judgment motion. The motion is currently on appeal to the Ninth Circuit. But it has been refiled in state court, and a motion to remove and a motion to dismiss have been denied by the state court judge, so it's going into discovery in state court.

There also have been claims against foreign corporations based on their minimum contacts with the United States. One case in particular that went up through the second Circuit, where the Supreme Court denied *cert.*, was against the two parent Shell Oil companies, based in England and the Netherlands.

Both the trial court judge and the Second Circuit found personal jurisdiction over the company based on direct contacts with New York, discounting any responsibility for jurisdictional purposes, for the activities of Shell U.S.A.

The doing business standard applied by the court is a standard that is generally applied in federal court. To the extent that the federal courts look to relatively minor contacts as sufficient to constitute doing business in the United States, I'd say that's partly a reflection of the fact that internationally and nationally, our legal systems have yet to catch up with transnational corporations, although we've had 100 years to try to do so. We have international corporations and we have national systems of jurisdiction.

One of the Second Circuit judges asked at oral argument, "What do you mean Shell's not here? They are not doing business in the United States? They have a gas station on every corner."

The fact that Shell is able to structure its business so that Shell U.S.A. does not count as contacts of the parent corporation is a fact of life, a fact of law for our judicial system, but one to which our increasingly global economy will have to respond, if we are to have any control, not just in terms of human rights, but any control over corporate activity.

The final category of possible defendants in the human rights cases are governments, both the U.S. government and foreign governments. Suits against the U.S. government are governed by the Federal Tort Claims Act and

various governmental immunities, and generally face a pretty tough road, for the same reasons that other kinds of tort suits against the U.S. government, particularly for acts that take place abroad, face difficulties.

Suits against foreign governments originally were very difficult because the Supreme Court held that the Foreign Sovereign Immunities Act applied in its standard forms, even when the claims are based on human rights issues, human rights claims. But Congress passed a law a couple of years ago to permit claims for gross human rights abuses against foreign governments if those governments are on the U.S. State Department's list of terrorist states. There have been a series of judgments against Cuba, Libya and Iran, based on that exception.

That statute has raised a number of concerns about the possible foreign policy implications. I know, just from reading in the newspapers, that within a few days of September 11, the State or Justice Department entered a statement for the first time in one of the cases against Iran.

I can imagine some of the foreign policy implications there. Ironically, that is the statute that was enacted by a modern Congress. To the extent that it causes foreign policy concerns, my urge would be to broaden, rather than to narrow. My general interest in this area is to promote accountability, and to promote accountability by all of the actors that I have mentioned, by individuals corporations and governments, both the U.S. government and foreign governments.

My concern about this foreign state terrorist exception is mostly that it is not even-handed. It doesn't just look political but it is political, and I would favor pushing for accountability in ways that are both multilateral and even-handed, that recognize that human rights are different than other kinds of claims, that there is an international basis for international approaches to accountability and to jurisdiction, to permitting claims to go forward in foreign jurisdictions, when the cases involve egregious human rights abuses.

In many countries, universal jurisdiction is exercised through criminal claims rather than through civil claims. But some of those criminal claims actually have more in common with our civil litigation system than is sometimes realized. Some of them are initiated by private actors, a system that we do not have in the United States.

The goal, as I say, should be to promote accountability by all of these actors. Civil litigation in the United States is just one piece of a larger effort, but one that has had, as I started with, a significant impact internationally. It has fed the drive for accountability, nourished it, interacted with it, in other countries, and that I would hope would lead to a broader and regulated use of the approach, but one in which the United States in this situation is leading the way in a positive way.

One final point to answer the question, should the United States be the police officer for the world? I don't particularly think so. I am not sure of the analogy to the police rather than the judge. I think there's something a little bit off there. But the reality is that the United States often plays that role. The United States plays that role in many different forms in many different fora, and I think that there is a bit of a double standard in critiquing it in the area of justice for human rights victims rather than in some of the other areas. If anything, this is an area in which it is less troublesome internationally than in some of the areas in which we less controversially play that role.

MS. WILSON: Thank you.

MR. HUME: It's an honor to participate in today's panel, and I can assure you that I must be the least accomplished commentator on the Alien Tort Claims Act to appear here today. I have, however, been fortunate enough to work on two extremely interesting ATCA cases over the course of the past year, which may give me somewhat of an unusual perspective on this unique area of the law.

The first is a case in which we defended Jack Lawn, the former Director of the Drug Enforcement Agency, and three of his deputies in a lawsuit brought by an alleged Mexican drug criminal, Dr. Alvarez Machain, for his extraterritorial arrest in 1990. Dr. Machain was arrested for his alleged participation in the brutal torture and murder of DEA agent Enrique Camerana in 1985. After the U.S. Government was unsuccessful in extraditing Machain and other members of the Guadalajara drug cartel suspected of murdering Camerana, certain DEA agents are alleged to have helped arrange for his arrest in Mexico and transfer to United States custody in Texas. After a lengthy criminal prosecution in which he managed to escape ultimate conviction, Machain turned around and hired an ACLU lawyer and sued the U.S. Government, the DEA agents and deputies and his Mexican abductors under the theory that they had violated international law by arresting him outside of the Mexican/U.S. extradition treaty. In our representation of the DEA defendants, we argued that they are clearly immune from this lawsuit under the Federal Employee Liability Reform Act, and, in any event, would have had qualified immunity from any such case. We also argued that a claim of "false arrest," especially when made by someone for whom there was easily sufficient probable cause to arrest consistent with Constitutional safeguards, is simply *not* an actionable tort under the ATCA.

