[This is the Summer 2013 Supplement for CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (4th ed. 2011). In addition to updating the notes with new cases, scholarship, and related materials, the Supplement includes excerpts of the Supreme Court’s decisions in Kiobel v. Royal Dutch Petroleum Co. (concerning the extraterritorial reach of the Alien Tort Statute) and Zivotofsky v. Clinton (concerning the political question doctrine), the D.C. Circuit’s decision in United States v. Hamdan (concerning the prosecution of material support for terrorism in military commissions), the Third Circuit’s decision in United States v. Bond (concerning the scope of the treaty power), and the Fourth Circuit’s decision in Samantar v. Yousuf (concerning foreign official immunity and deference to the Executive Branch).]

Chapter 1: Introduction: Historical and Conceptual Foundations

Page 23, add at the end of Note 4:

For an originalist argument that the Neutrality Proclamation and related actions taken by the Washington administration “were based on the principle that the Executive has the duty and the resulting power to comply with the obligations of the law of nations,” see Robert J. Reinstein, Executive Power and the Law of Nations in the Washington Administration, 46 U. Rich. L. Rev. 373, 377 (2012).

Page 38, add at the end of Note B:

For an extensive discussion of the ways in which historical practice can inform the powers of the President and Congress, see Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 421 (2012). The authors consider a variety of reasons why historical practice might be relevant in the separation of powers area, such as a Burkean preference for continuity

* Instructors using the Bradley & Goldsmith casebook are authorized to distribute this supplement to their students for classroom use.

4 The “aiding the enemy” proscription in 10 U.S.C. § 904, which was first codified in the Articles of War of 1806, see WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 102-03, 981 (rev. 2d ed. 1920),
and stability, an assumption that practices based on interbranch agreement are likely to have functional advantages, a desire to protect expectation interests that might have developed, and the recognition that governmental practices may be embedded within interbranch bargains that are difficult to disentangle. Practice is especially likely to play a significant role, they explain, in constitutional interpretation for those areas of law, such as foreign relations law, where judicial review is limited. As the authors further note, one test that is frequently invoked for determining when the practices of Congress or the Executive Branch should be credited is that of institutional acquiescence. Under this view, when an affected branch acquiesces in the exercise of authority of another branch, the result is a shared constitutional understanding that merits deference on a variety of grounds. The authors point out several problems with this view, including the fact that it seems to rest on a “Madisonian” conception of inter-branch rivalry that is unlikely to hold under modern political conditions. Nevertheless, the authors contend that it might still be possible to find genuine institutional acquiescence for some issues—for example, where there is bipartisan acceptance of the practice across multiple administrations—and they suggest that the test for finding executive acquiescence should be less stringent than the test for finding congressional acquiescence. They also explain that there are other potential justifications for crediting governmental practice that do not depend on the idea of institutional acquiescence, such as limitations on judicial capacity as well as the notion that descriptions of law (including constitutional law) should bear a general resemblance to the practices of the actors involved in the legal order.

Chapter 2: Courts and Foreign Relations

Page 49, add after Note 8:

8a. In 2008, Congress amended the Foreign Intelligence Surveillance Act of 1978 to make it easier for the government to conduct electronic surveillance of non-U.S. persons located outside the United States. Under 50 U.S.C. § 1881a, the government is no longer required to submit an individualized application to the Foreign Intelligence Surveillance Court (a special court created by the 1978 Act) identifying the particular targets or facilities to be monitored and instead is allowed to seek approval from the Court for mass surveillance. A group of individual attorneys and various human rights, labor, legal, and media organizations—whose work requires international communications with individuals they believe the government will likely monitor under the amendment—sued the government, alleging that Section 1881a violates the First and Fourth Amendments, Article III of the Constitution, and the principle of separation of powers. The Second Circuit concluded that the plaintiffs had standing to bring these claims, reasoning that the plaintiffs had a legitimate fear that the government would cause them a “future injury” by intercepting their
communications under Section 1881a, and also that the plaintiffs had sufficiently alleged a “present injury” involving professional and economic costs that they had incurred to avoid interception of their communications.

In Clapper v. Amnesty International USA, 135 S. Ct. 1138 (2013), the Supreme Court reversed in a 5-4 decision. In an opinion by Justice Alito, the Court explained (quoting from Raines v. Byrd) that “‘[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.’” In this case, said the Court, the plaintiffs’ fear that their communications would be intercepted was too speculative, given that the plaintiffs “have no actual knowledge of the government’s . . . targeting practices,” do not know whether the government would pursue surveillance of their communications under Section 1881a as opposed to some other provision, and do not know whether the FISA court would approve a surveillance program that covered them. Nor do the plaintiffs have standing by virtue of the costs they have incurred to avoid surveillance: “respondents cannot manufacture standing,” said the Court, “merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not particularly impending.”

The dissenters, led by Justice Breyer, argued that the alleged harm here was not speculative. In light of the nature of the communications in question, and the capacity and motives of the government in its surveillance program, there is a “high probability,” argued the dissenters, “that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties.”

Page 56, insert the following decision before the Notes and Questions:

Zivotosfky v. Clinton
132 S. Ct. 1421 (2012)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

I

The State Department’s Foreign Affairs Manual states that “[w]here the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport.” The manual specifically directs that passport officials should enter “JERUSALEM” and should “not write Israel or Jordan” when recording the birthplace of a person born in Jerusalem on a passport.
Section 214(d) [of the Foreign Relations Authorization Act for Fiscal Year 2003] sought to override this instruction by allowing citizens born in Jerusalem to have “Israel” recorded on their passports if they wish. . . .

Petitioner Menachem Binyamin Zivotofsky was born in Jerusalem on October 17, 2002, shortly after § 214(d) was enacted. Zivotofsky’s parents were American citizens and he accordingly was as well, by virtue of congressional enactment. Zivotofsky’s mother filed an application for a consular report of birth abroad and a United States passport. She requested that his place of birth be listed as “Jerusalem, Israel” on both documents. U.S. officials informed Zivotofsky’s mother that State Department policy prohibits recording “Israel” as Zivotofsky’s place of birth. Pursuant to that policy, Zivotofsky was issued a passport and consular report of birth abroad listing only “Jerusalem.”

Zivotofsky’s parents filed a complaint on his behalf against the Secretary of State. Zivotofsky sought a declaratory judgment and a permanent injunction ordering the Secretary to identify his place of birth as “Jerusalem, Israel” in the official documents. . . .

II

The lower courts concluded that Zivotofsky’s claim presents a political question and therefore cannot be adjudicated. We disagree.

In general, the Judiciary has a responsibility to decide cases properly before it, even those it “would gladly avoid.” Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). Our precedents have identified a narrow exception to that rule, known as the “political question” doctrine. We have explained that a controversy “involves a political question . . . where there is ‘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.’” Nixon v. United States, 506 U. S. 224, 228 (1993) (quoting Baker v. Carr, 369 U. S. 186, 217 (1962)). In such a case, we have held that a court lacks the authority to decide the dispute before it. . . .

[The D.C. Circuit] concluded that “[o]nly the Executive—not Congress and not the courts—has the power to define U.S. policy regarding Israel’s sovereignty over Jerusalem,” and also to “decide how best to implement that policy.” Because the Department’s passport rule was adopted to implement the President’s “exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem,” the validity of that rule was itself a “nonjusticiable political question” that “the Constitution leaves to the Executive alone.” [T]he D.C. Circuit’s opinion does not even mention § 214(d) until the fifth of its six paragraphs of analysis,
and then only to dismiss it as irrelevant: “That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action . . . is of no moment to whether the judiciary has [the] authority to resolve this dispute . . . .”

The existence of a statutory right, however, is certainly relevant to the Judiciary’s power to decide Zivotofsky’s claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky’s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Moreover, because the parties do not dispute the interpretation of § 214(d), the only real question for the courts is whether the statute is constitutional. At least since Marbury v. Madison, 1 Cranch 137 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” That duty will sometimes involve the “[r]esolution of litigation challenging the constitutional authority of one of the three branches,” but courts cannot avoid their responsibility merely “because the issues have political implications.” INS v. Chadha, 462 U. S. 919, 943 (1983).

In this case, determining the constitutionality of § 214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky’s case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President’s powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with § 214(d). Either way, the political question doctrine is not implicated. “No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts.” Chadha, 462 U.S. at 941-42.

The Secretary contends that “there is ‘a textually demonstrable constitutional commitment’ ” to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority, including in a case such as this, where the question is whether Congress or the Executive is “aggrandizing its power at the expense of another branch.”

Our precedents have also found the political question doctrine implicated when there is “a lack of judicially discoverable and manageable standards for resolving”
the question before the court. Framing the issue as the lower courts did, in terms of whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns. They dissipate, however, when the issue is recognized to be the more focused one of the constitutionality of § 214(d). Indeed, both sides offer detailed legal arguments regarding whether § 214(d) is constitutional in light of powers committed to the Executive, and whether Congress’s own powers with respect to passports must be weighed in analyzing this question. . . .

[The Court reviews the government’s and the petitioner’s arguments on the merits of the constitutionality of Section 214(d).]

Recitation of these arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not “turn on standards that defy judicial application.” Resolution of Zivotofsky’s claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case. . . .

Having determined that this case is justiciable, we leave it to the lower courts to consider the merits in the first instance.

[Justice Sotomayor, joined in part by Justice Breyer, concurred in part and in the judgment. In her view, the factors from Baker v. Carr]

reflect three distinct justifications for withholding judgment on the merits of a dispute. When a case would require a court to decide an issue whose resolution is textually committed to a coordinate political department, as envisioned by Baker’s first factor, abstention is warranted because the court lacks authority to resolve that issue. . . .

The second and third Baker factors reflect circumstances in which a dispute calls for decisionmaking beyond courts’ competence. . . .

The final three Baker factors address circumstances in which prudence may counsel against a court’s resolution of an issue presented.

While acknowledging that “it will be the rare case in which Baker’s final factors alone render a case nonjusticiable,” she argued that “our long historical tradition recognizes that such exceptional cases arise, and due regard for the separation of powers and the judicial role envisioned by Article III confirms that abstention may
be an appropriate response.” But she agreed with the Court that this particular case did not present a political question.]

[Justice Alito concurred in the judgment. He reasoned: “Under our case law, determining the constitutionality of an Act of Congress may present a political question, but I do not think that the narrow question presented here falls within that category. Delineating the precise dividing line between the powers of Congress and the President with respect to the contents of a passport is not an easy matter, but I agree with the Court that it does not constitute a political question that the Judiciary is unable to decide.”]

[Justice Breyer dissented. Like Justice Sotomayor, he emphasized all six of the Baker factors, and he agreed with her that prudential considerations can sometimes trigger application of the political question doctrine. Four sets of prudential considerations led him to conclude that this case presented a non-justiciable political question: “First, the issue before us arises in the field of foreign affairs. . . . Decisionmaking in this area typically is highly political. . . . Second, if the courts must answer the constitutional question before us, they may well have to evaluate the foreign policy implications of foreign policy decisions. . . . Third, the countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones [because they do not involve] an interest in property or bodily integrity, which courts have traditionally sought to protect, [and because Zivotofsky does not] assert an interest in vindicating a basic right of the kind that the Constitution grants to individuals and that courts traditionally have protected from invasion by the other branches of Government. . . . Fourth, insofar as the controversy reflects different foreign policy views among the political branches of Government, those branches have nonjudicial methods of working out their differences.”]

**Page 62, add at the end of Note 14:**

14a. Why did the Court in Zivotofsky only acknowledge and apply the first two of the six Baker factors? Does this decision mean that the other four factors are no longer relevant in determining whether a case presents a political question? Or that they are relevant only if one of the first two factors also is applicable? The Court cites Marbury for the proposition that it is the duty of the courts to decide constitutional questions, and quotes from Chadha to the effect that Congress and the President cannot decide the constitutionality of a federal statute. Do these references mean that the political question doctrine can never apply when the constitutionality of a federal statute is at issue?
Page 134, add at the end of Note 2:

In Chevron v. Naranjo, 667 F.3d 232 (2d Cir. 2012), the Second Circuit held that the Uniform Foreign Money Judgments Recognition Act does not give potential judgment-debtors a cause of action to challenge foreign judgments before enforcement of those judgments is sought. Rather, “[j]udgment-debtors can challenge a foreign judgment’s validity under the Recognition Act only defensively, in response to an attempted enforcement.” The court based its decision in part on considerations of international comity:

A decision by a court in one jurisdiction, pursuant to a legislative enactment in that jurisdiction, to decline to enforce a judgment rendered in a foreign jurisdiction necessarily touches on international comity concerns. It is a particularly weighty matter for a court in one country to declare that another country’s legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations. That inquiry may be necessary, however, when a party seeks to invoke the authority of our courts to enforce a foreign judgment.

But when a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver. In such an instance, the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world’s legal systems.

Page 137, add after Note 9:

9a. In some cases involving conduct outside the United States, U.S. courts may require, as a precondition to suit, that the plaintiff first exhaust remedies that are potentially available in another country. As discussed in Chapter 8, such an exhaustion requirement has been mandated by Congress for suits brought under a 1992 human rights statute, the Torture Victim Protection Act. As also discussed in that chapter, the Supreme Court has suggested that it might be appropriate for courts to impose such a requirement in cases brought under a more general statute that has been used for human rights litigation, the Alien Tort Statute (ATS). In Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008) (en banc), the Ninth Circuit held that, while
exhaustion is not required in ATS cases, it might be appropriate in select cases as a prudential matter, especially when a case has only a weak nexus to the United States. Recently, the Seventh Circuit held that an exhaustion requirement is appropriate for cases brought under the takings of property exception to immunity in the Foreign Sovereign Immunities Act (28 U.S.C. § 1605(a)(3)). See Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012). Any exhaustion requirement is likely to have exceptions for situations in which pursuing relief in the foreign country would be futile, dangerous, or clearly inadequate to address the alleged harm. Cf. Agudas Chasidei Chabad of U.S. v. Russian Federation, 528 F.3d 924, 949 (D.C. Cir. 2008) (“Assuming that an exhaustion requirement exists . . . the only remedy Russia has identified is on its face inadequate.”).

Chapter 3: Congress and the President in Foreign Relations

Page 153, add at the end of Note 3:

Although it did not concern foreign affairs, the Supreme Court’s much-discussed decision in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012), contains an important analysis of the scope of the Commerce Clause. That case involved the constitutionality of the 2010 Patient Protection and Affordable Care Act, which, among other things, mandates that most Americans maintain health insurance coverage and, if they fail to do so, it imposes a “shared responsibility payment” on them. Although a 5-4 majority of the Court upheld this individual mandate provision under the government’s taxing power, a 5-4 majority also concluded that the provision did not fall within the scope of Congress’s commerce authority. Chief Justice Roberts explained that the text of the Commerce Clause “reflects the natural understanding that the power to regulate assumes there is already something to be regulated.” Congress’s commerce authority therefore is limited, said Roberts, to the regulation of preexisting activity, whereas the individual mandate “compels individuals to become active in commerce by purchasing a product.” Justice Scalia, writing for himself and three other Justices, similarly reasoned that “it must be activity affecting commerce that is regulated, and not merely the failure to engage in commerce.”

Page 153, add at the end of Note 4:

In another part of the legislation at issue in Clark, Congress made it a crime for any U.S. citizen or permanent resident alien to have sex with a minor, even if not for money, if they do so after “travel[ing] in foreign commerce” and if the sex would be a
crime if committed in the United States. The U.S. Court of Appeals for the Third Circuit held that this provision falls within Congress’s commerce power because it involves a regulation of the channels of commerce. See United States v. Pendleton, 658 F.3d 299 (3d Cir. 2011).

Page 156, add after Note 9:

9a. The Eleventh Circuit has held that Congress’s Define and Punish Power does not give it the authority to criminalize drug trafficking in the territorial waters of another nation. See United States v. Bellaizac-Hurtado, 700 F.3d 1245 (11th Cir. 2012). In that case, the government sought to prosecute four individuals under the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70503(a), 70506, after finding a large amount of cocaine in their vessel in Panamanian waters. In support of its conclusion that drug trafficking is not currently an offense under the law of nations, the court explained that:

[T]he “law of nations,” in contemporary terms, means customary international law. . . .

