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FEDERAL STATUTES — WESTFALL ACT — D.C. CIRCUIT HOLDS THAT U.S. OFFICIALS ARE IMMUNE FROM ALIEN TORT STATUTE CLAIMS. — *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

Despite the numerous detainee cases working their way through the federal courts, Congress has yet to state clearly whether tort claims alleging torture in U.S. custody should be allowed to proceed.<sup>1</sup> In this legislative vacuum, detainees have faced an unsympathetic federal judiciary, which tends to defer to the Executive.<sup>2</sup> This approach lowers the likelihood that Congress will provide guidance because it reduces the Executive's incentives to lobby for updated statutes.<sup>3</sup> Recently, in *Ali v. Rumsfeld*,<sup>4</sup> the D.C. Circuit held that the Westfall Act<sup>5</sup> immunizes U.S. officials from claims brought under the Alien Tort Statute<sup>6</sup> (ATS) for actions within the scope of their employment.<sup>7</sup> The court's textualist opinion downplayed the Westfall Act's ambiguity following the Supreme Court's holding in *Sosa v. Alvarez-Machain*.<sup>8</sup> Given this ambiguity, the D.C. Circuit could have arrived at a contrary holding that would have been more likely to elicit congressional input.

Congress enacted the Westfall Act in 1988 to supersede the Supreme Court's decision in *Westfall v. Erwin*.<sup>9</sup> In holding that government employees could be liable in tort for nondiscretionary actions within the scope of their employment,<sup>10</sup> that case "eroded the common law tort immunity previously available to Federal employees."<sup>11</sup> The Westfall Act amended the Federal Tort Claims Act<sup>12</sup> (FTCA) to require that the United States be substituted as the defendant in any tort suit brought against a government employee acting within the scope of her employment.<sup>13</sup> Substitution is not applicable, however, when the

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<sup>1</sup> See *Vance v. Rumsfeld*, 653 F.3d 591, 622–26 (7th Cir. 2011) (interpreting congressional silence as implicitly approving such claims by U.S. citizens), *vacated and reh'g en banc granted*, Nos. 10-1687 & 10-2442, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011); *Arar v. Ashcroft*, 585 F.3d 559, 581 (2d Cir. 2009) (en banc) (inferring from congressional silence that such claims by alien plaintiffs were barred).

<sup>2</sup> See Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 694, 697–702 (2005).

<sup>3</sup> See generally EINER ELHAUGE, STATUTORY DEFAULT RULES 151–67 (2008).

<sup>4</sup> 649 F.3d 762 (D.C. Cir. 2011).

<sup>5</sup> Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)).

<sup>6</sup> 28 U.S.C. § 1350 (2006).

<sup>7</sup> See *Ali*, 649 F.3d at 775–78.

<sup>8</sup> 542 U.S. 692 (2004).

<sup>9</sup> 484 U.S. 292 (1988); see Westfall Act § 2(a)(4), (7), 102 Stat. at 4563.

<sup>10</sup> See *Westfall*, 484 U.S. at 294–95.

<sup>11</sup> Westfall Act § 2(a)(4), 102 Stat. at 4563.

<sup>12</sup> 28 U.S.C. §§ 2671–2680 (2006).

<sup>13</sup> Westfall Act § 5, 102 Stat. at 4564.

defendant's alleged conduct violates the Constitution or a federal statute authorizing a civil claim against an individual.<sup>14</sup>

Enacted by the First Congress,<sup>15</sup> the ATS provides federal jurisdiction over "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."<sup>16</sup> In 1980, in *Filártiga v. Peña-Irala*,<sup>17</sup> the Second Circuit construed this then—"rarely-invoked provision" as opening the federal courts to claims premised on violations of "universally accepted" international law norms — including "deliberate torture perpetrated under color of official authority."<sup>18</sup> Implicit in this holding was the conclusion that a separate cause of action was unnecessary.<sup>19</sup> While some judges and scholars criticized this conclusion,<sup>20</sup> many federal courts accepted it, leading to a wave of human rights litigation.<sup>21</sup>