In the other case that I've been privileged to work on, we represent a group of individuals from the country of Zimbabwe who have been persecuted and had numerous human rights violations visited upon them by the ruling political party in that country— ZANU-PF. The atrocities set forth in our Complaint include claims made on behalf of three individuals who were assassinated by ZANU-PF operatives as a result of their having supported or campaigned for ZANU-PF's first real political opposition in two decades of power, the Movement for Democratic Change. Plaintiffs sought to sue not only ZANU-PF, but also the head of that political party, Robert Mugabe, who also happens to be the long-standing

President of Zimbabwe. The case therefore raised important issues of head-of-state immunity, sovereign immunity, and diplomatic immunity.

Thus, I have had the privilege in the last year of arguing on behalf of the immunity of U.S. Government officials who have been accused of violating international law by organizing the extraterritorial arrest of a suspected drug criminal, and of arguing that the immunity of a foreign president should be disregarded in a case brought on behalf of individual human rights victims who have been tortured and murdered by that president's political party.

If this experience gives me any insight into answering the question of whether U.S. courts should be the world's policemen through the vehicle of the ATCA, I would try to summarize those insights or opinions in three ways:

First, the jurisprudential controversy over whether the ATCA means what the Second Circuit said it means in the *Filartiga* case from 1980 is to a considerable degree now moot. I begin with this point because many of the panelists here have spoken or will speak about the controversial interpretation of the ATCA and of its mystical and unknown original meaning. But, whatever the First Congress meant in 1789 when they gave district courts "original jurisdiction over any claim brought by an alien for a tort only in violation of the law of nations," it is now clear and cannot be disputed by even the most rigorous originalists that in 1992 the 102nd Congress decided that foreign individual victims of extra judicial killing or torture have a right to sue their foreign government oppressors here in United States Federal Court, even if all of the conduct over which they are suing took place in a foreign country—so long as the court can exercise personal jurisdiction over those defendants.

In other words, foreign murderers and torturers—beware! If you come to the United States, you may be served with papers which will initiate a lawsuit that may finally vindicate the principles of justice against your acts of barbarism abroad.

Congress has unambiguously said that those lawsuits are a good thing and should be a part of our legal system. Specifically, in 1992 Congress enacted the Torture Victim Protection Act, which unambiguously says that ATCA actions may be brought against foreign defendants who are alleged to have committed acts of extra judicial murder or torture under color of law. Therefore, the kinds of debates that Federalist society lawyers like myself normally like to have—namely, whether our federal courts are overstepping the jurisdiction envisioned by Congress and the Constitution—really has no bearing on the mandate set forth in the TVPA. In other words, one way to think about what the TVPA does is to allow private individuals to come to U. S. courts through U.S. lawyers and get a *judicially imposed sanction* against specific defendants whom they can prove, subject to all the ordinary rules of the Federal Rules on Civil Procedures and the Federal Rules of Evidence, are culpable for committing acts of atrocities that are so grievous as to constitute extra judicial killing or torture under color of law and in violation of international law.

Of course, while it should always be remembered that the TVPA removed much of the jurisprudential controversy surrounding the ATCA, it should also be emphasized that Congress did not go beyond torture and killing. The legislative history behind the TVPA is ambiguous as to whether Congress believed that other causes of action brought under the ATCA are improper. The statute itself does no more than endorse the cause of action for torture and murder. More far-flung interpretations of the ATCA, such as bringing suit for environmental crimes committed by U.S. multinationals, seem to be less plausible interpretations of the original statute, and clearly are not endorsed by the TVPA.

In other words, the jurisprudential controversy is still alive and well, but it does not sweep through the entire gambit of ATCA cases, and, indeed, does not touch the core of what the ATCA is about. Instead, it says, as we argued in Alvarez Machain, that unless the cause of action is for something that violates a norm of international law that is *specific, universal, and obligatory,* there ought not be any grounds for bringing that cause of action in U.S. court.

Thus, while torture and murder are clearly actionable under the TVPA, it also widely accepted that causes of action based upon terrorism, rape, genocide, and politically motivated violence should also be actionable under a fair reading of the ATCA. However, an action that alleges that a country arrested a foreign national in a manner that is outside its statutory arrest power, even though it had arrest power within its own territory and even though it is conceded that there was ample probable cause for that arrest, does not constitute a violation of international law that could possibly be actionable under the ATCA. At most, that action represented a violation of Mexican sovereignty for which only the State of Mexico may seek recourse through its diplomatic relationship with the United States.