Although a number of specially affected States—States that benefit financially from the drug trade—have ratified treaties that address drug trafficking, they have failed to comply with the requirements of those treaties, and the international community has not treated drug trafficking as a violation of contemporary customary international law. Scholars also agree that drug trafficking is not a violation of contemporary customary international law.

For an argument that Congress under the Define and Punish Clause “can define only offenses that already exist in international law,” but that “congressional definitions should receive a fair degree of deference from the courts when, as will often be the case, the existence or details of the underlying international norms are substantially unclear,” see Eugene Kontorovich, Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause, 106 Nw. U. L. Rev. 1675, 1682 (2012).

Page 157, add at the end of Note 10:

In United States v. Dire, 680 F.3d 446 (4th Cir. 2012), the Fourth Circuit held that the reference in the criminal piracy statute to the law of nations implicitly encompasses evolving international norms relating to piracy. In that case, a group of Somalis attacked a U.S. navy frigate on the high seas off the coast of Africa,
mistakenly thinking it was a merchant vessel. Their attack was unsuccessful, and they were captured and subsequently tried and convicted of piracy. They argued that piracy, as defined by the law of nations when the piracy statute was first enacted in the early 1800s, required a robbery of a vessel at sea, and they pointed out that they had not taken any property and had boarded the U.S. vessel only after being apprehended. The Fourth Circuit found this argument unpersuasive, concluding that the modern understanding of piracy encompasses acts of violence carried out against vessels for private gain, such as the acts in question in this case, and that the piracy statute implicitly incorporates this modern understanding.

**Page 179, add at the end of Note 9:**


**Page 199, add at the end of Note 10:**

For additional debate over whether the President is constitutionally required to veto legislation containing provisions that he believes are unconstitutional, compare, for example, Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 Wm. & Mary Bill Rts. J. 81 (2007) (arguing there is a constitutional duty to exercise the veto in this situation), with William Baude, *Signing Unconstitutional Laws*, 86 Ind. L.J. 303 (2011) (arguing that there is no such constitutional duty).

**Page 203, add at the end of Note 13:**

In March 2012, the Supreme Court decided this case, holding that there was no political question, and remanding the case back to the D.C. Circuit for a decision on the merits. See Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012). The Supreme Court’s opinion is excerpted above in the materials for Chapter 2.
Chapter 4: War Powers

Page 225, add after Note 7:

7a. Congress also has the power to “make rules concerning Captures on Land and Water.” For an argument that this Captures Clause was designed to give Congress the authority to determine what property is subject to capture by both public and private forces of the United States, and that this assignment of authority “supports an expansive role for Congress in war initiation and prosecution,” see Ingrid Wuerth, The Captures Clause, 76 U. Chi. L. Rev. 1683, 1690 (2009).

Chapter 5: War on Terrorism

Page 327, add at the end of Note 7:

For a revisionist assessment of Quirin that critiques the Court’s allowance of habeas corpus review, see Andrew Kent, Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case, 66 Vand. L. Rev. 153 (2013). Professor Kent maintains that “Quirin’s holding on court access for undisputed enemy fighters was contrary to practice and precedent, is not supported by substantial reasons, and interferes with a detailed framework of international law and diplomacy that has long governed detention and treatment of captured enemy combatants.”

Page 349, add after Note 13:

13a. On the last day of 2011, President Obama signed into law the National Defense Authorization Act of 2012, Subtitle D of Title 10 which includes several provisions related to the military detention of terrorism suspects. Subtitle D is complex and contains many subtleties, but its main elements are as follows.

Section 1021 of Subtitle D effectively codifies the Obama administration’s claimed detention authority. It “affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force . . . includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition under the law of war.” And it defines a “covered person” as either “[a] person who planned, authorized, committed, or aided
the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks” or “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”

Section 1022 requires military detention for a subset of those who are subject to detention under Section 1021, namely, anyone who is “a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda” and has participated in an attack or attempted attack against the United States or its coalition partners. Section 1022 exempts U.S. citizens, and it mandates detention only “pending disposition under the law of war.” It also allows the President to waive the requirement of mandatory detention “if the President submits to Congress a certification in writing that such a waiver is in the national security interests of the United States.” President Obama subsequently issued a Policy Directive that prospectively waives mandatory military detention for various situations in which a person has been apprehended by domestic law enforcement, such as when military detention would undermine cooperation with foreign governments or reduce the likelihood of getting cooperation from the detainee. See Presidential Policy Directive/PPD-14, Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year 2012, February 28, 2012.

Section 1023 requires the Defense Department to set forth procedures for implementing the periodic review process required by President Obama’s March 2011 Executive Order. It also lists various considerations that the Executive Branch should take into account in making this determination:

(A) the likelihood the detainee will resume terrorist activity if transferred or released; (B) the likelihood the detainee will reestablish ties with al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners if transferred or released; (C) the likelihood of family, tribal, or government rehabilitation or support for the detainee if transferred or released; (D) the likelihood the detainee may be subject to trial by military commission; and (E) any law enforcement interest in the detainee.

The Defense Department implemented this congressional directive on May 9, 2012. See Memorandum from the Deputy Secretary of Defense, “Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567” (May 9, 2012).
Sections 1026 and 1027 renew the prohibition on the use of federal funds for building detention facilities in the United States or transferring Guantanamo detainees to domestic facilities or releasing them into the United States. And Section 1028 renews the conditions on the transfer of Guantanamo detainees to third countries.

13b. On January 2, 2013, President Obama signed the National Defense Authorization Act for Fiscal Year 2013. As in the previous year, Subtitle D of Title 10 of the 2013 NDAA includes a number of provisions relating to the military detention of terrorism suspects.

Section 1022 continues the congressional opposition to closure of the detention facility at Guantanamo Bay by preventing the expenditure of any money to construct or modify a detention facility inside the United States for Guantanamo detainees.

Section 1024 is a reaction to an episode involving Ahmed Abdulkadir Warsame, a Somali with alleged ties to affiliates of al Qaeda. The United States captured Warsame in April of 2011 in international waters in the Gulf of Aden. It detained him in military custody and interrogated him for two months, initially without Miranda warnings, aboard a naval vessel. It later flew him to New York, where he was indicted and pled guilty to numerous charges related to material support for terrorism. Section 1024 requires the Secretary of Defense to notify Congress when the military detains an individual under the AUMF aboard a Navy ship. It also requires “a report on the use of naval vessels for the detention outside the United States of any individual who is detained pursuant to the Authorization for Use of Military Force.”

Section 1025 requires the Secretary of Defense to notify Congress about transfers of non-Afghan detainees from the Parwan detention facility in Afghanistan. Section 1027 bans the transfer or release of Guantanamo detainees to the United States (and thus also effectively reiterates the prohibition on federal criminal trials of Guantanamo detainees). Section 1028 extends the restrictions on overseas transfers of Guantanamo detainees by requiring the Secretary of Defense to make elaborate certifications before removing a detainee from Guantanamo.

Finally, Section 1029 is an apparent response to fears such as those expressed by the plaintiffs in Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012). In that case, a group of writers, journalists, and activists in the United States who claimed to have a reasonable fear that their activities would subject them to indefinite military detention under Section 1021 of the 2012 NDAA challenged the constitutionality of the provision. A district judge ruled that Section 1021 was overbroad and vague and thus facially unconstitutional under the First Amendment, and also that it lacked sufficient definitional structure and clarity to meet the requirements of due process. The judge permanently enjoined the enforcement of Section 1021, but the Second
Circuit stayed the injunction pending appeal. Oral argument in the case occurred in
February 2013. Section 1029 of the 2013 NDAA provides that nothing in the 2012
NDAA “shall be construed to deny the availability of the writ of habeas corpus or to
deny any Constitutional rights in a court ordained or established by or under Article III
of the Constitution to any person inside the United States who would be entitled to the
availability of such writ or to such rights in the absence of such laws.”

Upon signing the 2013 NDAA into law, President Obama issued a signing
statement that outlined the President’s “constitutional concerns” with Subtitle D. With
respect to Section 1025, the President stated:

Section 1025 threatens to upend that tradition, and could interfere with
my ability as Commander in Chief to make time-sensitive
determinations about the appropriate disposition of detainees in an active
area of hostilities. Under certain circumstances, the section could violate
constitutional separation of powers principles. If section 1025 operates
in a manner that violates constitutional separation of powers principles, my Administration will implement it to avoid the constitutional conflict.

With respect to Section 1028, he stated:

Section 1028 . . . hinders the Executive’s ability to carry out its military,
national security, and foreign relations activities and would, under
certain circumstances, violate constitutional separation of powers
principles. The executive branch must have the flexibility to act swiftly
in conducting negotiations with foreign countries regarding the
circumstances of detainee transfers. . . . [I]n the event that these
statutory restrictions operate in a manner that violates constitutional
separation of powers principles, my Administration will implement them
in a manner that avoids the constitutional conflict.

Page 349, add to the list of citations in note 14:

Jonathan Hafetz, Military Detention in the “War on Terrorism”: Normalizing the
Page 358, add before the Notes and Questions:

Hamdan v. United States (Hamdan II)
696 F.3d 1238 (D.C. Cir. 2012)

KAVANAUGH, CIRCUIT JUDGE:

The United States is at war against al Qaeda, an international terrorist organization. Al Qaeda’s stated goals are, among other things, to drive the United States from posts in the Middle East, to devastate the State of Israel, and to help establish radical Islamic control over the Greater Middle East. Al Qaeda uses terror to advance its broad objectives. Al Qaeda terrorists do not wear uniforms, and they target American civilians and members of the U.S. Military, as well as U.S. allies. After al Qaeda’s attacks on the United States on September 11, 2001, Congress authorized the President to wage war against al Qaeda. That war continues.

In war, when the United States captures or takes custody of alien enemy combatants or their substantial supporters, it may detain them for the duration of hostilities. Moreover, the United States may try unlawful alien enemy combatants before military commissions for their war crimes. See Hamdi v. Rumsfeld, 542 U.S. 507, 518-24 (2004); Ex parte Quirin, 317 U.S. 1, 26-45 (1942).

This case raises questions about the scope of the Executive’s authority to prosecute war crimes under current federal statutes.

This particular dispute involves the military commission conviction of Salim Hamdan, an al Qaeda member who worked for Osama bin Laden. In 2001, Hamdan was captured in Afghanistan. He was later transferred to the U.S. Naval Base at Guantanamo Bay, Cuba.

Hamdan was not just detained at Guantanamo as an enemy combatant. He was also accused of being an unlawful enemy combatant and was tried and convicted by a military commission for “material support for terrorism,” a war crime specified by the Military Commissions Act of 2006. See 10 U.S.C. § 950t(25); see also 10 U.S.C. § 950v(b)(25) (2006) (previous codification of same provision). Hamdan’s conviction was based on actions he took from 1996 to 2001—before enactment of the Military Commissions Act. At the time of Hamdan’s conduct, the extant federal statute authorized and limited military commissions to try violations of the “law of war.” 10 U.S.C. § 821.

As punishment for his war crime, Hamdan was sentenced by the military commission to 66 months’ imprisonment, with credit for some time already served.
Hamdan’s sentence expired in 2008. Although the United States may have continued to detain Hamdan until the end of hostilities pursuant to its wartime detention authority, see Hamdi, 542 U.S. at 518-22, Hamdan was transferred in late 2008 to Yemen and then released there. Even after his release, Hamdan has continued to appeal his U.S. war crimes conviction. . . .

Under a law now codified at 10 U.S.C. § 821, Congress has long authorized the Executive to use military commissions to try war crimes committed by the enemy. See Ex parte Quirin, 317 U.S. 1 (1942). That statute authorizes military commissions to try violations of the “law of war”—a term, as we explain below, that has long been understood to mean the international law of war. See Hamdan v. Rumsfeld, 548 U.S. 557, 603, 610 (2006) (plurality); id. at 641 (Kennedy, J., concurring); Quirin, 317 U.S. at 27-30, 35-36. Two other longstanding statutes separately authorize military commission prosecutions for spying and aiding the enemy. See 10 U.S.C. §§ 904, 906.4

After the Supreme Court’s 2006 decision in Hamdan, Congress enacted a new military commissions statute that, among other things, clarified the scope of the Executive’s authority to try war crimes. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. Of particular relevance here, Congress expanded military commissions beyond trying violations of the generic “law of war,” spying, and aiding the enemy. Congress instead also listed a large number of specific war crimes that could be tried by military commission, including conspiracy and material support for terrorism.

Hamdan argues that Congress lacked authority under Article I of the Constitution—namely, the Define and Punish Clause—to define material support for terrorism as a war crime subject to trial by a U.S. military commission. Hamdan maintains that Congress’s authority under the Define and Punish Clause is limited to proscribing offenses that are already illegal under international law. And Hamdan contends that material support for terrorism is not a recognized international-law war crime. The Government responds that Hamdan’s focus on the Define and Punish Clause alone is misplaced. According to the Government, the Declare War Clause and other war clauses in Article I, as supplemented by the Necessary and Proper Clause, independently authorize Congress to establish military commissions to try an enemy’s

---

4 The “aiding the enemy” proscription in 10 U.S.C. § 904, which was first codified in the Articles of War of 1866, see William Winthrop, Military Law and Precedents 102-03, 981 (rev. 2d ed. 1920), generally requires breach of a duty of loyalty as well as aid to the enemy. . . . The breach of loyalty requirement is made explicit in the 2006 Military Commissions Act, which re-codified the crime. 10 U.S.C. § 950t(26) (“Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.”) (emphasis added).
war crimes. And the Government further contends that Congress’s broad authority under the Declare War Clause is not constrained by the evolving and often difficult to discern standards of international law. Therefore, as the Government sees it, Congress has authority to make material support for terrorism a war crime triable by military commission.

We do not decide that antecedent question. Even assuming arguendo that Congress had authority under its various Article I war powers to establish material support for terrorism as a war crime in the Military Commissions Act of 2006, we conclude that the Act did not authorize retroactive prosecution for conduct that was committed before the Act’s enactment and was not prohibited by U.S. law at the time the conduct occurred. Here, Hamdan’s conduct occurred from 1996 to 2001—before enactment of the Military Commissions Act. And as we will explain, the federal statute in effect at the time of Hamdan’s conduct—10 U.S.C. § 821—did not authorize prosecution for material support for terrorism.

A

As is clear from the text of the Military Commissions Act of 2006, Congress was quite concerned about the ex post facto implications of retroactively prosecuting someone under the Act for conduct committed before its enactment. Congress tried to deal with any ex post facto problem by declaring in the text of the statute that “[t]he provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.” § 3(a), 120 Stat. at 2624. The Act continued: “Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.” Id.

As Congress well understood when it appended this unusual statement to the statute, the U.S. Constitution bars Congress from enacting punitive ex post facto laws. See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”). Among other things, the Ex Post Facto Clause bars laws that retroactively punish conduct that was not previously prohibited, or that retroactively increase punishment for already prohibited conduct. . . . The Ex Post Facto Clause thus prevents Congress and the Executive from retroactively applying a federal criminal statute to conduct committed before the statute was enacted.

As Congress itself recognized in the statutory text, retroactive prosecution by military commission could similarly raise serious constitutional issues, at the very least. As stated in the statutory text, however, Congress believed that the Act codified
no new crimes and thus posed no ex post facto problem. As we explain below, Congress’s premise was incorrect. The statute does codify some new war crimes, including material support for terrorism. The question for ex post facto purposes is this: If Congress had known that the Act was codifying some new crimes, would Congress have wanted the new crimes to be enforced retroactively? To begin with, the statutory text reveals a tight causal link between (i) Congress’s belief that the statute codified only crimes under pre-existing law and (ii) Congress’s statement that the statute could therefore apply to conduct before enactment. That causal link suggests that Congress would not have wanted new crimes to be applied retroactively. The Executive Branch agrees with that interpretation of the statute, stating: “Congress incorporated ex post facto principles into the terms of the MCA itself.” At a minimum, we know that the statutory text does not contemplate or address the possibility of retroactively applying new crimes, leaving us with at least something of an ambiguity. And courts interpret ambiguous statutes to avoid serious questions of unconstitutionality. . . . To avoid the prospect of an Ex Post Facto Clause violation here, we interpret the Military Commissions Act of 2006 so that it does not authorize retroactive prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission. In this case, therefore, Hamdan’s conviction stands or falls on whether his conduct was prohibited by the pre-existing statute, 10 U.S.C. § 821, at the time he committed the conduct.