In 2004, the Supreme Court weighed in, holding in *Sosa* that the ATS was a "jurisdictional statute creating no new causes of action."<sup>22</sup> But because the Court's inquiry into the statute's history turned up no evidence that Congress intended it "to sit on the shelf" awaiting legislative causes of action, the Court also held that judges had authority to recognize "claim[s] under the law of nations as an element of *common law*."<sup>23</sup> The Court cautioned that judges should carefully craft substantive rights to match only widely accepted international law norms, citing *Filártiga*'s treatment of official torture as having identified an appropriately well-established prohibition.<sup>24</sup>

In 2006, the *Ali* plaintiffs — five Iraqi citizens and four Afghani citizens — sued four senior Defense Department officials, including former Secretary of Defense Donald Rumsfeld, alleging abuse during their detentions at American facilities in Iraq and Afghanistan.<sup>25</sup> The plaintiffs asserted tort claims under the Fifth and Eighth Amend-

<sup>14</sup> *Id.* § 5(b)(2)(A), (B), 102 Stat. at 4564.

<sup>15</sup> See Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

<sup>16</sup> 28 U.S.C. § 1350 (2006).

<sup>17</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>18</sup> *Id.* at 878.

<sup>19</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 820 (D.C. Cir. 1984) (Bork, J., concurring) (noting, while disagreeing with, this aspect of *Filártiga*).

<sup>20</sup> See, e.g., *id.*; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 832–34 (1997).

<sup>21</sup> See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (calling *Filártiga* the "*Brown v. Board of Education*" of human rights litigation).

<sup>22</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

<sup>23</sup> *Id.* at 724–25 (emphasis added). This interpretation saved the ATS from irrelevance after the demise of "federal general common law." See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see also *Sosa*, 542 U.S. at 730 ("[T]he First Congress would [not] have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.").

<sup>24</sup> *Sosa*, 542 U.S. at 732 (citing *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

<sup>25</sup> *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 88–90 (D.D.C. 2007).

ments,<sup>26</sup> the Geneva Conventions, and the law of nations prohibitions on official torture and “cruel, inhuman or degrading treatment.”<sup>27</sup> The district court dismissed each claim, holding that the Fifth and Eighth Amendments did not apply to the plaintiffs<sup>28</sup> and that the Westfall Act precluded the law of nations and Geneva claims, which were brought under the ATS.<sup>29</sup> Citing *Sosa*’s holding that the ATS is not a substantive statute,<sup>30</sup> the court held that the claims did not fall within the Westfall Act’s exception for violations of federal statutes.<sup>31</sup>

The D.C. Circuit affirmed.<sup>32</sup> Writing for the panel, Judge Henderson<sup>33</sup> affirmed the dismissal of the constitutional claims<sup>34</sup> and the denial of declaratory relief.<sup>35</sup> She also affirmed that the Westfall Act precluded the ATS claim, citing precedent holding that the defendants’ conduct fell “within the scope of their employment”<sup>36</sup> and that even “allegations of serious criminality” did not eliminate Westfall Act immunity.<sup>37</sup> Therefore, the Westfall Act required the United States to be substituted as the defendant under the FTCA.<sup>38</sup> And because the plaintiffs had failed to file the administrative claim that the FTCA required, the district court lacked subject matter jurisdiction.<sup>39</sup> Judge Henderson agreed with the district court that the ATS claim fell outside the Westfall Act’s exception for suits “brought for a violation of a statute of the United States.”<sup>40</sup> She argued that the ATS does not impose violable duties; rather, it “is a jurisdictional statute creating no new causes of action.”<sup>41</sup> Thus, the ATS claim alleged “a violation of the law of nations, not of the ATS.”<sup>42</sup>

<sup>26</sup> The plaintiffs argued that the court should infer Fifth and Eighth Amendment causes of action under the Supreme Court’s decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which authorized courts to make such an inference where a constitutional violation is alleged. See *Detainees Litig.*, 479 F. Supp. 2d at 91, 93.

<sup>27</sup> *Detainees Litig.*, 479 F. Supp. 2d at 91. The plaintiffs also sought declaratory relief. See *id.*

<sup>28</sup> See *id.* at 95.

<sup>29</sup> See *id.* at 112.

<sup>30</sup> See *id.*

<sup>31</sup> *Id.* The court also rejected declaratory relief as having no “practical” effect. *Id.* at 118.

<sup>32</sup> *Ali*, 649 F.3d at 765. The detainees did not appeal their Geneva claim. *Id.* at 769.