A second thought I have about this area of law is simply to try to respond to the reactions that many lawyers, particularly conservative lawyers, have to these kinds of cases by focusing on the important distinction between subject matter jurisdiction and personal jurisdiction. The ATCA and the TVPA do absolutely *nothing* to alter the normal rules of personal jurisdiction that apply under our Constitution and under the Federal Rules of Civil Procedure. Those two statutes do, of course, dramatically expand the subject matter jurisdiction of the federal courts for the most egregious kinds of international crimes that can occur, and provide that the perpetrators of those crimes can be sued for civil damages when they come into our country. But while this is a massive expansion of subject matter jurisdiction, it is at least arguably an expansion that is concomitant with the egregious nature of the conduct it seeks to deter and to sanction. On the other hand, by maintaining the ordinary rules of personal jurisdiction, including rules of immunity which I am going to speak about in a moment, this area of the law respects the limited power of federal courts, and if there is something untoward about the notion

that a foreign war criminal who pays a short visit to New York City can be tagged with service of process and sued for civil damages, it is something that runs to the heart of our system's endorsement of "tag jurisdiction," which was upheld by the Supreme Court in the *Burnham* case, and not something that has anything peculiar to do with the ATCA or the TVPA.

Following on that second point, the third and final point I would emphasize is that the issue of immunity seems to me to be a central one in this area of the law. The principle of immunity is that a defendant may be culpable under the law, but that culpability cannot be allowed to give rise to a legal cause of action because of the defendant's association with a sovereign government. If one believes in it at all, the principle of immunity must rest upon the proposition that for certain problems the only solution is to seek a recourse in the political realm, and not in the legal one. In many instances that may simply be a judgment based upon the fact that we don't think there's a problem to begin with. In other words, governments have to act, they have to enforce police laws and police powers, and the fulfillment of those functions is therefore normally protected by immunity, *unless* our Constitution or a federal statute is violated. It's on that basis that the Alvarez Machain defendants are, and should continue to be held to be, immune.

In other instances, it does seem—as the State Department argued in the *Mugabe* case—that our own domestic law may find a person to be culpable and yet wish to hold him immune merely in order to show some amount of comity or respect for another sovereign; those are certainly important, critical principles for us to uphold as we try to interact with governments around the world, and to balance all of the competing interests that play into our foreign policy, of which concern for human rights can only be one. We never took issue with that in the *Mugabe* case. All we said is that those principles have a *limit* and that limit must be defined by *law*. In other words, the question raised in the *Mugabe* case is what is the limit to the principle of immunity, and where does the rule of law take over from the world of international geopolitics? While the district court did not give us everything we wanted and did not accept all our recommendations for how they should draw that line, it did make a dramatic step forward in defining how that line should be drawn, and in holding for the proposition that a purely *private* entity that happens to be controlled by a government's elected president cannot use that president's immunity to be immune itself, and therefore, it is subject to the rule of law even though he, the president, is not.

Finally, in closing, I'd like to take a stab at rhetorically answering the rhetorical question that this panel is presented with—should the U.S. Courts be the world's policemen through the use of the Alien Tort Claims Act and the Torture Victim Protection Act? Well, one's answer to that question depends on what kind of policemen one envisions here. Are these statutes like the Keystone Cops—figures of fun who do more harm than good; or are they like Inspector Clouseau—also a figure of fun, but one who somehow manages to get the bad guy in the end, though perhaps at too great a price in the ridicule and contempt he brings upon himself. Or are they like the Lone Ranger— crusading idealistically, perhaps imperialistically, out along the frontier of international law. I don't particularly like any of those images, so I offer a fourth. I think that the Alien Tort Claims Act and the Torture Victim Protection Act offer a simple, firm, and unobjectionable proposition—the rule of law exists, and if you are a mass murdering war criminal whose conduct falls *outside* defined boundaries of "sovereign action" and you choose to visit the United States, then you will risk the consequences of that law. Thus, I choose as my model Sergeant Joe Friday from Dragnet. But I replace his familiar rejoinder "Just the facts, ma'am" with the more judicious "Just the law"—as in, "Just the law, Mr. Mugabe," or "Just the law, Mr. Karadzic," or "Just the law, Mr. Marcos." These statutes stand for the proposition that just because you are a tyrant does not necessarily mean that you *and* all of your henchmen are *always* above the law. There are certain norms that are so fundamental to our system that we as a sovereign country have enacted them into our domestic law and said that *anyone* who violates them, *anywhere* in the world, can be found liable for civil damages if they choose to visit this country. That seems to me not altogether such a bad thing.

PROFESSOR BRADLEY: Well, the time is short, so what I will do is briefly outline a few areas of my concern about the litigation. Everything I am about to say is going to be fairly truncated, so I encourage people in the question period to feel free to press me and ask me to flesh any of these things out.

This litigation that Beth and Margaret have described really got started in 1980, and I think has in recent years been expanding quite significantly. It does stem from this 1980 decision in *Filartiga*. In my mind, it raises three concerns that we at least ought to be considering in evaluating whether this is a good idea or not.

First, I don't think it is fair to argue, notwithstanding what Beth said, that Congress has really authorized this broad litigation in any meaningful sense. It is true that Congress enacted some statutes recently that relate to human rights, but it is a very different matter to say that they've authorized this broad set of open-ended *Filartiga* style litigation, which I will describe in a minute. I don't think they have.