B

Before enactment of the Military Commissions Act in 2006, U.S. military commissions could prosecute war crimes under 10 U.S.C. § 821 for violations of the “law of war.” The Government suggests that at the time of Hamdan’s conduct from 1996 to 2001, material support for terrorism violated the “law of war” referenced in 10 U.S.C. § 821. It is true that in the text of the Military Commissions Act of 2006, Congress declared its belief that material support for terrorism was a pre-existing crime under the law of war and thus under 10 U.S.C. § 821. See § 3a, 120 Stat. at 2624. But exercising our independent review, as we must when considering the ex post facto implications of a new law, . . . we conclude otherwise. Material support for terrorism was not a war crime under the law of war referenced in 10 U.S.C. § 821 at the time of Hamdan’s conduct.

Analysis of this issue begins by determining what body of law is encompassed by the term “law of war” in 10 U.S.C. § 821. The Supreme Court’s precedents tell us: The “law of war” referenced in 10 U.S.C. § 821 is the international law of war. . . .

We turn, then, to the question whether material support for terrorism is an international-law war crime.
It is true that international law establishes at least some forms of terrorism, including the intentional targeting of civilian populations, as war crimes. See, e.g., Rome Statute of the International Criminal Court art. 8(2)(b), July 17, 1998, 2187 U.N.T.S. 90; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

But the issue here is whether material support for terrorism is an international-law war crime. The answer is no. International law leaves it to individual nations to proscribe material support for terrorism under their domestic laws if they so choose. There is no international-law proscription of material support for terrorism.

To begin with, there are no relevant international treaties that make material support for terrorism a recognized international-law war crime. Neither the Hague Convention nor the Geneva Conventions—the sources that are “the major treaties on the law of war”—acknowledge material support for terrorism as a war crime. See Hamdan, 548 U.S. at 604 (plurality); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, Oct. 18, 1907, 36 Stat. 2277.

Nor does customary international law otherwise make material support for terrorism a war crime. Customary international law is a kind of common law; it is the body of international legal principles said to reflect the consistent and settled practice of nations. . . . It is often difficult to determine what constitutes customary international law, who defines customary international law, and how firmly established a norm has to be to qualify as a customary international law norm. Cf. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

At the same time, the imprecision of customary international law calls for significant caution by U.S. courts before permitting civil or criminal liability premised on violation of such a vague prohibition. A general prohibition against violations of “international law” or the “law of nations” or the “law of war” may fail in certain cases to provide the fair notice that is a foundation of the rule of law in the United States. Therefore, as the Supreme Court required in an analogous context in Sosa, and as the plurality suggested in Hamdan, imposing liability on the basis of a violation of “international law” or the “law of nations” or the “law of war” generally must be based on norms firmly grounded in international law. See Sosa, 542 U.S. at 724-38; Hamdan, 548 U.S. at 602-03 & n.34, 605 (plurality). In this case, the asserted norm has no grounding in international law, much less firm grounding.
But here, the content of customary international law is quite evident. Material support for terrorism was not a recognized violation of the international law of war as of 2001 (or even today, for that matter). As we have noted, the Geneva Conventions and the Hague Convention do not prohibit material support for terrorism. The 1998 Rome Statute of the International Criminal Court, which catalogues an extensive list of international war crimes, makes no mention of material support for terrorism. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Nor does the Statute of the International Tribunal for the Former Yugoslavia, the Statute of the International Tribunal for Rwanda, or the Statute of the Special Court for Sierra Leone. See Statute of the International Tribunal for the Former Yugoslavia, adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1159, 1192; Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598, 1602 (includes terrorism itself as a crime); Statute of the Special Court for Sierra Leone art. 3(d), Jan. 16, 2002, 2178 U.N.T.S. 138 (same). Nor have any international tribunals exercising common-law-type power determined that material support for terrorism is an international-law war crime.

Commentators on international law have similarly explained that material support for terrorism is not an international-law war crime. See, e.g., ANDREA BIANCHI & YASMIN NAQVI, INTERNATIONAL HUMANITARIAN LAW AND TERRORISM 244 (2011) (“there is little evidence” that a proscription of “material support for terrorism” is “considered to be part of the laws and customs of war”). Nor is the offense of material support for terrorism listed in the JAG handbook on the law of war. See U.S. ARMY JAG, LAW OF WAR HANDBOOK (Maj. Keith E. Puls ed., 2005) . . . .

In short, neither the major conventions on the law of war nor prominent modern international tribunals nor leading international-law experts have identified material support for terrorism as a war crime. Perhaps most telling, before this case, no person has ever been tried by an international-law war crimes tribunal for material support for terrorism.

Not surprisingly, therefore, even the U.S. Government concedes in this case that material support for terrorism is not a recognized international-law war crime. No treaty that the Government has cited or that we are aware of identifies material support for terrorism as a war crime. And the Government further admits: The “offense of providing material support to terrorism, like spying and aiding the enemy, has not attained international recognition at this time as a violation of customary international law.”

To be sure, there is a strong argument that aiding and abetting a recognized international-law war crime such as terrorism is itself an international-law war crime.
And there are other similar war crimes. But Hamdan was not charged with aiding and abetting terrorism or some other similar war crime. He was charged with material support for terrorism. And as the Government acknowledges, aiding and abetting terrorism prohibits different conduct, imposes different mens rea requirements, and entails different causation standards than material support for terrorism. If the Government wanted to charge Hamdan with aiding and abetting terrorism or some other war crime that was sufficiently rooted in the international law of war (and thus covered by 10 U.S.C. § 821) at the time of Hamdan’s conduct, it should have done so.

The Government latches on to a few isolated precedents from the Civil War era to prop up its assertion that material support for terrorism was a pre-existing war crime as of 2001 for purposes of 10 U.S.C. § 821. There are several independent reasons that those cases fail to support the Government’s argument. First, the Civil War cases did not involve any charges of material support for terrorism. Instead, several cases involve guerillas who were punished for taking up “arms” as “insurgents”—that is, for direct attacks rather than material support. Others were convicted of “joining, aiding and assisting a band of robbers and bandits”—in other words, what we would likely call aiding and abetting, not material support. In short, those precedents are at best murky guidance here. Second, those Civil War commissions were in part military tribunals governing certain territory—which are a separate form of military commission subject to a separate branch of law, and not the kind of law-of-war military commission at issue here. As others have suggested, their precedential value is therefore limited. Third, and perhaps most to the point, those cases do not establish that material support for terrorism was a war crime recognized under international law as of 1996 to 2001 when Hamdan committed his conduct, which is the relevant inquiry under 10 U.S.C. § 821. The Government contends that those Civil War precedents illuminate what it calls the “U.S. common law of war”—not the international law of war. But the statutory constraint here imposed by 10 U.S.C. § 821 is the international law of war. . . . To be sure, U.S. precedents may inform the content of international law. But those Civil War precedents fail to establish material support for terrorism as a war crime under the international law of war as of 1996 to 2001. And even the Government admits that material support for terrorism was not an international-law war crime as of 1996 to 2001.

Page 362, add after Note 10:

10a. Consider the D.C. Circuit’s 2012 decision in Hamdan II, excerpted above. Did the court give sufficient deference to Congress’s judgment in the Military Commissions Act that material support for terrorism was a violation of customary international law? Did the Executive Branch undercut the basis for such deference by arguing that material support for terrorism was a violation of the “U.S. common law of
war” rather than of the international laws of war? Compare and contrast this decision with the Supreme Court’s decision in *Hamdi v. Rumsfeld*. In *Hamdi*, the plurality considered U.S. historical practice as well as international law in concluding that the AUMF implicitly authorized detention. Why wasn’t a similarly broad consideration of U.S. historical practice appropriate in *Hamdan II* in discerning whether Congress had implicitly authorized the prosecution of material support for terrorism in 10 U.S.C. § 821? Because Section 821 specifically refers to the “law of war”?

10b. The holding in *Hamdan II* raised the question whether a charge for stand-alone conspiracy involving conduct before 2006 is triable by military commission. The issue arose in connection with the 2008 military commission conviction of Ali Hamza Ahmad Suliman al-Bahlul for conspiring with Osama bin Laden and others to commit murder of protected persons and attacking civilians. After *Hamdan II*, Bahlul appealed to the D.C. Circuit, arguing that *Hamdan II* required reversal of his conviction because his stand-alone conspiracy charges were, like the material support charges in *Hamdan II*, not an “international-law war crime” before 2006. In response, the U.S. government agreed that *Hamdan II* required reversal of Bahlul’s conviction, and the D.C. Circuit vacated the conviction. The government later sought rehearing *en banc* in *Bahlul*, however, arguing that *Hamdan II* was itself wrongly decided because the phrase “law of war” in 10 U.S.C. § 821 should be interpreted to include the U.S. common law of war in addition to the international law of war. The D.C. Circuit granted the petition on April 23, 2013, and asked the parties to address two issues in addition to ones raised in their briefs:

(1) For purposes of considering whether the Military Commissions Act of 2006 may permissibly proscribe pre-2006 conduct that was not a war crime triable by military commission under 10 U.S.C. § 821 before 2006, does the Ex Post Facto Clause apply in cases involving detainees at Guantanamo?

(2) Assuming arguendo that, as *Hamdan II* concluded, the Military Commissions Act of 2006 does not proscribe pre-2006 conduct that was not a war crime triable by military commission under 10 U.S.C. § 821 before 2006, and that 10 U.S.C. § 821 permits trial by military commission only for war crimes that were proscribed under the international law of war at the time of the offense, was conspiracy a violation of the international law of war at the time of Bahlul’s offense?

Oral argument in this case is tentatively scheduled for the Fall of 2013.
Page 363, add at the end of Note 11:

For a consideration of the forum choices that should be available for the trial of suspected terrorists, from the perspective of institutional design, and an argument that jurisdictional redundancy between civilian courts and military commissions has net benefits in this context, see Aziz Huq, *Forum Choice for Terrorism Suspects*, 61 Duke L.J. 1415 (2012).

Page 381, add at the end of Note 6:


Page 396, add at the end of Note 12:

Overturning an earlier panel decision, the Seventh Circuit, sitting *en banc*, declined to allow a *Bivens* action in *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (*en banc*). That case involved allegations by two U.S. citizen employees of a private security firm that they had been abusively detained and interrogated by the U.S. military in Iraq. They sued both U.S. military personnel as well as Secretary of State Donald Rumsfeld. A *Bivens* action was not appropriate for this situation, reasoned the court, because “civilian courts should not interfere with the military chain of command—not, that is, without statutory authority.” The court also noted that there were statutorily-prescribed mechanisms for seeking compensation for injury caused by the military (which the plaintiffs here had not pursued) and the court expressed the view that these mechanisms “tell[] us that [Congress] considered how best to address the fact that the military can injure persons by improper conduct.” Even if a *Bivens* action were appropriate, the court further concluded, the claims against Rumsfeld would need to be dismissed. To hold him liable, said the court, the plaintiffs “would need to allege that Rumsfeld knew of a substantial risk to security contractors’ employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed,” whereas “[t]he complaint does not contain such an allegation and could not plausibly do so.”

A significant additional hurdle for detainees suing U.S. government officials for alleged mistreatment is the doctrine of qualified immunity. “Qualified immunity gives
government officials breathing room to make reasonable but mistaken judgments about open legal questions.” Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011). It “shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” Id. at 2080 (internal citation and quotations omitted). Under the second prong of this test, a “Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right’” Id. at 2083 (internal citation and quotations omitted). The Court does “not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” Id.

An important decision applying these principles in the context of the war on terrorism is Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012). In that case, Jose Padilla (whose status and fate are discussed in Note 10 of Section B, at pages 342-43 of the casebook) sued John Yoo, who as Deputy Assistant Attorney General in the Bush administration wrote legal memoranda and helped craft policies that Padilla alleged violated his constitutional rights. The Ninth Circuit dismissed the case on qualified immunity grounds for two reasons. First, because Yoo offered his legal advice before the Supreme Court’s decision in Hamdi, at a time when Ex parte Quirin was the leading precedent, it was not “beyond debate” during Yoo’s tenure that Padilla was, as he alleged, “entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal.” Second, Padilla’s allegations of detention and interrogation abuses—which included prolonged isolation, light deprivation, extreme variations in temperature, sleep adjustment, threats of severe physical abuse, death threats, administration of psychotropic drugs, and various stress positions—were not clearly unlawful at the relevant time. The court reasoned that “although it has been clearly established for decades that torture of an American citizen violates the Constitution, and we assume without deciding that Padilla’s alleged treatment rose to the level of torture, that such treatment was torture was not clearly established in 2001-03.”

Page 406, add at the end of Note 6:

In late 2012, Congress renewed the FISA Amendments Act for another five years, through the end of 2017.
Speech by Eric Holder, U.S. Attorney General, at Northwestern University School of Law

... [A]n operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.

The evaluation of whether an individual presents an “imminent threat” incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice—and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military—wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.

Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.

Of course, any such use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force. The principle of necessity requires that the target have definite military value. The principle of distinction requires that only lawful targets—such as combatants, civilians directly participating in hostilities, and military objectives—may be targeted
intentionally. Under the principle of proportionality, the anticipated collateral damage must not be excessive in relation to the anticipated military advantage. Finally, the principle of humanity requires us to use weapons that will not inflict unnecessary suffering.

These principles do not forbid the use of stealth or technologically advanced weapons. In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations, and that the risk of civilian casualties can be minimized or avoided altogether.

Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. “Due process” and “judicial process” are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments—all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time. The Constitution’s guarantee of due process is ironclad, and it is essential—but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war—even if that individual happens to be a U.S. citizen.

That is not to say that the Executive Branch has—or should ever have—the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens.

Page 416, add after Note 5:

5a. Attorney General Holder’s speech presents the Obama administration’s legal rationale for the targeted killing of U.S. citizens. The “recent court decision” that Holder is alluding to is *Al-Alaoui*, which is excerpted at pages 407-11 of the casebook.
Holder argues that Executive Branch procedures for making targeted killing decisions are sufficient to satisfy the requirements of due process. Is this argument persuasive? Would judicial review be infeasible in this context? Is it significant to the due process analysis that, as Holder emphasizes, “the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens”? Holder refers to compliance with “applicable law of war principles.” Do these principles provide a meaningful restraint on Executive Branch action in this context?

5b. In February 2013, NBC News disclosed the existence of an undated 16-page Department of Justice White Paper entitled Lawfulness of Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force. NBC reported that administration officials had represented the White Paper “as a policy document that closely mirrors the arguments of classified memos on targeted killings by the Justice Department’s Office of Legal Counsel.” The White Paper purported to provide a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa’ida or an associated force of al-Qa’ida—that is, an al-Qa’ida leader actively engaged in planning operations to kill Americans.

In doing so, the White Paper tracked in more detail the basic argument put forth in Attorney General Holder’s speech, but some of the details were significant.

First, the White Paper argued that “the United States is in an armed conflict with al-Qa’ida and its associated forces, and Congress has authorized the President to use all necessary and appropriate force against those entities.” It explained that the AUMF authorized force against persons who are American citizens, and that the authorization extended into any country where al-Qa’ida or an associated force had a “significant and organized presence and from which al-Qa’ida or an associated force, including its senior operational leaders, plan attacks against U.S. persons and interests.”