<sup>33</sup> Judge Henderson was joined by Chief Judge Sentelle.

<sup>34</sup> See *Ali*, 649 F.3d at 769–74.

<sup>35</sup> See *id.* at 778.

<sup>36</sup> *Id.* at 775 n.20.

<sup>37</sup> *Id.* at 775 (quoting *Rasul v. Myers (Rasul I)*, 512 F.3d 644, 660 (D.C. Cir.), *rev’d on other grounds*, 129 S. Ct. 763 (2008)).

<sup>38</sup> *Id.*

<sup>39</sup> See *id.* (“[W]e view the failure to exhaust administrative remedies as jurisdictional.” (alteration in original) (quoting *Rasul I*, 512 F.3d at 661)).

<sup>40</sup> 28 U.S.C. § 2679(b)(2)(B) (2006); see *Ali*, 649 F.3d at 778.

<sup>41</sup> *Ali*, 649 F.3d at 776 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004)) (internal quotation mark omitted).

<sup>42</sup> *Id.*

Judge Edwards dissented from the majority's disposition of the ATS claim.<sup>43</sup> He called the court's treatment of *Sosa* "strikingly incomplete"<sup>44</sup> for failing to recognize that the ATS both provides jurisdiction and "incorporates the law of nations"<sup>45</sup> by authorizing federal courts to entertain common law actions for violations of international law.<sup>46</sup> Unlike other jurisdictional statutes, Judge Edwards pointed out, the ATS "authoriz[es] the federal courts to *impose* liability."<sup>47</sup> Thus, it provides "'statutory authority' sufficient to satisfy the Westfall Act exception."<sup>48</sup> Judge Edwards also examined legislative history that suggested that, in enacting the Westfall Act, Congress meant to preclude only ordinary common law liability, not liability under the law of nations.<sup>49</sup> As a result, Judge Edwards concluded, the Westfall Act should not be read to protect U.S. officials from ATS claims.<sup>50</sup>

The court's formalistic reading of *Sosa* and its refusal to look beyond the Westfall Act's text obscure the fact that today's understanding of the ATS differs from the one familiar to the Westfall Act's enacting Congress. *Ali* lowers the chances that Congress — which has sent ambiguous signals regarding detainee tort claims — will address whether U.S. officials should in fact be immune from ATS claims.

The court's holding weakens protections against torture in two related ways. First, it works to deny victims a remedy by triggering the substitution of the United States as defendant under the FTCA. The FTCA's waiver of U.S. sovereign immunity does not extend to "claim[s] arising in a foreign country,"<sup>51</sup> so claims like the *Ali* plaintiffs' are easily dismissed.<sup>52</sup> Second, given that criminal prosecutions of senior U.S. officials are unlikely,<sup>53</sup> insulating officials from tort liability removes one of the only remaining legal mechanisms for deterring torture of noncitizens. While FTCA liability might ordinarily incentivize the government to monitor employees closely — like a private employer facing vicarious liability<sup>54</sup> — that effect vanishes under the FTCA's

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<sup>43</sup> *Id.* at 778 (Edwards, J., dissenting). Although writing in dissent, Judge Edwards agreed with the majority's disposition of the constitutional and declaratory relief claims. *Id.* at 779.

<sup>44</sup> *Id.* at 779.

<sup>45</sup> *Id.* at 781.

<sup>46</sup> *See id.* at 790–92.

<sup>47</sup> *Id.* at 792.

<sup>48</sup> *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004)).

<sup>49</sup> *Id.* at 789 (citing H.R. REP. NO. 100-700, at 2 (1988)).

<sup>50</sup> *Id.* at 792–93.

<sup>51</sup> 28 U.S.C. § 2680(k) (2006).

<sup>52</sup> *See, e.g., Harbury v. Hayden*, 522 F.3d 413, 422–23 (D.C. Cir. 2008).

<sup>53</sup> *See* David Johnston & Mark Mazzetti, *Legal and Political Hurdles Stand in the Way of Prosecuting Interrogation Abuses*, N.Y. TIMES, Aug. 26, 2009, at A10.