Second, the nature of this litigation is such that it requires a heavy amount of policymaking by the courts — a role that I think it turns out they are not very well-equipped to engage in. One can therefore raise questions about whether it is legitimate for the courts to be engaged in as much policymaking and foreign relations policymaking as this litigation requires.

The final concern I will raise is more generally whether this is even a sensible way to conduct American foreign policy. There are a number of reasons to think it is not. First, with respect to Congress' role in this. The *Filartiga* case and the cases that follows it rely on this one-sentence statute that was passed more than 200 years ago. They do not

rely on these other statutes that Beth has referred to. When those statutes apply, everyone agrees that the cases can be heard.

But the key issue is, what happens when those congressional enactments do not apply? The answer has been, in the lower courts, that we rely on this old, newly discovered statute — the Alien Tort Statute.

There are many reasons to think that if we should apply the original intent of the statute — of course, people debate whether one should do that with law — but if one should, that Congress clearly didn't intend for the sort of litigation we are now seeing.

I won't go through all the historical points because one could say quite a bit about that. But among other things, the Congress that enacted this could not have imagined international law governing these sorts of issues, which involve the relationship between governments and their own citizens. They would not have had this extraterritorial idea as even being a proper exercise of American power; that is, trying to reach out and regulate what Nigeria or Paraguay does with respect to its citizens.

In addition — and I won't go into detail at all on this — it looks from historical evidence like the people who wrote this statute did not view the law of nations as being part of federal law in a constitutional sense. They thought it was important; they thought in some cases it would apply. But they did not think it gave the federal courts jurisdiction by and of itself. So, they wouldn't have thought in these modern terms that *Filartiga* has set forth.

I think more importantly that we can make some educated guesses about the policies behind the statute. When we do that, I think it's pretty clear that the modern litigation does not sit well with those policies. It looks like the people who wrote this statute had two things in mind. First, they wanted a federal court forum for situations in which the U.S. government might be either legally or politically accountable for certain kinds of torts in violation of international law. All the discussions that we can find relating to the statute are about that. All the historical episodes people cite behind the statute are about that U.S. responsibility.

The second general concern is to have a federal court forum that would reduce foreign relations controversies that would arise if we did not address certain kind of torts.

Neither of these concerns is served by *Filartiga*-type litigation. The U.S. is not responsible in the legal or, really, political fashion for various kinds of egregious conduct that may be occurring within the borders of other countries. There may be good moral reasons why we may be concerned about it, but we are not legally responsible in the way the founders and the writers of the statute were thinking.

Second, if anything, this litigation tends to raise foreign relations issues and difficulties — not in every case, to be sure, as Beth pointed out, but certainly in some cases. It is difficult to argue that it somehow, in net, improves our foreign relations. The State Department and other branches of the government have in some cases been quite concerned about the foreign relations impact of these cases. It is not a vehicle for reducing foreign relations controversies in the way that Congress wanted.

Even if one looks to the modern actions of the President and the Congress, one finds that, yes, they've enacted very discrete and limited sorts of legislation to allow particular causes of action. And when those requirements are met, everyone can agree that Congress has authorized a particular suit. Beth has mentioned a recent statute that allows suits against particular state sponsors of terrorism. But she didn't mention that it is limited to U.S. and it is not this alien versus alien tort suit with no connections to the United States.

Even the torture statute, which Congress enacted in the early 1990's is very circumscribed in terms of the kind of conduct covered — only two causes of action, torture and what they call in the statute extrajudicial killing. A number of procedural limitations were imposed by Congress; a statute of limitations, exhaustion requirements, definitional requirements that have to be met in the case, none of which apparently apply in these *Filartiga* cases.

So again, one cannot assume that just because Congress has addressed particular issues that it has focused on, that it has therefore more broadly approved of this open-ended litigation that we have had under the Alien Tort Statute. So don't think Congress has authorized this.

My second concern is about the role of the courts in these cases, particularly since they really are, in some sense, unconnected to any particular statutory directive.

One of the questions that Margaret pointed out that we could try to address, which I don't think any of us will, is what is the law of nations. The bottom line is, nobody knows. Maybe they didn't know perfectly well in 1789 either, but they probably had a much clearer answer than we do today. There is massive debate in the international community about even what it takes to form the law of nations — what evidence one would look to for the law of nations. There is even more debate about the content of the law of nations, and no statutory or political branch guidance on any of that.

The courts are entirely left to the arguments of the litigants and academic writers and trying to piece that together. Inevitably, it is a highly creative and politicized process involving lots of normative claims about what would be desirable for international law to regulate. But we have no treaty texts that are binding in these particular cases and nothing very concrete to look to.

In addition, one studies these cases, as all of us have, inevitably because we don't have much in the way

of statutory guidance. What one sees is that courts have to fashion on their own a multitude of procedural doctrines to try to facilitate this litigation to make it actually work, so they invent doctrines like various federal common-law principles to reconcile it with the requirements of jurisdiction. They imply causes of action out of a one-sentence jurisdictional statute written 210 years ago in order to actually give them a claim in these cases. And they do a lot of other things, too.