Second, the White Paper addressed constitutional issues implicated by a lethal operation against a U.S. citizen senior al-Qa’ida leader. It first examined the Due Process clause. Deploying the same Mathews v. Eldridge balancing framework used by the Supreme Court in Hamdi, the White Paper noted that both the government’s interest in waging war and protecting its citizens, and the individual’s interest in his
life, were “weighty.” Taking into account these interests and various “practical considerations” about the “realities of combat,” the White Paper concluded that the United States could use lethal force outside the United States against a U.S. citizen who is an operational leader of al-Qa’ida and is involved in planning attacks against the United States in at least the following circumstances:

(1) where an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat to violent attack against the United States; (2) where a capture operation would be infeasible—and where those conducting the operation continue to monitor whether capture becomes feasible; and (3) where such an operation would be conducted consistent with applicable law of war principles.

The White Paper added that the “imminent threat” requirement “does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future” because “[d]elaying action against individuals continually planning to kill Americans until some theoretical end stage of the planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result.”

The White Paper next examined the Fourth Amendment prohibition on “unreasonable . . . seizures.” It noted that the test for Fourth Amendment reasonableness is “situation-dependent,” and concluded that any intrusion on a target’s Fourth Amendment interests by a lethal killing under the circumstances addressed in the paper would be outweighed by the governmental interest in protecting the lives of U.S. persons. The White Paper then turned to 18 U.S.C. § 1119(b), which prohibits a U.S. national from killing another U.S. national outside the United States. It concluded that this statute did not apply because Congress implicitly intended Section 1119(b) to contain a “public authority” exception for otherwise lawful killings during warfare of the type addressed in the paper. Finally, the White Paper concluded that the contemplated lethal operations complied with the War Crimes Act, 18 U.S.C. § 2441, because the contemplated operations were against individuals taking active part in hostilities.

5c. The Executive branch’s public representations about the CIA’s otherwise secret drone strike program proved relevant to the ACLU’s Freedom of Information Act (FOIA) request to the CIA for records of that program in American Civil Liberties Union v. Central Intelligence Agency, 710 F.3d 422 (D.C. Cir. 2013). The CIA responded to the request with a so-called “Glomar response,” in which it claimed that it could neither confirm nor deny the existence of the records because doing so would reveal classified information, namely, “whether or not the CIA is involved in drone
strikes or at least has an intelligence interest in drone strikes.” The D.C. Circuit rejected this claim after concluding that government officials had already acknowledged that the CIA had an intelligence interest in drones. It based this conclusion on, among other things, the facts that (a) the President and other top officials had acknowledged that the U.S. drone strikes against al Qaeda are based on the full range of U.S. intelligence capabilities, (b) the CIA is a central government provider of such intelligence, (c) then-CIA Director Panetta talked publicly about the details of U.S. drone strikes, and (d) the CIA had acknowledged in related litigation in the Southern District of New York that it possessed materials relevant to the FOIA request, such as a copy of Attorney General Holder’s speech. The Court did not require the CIA to release all responsive records, however. Rather, it simply required the CIA to prepare a description of the kind of responsive records it possessed, followed by litigation over whether FOIA exemptions apply to those documents. The Court left open how detailed the description of the CIA documents must be.

Chapter 6: States and Foreign Relations

Page 436, add at the end of Note 7:

For a recent lower court decision applying Crosby, see Odebrecht Construction, Inc. v. Secretary, Florida Department of Transportation (11th Cir. May 6, 2013) (upholding preliminary injunction against Florida law that prevented any company doing business in Cuba from bidding on state or local public contracts in the State of Florida, because of a conflict with “the extensive and highly calibrated federal regime of sanctions against Cuba promulgated by the legislative and executive branches over almost fifty years”).

Page 436, replace Note 9 with the following:

9. In 2010, the State of Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act, the express purpose of which was to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” The federal government brought suit against Arizona, challenging the validity of the Act. In an opinion by Justice Kennedy, the Supreme Court held that three provisions in the Act were preempted by federal law. See Arizona v. United States, 132 S. Ct. 2492 (2012).

First, the Court concluded that Section 3 of the Act, which made failure to comply with federal alien-registration requirements a state misdemeanor, improperly
intruded on the field of alien registration, which the Court found had been completely occupied by Congress. “Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation’s borders,” the Court explained. The Court relied heavily on Hines v. Davidowitz (excerpted at pages 422-26 of the casebook).

Second, the Court concluded that Section 5(C) of the Act, which made it a state misdemeanor for “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor” in Arizona, stood as an obstacle to the federal regulatory system established by Congress relating to the employment of illegal aliens. The Court explained that, since the Court’s decision in De Canas v. Bica (excerpted at pages 426-28 of the casebook), Congress had comprehensively regulated the employment of illegal aliens, and it found that Congress “made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.” In light of this, the Court reasoned that “Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.”

Third, the Court concluded that Section 6 of the Act, which authorized state and local officers to make warrantless arrests of certain aliens suspected of having committed an offense that would make them removable from the United States, also created an obstacle to federal law by giving greater authority to state officers to make arrests than Congress has given to federal immigration officers. “By authorizing state officers to decide whether an alien should be detained for being removable,” the Court explained, “§ 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government.”

As background for its preemption analysis, the Court also emphasized the federal government’s broad power to regulate immigration, a power stemming in part from the government’s “inherent power as sovereign to control and conduct relations with foreign nations.” In addition, the Court noted that it “is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”

The Court found, however, that one of the challenged provisions in the Act was not preempted. This provision, Section 2(B), required state officers to make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” The Court observed that “[c]onsultation between federal and state officials is an important feature of the immigration system” and that “Congress has done nothing to suggest it is
inappropriate [for state officers] to communicate with [federal immigration officials] in these situations.”

Justices Scalia, Thomas, and Alito each filed separate dissents.

Chapter 7: Treaties and Other International Agreements

Page 518, add at the end of Note 7:

For an argument (with specific reference to the Vienna Convention litigation) that stare decisis should have less force with respect to decisions involving the application of international law than for decisions involving the application of domestic statutes, because international law is subject to further interpretation by tribunals and other actors outside the U.S. legal system, see Michael P. Van Alstine, Stare Decisis and Foreign Affairs, 61 Duke L.J. 941 (2012).

Page 518, add after Note 7:

7a. For a state court decision granting an evidentiary hearing to determine whether a foreign national was prejudiced by the lack of consular notification, see Gutierrez v. Nevada, 2012 Nev. Unpub. LEXIS 1317 (Nev. Sup. Ct. Sept. 19, 2012). While noting that “Avena does not obligate the states to subordinate their post-conviction review procedures to the ICJ ruling,” the court concluded that the record in this case, unlike the record in Medellin and other cases in which a hearing had been denied, showed that the defendant “arguably suffered actual prejudice due to the lack of consular assistance.” See also Torres v. State, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004) (granting evidentiary hearing to comply with Avena).

Pages 527-31, replace United States v. Lue with the following decision:

United States v. Bond
681 F.3d 149 (3d Cir. 2012)

[Carol Anne Bond, who worked for a chemical manufacturer in Pennsylvania, learned that her friend was pregnant and that Bond’s husband was the father of the child. Seeking revenge, Bond stole toxic chemicals from her employer and ordered other
Jordan, Circuit Judge.

Understanding whether application of the Act to Bond violates the structural limits of federalism begins with the Tenth Amendment, which Bond cites and which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. That text, as the Supreme Court has observed, “confirms that the power of the Federal Government is subject to limits that may . . . reserve power to the States.” New York v. United States, 505 U.S. 144, 157 (1992). Thus, it encapsulates the principles of federalism upon which our nation was founded.

. . . [Missouri v. Holland, 252 U.S. 416 (1920)] teaches that, when there is a valid treaty, Congress has authority to enact implementing legislation under the Necessary and Proper Clause, even if it might otherwise lack the ability to legislate in the domain in question. The legislation must, of course, meet the Necessary and Proper Clause’s general requirement that legislation implemented under that Clause be “rationally related to the implementation of a constitutionally enumerated power.” United States v. Comstock, 130 S. Ct. 1949, 1956 (2010); see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (“[A]ll means which are appropriate,
which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional"). In the treaty context, that requirement has been understood to mean that a treaty and its implementing legislation must be rationally related to one another. United States v. Ferreira, 275 F.3d 1020, 1027 (11th Cir. 2001). Thus, as long as “the effectuating legislation bear[s] a rational relationship to” a valid treaty, United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998), the arguable consequence of Holland is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states’ rights the President and Congress may choose to venture.

Bond vigorously disputes the implications of that conclusion. Specifically, she argues that legal trends since the Supreme Court’s 1920 decision in Holland make it clear that the Tenth Amendment should not be treated as irrelevant when examining the validity of treaty-implementing legislation. Concluding otherwise, she asserts, would make “nothing . . . off-limits” in a world where, more and more, “international treaties govern[] a virtually unlimited range of subjects and intrude[] deeply on internal concerns.” That latter point is not without merit. Juxtaposed against increasingly broad conceptions of the Treaty Power’s scope, reading Holland to confer on Congress an unfettered ability to effectuate what would now be considered by some to be valid exercises of the Treaty Power runs a significant risk of disrupting the delicate balance between state and federal authority.

Those concerns notwithstanding, Bond does not argue that the Convention itself is constitutionally infirm. On the contrary, she admits “that a treaty restricting chemical weapons is a ‘proper subject[] of negotiations between our government and other nations.’” Accordingly, we need not tackle, head on, whether an arguably invalid treaty has led to legislation encroaching on matters traditionally left to the police powers of the states. Nevertheless, resolving the argument Bond does lodge against her prosecution requires at least some consideration of whether the Convention is, in fact, valid. . . . We therefore turn briefly to whether the Convention falls within the Treaty Power’s appropriate scope, bearing in mind that Bond seems to accept that it does.

The Constitution does not have within it any explicit subject matter limitation on the power granted in Article II, § 2. That section states simply that the President has the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. Const. art. II, § 2, cl. 2. Throughout much of American history, however, including when Holland was handed down, it was understood that the Treaty Power was impliedly limited to certain subject matters. . . .
Contemporaneous records such as the Virginia Ratifying Convention show that the Founders generally accepted that the purpose of treaties was, as James Madison put it, to regulate “intercourse with foreign nations,” and that the “exercise” of the Treaty Power was expected to be “consistent with” those “external” ends. The Debates in The Several State Conventions on the Adoption of the Constitution 514-15 (Jonathan Elliot ed., 2d ed. 1941); see The Federalist No. 45 (James Madison) (stating that the Treaty Power “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce”).

Early cases followed that reasoning and indicated that the Treaty Power is confined to matters traditionally understood to be of international concern. See, e.g., Ross v. McIntyre, 140 U.S. 453, 463 (1891) (“The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments.”); De Geoffroy v. Riggs, 133 U.S. 258, 266 (1890) (“That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear.”); Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872) (“[I]nasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty . . .”).

That is not to say, however, that any treaty encroaching on matters ordinarily left to the states was considered to be beyond the Treaty Power’s permissible ambit. On the contrary, so long as the subject matter limitation was satisfied—which it undoubtedly was in cases involving “subjects [such as] peace, alliance, commerce, neutrality, and others of a similar nature,” William Rawle, A View of the Constitution of the United States 65 (2d ed. 1829), or, as Jay put it, “war, peace, and commerce,” The Federalist No. 64 (John Jay)—it was accepted that treaties could affect domestic issues. Many early decisions of the Supreme Court upheld treaties of that nature, including treaties regarding the ownership and transfer of property. See, e.g., Carneal v. Banks, 23 U.S. (10 Wheat.) 181, 189 (1825) (treaty between the United States and France that allowed citizens of either country to hold lands in the other). Still, it was widely accepted that the Treaty Power was inherently limited in the subject matter it could properly be used to address, see Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (“The treatymaking power is broad enough to cover all subjects that properly pertain to our foreign relations . . .”); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (“The treaty-making power of the United States . . . does not extend ‘so far as to authorize what the Constitution forbids,’ . . . [but] does extend to all proper subjects of negotiation between our government and other nations.”), and that the purpose of limiting the Treaty Power to matters which “in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty” was to ensure that treaties were

Despite the long history of that view of the Treaty Power, the tide of opinion, at least in some quarters, has shifted decisively in the last half-century. Many influential voices now urge that there is no limitation on the Treaty Power, at least not in the way understood from the founding through to the middle of the Twentieth Century. . . . That change is reflected in the Restatement (Third) of Foreign Relations Law of the United States (1987), which declares flatly that, “[c]ontrary to what was once suggested, the Constitution does not require that an international agreement deal only with ‘matters of international concern.’” Third Restatement § 302 cmt. c; see id. § 303(1) (“[T]he President, with the advice and consent of the Senate, may make any international agreement of the United States in the form of a treaty.”).

Whatever the Treaty Power’s proper bounds may be, however, we are confident that the Convention we are dealing with here falls comfortably within them. The Convention, after all, regulates the proliferation and use of chemical weapons. One need not be a student of modern warfare to have some appreciation for the devastation chemical weapons can cause and the corresponding impetus for international collaboration to take steps against their use. Given its quintessentially international character, we conclude that the Convention is valid under any reasonable conception of the Treaty Power’s scope. In fact, as we discuss at greater length herein, because the Convention relates to war, peace, and perhaps commerce, it fits at the core of the Treaty Power.

Because Holland clearly instructs that “there can be no dispute about the validity of [a] statute” that implements a valid treaty, the constitutionality of Bond’s prosecution would seem to turn on whether the Act goes beyond what is necessary and proper to carry the Convention into effect, or, in other words, whether the Act fails to “bear a rational relationship to” the Convention, Lue, 134 F.3d at 84. According to Bond, however, only a simplistic reading of Holland could lead one to think that the Supreme Court was saying that “Congress’s power to implement treaties is subject to no limit other than affirmative restrictions on government power like the First Amendment.”

The problem with Bond’s attack is that, with practically no qualifying language in Holland to turn to, we are bound to take at face value the Supreme Court’s statement that “[i]f the treaty is valid there can be no dispute about the validity of the statute . . . as a necessary and proper means to execute the powers of the Government.” A plurality of the Supreme Court itself apparently gave that passage the simplistic reading Bond denounces when it said, in Reid v. Covert, 354 U.S. 1 (1957), that:
The Court [in Holland] was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

Id. at 18.

It is true that Justice Holmes spoke later in Holland in language that implies a balancing of the national interest against the interest claimed by the State, see Holland, 252 U.S. at 435 (“Here a national interest of very nearly the first magnitude is involved.”), but that was in the context of assessing the validity of the Migratory Bird Treaty itself, not the implementing statute. That the latter was constitutional in light of the validity of the former seemed to the Supreme Court to require no further comment at all.

That does not mean, of course, that the Holland court would have spoken in the same unqualified terms had it foreseen the late Twentieth Century’s changing claims about the limits of the Treaty Power, or had it been faced with a treaty that transgressed the traditional subject matter limitation. It may well have chosen to say more about how to assess the validity of a treaty, and hence of coextensive treaty-implementing legislation. Perhaps Holland’s vague comment about “invisible radiation[s] from the general terms of the Tenth Amendment,” would have been given some further explication. As we have previously described, when Holland was decided, and, more importantly, when the Founders created the Treaty Power, it was generally understood that treaties should concern only matters that were clearly “international” in character, matters which, in Holland’s words, invoke a national interest that “can be protected only by national action in concert with that of another [sovereign nation].” Id. at 435. . . . [The Treaty Clause] was not a general and unlimited grant of power to the federal government.

Because an implied subject matter limitation on the Treaty Power was a given at the time Holland was written, it was enough to answer the states’ rights question in that case by pointing out that the Tenth Amendment only reserves those powers that are not delegated and that “the power to make treaties is delegated expressly.” Thus, Holland’s statement that “there can be no dispute about the validity” of a statute implementing a valid treaty, is sensible in context and, in any event, binds us. We do not discount the significance of the Supreme Court’s emphasis on the important role that federalism plays in preserving individual rights [in the Court’s decision remanding the case back to the Third Circuit], and it may be that there is more to say about the
uncompromising language used in *Holland* than we are able to say, but that very direct language demands from us a direct acknowledgement of its meaning, even if the result may be viewed as simplistic. If there is nuance there that has escaped us, it is for the Supreme Court to elucidate.