<sup>54</sup> *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.8, at 188 (7th ed. 2007); *cf.* Westfall Act, Pub. L. No. 100-694, § 2(a)(2), 102 Stat. 4563, 4563 (1988) (codified at 28 U.S.C.

foreign country exception. U.S. citizens, whose constitutional rights are more firmly established, may benefit from stronger legal deterrents against abuse.<sup>55</sup> While torture of both Americans and aliens is illegal,<sup>56</sup> *Ali* tells U.S. officials to fear liability only for the former.

Whether this outcome is entirely undesirable is, of course, debatable. But it is striking that the Westfall Act has, since its enactment, been stretched far beyond the scope that Congress apparently intended.<sup>57</sup> In part, this shift is a result of *Sosa*, which recognized a role for federal common law — defining substantive international law claims — that would not have been anticipated at the Westfall Act's enactment.<sup>58</sup> Indeed, law of nations violations “are not akin to the types of ‘routine acts or omissions’ that Congress appears to have had in mind.”<sup>59</sup> The Westfall Act's “Findings and Purposes” section (unmentioned by the *Ali* majority) focuses entirely on *Westfall*, which concerned a state law negligence claim.<sup>60</sup> The Act's legislative history (similarly unmentioned by the majority) also suggests that Congress intended the law's protections to extend only to state law liability.<sup>61</sup> Moreover, Congress has chosen, as recently as 2005, not to foreclose detainee suits explicitly — to the contrary, it has enacted language suggesting that U.S. officials could, in fact, face such liability.<sup>62</sup>

Still, if Congress had wanted *judges* to help define immunity, it could have written one exception into the Westfall Act for violations of “federal law,” thereby including federal common law. Additionally, the “irony” that Judge Edwards identified — that the United States, which

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§ 2671 note (2006)) (comparing FTCA liability to the “manner in which the common law historically has recognized the responsibility of an employer”).

<sup>55</sup> See *Vance v. Rumsfeld*, 653 F.3d 591, 611–26 (7th Cir. 2011) (allowing U.S. citizens to assert *Bivens* claims against U.S. officials alleged to have committed torture abroad and calling deterrence the “core premise” of *Bivens*, *id.* at 615 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001)) (internal quotation marks omitted), *vacated and reh'g en banc granted*, Nos. 10-1687 & 10-2442, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011).

<sup>56</sup> 18 U.S.C. §§ 2340–2340A (2006) (criminalizing torture).

<sup>57</sup> *Ali* is only the latest detainee case to apply the Westfall Act. See, e.g., *Rasul v. Myers (Rasul I)*, 512 F.3d 644, 656–60 (D.C. Cir.) (holding that alleged torture fell “within the scope of [defendants'] office/employment,” *id.* at 660), *rev'd on other grounds*, 129 S. Ct. 763 (2008).

<sup>58</sup> See Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1749 & n.215 (2008) (noting that *Filártiga*, the leading ATS case at the Westfall Act's enactment, assumed that the ATS created a cause of action); Brief for Appellants at 55, *Ali*, 649 F.3d 762 (Nos. 07-5178, 07-5185, 07-5186, 07-5187) (noting that when considering the Westfall Act, Congress thought “the ATS provided a substantive cause of action”).

<sup>59</sup> *Ali*, 649 F.3d at 789 (Edwards, J., dissenting) (quoting H.R. REP. NO. 100-700, at 6 (1988)).

<sup>60</sup> See Pub. L. No. 100-694, § 2, 102 Stat. 4563, 4563 (1988) (codified at 28 U.S.C. § 2671 note (2006)); *Westfall v. Erwin*, 484 U.S. 292, 293–95 (1988).

<sup>61</sup> See *Ali*, 649 F.3d at 789 (Edwards, J., dissenting); Lin, *supra* note 58, at 1741–45.

<sup>62</sup> See, e.g., Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, div. A, tit. X, § 1004(a), 119 Stat. 2739, 2740 (establishing certain defenses available in “civil action[s]” relating to the “detention and interrogation of aliens”).

has facilitated human rights by recognizing claims against foreign officials for torture, would immunize U.S. officials for the same violations<sup>63</sup> — could reflect congressional preferences: although torture is a criminal offense, Congress's recent efforts to limit detainees' access to courts<sup>64</sup> hint that Judge Edwards's account is overly optimistic.