I just have a minute or two left. I want to point out, just to be even-handed about it, there are all sorts of ways in which these cases also require the courts to act in a much more conservative direction, sometimes in the same case. The judges find themselves fashioning all sorts of federal common-law doctrines to limit some of the excesses of the litigation, again without any particular guidance from Congress or the President

PANELIST: And yet, especially in the 19th century and obviously in the 18th century, and even to this day. But then, absolutely to violate the law of nations, you needed to be a government. It was literally the law of nations. And so — that's not true?

PROFESSOR BRADLEY: There are a few areas, which I think everybody basically agrees on, in which individuals could have violated the law of nations. Blackstone actually talked about it in his treatise on commentaries on the law of England. They are very narrow. I think piracy and breaches of neutrality. The situations I was just talking about might be another one. And an assault on ambassadors was another category.

Those were the kinds of cases they probably were thinking about in terms of the Alien Tort Statute. All of them in the context of U.S. responsibility for that sort of conduct.

MS. WILSON: Let me stop you right here. We can come back to questions at the end if we have any time. I still would like everybody here to walk away from this room having some clue about what the Alien Tort Statute is about. I'm not sure we're there yet. So, what I would like to do is call on Andy to give us a run-down of the *Filartiga* case and where we stand right now.

Looking at the original intent of Congress is a very interesting academic exercise, but the answer is that we don't know. So, that you can be conversant about the Alien Tort Statute today and how it's being used, I think it would be helpful to talk about *Filartiga* and talk about the cases that came after *Filartiga,* one in 1999, but currently no Supreme Court precedent, which is why it is such an open question.

And then we can get into some of the issues about the political questions involved, retaliation by other governments, whether torture victims have anywhere else to go and whether or not we have bitten off more than we can chew. But without a foundation, which I was hoping you were going to get, I don't know that those questions are going to mean a lot to you.

MR. VOLLMER: I'll try to give a very short overview of the modern development of the cases under the Alien Tort Statute, and I have lots of help up here to correct me when I get it wrong, since I'm up here being taken slightly by surprise. But let me try. My main effort here will be to try to identify some of the issues that are important today and are not entirely settled yet.

It is a very old statute. It was hardly used until 1980 — right before 1980 — in a very important Second Circuit decision in 1980 called *Filartiga*, which Professor Stephens talked about.

That was a case against a U.S. resident. A person in the United States discovered that a person who had tortured her, I think, in Paraguay was also living in the United States. So the case was brought by the victim against the torturer under the Alien Tort Statute for conduct occurring in Paraguay.

The Second Circuit decision had to resolve a lot of unusual questions that came up, such as, is there a claim authorized by the Alien Tort Statute, or is it just jurisdictional? And that is still today a very important question, settled in some circuits, particularly the Second because in *Filartiga*, the Second Circuit said, "yes, it does create a claim; yes, federal courts have jurisdiction; and the jurisdictional grant is constitutional."

That does not necessarily mean that everyone agrees with those outcomes today, but it was a very important start and it reinvigorated or actually commenced this use of the statute for international human rights abuses and allegations of human rights abuses. Of course, you need an alien as a plaintiff because the statute requires it. But if there is federal court jurisdiction and there are claims that arise under it, it could be used alien v. alien. That is another one of the issues that has become so important of the debate about the statute today.

The next key event is a D.C. Circuit case in 1984 called *Teloran.* A lot of the questions come up again about whether these cases — that is, foreign human rights issues — should be litigated in U.S. courts.

The D.C. Circuit three-judge panel had three separate opinions, reaching conclusions — ultimately reaching a judgment but with very different reasoning. And some of our panelists know the opinions better than I. The one I remember the best is Judge Bork's decision, saying that the statute does not create a claim; it's purely jurisdictional. So that issue is live in the D.C. Circuit and in other circuits.

The next key event, I think is a further development in the Second Circuit. That is the case against Koradjik from the Bosnian atrocity area. Avariety of additional issues were addressed in that case, particularly whether private parties can be liable for breaches of international law in certain circumstances and whether modern developments of international law ought to recognize the liability of private parties.

There was also an important service question because he, too, was served personally when he was visiting New York City, I believe for a United Nations event.

PANELIST: Well, I do think it's interesting to note that he was here at the invitation of the U.S. government, for the date in peace discussions and yet there was still adequate service.

MR. VOLLMER: I think the only other point, and then maybe we ought to get maybe a little bit of fill-in from other panelists, is that the other major development in this area that has begun to occur in the past five years or so is the use of the statute against corporations, who traditionally, under international law, except for some exceptions we've already talked about — along with private parties, are not subject to regulation by international law and, therefore, of course, could not violate it.

There were some exceptions, as we have already discussed. But what I was going to talk about — and whether I get to talk about it or not, I'm not sure — is a variety or set of questions that come up in the cases against corporations. I believe there are some quite serious issues; some at the high level we've already been discussing but some at a more detailed level that litigators care about, which I am happy to get back to.