Thus, because the Convention falls comfortably within the Treaty Power’s traditional subject matter limitation, the Act is within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power, unless it somehow goes beyond the Convention. Bond argues that it does.

She says that the Act covers a range of activity not actually banned by the Convention and thus cannot be sustained by the Necessary and Proper Clause. Whether that argument amounts to a facial or an as-applied attack on the Act, it fails. We stated in [our first decision in this case] that “[the Act] . . . closely adheres to the language of the . . . Convention,” and so it does. True, as Bond notes, the Convention bans persons from using, developing, acquiring, stockpiling, or retaining chemical weapons, while the Act makes it unlawful to “receive, stockpile, retain, own, possess, [16]

---

16 We pause to consider how, if *Holland* were not so clear in its “valid treaty equal valid implementing legislation” holding, treaties and implementing legislation might usefully be reviewed in light of the apparently evolving understanding of the Treaty Power that we have described. The Founders deliberately drafted Article II, § 2 without defining the limits of the Treaty Power because they decided its scope required flexibility in the face of unknowable future events. . . . We do not second guess the wisdom of their choice and acknowledge that any attempt to precisely define a subject matter limitation on the Treaty Power would involve political judgments beyond our ken. . . .

Nevertheless, while the outer boundaries of the Treaty Power may be hard to delineate, we can safely say that certain kinds of treaties fall within the core of that power, namely those dealing with war, peace, foreign commerce, and diplomacy directed to those ends. . . . As to treaties of such character, it is hard to argue with the reasoning in *Holland* that, because “the power to make treaties is delegated expressly,” the Tenth Amendment has nothing meaningful to say. However, just as some treaties may fall comfortably within the traditionally understood bounds of the Treaty Power, some may be negotiated that will plainly fall outside that scope. If such a treaty were challenged, a court would be bound to take up an issue not present here, namely whether and when a treaty has reached a constitutional boundary, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”), recognizing that a treaty falling outside the limits of the Treaty Power would be unconstitutional as ultra vires . . . . The deliberately vague boundaries of the Treaty Power would probably relegate that court to the unenviable position of saying it knew a violation when it saw one.

Before the outer limits of the treaty power are reached, however, it may be that federalism does have some effect on a treaty’s constitutionality. While it is not our prerogative to ignore *Holland’s* rejection of federalism limitations upon the Treaty Power, the Supreme Court could clarify whether principles of federalism have any role in assessing an exercise of the Treaty Power that goes beyond the traditionally understood subject matter for treaties. *Holland* itself indicates that “invisible radiation[s] from the general terms of the Tenth Amendment” may be pertinent in deciding whether there is any space between obviously valid treaties and obviously ultra vires treaties and whether, in that space, some judicial review of treaties and their implementing legislation may be undertaken to preserve the federal structure of our government. The “invisible radiation[s]” imagery is unusual but, in light of current conceptions about the breadth of the Treaty Power, it may well be worth taking seriously.
use, or threaten to use” a chemical weapon, but those differences in wording do not prove that the Act has materially expanded on the Convention. . . . The meaning of the list in the former seems rather to fairly encompass the latter (with the possible exception of the “threaten to use” provision of the Act) and, if the Act goes beyond the Convention at all, does not do so in the “use” aspect at issue here.

So while Bond’s prosecution seems a questionable exercise of prosecutorial discretion, and indeed appears to justify her assertion that this case “trivializes the concept of chemical weapons” the treaty that gave rise to it was implemented by sufficiently related legislation. . . .

In short, because the Convention pertains to the proliferation and use of chemical weapons, which are matters plainly relating to war and peace, we think it clear that the Convention falls within the Treaty Power’s core. Consequently, we cannot say that the Act disrupts the balance of power between the federal government and the states, regardless of how it has been applied here. . . .

For the foregoing reasons, we will affirm the judgment of conviction.

Page 536, replace Note 12 with the following Note:

12. The Bond decision, excerpted above, was issued after the Supreme Court held that the defendant in that case had standing to raise a federalism challenge to the Chemical Weapons Implementation Act. The Supreme Court’s decision is described in Note 17 on page 538 of the casebook.

In the decision above, the Third Circuit applies Holland, as it is required to do as a lower court, and it accepts that “the arguable consequence of Holland is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states’ rights the President and Congress may choose to venture.” But the court also seems troubled about the potential breadth of the treaty power. What precisely does the court find troubling? What does the court mean when it states, at the end of footnote 16, that the “invisible radiation” imagery from Holland “may well be worth taking seriously”? Is it true, as the court states, that Holland “clearly instructs that ‘there can be no dispute about the validity of [a] statute’ that implements a valid treaty”?

---

20 The decision to use the Act—a statute designed to implement a chemical weapons treaty—to deal with a jilted spouse’s revenge on her rival is, to be polite, a puzzling use of the federal government’s power.
The Third Circuit concludes that, at least as a historical matter, it was understood that there were subject matter limits on the treaty power. But it says that the treaty at issue in this case—the Chemical Weapons Convention—falls within the “core” of the treaty power because it concerns matters relating to war and peace. What types of treaties would fall outside the core?

For decisions rejecting federalism challenges to criminal legislation implementing the International Convention Against the Taking of Hostages, which applies even to acts of hostage taking in the United States for purely private purposes if either the perpetrator or victim is a foreign national, see United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001), and United States v. Lue, 134 F.3d 79 (2d Cir. 1998). Both decisions are cited by the court in Bond.

The Supreme Court has now granted certiorari in Bond and will hear oral argument in October 2013.

Page 539, add to the list of citations in Note 18:


Page 581, add the following Note after note 16:

16a. For a recent discussion of the constitutional authority to terminate treaties, and an argument that the Senate could validly condition its advice and consent to treaties by imposing limitations on presidential termination, see Kristen E. Eichensehr, Treaty Termination and the Separation of Powers, 53 Va. J. Int’l L. 247 (2013).

Page 582, add at the end of Note 19:

For an argument that the President’s unilateral assumption of international obligations through signature of treaties is constitutionally problematic, see David H. Moore, The President’s Unconstitutional Treatymaking, 59 UCLA L. Rev. 598 (2012).

Page 582, add the following Note after Note 20:

20a. The Constitution makes clear that presidents may not ratify an Article II treaty unless they first obtain the advice and consent of two-thirds of the Senate.
Typically, presidents will not risk the defeat of a treaty when it appears that there are insufficient votes in the Senate. As a result, there are relatively few instances in which the full Senate has specifically voted to reject a treaty. The most famous example of such a rejection was of the Versailles Treaty that established the League of Nations after World War I. Another example is the Senate’s rejection in 1999 (during the Clinton Administration) of the Comprehensive Nuclear Test Ban Treaty. In December 2012, the Senate voted to reject the UN Convention on the Rights of Persons with Disabilities, on a vote of 61 in favor and 38 against, five votes short of the two-thirds needed for approval. The Convention was rejected even though the Obama Administration had suggested a variety of reservations, understandings, and declarations, including a declaration stating: “The United States declares that the provisions of the convention are not self-executing, and thus would not be directly enforced by U.S. courts or of itself give rise to individually enforceable rights.”

Page 591, add at the end of Note 1:

For an argument that the Senate could, and in many circumstances should, give its advice and consent to Article II treaties prior to the treaties’ final negotiation, and that this process would have advantages over ex ante congressional-executive agreements, see Jean Galbraith, Prospective Advice and Consent, 37 Yale J. Int’l L. 247 (2012).

Page 595, add after Note 17:

17a. Consider these remarks by Harold Koh, then-Legal Adviser to the State Department, in October 2012, explaining why the Executive Branch sometimes seeks to conclude international agreements as Article II treaties rather than as congressional-executive agreements:

I am sometimes asked, why don’t we just ratify a particular convention by congressional-executive agreement, rather than Article II Treaty? If it is so hard to get 67 votes for a treaty, why don’t we just accede to it by statute? The short answer . . . is that a particular non-treaty route might be legally available to the Executive for entering into certain kinds of international agreements, but may not be politically advisable as a matter of comity to Congress. Congress has its own strong views on how certain types of agreements should be entered into and will fight for those outcomes as a matter of institutional and political prerogative. That does not mean that the Executive’s hands are tied in any given case. But what it does mean is that a key part of being an Executive Branch lawyer is accurately forecasting to your clients when choosing a
particular legal route—even if lawful—may foster bitter political conflict and invite unnecessary trouble.

Every time we enter into an international agreement, we also send the world a message. Securing a 67-vote Senate supermajority for a treaty is particularly hard work, and requires a very high degree of bipartisanship. In any given case, concluding a treaty with the requisite two-thirds support sends a powerful political message about how united our nation is behind a particular international obligation. And so, for all their difficulties, Article II treaties remain a critically important focus of our international lawmaking practice.

Harold Hongju Koh, *Twenty-First International Lawmaking* (Oct. 17, 2012), at http://www.state.gov/s/l/releases/remarks/199319.htm. Does this suggest that any constraints on the use of congressional-executive agreements as an alternative to Article II treaties are entirely political rather than legal? Why does “Congress ha[ve] its own strong views on how certain types of agreements should be entered into”?

**Page 596, add at the end of Note 19:**


**Page 603, add after Note 12:**

12a. The Anti-Counterfeiting Trade Agreement (ACTA) is a legally binding international agreement that establishes standards for the enforcement of intellectual property rights. A representative of the Office of the U.S. Trade Representative, an Executive Branch agency, signed the Agreement in 2011, and the Executive Branch claimed that no congressional approval was required in order for the United States to become a party to it. For the argument that ACTA does not fall within any of the accepted circumstances for concluding a sole executive agreement, see Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, ASIL Insights (Aug. 24, 2011), http://www.asil.org/pdfs/insights/insight110824.pdf; and Jack Goldsmith & Lawrence Lessig, *Anti-Counterfeiting Agreement Raises Constitutional Concerns*, Wash. Post

In response, consider these remarks from Harold Koh, Legal Adviser to the State Department:

Academics like to put things in boxes, and tend to treat this area of law as divided into three. You have your treaty box. You have your congressional-executive agreement box, which is subdivided into “ex ante” agreements, where Congress first authorizes the agreement by statute, and the Executive then negotiates and concludes it; and “ex post” agreements, where the Executive first negotiates an agreement and then brings it to Congress for subsequent approval. Third, you have your “sole executive agreement” box, covering those areas where the President makes international law based on his independent constitutional authority.

But in the real world, this tidy framework grossly over-simplifies reality. There are a wealth of international agreements that are consistent with, and can be implemented under, existing law, but that do not fall neatly into any of these boxes. Many of these agreements may not even be intended to affect legal interests at the domestic level (e.g., by being judicially enforceable like in the Pink and Belmont cases). For example, recently, we in the Legal Adviser’s Office were surprised to find controversy surrounding the Executive’s authority to enter into the Anti-Counterfeiting Trade Agreement, or ACTA, a multilateral agreement on enforcing intellectual property rights. Certainly, some of that controversy may have derived from policy disagreements with the goals of the ACTA, but a surprisingly large number of law professors questioned the Executive’s legal authority even to enter the agreement. They said, “I don’t see an express ex ante congressional authorization, so it can’t fit into the congressional-executive agreement box, nor does this look like a traditional topic for a sole executive agreement. Since it falls between the stools, that must mean the U.S. lacks any authority to enter the agreement!”

But authority in this area sits not on isolated stools, but rather runs in a spectrum. Why was entering the agreement a legally available option? First, while Congress did not expressly pre-authorize this particular agreement, it did pass legislation calling on the Executive to “work[ ]
with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights.” Further, we and USTR determined that the agreement negotiated fit within the fabric of existing law; it was fully consistent with existing law and did not require any further legislation to implement. We also surveyed how the political branches have dealt with similar agreements in the past, and found that Congress’ call for executive action to protect intellectual property rights arose against the background of a long series of agreements on the specific question of intellectual property protection done in a similar fashion.

Harold Hongju Koh, Twenty-First International Lawmaking (Oct. 17, 2012), at http://www.state.gov/s/l/releases/remarks/199319.htm. Does the “spectrum” approach suggested by Koh give the Executive Branch too much discretion to conclude international agreements without obtaining express approval from Congress?

Chapter 8: Customary International Law and International Human Rights Litigation

Page 622, add at the end of Note 16:


The heart of the modern position is that customary international law binds State actors and thus preempts State law applicable to State officials and private parties. The basic case for the modern position relies on an inference from the constitutional structure very similar to the one advanced by Bellia and Clark: Violations of customary international law risk retaliation against the nation as a whole. Permitting States to violate it allows States to externalize the costs of such violations, thus likely producing excessive violations.
Page 636, add the following decision before the *Notes and Questions*:

**Kiobel v. Royal Dutch Petroleum Co.**
(U.S. Supreme Court, April 17, 2013)

**CHIEF JUSTICE ROBERTS** delivered the opinion of the Court. . . .

Petitioners were residents of Ogoniland, an area of 250 square miles located in the Niger delta area of Nigeria and populated by roughly half a million people. When the complaint was filed, respondents Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., were holding companies incorporated in the Netherlands and England, respectively. Their joint subsidiary, respondent Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), was incorporated in Nigeria, and engaged in oil exploration and production in Ogoniland. According to the complaint, after concerned residents of Ogoniland began protesting the environmental effects of SPDC’s practices, respondents enlisted the Nigerian Government to violently suppress the burgeoning demonstrations. Throughout the early 1990’s, the complaint alleges, Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property. Petitioners further allege that respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents’ property as a staging ground for attacks.

Following the alleged atrocities, petitioners moved to the United States where they have been granted political asylum and now reside as legal residents. They filed suit in the United States District Court for the Southern District of New York, alleging jurisdiction under the Alien Tort Statute and requesting relief under customary international law. The ATS provides, in full, that “[t]he 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.” 28 U.S.C. § 1350. According to petitioners, respondents violated the law of nations by aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction. The District Court dismissed the first, fifth, sixth, and seventh claims, reasoning that the facts alleged to support those claims did not give rise to a violation of the law of nations. The court denied respondents’ motion to dismiss with respect to the remaining claims, but certified its order for interlocutory appeal pursuant to § 1292(b).
The Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. We granted certiorari to consider that question. After oral argument, we directed the parties to file supplemental briefs addressing an additional question: “Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” We heard oral argument again and now affirm the judgment below, based on our answer to the second question.

II

Passed as part of the Judiciary Act of 1789, the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years. . . . The statute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action. We held in Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004), however, that the First Congress did not intend the provision to be “stillborn.” The grant of jurisdiction is instead “best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.” Id. at 724. We thus held that federal courts may “recognize private claims [for such violations] under federal common law.” Id. at 732. . . .

The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign. Respondents contend that claims under the ATS do not, relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,” Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2878 (2010), and reflects the “presumption that United States law governs domestically but does not rule the world,” Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007).

This presumption “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991). . . .

We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad. . . . The ATS, on the other hand, is “strictly jurisdictional.” Sosa, 542 U.S. at 713. It does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law. But we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that
may be brought under the ATS.

Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns. . . . These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.

These concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are “‘specific, universal, and obligatory.’” 542 U.S. at 732 (quoting In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)). As demonstrated by Congress’s enactment of the Torture Victim Protection Act, note following 28 U.S.C. § 1350, identifying such a norm is only the beginning of defining a cause of action. *See id.* § 3 (providing detailed definitions for extrajudicial killing and torture); *id.* § 2 (specifying who may be liable, creating a rule of exhaustion, and establishing a statute of limitations). Each of these decisions carries with it significant foreign policy implications.

The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.

III

Petitioners contend that even if the presumption applies, the text, history, and purposes of the ATS rebut it for causes of action brought under that statute. It is true that Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad. *See, e.g.*, 18 U.S.C. § 1091(e) (providing jurisdiction over the offense of genocide “regardless of where the offense is committed” if the alleged offender is, among other things, “present in the United States”). But to rebut the presumption, the ATS would need to evince a “clear indication of extraterritoriality.” *Morrison*, 130 S. Ct. at 2883. It does not.

