The "Bizarre Result": The Alien Tort Statute, The Westfall Act, and the Problem of Wartime Detentions in *Ali v. Rumsfeld*

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Abstract: On June 21, 2011, in Ali v. Rumsfeld, the U.S. Court of Appeals for the District of Columbia held that constitutional protections do not apply to noncitizen enemy detainees in a foreign theater of war, and that the Westfall Act immunizes federal employees from suits brought by such detainees under the Alien Tort Statute. This decision adds to the uncertainty about what recourse, if any, noncitizen enemy detainees have for abuses committed by their U.S. military captors.

Introduction

Afghan and Iraqi citizens claiming they were tortured, abused, and detained by the United States military filed an action against former Secretary of Defense Donald Rumsfeld and other high-ranking military officers.\(^1\) The plaintiffs alleged that their treatment violated the United States Constitution, the law of nations, and the Geneva Convention IV.\(^2\) The United States District Court for the District of Columbia dismissed the claims for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.\(^3\) The plaintiffs appealed, arguing that their treatment violated their Fifth and Eighth Amendment rights, and that the Alien Tort Statute (ATS) provided them with a statutory cause of action against the defendants in their individual capacities.\(^4\) The United States Court of Appeals for the District of Columbia upheld the district court decision, affirming that the Constitution does not protect noncitizen enemy detainees in a foreign theater of war, and that the Westfall Act provides absolute immunity to federal employees.

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2 See id. at 91.
3 Id. at 119.
4 See Ali, 649 F.3d at 765 (D.C. Cir. 2011).
sued under the ATS.\textsuperscript{5} Judge Edwards dissented, concluding that the
ATS falls within the Westfall Act’s exception for United States statutes
because it is both jurisdictional and substantive.\textsuperscript{6} To support this posi-
tion, Judge Edwards reasoned that the United States Supreme Court’s
reading of the ATS in \textit{Sosa v. Alvarez-Machain} “open[s] the door a crack
to the possible recognition of new causes of action under international
law . . . .”\textsuperscript{7} These differing interpretations of \textit{Sosa}, the ATS, and its
relationship to the Westfall Act turned on the issue of whether the ATS is
strictly jurisdictional or whether it also provides a statutory cause of ac-
tion.\textsuperscript{8} The possibility of redress for noncitizen enemy detainees was
broached by Judge Edwards but remains unresolved.\textsuperscript{9}

\section*{I. Detainees’ Abuse, Complaint, and Trial}

From 2003 to 2004, four Afghan and five Iraqi citizens were de-
tained by United States military forces because of hostilities in those
countries.\textsuperscript{10} The Afghan citizens were held at U.S. detention facilities
throughout Afghanistan, and the Iraqi citizens were held at Abu Ghraib
prison and other facilities in Iraq.\textsuperscript{11} The prisoners were held for varying
amounts of time—some remained in U.S. custody for months, some for
a year, and some were detained multiple times.\textsuperscript{12}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 770–73, 775; \textit{see} Alien Tort Statute, 28 U.S.C. § 1350 (2006) (stating that “dis-

tric 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”); Federal Tort


(providing immunity to federal employees for torts committed in the scope of employ-

ment and substituting the United States as the sole defendant to a claim for violation of

the Federal Tort Claims Act).

\item \textit{See Ali}, 649 F.3d at 791 (Edwards, J., dissenting); \textit{see also} 28 U.S.C. § 2679(b)(2)(B)

(providing that the Westfall Act’s grant of immunity does not apply to claims alleging viola-

tion of a United States statute).

\item \textit{Ali}, 649 F.3d at 780 (Edwards, J., dissenting) (quoting \textit{Saleh v. Titan Corp.}, 580 F.3d


\item \textit{See Ali}, 649 F.3d at 778 (majority opinion); \textit{id.} at 791 (Edwards, J., dissenting).

\item \textit{See id.} at 792–93 (Edwards, J., dissenting). \textit{See generally} Karen Lin, \textit{Note, An Unintended

Double Standard of Liability: The Effect of the Westfall Act on The Alien Tort Claims Act}, 108 Col-

um. L. Rev. 1718, 1719, 1757 (2008) (describing the historic use of the ATS as guarantor of

international human rights in United States courts).

\item \textit{In re Iraq & Afg. Detainees Litig.}, 479 F. Supp. 2d 85, 88 (D.D.C. 2007), aff’d sub nom.

\textit{Ali v. Rumsfeld}, 649 F.3d 762, 765 (D.C. Cir. 2011). The court took judicial notice of the

fact that the United States was engaged in wars in Afghanistan and Iraq. \textit{Id.} at 102.

\item \textit{Id.} at 88.