The final point I want to stress for you is the use of the statute, first against corporations, and then second, for quite old wrongs. I'm sure you're all aware of the series of cases that have been filed, alleging breaches of international law for conduct during World War II. There were cases against the Swiss banks; there were cases against a lot of members of German industry; there was a case against Ford for the conduct of its German sub.

The current vogue is cases against Japan for a variety of atrocities that occurred, allegedly by Japan — almost certainly by Japan in view of historians — during World War II.

MS. WILSON: Well, I think we may know a little bit more about it than we did. Andy, I think I will allow you some rebuttal time in a little bit, but I would like John Yoo to finally get a chance to say something. He has requested to go last. He's not shy; I think he just wanted to make sure he got the last word.

MR. YOO: No, no.

MS. WILSON: We've all been waiting to hear from you, John.

MR. YOO: I definitely do not want the last word.

It is good to be here, and let me start with the usual disclaimer that my views do not represent those of the Justice Department. I recognize a lot of friendly faces. It's good to see you. You probably know that my views rarely, if ever, represent the views of the Justice Department.

In approaching this, I am probably not really going to talk much about the Alien Tort Statute as much as a species of legislation I think which is typical.

The criticisms I have of the Alien Tort Statute are non-partisan in the sense that they also apply to the Helms-Burton Act, another case where we are using causes of action to further foreign policy goals. There is a proposal on the Hill to create a cause of action to sue Osama bin Laden and the al Qaeda network for damages caused by the September 11 attacks.

Let me also say that, in doing this talk, I'm a little out of character. Usually, in my academic writing, which has mostly been in the war powers area, I've mostly been a formalist and I look to the original understanding. Everybody here has already talked about this. So I thought it would be fun to be a functionalist for once.

And so, you'll find that, like a functionalist, I am going to make overbroad generalizations about government and I am going to balance lots of things and then tell you that what I think is the right balance happens to be right because that's what I think. And so, I think it's going to be a lot of fun for me and for you, too.

As you can tell from the descriptions of the cases, a lot of the points of these cases, not just in the Alien Tort Statute context, but in places like Helms-Burton, are to not just recover damages, because oftentimes there's no expectation of recovering damages, but to make a political statement.

You don't sue Karadzic to get billions of dollars; you're suing him to make a statement about the type of activity he is engaged in. That creates a problem because the point of making that statement is to send a message in our foreign policy. I don't think people who support or oppose this type of litigation pretend it does otherwise. I think that creates some problems for the way we run our foreign policy, the way we set it and the way we implement it.

One way to understand that is to suppose you were going to create an ideal governmental structure for

developing foreign policy and for implementing it. What would it look like? A lot of political scientists have written about this question. No matter whether they think that power is the driving force in foreign affairs and international relations or economics or other things, almost all the theories in international relations are based on the idea that nation-states are rational actors, that they calculate the costs and benefits of their actions, that they have rational goals, that they translate those goals into policies and they try to implement those policies, and that they take feedback on the policies. And if they're succeeding or not, they change those policies and lead it to success.

For example, the first three weeks of our bombing campaign, we found that nothing was happening. Then we decided to bring in the B-52s and look what happened. That's an example of using feedback in order to change policies to achieve more effective goals.

This vision of how to run foreign policy is recognized by the Supreme Court and by different legal theories. You are probably all familiar with the language from Curtiss-Wright, about how it is a dangerous, scary world out there and how we need to have secrecy and dispatch of action by the President, who is the sole representative in our foreign affairs. I don't have to quote for this audience Federalist Number 70, where Alexander Hamilton went on one of his riffs about the virtues of the Presidency, a as unitary executive that could act secretly and swiftly to pursue the national interest.

Now, having described that sort of ideal system for conducting foreign policy — maybe this isn't the right audience to ask this question because you already knew the answer — do you think the judiciary displays any of the characteristics of a rational unitary actor that can easily take feedback and change its policies in accordance thereto, to reach its goals?

Let's take a look at the federal judiciary. First, the judiciary is slow. It takes years — sometimes 3 years, sometimes 12 years, sometimes 20 years for litigation to complete. It's decentralized. There are 94 district courts, with 647 district judges who can have different opinions about whether the Alien Tort Statute creates a cause of action. There is no unified position amongst the circuit courts as to whether the Alien Tort Statute permits the kind of litigation we are talking about here.

Furthermore, courts are not in the job — I'm not talking about the 9th Circuit, by the way — of measuring the costs and benefits of their actions and adjusting those policies that they think they are working or not. Courts are supposed to interpret the law, figure out the principle and apply it, regardless of what the social costs and benefits are. Balancing costs and benefits is a job for the legislature.

If a court, for example, believes an Alien Tort Statute violation has occurred, say in regard to Paraguay, which is the *Filartiga* case, it can not say, "well, I decide not to give damages to the defendant because it would be bad for our current policy towards Paraguay." Right? The court has to issue its judgment regardless of whether it interferes with our relations with Paraguay.

Further, and I don't mean to insult any federal judges in the audience, but the federal judiciary is rather error-prone. If it were not error-prone, you wouldn't need circuit courts. You wouldn't need a Supreme Court. Courts make mistakes all the time, and it takes years to correct them. And, it is a very cumbersome system to actually communicate upwards in the system that those errors have occurred and to have them changed.