To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches “*any* civil action” suggest application to torts committed abroad; it is well established that generic terms
like “any” or “every” do not rebut the presumption against extraterritoriality. . . .

Petitioners make much of the fact that the ATS provides jurisdiction over civil actions for “torts” in violation of the law of nations. They claim that in using that word, the First Congress “necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil.” For support, they cite the common-law doctrine that allowed courts to assume jurisdiction over such “transitory torts,” including actions for personal injury, arising abroad. . . .

Under the transitory torts doctrine, however, “the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place.” Cuba R. Co. v. Crosby, 222 U.S. 473, 479 (1912) (majority opinion of Holmes, J.). The question under Sosa is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law. The reference to “tort” does not demonstrate that the First Congress “necessarily meant” for those causes of action to reach conduct in the territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality.

Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign. We explained in Sosa that when Congress passed the ATS, “three principal offenses against the law of nations” had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. The first two offenses have no necessary extraterritorial application. . . .

Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS. Each concerned the rights of ambassadors, and each involved conduct within the Union. In 1784, a French adventurer verbally and physically assaulted Francis Barbe Marbois—the Secretary of the French Legion—in Philadelphia. The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided. And in 1787, a New York constable entered the Dutch Ambassador’s house and arrested one of his domestic servants. At the request of Secretary of Foreign Affairs John Jay, the Mayor of New York City arrested the constable in turn, but cautioned that because “neither Congress nor our [State] Legislature have yet passed any act respecting a breach of the privileges of Ambassadors,” the extent of any available relief would depend on the common law. See Curtis A. Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int’l L. 587, 641-642 (2002) (quoting 3 Dept. of State, The Diplomatic
Correspondence of the United States of America 447 (1837)). The two cases in which the ATS was invoked shortly after its passage also concerned conduct within the territory of the United States. See Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (wrongful seizure of slaves from a vessel while in port in the United States); Moxon v. The Fanny, 17 F. Cas. 942 (D.C. Pa. 1793) (No. 9895) (wrongful seizure in United States territorial waters).

These prominent contemporary examples—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.

The third example of a violation of the law of nations familiar to the Congress that enacted the ATS was piracy. Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country. . . . This Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application. . . . Petitioners contend that because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad.

Applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves. . . .

Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. As Justice Story put it, “No nation has ever yet pretended to be the custos morum of the whole world . . . .” United States v. The La Jeune Eugenie, 26 F. Cas. 832, 847 (No. 15,551) (CC Mass. 1822). It is implausible to suppose that the First Congress wanted their fledgling Republic—struggling to receive international recognition—to be the first. Indeed, the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing.

The United States was, however, embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States. Bradley, 42 Va. J. Int’l L., at 641. Such offenses against ambassadors violated the law of nations, “and if not adequately redressed could rise to an issue of war.” Sosa, 542 U.S. at 715. . . .
The ATS ensured that the United States could provide a forum for adjudicating such incidents. Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.

Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. See Doe v. Exxon Mobil Corp., 654 F.3d 11, 77-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). Moreover, accepting petitioners’ view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.

We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. “[T]here is no clear indication of extraterritoriality here,” Morrison, 130 S. Ct. at 2883, and petitioners’ case seeking relief for violations of the law of nations occurring outside the United States is barred.

IV

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

JUSTICE KENNEDY, concurring.

The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition. Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the
reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

[Justice Alito concurred and was joined by Justice Thomas. He sought to elaborate on the Court’s observation that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” In his view, “a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies Sosa’s requirements of definiteness and acceptance among civilized nations.”]

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in the judgment.

Recognizing that Congress enacted the ATS to permit recovery of damages from pirates and others who violated basic international law norms as understood in 1789, Sosa essentially leads today’s judges to ask: Who are today’s pirates? We provided a framework for answering that question by setting down principles drawn from international norms and designed to limit ATS claims to those that are similar in character and specificity to piracy.

In this case we must decide the extent to which this jurisdictional statute opens a federal court’s doors to those harmed by activities belonging to the limited class that Sosa set forth when those activities take place abroad. To help answer this question here, I would refer both to Sosa and, as in Sosa, to norms of international law.

In my view the majority’s effort to answer the question by referring to the “presumption against extraterritoriality” does not work well. That presumption “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.” Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2877 (2010). The ATS, however, was enacted with “foreign matters” in mind. The statute’s text refers explicitly to “alien[s],” “treat[ies],” and “the law of nations.” The statute’s purpose was to address “violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious con-sequences in international affairs.” Sosa, 542 U.S. at 715. And at least one of the three kinds of activities that we found to fall within the statute’s scope, namely piracy, normally takes place abroad.

The majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas. That is because the robbery and murder that make up
piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies. . . .

The majority nonetheless tries to find a distinction between piracy at sea and similar cases on land. It writes, “Applying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign and therefore carries less direct foreign policy consequences.” But, as I have just pointed out, “[a]pplying U.S. law to pirates” does typically involve applying our law to acts taking place within the jurisdiction of another sovereign. Nor can the majority’s words “territorial jurisdiction” sensibly distinguish land from sea for purposes of isolating adverse foreign policy risks, as the Barbary Pirates, the War of 1812, the sinking of the Lusitania, and the Lockerbie bombing make all too clear.

The majority also writes, “Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction.” I very much agree that pirates were fair game “wherever found.” Indeed, that is the point. That is why we asked, in Sosa, who are today’s pirates? Certainly today’s pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are “fair game” where they are found. . . . And just as a nation that harbored pirates provoked the concern of other nations in past centuries, so harboring “common enemies of all mankind” provokes similar concerns today. . . .

In applying the ATS to acts “occurring within the territory of a[another] sovereign,” I would assume that Congress intended the statute’s jurisdictional reach to match the statute’s underlying substantive grasp. That grasp, defined by the statute’s purposes set forth in Sosa, includes compensation for those injured by piracy and its modern-day equivalents, at least where allowing such compensation avoids “serious” negative international “consequences” for the United States. 542 U.S. at 715. And just as we have looked to established international substantive norms to help determine the statute’s substantive reach, so we should look to international jurisdictional norms to help determine the statute’s jurisdictional scope.

The Restatement (Third) of Foreign Relations Law is helpful. Section 402 recognizes that, subject to § 403’s “reasonableness” requirement, a nation may apply its law (for example, federal common law, not only (1) to “conduct” that “takes place [or to persons or things] within its territory” but also (2) to the “activities, interests, status, or relations of its nationals outside as well as within its territory,” (3) to “conduct outside its territory that has or is intended to have substantial effect within its territory,” and (4) to certain foreign “conduct outside its territory . . . that is directed against the security of the state or against a limited class of other state interests.” In addition, § 404 of the Restatement explains that a “state has jurisdiction to define and
prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade,” and analogous behavior.

Considering these jurisdictional norms in light of both the ATS’s basic purpose (to provide compensation for those injured by today’s pirates) and Sosa’s basic caution (to avoid international friction), I believe that the statute provides jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

I would interpret the statute as providing jurisdiction only where distinct American interests are at issue. Doing so reflects the fact that Congress adopted the present statute at a time when, as Justice Story put it, “No nation ha[d] ever yet pretended to be the custos morum of the whole world.” United States v. La Jeune Eugenie, 26 F. Cas. 832, 847 (No. 15,551) (CC Mass. 1822). That restriction also should help to minimize international friction. Further limiting principles such as exhaustion, forum non conveniens, and comity would do the same. So would a practice of courts giving weight to the views of the Executive Branch. . . .

As I have indicated, we should treat this Nation’s interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest justifying application of the ATS in light of the statute’s basic purposes—in particular that of compensating those who have suffered harm at the hands of, e.g., torturers or other modern pirates. . . .

International norms have long included a duty not to permit a nation to become a safe harbor for pirates (or their equivalent). . . .

More recently two lower American courts have, in effect, rested jurisdiction primarily upon that kind of concern. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), an alien plaintiff brought a lawsuit against an alien defendant for damages suffered through acts of torture that the defendant allegedly inflicted in a foreign nation, Paraguay. Neither plaintiff nor defendant was an American national and the actions underlying the lawsuit took place abroad. The defendant, however, “had . . . resided in the United States for more than ninth months” before being sued, having overstayed his visitor’s visa. Id. at 878-79. Jurisdiction was deemed proper because the defendant’s alleged conduct violated a well-established international law norm, and the suit vindicated our Nation’s interest in not providing a safe harbor, free of damages claims, for those defendants who commit such conduct.
In *Marcos*, the plaintiffs were nationals of the Philippines, the defendant was a Philippine national, and the alleged wrongful act, death by torture, took place abroad. . . . A month before being sued, the defendant, “his family, . . . and others loyal to [him] fled to Hawaii,” where the ATS case was heard. In re Estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1469 (9th Cir. 1994). As in *Filartiga*, the court found ATS jurisdiction.

And in *Sosa* we referred to both cases with approval, suggesting that the ATS allowed a claim for relief in such circumstances. . . . Not surprisingly, both before and after *Sosa*, courts have consistently rejected the notion that the ATS is categorically barred from extraterritorial application. . . .

Application of the statute in the way I have suggested is consistent with international law and foreign practice. Nations have long been obliged not to provide safe harbors for their own nationals who commit such serious crimes abroad. . . .

Many countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad. . . .

Other countries permit some form of lawsuit brought by a foreign national against a foreign national, based upon conduct taking place abroad and seeking damages. Certain countries, which find “universal” criminal “jurisdiction” to try perpetrators of particularly heinous crimes such as piracy and genocide, see *Restatement* § 404, also permit private persons injured by that conduct to pursue “*actions civiles,*” seeking civil damages in the criminal proceeding. . . .

At the same time Congress has ratified treaties obliging the United States to find and punish foreign perpetrators of serious crimes committed against foreign persons abroad. . . .

And Congress has sometimes authorized civil damages in such cases. See generally note following 28 U.S.C. § 1350 (Torture Victim Protection Act of 1991 (TVPA) (private damages action for torture or extrajudicial killing committed under authority of a foreign nation)) . . . .

Congress, while aware of the award of civil damages under the ATS—including cases such as *Filartiga* with foreign plaintiffs, defendants, and conduct—has not sought to limit the statute’s jurisdictional or substantive reach. Rather, Congress has enacted other statutes, and not only criminal statutes, that allow the United States to prosecute (or allow victims to obtain damages from) foreign persons who injure foreign victims by committing abroad torture, genocide, and other heinous acts. See, *e.g.*, 18 U.S.C. § 2340A(b)(2) (authorizing prosecution of torturers if “the alleged
offender is present in the United States, irrespective of the nationality of the victim or alleged offender”); § 1091(e)(2)(D) (genocide prosecution authorized when, “regardless of where the offense is committed, the alleged offender is . . . present in the United States”); note following 28 U.S.C. § 1350, § 2(a) (private right of action on behalf of individuals harmed by an act of torture or extrajudicial killing committed “under actual or apparent authority, or color of law, of any foreign nation”). . . .

Applying these jurisdictional principles to this case, however, I agree with the Court that jurisdiction does not lie. The defendants are two foreign corporations. Their shares, like those of many foreign corporations, are traded on the New York Stock Exchange. Their only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors. The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.

Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction . . . it would be farfetched to believe, based solely upon the defendants’ minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an “enemy of all mankind.” Thus I agree with the Court that here it would “reach too far to say” that such “mere corporate presence suffices.”

I consequently join the Court’s judgment but not its opinion.

Page 640, replace Note 12 with the following Notes:

12. As discussed in Section B of Chapter 9, the Supreme Court has held that federal statutes should be presumed not to apply to conduct occurring outside the United States. In EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991), the Court applied this presumption in holding that Title VII did not apply to a U.S. corporation’s alleged discriminatory treatment of a U.S. citizen in Saudi Arabia. In Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010), the Court applied the presumption in holding that Section 10(b) of the Securities Exchange Act did not apply to claims of alleged misconduct in connection with securities traded on foreign exchanges. The Court has explained that the presumption “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters,” Morrison, 130 S. Ct. at 2877, and that it also “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord,” Arabian American Oil, 499 U.S. at 248. The Court has not applied the
presumption to all federal statutes, however. Although it once applied the presumption in the area of antitrust law, it no longer does so. See Hartford Fire Insurance Co. v. California, 509 U.S. 764, 795-96 (1993) (“Although the proposition was perhaps not always free from doubt . . . it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”). Moreover, the presumption does not apply to “criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.” United States v. Bowman, 260 U.S. 94, 98 (1922).

Despite the presumption against extraterritoriality, most lower courts had assumed before Kiobel that claims could be brought under the ATS for foreign conduct. One reason they may have had this assumption is that the ATS is limited to torts that violate international law. Since international law applies globally, it may not seem “extraterritorial” for a U.S. court to apply it to adjudicate a dispute concerning conduct abroad. In Sosa, however, the Supreme Court seemed to suggest that the cause of action in ATS cases was coming from federal common law that was authorized in some fashion by the ATS, a proposition confirmed by the Court in Kiobel. The issue in Kiobel, therefore, was whether the presumption against extraterritoriality applied to a claim under U.S. federal common law. The majority contends that, if anything, the justifications for the presumption apply with greater force in the context of a judicially developed rather than statutory cause of action. Is that argument persuasive? If courts have been implicitly delegated the authority to develop common law causes of action, might they also have been delegated the authority to determine the appropriate extraterritorial reach of the causes of action?

12a. After Kiobel, what is left of ATS litigation? It is clear that foreign corporations may not be sued under the ATS for torts they commit abroad. (Indeed, the Court was 9-0 on that point.) What about U.S. corporations? At the end of its opinion, the majority states that “where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application,” and that “mere corporate presence” in the United States is not enough. What, beyond mere corporate presence, might be enough? What answer was Justice Alito suggesting in his concurrence? If a U.S. corporation helps plan tortious activity that occurs abroad, is the case no longer extraterritorial for purposes of the presumption against extraterritoriality? What if the U.S. corporation simply has knowledge of the foreign tortious activity?

12b. Recall the Second Circuit’s decision in Filartiga, which involved a suit against a former Paraguayan police inspector for acts committed in Paraguay. (The
decision is excerpted at pages 608-13 of the casebook.) Does *Kiobel* suggest that *Filartiga* was wrongly decided? Importantly, the Torture Victim Protection Act (TVPA) now provides an alternative basis for a case, like *Filartiga*, that involves acts of torture or “extrajudicial killing.” Justice Kennedy, who was part of the five-Justice majority in *Kiobel*, observed in his short concurrence that the decision left open “significant questions regarding the reach and interpretation of the Alien Tort Statute” and that “the presumption against extraterritorial application may require some further elaboration and explanation” in cases covered “neither by the TVPA nor by the reasoning and holding of today’s case.” What cases might he have had in mind?

12c. In arguing in *Kiobel* that the presumption against extraterritoriality has been overcome in this case, Justice Breyer contends in his concurrence that the ATS was designed in part to allow suits against pirates, whose conduct would typically take place outside the United States. What is the majority’s response to this argument? What evidence is there, if any, that the ATS was in fact designed for suits against pirates? Even if pirates could have historically been sued under the ATS, is Justice Breyer right in describing egregious human rights abuses as “modern-day equivalents” to piracy? In any event, isn’t Justice Breyer correct that the United States has an interest in not being a safe haven for human rights abusers? Is it a sufficient answer to Breyer that Congress has already addressed the issue to some extent through immigration and criminal laws and that it can provide for broader civil liability if it is dissatisfied with the decision in *Kiobel*?