\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
While the length of the prisoners’ detentions varied, the abuses they suffered at the hands of the U.S. military were largely similar. Among the more egregious offenses alleged by the prisoners were extended periods of sensory, food and water deprivation; fierce beatings resulting in permanent injury; withholding of essential medication and failure to address life threatening injuries; electrical shock treatment resulting in unconsciousness; prolonged exposure to extreme heat; repeated anal probes; and various forms of psychological abuse including racial epithets, death threats, simulated sodomy, exposure to aggressive dogs, and confinement in cages with lions.

Based on these allegations, the prisoners initially filed complaints in four separate jurisdictions against Donald Rumsfeld, the former Secretary of Defense, and other high-ranking military officers responsible for directing the wars in Afghanistan and Iraq. On June 17, 2005, the Judicial Panel on Multidistrict Litigation consolidated the complaints and transferred them to the district court. On January 5, 2006, the plaintiffs filed an amended complaint seeking declaratory relief for multiple causes of action. First, the plaintiffs alleged that the circumstances of their detention violated their Fifth Amendment right to due process, and their Fifth and Eighth Amendment protection from cruel and unusual punishment. Pursuant to the ATS and Geneva Convention IV, the plaintiffs also alleged violations of the law of nations prohibition against torture and cruel, inhuman or degrading treatment. In response, the defendants filed separate motions to dismiss each claim for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

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13 Id. at 88–90.
14 See id. “These are only some of the many examples of abuse allegedly inflicted on the plaintiffs . . . .” Id. at 90.
15 See Detainees, 479 F. Supp. 2d at 90. All claims against the Secretary of Defense “[sought] to impose liability both individually and in his official capacity, whereas the claims against the other defendants [sought] to impose only individual liability.” Id.
17 Detainees, 479 F. Supp. 2d at 90–91.
18 Id. at 91.
19 See id. The plaintiffs abandoned a similar claim under the Third Geneva Convention “once it became clear that the government was not characterizing the plaintiffs as prisoners of war . . . .” Id. at 91 n.4.
20 Id. at 91.
A. Constitutional Claims Under Bivens

The plaintiffs alleged violations of the Fifth and Eighth Amendments pursuant to the theory of tort liability for constitutional violations established in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics.* Bivens held that plaintiffs could recover monetary damages for constitutional violations by federal officials. The defendants argued, and the district court agreed, that the Constitution did not protect nonresident aliens injured in a foreign theater of war. The district court held that the defendants were subject to qualified immunity because the plaintiffs’ constitutional rights were not clearly established at the time of the violations. Even if the defendants had knowingly violated the plaintiffs’ constitutional rights, the court held that “special factors,” namely the need for judicial deference in the realm of foreign policy, counseled against a Bivens remedy.

B. The ATS and the Westfall Act

The district court also considered whether the Westfall Act precluded a finding of personal liability against the defendants under the Alien Tort Statute. The defendants argued that they were personally immune to suits brought pursuant to the ATS because whenever a federal employee commits a tort within the scope of his employment, the Westfall Act substitutes the United States government as a defendant under the Federal Tort Claims Act (FTCA). The plaintiffs argued that the Westfall Act did not apply to its law of nations and Geneva Conven-
tion IV claims because: (1) by its language, the Westfall Act applies only to negligent torts and not to intentional torts; (2) the defendants were acting outside the scope of their employment; and (3) the law of nations claims fell within the Westfall Act’s exception for violations of United States statutes. The district court disposed of the plaintiffs’ first two arguments, finding that the Westfall Act was intended to apply to negligent and intentional torts alike, and that the defendants were acting within the scope of their employment when they committed the alleged acts.

In determining whether the ATS fell within the Westfall Act’s exception for violations of United States statutes, the district court relied on the Supreme Court’s decision in *Sosa v. Alvarez-Machain*. In *Sosa*, the Supreme Court held that “the ATS is a jurisdictional statute creating no new causes of action . . . .” The district court reasoned that because the ATS did not create new causes of action, it was not subject to violation and therefore not eligible for the Westfall Act’s exception. Consequently, the district court applied the Westfall Act and held that the defendants were entitled to absolute immunity for the ATS claims. The United States was substituted as the defendant in place of former Secretary Rumsfeld and the other military officers, and the court dismissed the plaintiffs’ ATS claims under the FTCA. Likewise,

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28 See *Detainees*, 479 F. Supp. 2d at 110–12, 114.

29 See *id.* at 111, 114. “[W]rongful” conduct within the meaning of the Westfall Act includes all conduct that has “no legal sanction,” and thereby includes intentional torts. See *id.* at 111. The Court also found that “detaining and interrogating enemy aliens . . . [is] incidental to the conduct the defendants were employed to perform.” *Id.* at 114.

30 See *id.* at 112; see also § 2679(b)(2)(B) (stipulating that the Westfall Act’s grant of immunity to U.S. government employees does not extend to civil actions “brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 724 (2004).

31 See 542 U.S. at 724.


33 See *Detainees*, 479 F. Supp. 2d at 114–15. The request for declaratory relief was also denied because it was not predicated on any substantive claims. *Id.* at 118–19.