In light of this uncertainty, Judge Edwards was wise to suggest that Congress should “give the judiciary better directions on this matter” by clarifying whether immunity extends to ATS claims.<sup>65</sup> First, Congress can fine-tune a liability regime in ways that courts cannot; for example, it might authorize liability only for certain acts or only to a certain extent, thus cabining judicial discretion and balancing competing policy concerns.<sup>66</sup> Indeed, Congress has recently shown itself able to respond to detainee cases with comprehensive statutory frameworks.<sup>67</sup> Second, established separation of powers principles favor Congress's involvement in an issue that has become central to national security policy.<sup>68</sup> Without congressional input — and because, under *Ali*, the judiciary cannot impose liability under the ATS — the Executive has complete control over immunity.

Scholars have argued that courts should (and often do) interpret ambiguous statutes to incentivize careful drafting and to provoke legislative overrides of undesirable judicial decisions.<sup>69</sup> For example, Professor Einer Elhauge proposes that in certain circumstances, when an interest group on one side of an issue has “greater ability to command time on the legislative agenda, raise issues, and/or influence statutory drafting,”<sup>70</sup> courts should employ canons favoring the comparatively powerless group.<sup>71</sup> Because influential groups can lobby for updated

<sup>63</sup> *Ali*, 649 F.3d at 793 (Edwards, J., dissenting).

<sup>64</sup> See, e.g., DTA § 1005(e)(1), 119 Stat. at 2742 (stripping federal courts of habeas corpus jurisdiction in Guantánamo Bay detainee cases).

<sup>65</sup> *Ali*, 649 F.3d at 793 (Edwards, J., dissenting).

<sup>66</sup> See ELHAUGE, *supra* note 3, at 154 (noting that a statutory update can offer a resolution “that both is unavailable as a plausible legal interpretation and reflects enactable preferences more accurately than judicial estimates”).

<sup>67</sup> See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (overriding the decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)), *invalidated in part* by *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); DTA, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (overriding the decision in *Rasul v. Bush*, 542 U.S. 466 (2004)).

<sup>68</sup> See, e.g., *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring in part) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring)); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050-51 (2005) (examining executive action in the war on terror under Justice Jackson's *Youngstown* approach); Sunstein, *supra* note 2, at 704 (“[P]rotection of national security is [constitutionally] parceled out between Congress and the president . . .”).

<sup>69</sup> See Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 428-31 (1992).

<sup>70</sup> ELHAUGE, *supra* note 3, at 162.

<sup>71</sup> *Id.* at 162-63.

statutes, “preference-eliciting” canons tend to maximize political satisfaction by “forcing explicit decisionmaking by the political process.”<sup>72</sup> The model applies only when “enactable preferences” are unclear — that is, when judges cannot determine which policy lawmakers would favor if given a choice.<sup>73</sup>

Evaluating *Ali* through this lens helps illuminate the appeal of the preference-eliciting model. The scope of the Westfall Act’s exceptions was susceptible of two plausible interpretations, and Congress’s preferences were opaque.<sup>74</sup> However, the majority’s textualist opinion makes Congress less likely to provide input: the Executive, which enjoys enormous influence on legislation,<sup>75</sup> would gain little from overriding the outcome. Where congressional clarification is at a premium, resolving ambiguities in favor of detainees may be a wiser strategy.<sup>76</sup>

In cases like *Ali*, a preference-eliciting approach has some clear advantages over a textualist one. Textualism is often favored for its disciplining effects on lawmakers: if courts strictly enforce text, legislators will be motivated *ex ante* to avoid errors, lest a literal reading conflict with their preferences.<sup>77</sup> But in *Ali*, *ex ante* effects played no role: the Westfall Act’s enactors could not have accounted for *Sosa*’s later holding.<sup>78</sup> And *ex post*, the preference-eliciting model better accounts for the realities of congressional agenda setting: when textualism favors an influential party, legislative response may be *less* likely.

This same nuance also helps rebut the less consequentialist objection that preference-eliciting canons are inconsistent with the judicial role.<sup>79</sup> Textualists favor their approach because it constrains judicial discretion,<sup>80</sup> but a textualist reading, when it favors the Executive, tends to be shielded from correction. By contrast, because Congress

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<sup>72</sup> *Id.* at 154.

<sup>73</sup> *Id.* at 155–56.