12d. When *Kiobel* was initially argued before the Supreme Court on the issue of corporate liability, the Executive Branch filed an amicus brief in support of the plaintiffs, arguing that “[c]ourts may recognize corporate liability in actions under the ATS as a matter of federal common law.” This brief was signed by both the Justice Department and the State Department. After the Court ordered reargument on the issue of extraterritoriality, however, the Executive Branch filed a brief in support of the defendants, contending that a cause of action should not be recognized under the ATS in the circumstances of this case, where “foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign’s treatment of its own citizens in its own territory, without any connection to the United States beyond the residence of the named plaintiffs in this putative class action and the corporate defendants’ presence for jurisdictional purposes.” The Executive Branch made clear, however, that it was not arguing against all extraterritorial applications of the ATS, and, in particular, that it was not suggesting that the decision in *Filartiga* was wrong. Perhaps signaling internal disagreement within they Executive Branch, the brief was

---

* For a recent lower court decision holding that modern acts of piracy can be the basis for a civil claim under the ATS, see Institute of Cetacean Research v. Sea Shepherd Conservation Society (9th Cir. Feb. 25, 2013).
signed by the Justice Department, but (unlike in a number of other ATS cases) not by the State Department.

The State Department may have viewed the Justice Department’s position on extraterritoriality as unduly restrictive. During the Bush administration, however, the Executive Branch had advanced an even more restrictive view: in a brief filed in Sosa v. Alvarez-Machain that was signed by both the Justice Department and the State Department, the Executive Branch argued that the ATS should not be construed to apply at all to torts against aliens committed in foreign countries. During oral argument in Kiobel, Justice Scalia asked the Solicitor General about the Justice Department’s willingness in its brief to accept the Filartiga line of cases even though it had argued against that line of cases during the Bush administration. “[W]hy should we listen to you rather than the solicitors general who took the opposite position?,” Justice Scalia inquired. Chief Justice Roberts followed up to note that “Justice Scalia’s point means that whatever deference you are entitled to is compromised by the fact that your predecessors took a different position.” The Court made no mention of deference in its decision in Kiobel.

12e. In light of the Supreme Court’s restriction of ATS litigation in Kiobel, plaintiffs may attempt to use state tort law as a vehicle for litigating claims that they might otherwise have attempted to litigate under the ATS. Cases based on state law typically cannot be brought in federal court unless there is diversity jurisdiction, which will not be available in cases between foreign parties. Whether brought in federal or state court, cases based on state tort law are likely to raise difficult choice-of-law questions. Relevant to the choice-of-law question will be the fact that there are probably due process and other limitations on the extent to which states can apply their tort law to conduct in other countries. Plaintiffs may also face more significant forum non conveniens limitations if they lack a federal cause of action, especially where both the plaintiffs and the defendants are non-U.S. citizens. In some instances, state causes of action might also be subject to federal preemption. (Preemption of state law that relates to foreign affairs is discussed in Chapter 6 of the casebook.)

Page 651, add the following decision before the Notes and Questions:

Yousuf v. Samantar (Samantar II)
699 F.3d 763 (4th Cir. 2012)

TRAXLER, CIRCUIT JUDGE:

For the second time in this case, we are presented with the question of whether Appellant Mohamed Ali Samantar enjoys immunity from suit under the Torture
Victim Protection Act of 1991 (“TVPA”), and the Alien Tort Statute (“ATS”). In the previous appeal, we rejected Samantar’s claim to statutory immunity under the Foreign Sovereign Immunities Act (“FSIA”), but held open the possibility that Samantar could “successfully invoke an immunity doctrine arising under pre-FSIA common law.” The Supreme Court affirmed our reading of the FSIA and likewise suggested Samantar would have the opportunity to assert common law immunity on remand. See Samantar v. Yousuf, 130 S. Ct. 2278, 2293 (2010).

On remand to the district court, Samantar sought dismissal of the claims against him based on common law immunities afforded to heads of state and also to other foreign officials for acts performed in their official capacity.

The district court renewed its request to the State Department for a response to Samantar’s immunity claims. Despite having remained silent during Samantar’s first appeal, the State Department here took a position expressly opposing immunity for Samantar. The United States submitted to the district court a Statement of Interest (SOI) announcing that the Department of State, having considered “the potential impact of such an immunity decision on the foreign relations interests of the United States,” had determined that Samantar was not entitled to immunity from plaintiffs’ lawsuit. The SOI indicated that two factors were particularly important to the State Department’s determination that Samantar should not enjoy immunity. First, the State Department concluded that Samantar’s claim for immunity was undermined by the fact that he “is a former official of a state with no currently recognized government to request immunity on his behalf,” or to take a position as to “whether the acts in question were taken in an official capacity.” Noting that “[t]he immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official,” the government reasoned that Samantar should not be afforded immunity “in the absence of a recognized government . . . to assert or waive [Samantar’s] immunity.” Second, Samantar’s status as a permanent legal resident was particularly relevant to the State Department’s immunity determination. According to the SOI, “U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents” or naturalized citizens such as two of the plaintiffs.

The district court denied Samantar’s motion to dismiss, apparently viewing the Department of State’s position as controlling and surrendering jurisdiction over the issue to the State Department: “The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant’s common law sovereign immunity defense is no longer before the Court, which will now proceed to consider the remaining issues in defendant’s Motion to Dismiss.” But, in denying Samantar’s subsequent motion to reconsider, the district court implied that it performed its own analysis and merely took the State Department’s view into account:
“The Executive Branch has spoken on this issue and . . . [is] entitled to a great deal of
deference. They don’t control but they are entitled to deference in this case.” The
district court noted that both “the residency of the defendant” and “the lack of a
recognized government” were factors properly considered in the immunity calculus. . .

II.

Before proceeding further, we must decide the appropriate level of deference
courts should give the Executive Branch’s view on case-specific questions of
individual foreign sovereign immunity. The FSIA displaced the common law regime
for resolving questions of foreign state immunity and shifted the Executive’s role as
primary decision maker to the courts. After Samantar, it is clear that the FSIA did no
such thing with respect to the immunity of individual foreign officials; the common
law, not the FSIA, continues to govern foreign official immunity. And, in light of the
continued viability of the common law for such claims, the Court saw “no reason to
believe that Congress saw as a problem, or wanted to eliminate, the State
Department’s role in determinations regarding individual official immunity” under the
common law. The extent of the State Department’s role, however, depends in large
part on what kind of immunity has been asserted.

A.

In this case, Samantar claims two forms of immunity: (1) head-of-state
immunity and (2) “foreign official” or “official acts” immunity. “Head-of-state
immunity is a doctrine of customary international law” pursuant to which an
incumbent “head of state is immune from the jurisdiction of a foreign state’s courts.”
In re Grand Jury Proceedings, 817 F.2d 1108, 1110 (4th Cir. 1987). “Like the related
document of sovereign [state] immunity, the rationale of head-of-state immunity is to
promote comity among nations by ensuring that leaders can perform their duties
without being subject to detention, arrest or embarrassment in a foreign country’s legal
system.” Id.

“A head-of-state recognized by the United States government is absolutely
immune from personal jurisdiction in United States courts unless that immunity has
been waived by statute or by the foreign government recognized by the United States.”
of individual immunity derive from the State, head-of-state immunity is tied closely to
the sovereign immunity of foreign states.

Samantar also seeks immunity on the separate ground that all of the actions for
which plaintiffs seek to hold him liable occurred during the course of his official duties
within the Somali government. See Restatement (Second) of Foreign Relations Law § 66(f) (stating that “[t]he immunity of a foreign state . . . extends to . . . any . . . public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state”); Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009) (“At the time the FSIA was enacted, the common law of foreign sovereign immunity recognized an individual official’s entitlement to immunity for acts performed in his official capacity.”) (internal quotation marks omitted); Samantar, 130 S. Ct. at 2290-91 (“[W]e do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity.”). This is a conduct-based immunity that applies to current and former foreign officials. See Matar, 563 F.3d at 14 (“An immunity based on acts—rather than status—does not depend on tenure in office.”).

B.

The United States, participating as *amicus curiae*, takes the position that federal courts owe absolute deference to the State Department’s view of whether a foreign official is entitled to sovereign immunity on either ground. According to the government, under long-established Supreme Court precedent, the State Department’s opinion on any foreign immunity issue is binding upon the courts. The State Department’s position allows for the federal courts to function as independent decision makers on foreign sovereign immunity questions in only one instance: when the State Department remains silent on a particular case. Thus, the United States contends that the State Department resolved the issues once it presented the district court with its view that Samantar was not entitled to immunity.

Samantar, by contrast, advocates the view that deference to the Executive’s immunity determination is required *only when the State Department explicitly recommends that immunity be granted*. Samantar argues that when the State Department concludes, as it did in this case, that a foreign official is not entitled to immunity or remains silent on the issue, courts can and must decide independently whether to grant immunity. And, the plaintiffs offer yet a third view, suggesting that the State Department’s position on foreign sovereign immunity does not completely control, but that courts must defer “to the reasonable views of the Executive Branch” regardless of whether the State Department suggests that immunity be granted or denied. In this case, plaintiffs contend the State Department’s rationale for urging

---

3 Even then, however, the State Department insists that the courts must fashion a decision based on principles that it has articulated. See Samantar, 130 S. Ct. at 2284. In making this argument, the government fails to distinguish between status-based and conduct-based immunity.
denial of immunity, as set forth in its SOI, was reasonable and that the district court properly deferred to it.

1. Executive’s Pre-FSIA Role in Foreign State Immunity

It was not until the late 1930s—in the context of in rem actions against foreign ships—that judicial deference to executive foreign immunity determinations emerged as standard practice. . . . Citing a line of cases involving ships owned by foreign sovereigns, Samantar explained that

a two-step procedure developed for resolving a foreign state’s claim of sovereign immunity, typically asserted on behalf of seized vessels. . . . Under that procedure, the diplomatic representative of the sovereign could request a “suggestion of immunity” from the State Department. [Ex parte Peru, 318 U.S. 578, 581 (1943).] If the request was granted, the district court surrendered its jurisdiction. . . . But “in the absence of recognition of the immunity by the Department of State,” a district court “had authority to decide for itself whether all the requisites for such immunity existed.” Ex parte Peru, 318 U.S. at 587 . . . .

Samantar, 130 S. Ct. at 2284. Subsequently, there was a shift in State Department policy from a theory of absolute immunity to restrictive immunity, but this shift “had little, if any, impact on federal courts’ approach to immunity analyses . . . and courts continued to abide by that Department’s suggestions of immunity.” Republic of Austria v. Altmann, 541 U.S. 677, 690, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004) (internal quotation marks and alteration omitted). Thus, at the time that Congress enacted the FSIA, the clearly established practice of judicial deference to executive immunity determinations had been expressed largely in admiralty cases.

In this pre-FSIA era, decisions involving claims of individual foreign sovereign immunity were scarce. See Samantar, 130 S. Ct. at 2291 (noting that “questions of official immunity . . . in the pre-FSIA period . . . were few and far between”). But, to the extent such individual claims arose, they generally involved status-based immunities such as head-of-state immunity, see, e.g., Ye v. Zemin, 383 F.3d 620, 624-25 (7th Cir. 2004), or diplomatic immunity arising under international treaties. The rare cases involving immunity asserted by lower-level foreign officials provided inconsistent results.

2. Executive Power
The Constitution assigns the power to “receive Ambassadors and other public Ministers” to the Executive Branch, U.S. Const. art. II, § 3, which includes, by implication, the power to accredit diplomats and recognize foreign heads of state. Courts have generally treated executive “suggestions of immunity” for heads of state as a function of the Executive’s constitutional power and, therefore, as controlling on the judiciary.

Accordingly, consistent with the Executive’s constitutionally delegated powers and the historical practice of the courts, we conclude that the State Department’s pronouncement as to head-of-state immunity is entitled to absolute deference. The State Department has never recognized Samantar as the head of state for Somalia; indeed, the State Department does not recognize the Transitional Federal Government or any other entity as the official government of Somalia, from which immunity would derive in the first place. The district court properly deferred to the State Department’s position that Samantar be denied head-of-state immunity.

Unlike head-of-state immunity and other status-based immunities, there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity. Such cases do not involve any act of recognition for which the Executive Branch is constitutionally empowered; rather, they simply involve matters about the scope of defendant’s official duties.

This is not to say, however, that the Executive Branch has no role to play in such suits. These immunity decisions turn upon principles of customary international law and foreign policy, areas in which the courts respect, but do not automatically follow, the views of the Executive Branch. With respect to foreign official immunity, the Executive Branch still informs the court about the diplomatic effect of the court’s exercising jurisdiction over claims against an official of a foreign state, and the Executive Branch may urge the court to grant or deny official-act immunity based on such considerations.

In sum, we give absolute deference to the State Department’s position on status-based immunity doctrines such as head-of-state immunity. The State Department’s determination regarding conduct-based immunity, by contrast, is not controlling, but it carries substantial weight in our analysis of the issue.

III.

A.

We turn to the remaining question of whether Samantar is entitled to foreign official immunity under the common law. In considering the contours of foreign
official immunity, we must draw from the relevant principles found in both international and domestic immunity law, as well as the experience and judgment of the State Department, to which we give considerable, but not controlling, weight.

From the earliest Supreme Court decisions, international law has shaped the development of the common law of foreign sovereign immunity. . . . Indeed, an important purpose of the FSIA was the “codification of international law at the time of the FSIA’s enactment.” Samantar, 130 S. Ct. at 2289. Even after the FSIA was enacted, international law continued to be relevant to questions of foreign sovereign immunity as the Court interpreted the FSIA in light of international law.

As previously noted, customary international law has long distinguished between status-based immunity afforded to sitting heads-of-state and conduct-based immunity available to other foreign officials, including former heads-of-state. With respect to conduct-based immunity, foreign officials are immune from “claims arising out of their official acts while in office.” Restatement (Third) of Foreign Relations Law § 464, reprt. note 14; Matar, 563 F.3d at 14 (“An immunity based on acts--rather than status--does not depend on tenure in office.”). This type of immunity stands on the foreign official’s actions, not his or her status, and therefore applies whether the individual is currently a government official or not. . . . This conduct-based immunity for a foreign official derives from the immunity of the State: “The doctrine of the imputability of the acts of the individual to the State . . . in classical law . . . imputes the act solely to the state, who alone is responsible for its consequence. In consequence any act performed by the individual as an act of the State enjoys the immunity which the State enjoys.” HAZEL FOX, THE LAW OF STATE IMMUNITY at 455 (2d ed. 2008).

At least as early as its decision in Underhill v. Hernandez, 168 U.S. 250, 252 (1897), the Supreme Court embraced the international law principle that sovereign immunity, which belongs to a foreign state, extends to an individual official acting on behalf of that foreign state. By the time the FSIA was enacted, numerous domestic courts had embraced the notion, stemming from international law, that “[t]he immunity of a foreign state . . . extends to . . . any . . . public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state.” Restatement (Second) of Foreign Relations Law § 66(f). Although the context for these cases was different—almost all involved the erroneous (pre-Samantar) application of the FSIA to individual foreign officials claiming immunity—these decisions are instructive for post-Samantar questions of common law immunity. . . .

These cases sketch out the general contours of official-act immunity: a foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where “the officer purports to act as an individual and not as an
official, [such that] a suit directed against that action is not a suit against the sovereign.” [Chuidian v. Philippine National Bank, 912 F.2d 1095, 1106 (9th Cir. 1990).] A foreign official or former head-of-state will therefore not be able to assert this immunity for private acts that are not arguably attributable to the state, such as drug possession or fraud. See, e.g., In re Doe, 860 F.2d 40, 45 (2d Cir. 1988) (“[W]ere we to reach the merits of the issue, we believe there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law.”).

B.

In response, plaintiffs contend that Samantar cannot raise this immunity as a shield against atrocities such as torture, genocide, indiscriminate executions and prolonged arbitrary imprisonment or any other act that would violate a *jus cogens* norm of international law. . . . Unlike private acts that do not come within the scope of foreign official immunity, *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official’s employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign. . . . 6

There has been an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms—i.e., they commit international crimes or human rights violations . . . .

American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims. . . . We conclude that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity.