In the military, if you bomb the wrong target, your commanding officer can immediately tell you bombed the wrong target; now go sit in the corner until your next flight takes off.

In the judiciary, you have to have oral arguments. You have to have an opinion written. It has to be sent back to the district court, which inevitably misinterprets it, I'm sure it comes back. This is one of the most inefficient systems for feedback and change of policy that you could come up with.

So, the question is, then, does it make sense as a matter of design of the federal government or national government in foreign policy to have things like the Alien Tort Statute, Helms-Burton, or some of the new ideas that we are floating today? I think my conclusion would be no. But I don't really have any sort of position as to the meaning or the textual meaning of the Alien Tort Statute itself.

So, I think I am actually the only one who made it within ten minutes, so I am going to keep going until I finish the time.

If this was a little discombobulated, it's because I've been working on military commissions for the last three, four, five weeks.

MS. WILSON: You're just trying to fit in with the rest of the group.

MR. YOO: Well, I'm trying to talk about stuff no one understands. I was just going to say, as regards the military commissions, if anybody has questions about those, I'd be happy to answer them, as well.

But just one story. I was telling one of my colleagues, with whom I've been working pretty closely, that I was going to the Federalist Society to do a panel on the Alien Tort Statute. He said, isn't that what we're doing in Afghanistan?

So, I will leave it at that, and I guess we will turn it over to you for questions.

MS. WILSON: Thank you very much. I'd like to turn it over to questions in just a moment, but first I want to see if Andy has a couple of minutes of any point that he was unable to make that he was itching to make before we get into questions from the group.

MR. VOLLMER: No.

MS. WILSON: All right. He's going to be a sport about it. So, questions.

MR. VOLLMER: I get the same fee.

MS. WILSON: All right. Yes, sir.

AUDIENCE PARTICIPANT: I have a jurisdictional question. I understand, if you've got him personally or for *in personam* jurisdiction. My question is, if you're going to tap into the asset, is that a quasi-*in personam* jurisdiction? Are you limited to whatever is in the country and what you can get to?

MR. YOO: I'm tempted to say no comment, if you're asking how we're going to enforce the judgment. But I'm not sure whether you're asking how we enforce the judgment or whether you're asking how we can get personal jurisdiction through another means. Is that what you're asking?

AUDIENCE PARTICIPANT: No, I'm asking, once you have —

MR. YOO: Once we have the judgment?

AUDIENCE PARTICIPANT: No. Once you get *in personam* jurisdiction to put the defendant in jeopardy, once you've tapped his asset, are you limited in your remedy to the asset that you have tapped?

MR. YOO: To be honest, I don't think I know the answer to that question.

PANELIST: This is all *Penoya v. Neff* (phonetic), right? You'll remember from first-year law school. There are different categories, and if you have *in personam* jurisdiction, you are not limited to the value of the property because you have not attached the property; you are attaching the person.

AUDIENCE PARTICIPANT: Well, do we now have a globalization of the long-arm statute?

PROFESSOR STEPHENS: If you have a judgment in this country and you find assets in another country, the question becomes whether that country will enforce the U.S. judgment.

The answer depends both on what kind of agreement we have in that country for enforcement and whether they will look behind the judgment at our basis for jurisdiction, which some countries will do, and find that either the *in personam* transient presence jurisdiction is insufficient or that the subject matter jurisdiction was improper, or that a default judgment is unenforceable. So there are many reasons why these judgments can be even harder to enforce than standard U.S. court judgments.

AUDIENCE PARTICIPANT: So if you've got a defendant that never comes into the U.S., you can actually get jurisdiction just by tapping his account, and once you've got that account you can also go to other nations and go after assets in other nations?

PANELIST: Well, I think — others are better situated. The major answer is that it's no different from where it is anywhere in the law. None of that is changed in any way by Alien Tort Claims Act jurisprudence or the Tortured Victim Protection Act. Personal jurisdiction rules are what they are, and their implications for attaching other assets are what they are.

MS. WILSON: All right. Go.

AUDIENCE PARTICIPANT: I have a question for Beth. From a claims perspective, are you worried that some of these new cases are taking the statute to the bar and are going to result in a ratcheting down of the jurisdiction? I'm going to give you an example.

In the preceding cases, now I guess you use the word transnational corporation, they were trying to get by the state acts requirement and essentially link U.S. corporations with foreign citizens who've committed clearly bad acts. But in some cases, for example, they are now saying that the corporations almost have a duty, as if it's a negligence action. It should be doing something in those countries, for example, to protect their workers.

Do you think that is a proper? Where the plaintiffs are saying in addition to being liable for a state action of murder or torture, these corporations are also liable to prevent acts against their workers and to improve labor standards in those countries?

PROFESSOR STEPHENS: When you started your question, I was going to say no comment. And I guess, in part, because one plaintiff's attorney's excessive application of the statute is another plaintiff's attorney's core, burning injustice, with plaintiffs who have a right to seek redress. If it fits within the permissible boundaries of our law and passes a Rule 11 standard, then it's a reasonable use of our legal system.