<sup>74</sup> See sources cited *supra* notes 57–64; cf. Adam Zagorin, *The Politics of Torture*, TIME, Dec. 24, 2007, at 20 (reporting that “lawmakers’ interest in probing the torture issue [is] unclear” because they fear seeming “soft on terrorism”).

<sup>75</sup> See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 348 & tbl.7, 362 (1991).

<sup>76</sup> See ELHAUGE, *supra* note 3, at 166 (arguing for default rules “based on certain categories of cases rather than case-by-case measurements of relative political influence”).

<sup>77</sup> See, e.g., Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685 (1999) (arguing that textualism is “designed to provide Congress with incentives to . . . set forth clearly articulated laws”).

<sup>78</sup> Cf. Solimine & Walker, *supra* note 69, at 436 (“[T]here will be instances where Congress simply did not foresee a fact situation with which the Court is subsequently confronted. The Court then makes a decision, giving the Congress a chance to correct it, if it desires.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 493–97 (1989) (discussing the problem of changed circumstances for statutory interpretation).

<sup>79</sup> See Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1392–93 (2005).

<sup>80</sup> See generally Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983).

can easily correct a statutory decision with which it disagrees, a preference-eliciting approach is a particularly ineffective tool for judges seeking to advance policy preferences.<sup>81</sup> Indeed, the goal of the approach is to avoid the unalloyed exercise of judicial judgment.<sup>82</sup>

Other concerns with a preference-eliciting model in this context carry more weight. Interim costs, if the court's interpretation contradicts legislative preferences, must be acceptable.<sup>83</sup> Courts often hesitate to rule against the Executive in national security cases, where error costs can be considerable.<sup>84</sup> But as an initial matter, casting torture purely as a "national security" issue surely fails to capture the breadth of the interests at stake.<sup>85</sup> Moreover, there are other reasons to doubt that denying immunity would be prohibitively costly: First, senior U.S. officials (including Secretary Rumsfeld) already face liability in suits brought by U.S. citizens for similar abuses.<sup>86</sup> Second, Congress can foreclose liability even retroactively.<sup>87</sup> Third, a flood of claims by alien detainees would be unlikely to ensue, since such individuals tend to lack counsel for civil cases<sup>88</sup> and the realm of conduct actionable under the ATS is narrowly circumscribed.<sup>89</sup>

Scholars have noted the judiciary's tendency to defer systematically to the Executive during emergencies, only to revert to a more confrontational posture as the emergency fades.<sup>90</sup> Whether or not this pattern is desirable,<sup>91</sup> concerns about institutional competence and error costs decrease along with the security stakes. *Ali*'s effect — reducing the incentives for congressional input — must be assessed in this context. Similarly, whether discomfort with the preference-eliciting approach outweighs the desire for congressional input depends on how critical such input is. While this inquiry might ordinarily take judges outside their zone of competence, separation of powers principles and the doctrinal muddle left by *Sosa* both suggest that the *Ali* court missed a justified opportunity to spur Congress to revisit the Westfall Act's scope.

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<sup>81</sup> See ELHAUGE, *supra* note 3, at 163 (emphasizing this "reason for favoring the politically powerless that has nothing to do with whether their claims are attractive on policy grounds").

<sup>82</sup> See *id.* at 3–5.

<sup>83</sup> See *id.* at 165.

<sup>84</sup> See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 16, 31 (2007).

<sup>85</sup> See generally Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

<sup>86</sup> See, e.g., *Vance v. Rumsfeld*, 653 F.3d 591, 594 (7th Cir. 2011), *vacated and reh'g en banc granted*, Nos. 10-1687 & 10-2442, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011); *Doe v. Rumsfeld*, No. 1:08-CV-1902, 2011 WL 3319439, at \*12 (D.D.C. Aug. 2, 2011); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1019–30 (N.D. Cal. 2009).

<sup>87</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 280 (1994).

<sup>88</sup> See POSNER & VERMEULE, *supra* note 84, at 208.

<sup>89</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

<sup>90</sup> See, e.g., POSNER & VERMEULE, *supra* note 84, at 3.

<sup>91</sup> Compare, e.g., *id.* at 15–57 (desirable), with Sunstein, *supra* note 2, at 702–05 (undesirable).