Moreover, we find Congress’s enactment of the TVPA, and the policies it reflects, to be both instructive and consistent with our view of the common law regarding these aspects of *jus cogens*. Plaintiffs asserted claims against Samantar under the TVPA which authorizes a civil cause of action against “[a]n individual who,

---

6 In spite of this, allegations of *jus cogens* violations do not overcome head-of-state or any other status-based immunity. See, e.g., Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) (2002) ICJ 3 (concluding that the sitting foreign minister of the Democratic Republic of Congo was entitled to status-based immunity against alleged *jus cogens* violations).
under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture” or “extrajudicial killing.” “The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) ipso facto a violation of U.S. domestic law.” Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 (2d Cir. 2000). Thus, in enacting the TVPA, Congress essentially created an express private right of action for individuals victimized by torture and extrajudicial killing that constitute violations of jus cogens norms . . .

C. SOI from the State Department

In its SOI, the State Department submitted a suggestion of non-immunity. The SOI highlighted the fact that Samantar “is a former official of a state with no currently recognized government to request immunity on his behalf” or to take a position as to whether the acts in question were taken in an official capacity.” Noting that “[t]he immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official,” the government reasoned that Samantar should not be afforded immunity “[i]n the absence of a recognized government . . . to assert or waive [Samantar’s] immunity.” The second major basis for the State Department’s view that Samantar was not entitled to immunity was Samantar’s status as a permanent legal resident. According to the SOI, “U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts, particularly when sued by U.S. residents” or naturalized citizens such as two of the plaintiffs.

Both of these factors add substantial weight in favor of denying immunity. Because the State Department has not officially recognized a Somali government, the court does not face the usual risk of offending a foreign nation by exercising jurisdiction over the plaintiffs’ claims. Likewise, as a permanent legal resident, Samantar has a binding tie to the United States and its court system.

Because this case involves acts that violated jus cogens norms, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups, we conclude that Samantar is not entitled to conduct-based official immunity under the common law, which in this area incorporates international law. Moreover, the SOI has supplied us with additional reasons to support this conclusion. Thus, we affirm the district court’s denial of Samantar’s motion to dismiss based on foreign official immunity.
Page 654, add at the end of Note 10:

Since the Supreme Court’s decision in Samantar, a number of courts have treated as dispositive Executive Branch suggestions of immunity for foreign officials. See, e.g., Manoharan v. Rajapaksa, 711 F.3d 178 (D.C. Cir. 2013) (sitting head of state of Sri Lanka); Habyarimana v. Kagame, 696 F.3d 1029 (10th Cir. 2012) (sitting head of state of Rwanda); Giraldo v. Drummond, 808 F. Supp. 2d 247 (D.D.C. 2011) (former head of state of Columbia). However, the Fourth’s Circuit’s 2012 decision in the subsequent proceedings in Samantar II, excerpted above, takes the position that such absolute deference to the Executive Branch is appropriate only for status immunity, not conduct immunity.

Page 657, add after Note 19:

19a. Consider the Fourth Circuit’s 2012 decision in Samantar II, excerpted above. With respect to deference to the Executive Branch, does the court’s distinction between status immunity and conduct immunity make sense? Why does the Executive Branch’s role in receiving ambassadors warrant absolute deference for the former but not the latter? What is the basis for the court’s conclusion that conduct immunity does not apply to alleged jus cogens violations? Is the court saying that international law currently recognizes a jus cogens limitation on conduct immunity in civil cases, or simply that international law allows nations to adopt such a limitation if they choose to do so? If it is the latter, should this decision for the United States be made by the federal courts, or by the political branches of the government? Look at footnote 6 of the court’s opinion. Why would there be a jus cogens limitation on conduct immunity but not status immunity? Does this decision, if accepted by other courts, mean that there will be no conduct immunity defense in, for example, a suit against an Israeli official for alleged war crimes in Gaza, or against a Chinese official for alleged torture of members of the Falun Gong?

Page 658, add after Note 20:

20a. In February 2012, the International Court of Justice issued an important decision concerning sovereign immunity. In that case, Germany v. Italy, the ICJ held (by a vote of 12-3) that Italy had violated customary international law in allowing its courts to exercise jurisdiction over civil claims against Germany relating to Germany’s violation of international humanitarian law during Germany’s occupation of Italy in World War II. In the decision, the ICJ reasoned as follows:
(a) states have a right of sovereign immunity under customary international law, stemming from the sovereign equality of nations,

(b) the relevant international law of immunity is that which exists at the time of the proceedings rather than at the time of the underlying conduct,

(c) the acts of Germany in question constituted sovereign acts (*acta jure imperii*) for purposes of immunity, notwithstanding the illegality of the acts,

d) states are generally entitled to immunity in other nations’ courts for sovereign acts,

e) even if there is an exception for tortious acts committed in the forum state, the exception does not apply to the sovereign acts of a state’s armed forces and other organs of a state working with those forces during an armed conflict,

(f) this immunity applies even if the acts constituted serious violations of international human rights law or the law of armed conflict, and

g) this is true even if the acts constituted *jus cogens* violations, and even if there are no other effective opportunities for relief.

In many respects, U.S. law is in accord with the decision. For example, U.S. courts have consistently rejected the argument that a violation of *jus cogens* norms constitutes an implicit waiver of sovereign immunity. In addition, as discussed in Section D of Chapter 2, the U.S. Supreme Court has held, like the ICJ, that immunity is to be determined based on the law and circumstances at the time of the proceedings, not at the time of the acts.

The reasoning of the ICJ’s decision raises questions, however, about the defensibility under customary international law of the FSIA’s state sponsor of terrorism exception to immunity. The ICJ specifically noted that this exception “has no counterpart in the legislation of other States.” (Canada, however, recently enacted similar legislation. *See Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s. 2* (assented to March 13, 2012).) Moreover, if Germany’s undisputed violations of international humanitarian law during World War II do not qualify for an exception to immunity, it is difficult to see how a state’s sponsorship of terrorism would qualify. Because the state sponsor of terrorism exception applies only to a small number of states with which the United States does not have close relations, the international consequences of the potential inconsistency with international law may be limited.

The ICJ’s reasoning also may implicate the FSIA’s property takings exception (28 U.S.C. § 1605(a)(3)). Although the ICJ did not specifically mention this exception, it, like the state sponsor of terrorism exception, does not appear in the sovereign immunity law of other states. *See Hazel Fox, The Law of State Immunity* 350 (2d ed. 2008). While this exception applies only if the property at issue is either present in the United States in connection with a commercial activity or is owned or operated by an agency or instrumentality engaged in commercial activity
in the United States, the exception does not require that the taking of property itself have been a non-sovereign act. It might be argued, however, that if a foreign state engages in conduct that meets the commercial nexus requirements of this exception, it has waived its immunity for these purposes. Nothing in the ICJ’s decision speaks directly to that argument.

The FSIA’s noncommercial tort exception (28 U.S.C. § 1605(a)(5)) is easier to defend. As the ICJ noted, a number of states have an exception for torts committed in the forum state, and they do not specifically restrict the exception to private, commercial acts. While the U.S. exception does not contain an express carve-out for the conduct of foreign armed forces in the United States during an armed conflict, claims about such conduct are unlikely to arise in U.S. litigation. Moreover, such conduct might fall within the discretionary function limitation in the tort exception (a limitation that the ICJ observed “has no counterpart in the legislation of other States”). But cf. Letelier v. Republic of Chile, 486 F. Supp. 665, 673 (S.D.N.Y. 1980) (reasoning that a foreign state “has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law”).

The ICJ’s reasoning is not directly relevant to the issue of whether and to what extent the officials of foreign states should receive immunity in U.S. courts. The ICJ emphasized that it was “addressing only the immunity of the State itself from the jurisdiction of the courts of other States” and that the “question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.” It is worth noting, however, that the ICJ’s reasoning that conduct can still be sovereign in character even if it violates fundamental human rights norms is potentially relevant to individual official immunity, to the extent that such immunity turns on a distinction between official and private acts.

Page 682, add after Note 7:

7a. As expected, the Supreme Court granted certiorari to review the Second Circuit’s decision in Kiobel. The question originally before the Court was whether private corporations could be sued under the ATS. When the case was argued in February 2012, however, a number of the Justices asked about the proper extraterritorial reach of the ATS. The Court subsequently directed the parties to reargue the case in the October 2012 Term and to address the following additional question: “Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” In April
2013, the Court held that claims can generally not be brought under the ATS for conduct occurring in foreign countries. (The decision is excerpted above.) The Court did not resolve the question of corporate liability under the ATS.

Page 683, add at the end of Note 8:

In Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012), the Supreme Court held that, because of its use of the word “individual,” the TVPA authorizes suit only against natural persons. The Court made clear, however, that its decision did not necessarily suggest how it would come out on the issue of corporate liability under the ATS. Because the ATS does not use the term “individual,” the Court noted, it “offers no comparative value here regardless of whether corporate entities can be held liable in a federal common-law action brought under that statute.”

Page 683, add at the end of Note 10:


Page 685, add after Note 13:

13a. Other recent corporate ATS cases include Sarei v. Rio Tinto, 671 F.3d 736 (9th Cir. 2011) (en banc), and Aziz v. Alcolac, Inc., 658 F.3d 388 (4th Cir. 2011). In Rio Tinto, the Ninth Circuit held (in a divided en banc decision) that the ATS applies to conduct in foreign countries, and that it can be applied to the conduct of corporations, including for aiding and abetting. In Aziz, the Fourth Circuit held that the specific intent standard set forth in the Rome Statute for the International Criminal Court should be applied to adding and abetting claims brought under the ATS.

Page 685, add at the end of Note 15:

For consideration of how international human rights litigation might develop if courts restrict the availability of the ATS, see Donald Earl Childress III, The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation, 100 Geo. L.J. 709 (2012).
Page 711, add to the list of citations in Note 13:


Chapter 9: Extraterritoriality

Page 723, add at the end of Note 5:

For additional background on Reid v. Covert, and consideration more broadly of the phenomenon of prosecuting civilians in military courts-martial, see Captain Brittany Warren, The Case of the Murdering Wives: Reid v. Covert and the Complicated Question of Civilians and Courts-Martial, 212 Mil. L. Rev. 133 (2012).

Page 724, add at the end of Note 7:

For an argument that “Boumediene’s functional test, which focuses the inquiry of whether the Suspension Clause applies to an executive detention abroad primarily on practical concerns, is in considerable tension with the fundamental norms jurisprudence that underlies and pervades the Court's opinion,” see Jules Lobel, Fundamental Norms, International Law, and the Extraterritorial Constitution, 36 Yale J. Int’l L. 307, 309 (2011). For a critique of the extraterritoriality analysis in Boumediene, especially its treatment of the Insular Cases, see Andrew Kent, Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases, 97 Iowa L. Rev. 101 (2011).

Page 745, add at the end of Note 9:

As discussed above in the materials for Chapter 8, the Supreme Court held in Kiobel v. Royal Dutch Petroleum Co. (April 2013), that the presumption against extraterritoriality applies to claims brought under the Alien Tort Statute. The Court acknowledged that the presumption has typically been applied to limit the reach of federal regulatory statutes, not a jurisdictional statute like the ATS. But the Court reasoned that “the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.” In fact, said the Court, “the danger of unwarranted judicial interference in the conduct of foreign
policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.” There is some ambiguity in the decision, however, about the circumstances under which ATS claims will sufficiently “touch and concern the territory of the United States” in a way that will avoid the presumption.

In a concurrence that was joined by three other Justices, Justice Breyer argued that, instead of applying the presumption against extraterritoriality, the Court should have “look[ed] to international jurisdictional norms to help determine the statute’s jurisdictional scope.” Doing so led him to conclude that the ATS should apply “where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”

Page 745, add at the end of Note 10:

For an argument that “when Congress enacts a statute silent on geographic scope designed to implement international substantive law, courts should construe that statute in line with international jurisdictional law, including attendant principles of extraterritorial jurisdiction,” see Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 Va. L. Rev. 1019, 1023 (2011).

Page 745, add after Note 10:

10a. In United States v. Bellaizac-Hurtado, 700 F.3d 1245 (11th Cir. 2012), the Eleventh Circuit held that Congress could not use its authority to define and punish offenses against the law of nations to prosecute acts of drug trafficking occurring in foreign waters because drug trafficking does not violate customary international law.* One of the judges on the panel, Judge Barkett, concurred on the ground that the Define and Punish Clause should be read as implicitly incorporating international law limits on prescriptive jurisdiction, limits that she argued do not allow for the prosecution of drug trafficking that lacks any connection to the United States.

---

* Cf. United States v. Nueci-Pena, 711 F.3d 191 (1st Cir. 2013) (prosecution of drug trafficking on the high seas, in vessels “without nationality,” is supported by Congress’s authority to “define and punish . . . Felonies committed on the high Seas”).
12. It is not clear whether or to what extent the Due Process Clause of the Fifth Amendment might also limit the permissible application of federal law to conduct occurring outside the United States. For discussion of that issue, see Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217 (1992), and A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation*, 35 Colum. J. Transnat’l L. 379 (1997).

This due process issue has arisen in cases brought under the Maritime Drug Law Enforcement Act (MDLEA), which provides that “[i]t is unlawful for any person . . . on board a vessel subject to the jurisdiction of the United States . . . to possess with intent to manufacture or distribute, a controlled substance.” The MDLEA also provides that “a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding” under the statute. Courts have generally assumed that applications of this statute are subject to due process limitations but that these limitations simply require that the law not be applied in an “arbitrary or fundamentally unfair” manner. *See*, e.g., United States v. Suerte, 291 F.3d 366 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548 (1st Cir. 1999). The U.S. Court of Appeals for the Ninth Circuit also requires a nexus between the defendant’s activities and the United States. *See*, e.g., United States v. Klimavicius-Viloria, 144 F.3d 1249 (9th Cir. 1998); United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990). This nexus requirement has been expressly rejected by other circuit courts. *See* *Suerte*, 291 F.3d at 369-72 (summarizing decisions). Even the Ninth Circuit does not impose this requirement for stateless vessels, see United States v. Caicedo, 47 F.3d 370, 379 (9th Cir. 1995), and for situations in which international law allows for universal jurisdiction, see United States v. Shi, 525 F.3d 709, 723 (9th Cir. 2008).

In United States v. Brehm, 691 F.3d 547 (4th Cir. 2012), the Fourth Circuit considered this due process issue in the context of a prosecution under the Military Extraterritorial Jurisdiction Act (MEJA), which allows for the prosecution of individuals who commit serious crimes “while employed by or accompanying the Armed Forces outside the United States.” In that case, a South African citizen stabbed a British citizen at Kandahar Airfield (KAF), a NATO-operated military base in Afghanistan, while both where employed with private contractors supporting the NATO war effort. In concluding that the assertion of extraterritorial criminal jurisdiction in that case did not violate due process, the court noted that “[the defendant’s] actions affected significant American interests at KAF, not the least of which was the preservation of law and order on the base, the maintenance of military-related discipline, and the reallocation of DOD resources to confine [the defendant], provide care for [the victim], and investigate the incident.”
Page 757, add at the end of Note 10:

See also Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause*, 106 Nw. U. L. Rev. 1675, 1682 (2012) (arguing that Congress under the Define and Punish Clause “can define only offenses that already exist in international law,” but that “congressional definitions should receive a fair degree of deference from the courts when, as will often be the case, the existence or details of the underlying international norms are substantially unclear”).

Page 779, add at the end of Note 5:

In *Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012), the Ninth Circuit held, in an *en banc* decision, that a person being extradited could bring a habeas corpus challenge alleging that his extradition would violate the Convention Against Torture (CAT). Even though the CAT is not self-executing, the court reasoned that “[t]he CAT and its implementing regulations are binding domestic law, which means that the Secretary of State *must* make a torture determination before surrendering an extraditee who makes a CAT claim.” The court further observed that:

The process due here is that prescribed by the statute and implementing regulation: The Secretary must consider an extraditee’s torture claim and find it not “more likely than not” that the extraditee will face torture before extradition can occur. An extraditee thus possesses a narrow liberty interest: that the Secretary comply with her statutory and regulatory obligations.

The court remanded to the district court “so that the Secretary of State may augment the record by providing a declaration that she has complied with her obligations.”