In terms of corporations, I am very supportive of the concept of enforcing human rights standards against corporations, and this gets into what Andy didn't get a chance to talk about from a different perspective. I think the question about how far it should go, how attenuated the connection is between the corporation and the human rights abuse, and the extent to which obligations are being imposed on corporations that go beyond just refraining from certain acts, I think the key there is to not step beyond the state of the law.

I certainly do not like to see negative decisions and negative precedents, although courts are quite capable of throwing us out when they think we've stepped beyond the state of the law, and it's happened in several of the corporate cases. And I think there is a growing international recognition of the application of international law to corporations, which I think is well established enough to justify litigation in U.S. courts.

MR. VOLLMER: Could I say a word on this?

MS. WILSON: Yes.

MR. VOLLMER: This is the subject I was going to address.

My concern — I have many concerns, which take far more than my almost allotted eight minutes. But the question here is about the theories of substantive liability that can be applied to corporations under the Alien Tort Statute. You need a breach of international law, and what you do not see is rigorous analysis of whether international law contains theories of secondary liability, which I think is precisely the concern your question identifies.

A lot — not every one, but many — of these cases against corporations concern misconduct by governmental actors, soldiers, police, government officials. And the effort in the suit against the corporation is to evaluate and impose secondary rather than primary liability against the corporation.

The question should be, does international law contain such a theory, and does it do it with sufficient clarity and precision for courts to have a rule of liability, a standard of liability to apply? What you see, happening instead, are plaintiffs alleging secondary theories of liability with no precision, and often based on secondary liability theories that we know as U.S. and common lawyers, rather than an analysis of what international law provided during World War II in the World War II cases.

It highlights two principle concerns I'll just try to cover quickly. It actually identifies lots of concerns. It identifies a concern about the amorphousness about international law. Does it really contain secondary theories of secondary liability that corporations can identify and conform their conduct to, or not?

Second, it raises, a lot of concern about the anti-democratic nature of the application of this statute. What you do not have is elected legislators in the United States making determinations of when corporations should be liable and when they should not be liable. You instead have these cases being brought by very sympathetic plaintiffs and decided by judges of good will, but who are prepared to look hard for a remedy because the plaintiffs are so sympathetic.

So, my concerns about this statute is that there has been no evaluation about the trade-offs and accommodations that we should be making to define a cause of action, as we did in the Torture Victim Protection Act, for example.

AUDIENCE PARTICIPANT: Two questions. One comment I would make is that I don't think the point came across as to how widespread these cases are and how assertively this tactic is being used. One of the private plaintiffs in the *Microsoft* case had a state law claim tossed out and brought it under the Alien Torts Claims Act.

But if the Administration felt that the the trend here were going too far, what tools does the Administration have in its toolbox, without relying either on the judiciary or on the legislative branches, to do something about what's happening?

Let me just quickly say, because I am not speaking out of any privileged information here, but it may well be that the *Mashein* decision from the Ninth Circuit will be petitioned to the Supreme Court. It would seem with the

government and the Solicitor General pressing, if they decided to do so, that it has a high likelihood of being granted, and it would be on the federal tort claims act issue, but could also piggyback in the Torture Victim Protection Act for the Supreme Court's review, which would give it a chance to curtail with appropriate legal analysis — and again, I stress law versus politics — curtail what's actually contained in this Alien Tort Claims Act broad language from 1789.

PANELIST: I'll address the first question about the tools, outside the legislation and the courts. But I want to say one very brief thing about the TVPA, which we haven't mentioned. One of its many requirements is that there's foreign state action. So this is not a *Mugabi* (phonetic) question, but it really doesn't apply in this new corporate wave of litigation. You have to go back to the Alien Tort Statute, if at all, or you'd have to prove under the statute that there was in fact state action because it clearly requires that as a matter of statutory law.

In terms of the tools, I think that does implicate *Mugabi*. The State Department and Executive Branch, I think, has a pretty large amount of authority on an ad hoc basis to try to suggest head-of-state immunity. And it does that in cases involving real heads of state. My sense is that courts will give close to absolute deference when they suggest that a sitting head of state, at least, is immune, which the State Department has done.

Outside of that, however — and most of the cases don't implicate head-of-state immunity — I think the State Department and the Executive Branch is left to its usual tools of filing briefs that suggest its views about the case, *amicus curiae* briefs and statements of interest. Sometimes courts seem to give those a fair amount of weight; sometimes they don't.

The Reagan Administration filed a brief in one of the more prominent Alien Tort Statute cases in the mid-1980s, arguing that it didn't think the statute should be used for all of its litigation, and the Ninth Circuit decided to disregard the Executive —

PANELIST: They're cases filed.

MS. WILSON: Good. All right. I appreciate your being here.

What I want to give you is citations to the two cases you heard bandied about up here — *Filartiga v. Pena*, 630 F.2d 876 (2d. Cir. 1980). The WEWA case that Andy mentioned was decided in the year 2000, 226 F.3d 88. It is against Royal Dutch Petroleum and gets into some of the issues regarding suing corporations.

So you can have somewhere to go if you really want to learn about this. I appreciate your being here.