34 See *id.* at 114–15; see also Federal Tort Claims Act, 28 U.S.C. § 2675(a) (2006) (permitting dismissal of tort claims against the United States for failure to exhaust administrative remedies); § 2679(d)(1) (substituting the United States as the defendant for tort actions against U.S. employees acting within the scope of their employment).
the court dismissed the plaintiffs’ independent Geneva Convention IV claims on the grounds that the Convention is not “self-executing” and can be enforced only through “legislation or diplomacy.” The plaintiffs appealed the constitutional and ATS claims to the D.C. Circuit.

II. On Appeal: Differing Interpretations of Sosa, the ATS, and the Westfall Act

The D.C. Circuit unanimously affirmed the district court’s holding with regard to the plaintiffs’ Fifth and Eighth Amendment Bivens claims. The sole point of contention between the majority and the dissent involved the question of whether the ATS is jurisdictional or substantive, and thus whether it is subject to the Westfall Act’s exception for statutory violations. Although the majority and the dissent on the D.C. Circuit both rested their interpretations of the ATS on the Supreme Court’s holding in Sosa, they arrived at different conclusions.

A. Sosa: The Supreme Court Weighs in on the ATS

The plaintiff in Sosa, like the plaintiffs in Ali, argued “that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law.” The Supreme Court disagreed, finding that the “ATS is a jurisdictional statute creating no new causes of action,” and that it was “enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.” This jurisdictional reading was supported, the Court found, by the ATS’s original designation as a grant of mere “cognizance,” and by the placement of the ATS

36 Ali, 649 F.3d at 769.
38 See Ali, 649 F.3d at 779 (Edwards, J., dissenting).
39 See id. at 778 (majority opinion); id. at 779 (Edwards, J., dissenting); see also Sosa v. Alvarez-Machain, 542 U.S. 692, 724, 729 (2004).
40 Sosa, 542 U.S. at 713; see Ali, 649 F.3d at 777.
41 Sosa, 542 U.S. at 724.
in section 9 of the Judiciary Act of 1789—a statute “otherwise exclusively concerned with federal-court jurisdiction . . . .” The Justices differed as to the scope of the common law claims implicated by the ATS, but the Sosa Court’s interpretation was unequivocal: the ATS is a jurisdictional statute, it extends federal jurisdiction to a limited number of claims arising out of the law of nations, and those claims are confined to the common law.

B. The Ali Majority: The ATS as Jurisdictional Grant

Though seemingly clear after Sosa, the scope of the ATS led the Ali majority and dissent down divergent paths, and ultimately to different outcomes. Recognizing the similarity between the Ali and Sosa plaintiffs’ arguments, the Ali majority adopted the logic of the Sosa majority. As in Sosa, the Ali majority found that historical context, as well as the text of the original ATS, clearly demonstrated the statute’s “strictly jurisdictional nature.” The Ali majority concluded that the Sosa holding alone was sufficient to defeat the plaintiffs’ argument that the ATS provides an independent cause of action within the statutory violation exception to the Westfall Act.

The majority bolstered its interpretation of the ATS by comparing it to the Supreme Court’s treatment of the Gonzalez Act in United States v. Gonzalez.
In *Smith*, the Supreme Court decided that the Gonzalez Act does not fall within the Westfall Act’s statutory violation exception because it does not impose any obligations or duties of care. The Court thus concluded that the Westfall Act’s grant of immunity applied. Because the ATS, like the Gonzalez Act, does not impose “any obligations or duties of care,” the *Ali* majority held that it was not eligible for the Westfall Act’s statutory violation exception.

The majority also acknowledged a source of interpretive difference raised by the *Sosa* majority and the *Ali* dissent. The majority acknowledged that the *Sosa* Court did not expressly preclude the argument that the ATS “effectively incorporates the law of nations” in statutory form when it declared “that the domestic law of the United States recognizes the law of nations . . . .” Nevertheless, the *Ali* majority decided that the appropriate interpretation of *Sosa* was that the ATS incorporates the law of nations through the common law, and not through United States statutory law. On the strength of *Sosa* and the likeness of the ATS to the Gonzalez Act, the *Ali* majority concluded that the ATS does not fall within the Westfall Act’s statutory violation exception. The majority therefore upheld the district court’s grant of absolute immunity to the defendants, allowed the United States to substitute itself as the sole defendant under the FTCA, and dismissed the FTCA claims for failure to exhaust administrative remedies.

C. The *Ali* Dissent: The ATS as a Substantive Statute Within the Westfall Exception

Judge Edwards began the analysis in his *Ali* dissent not by addressing the scope of the ATS as defined in *Sosa*, but by referencing his own interpretation of the ATS in his concurrence in *Tel-Oren v. Libyan Arab*

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49 See 499 U.S. at 174–75.
50 See id.
51 See 649 F.3d at 776, 778.
52 See id. at 777–78.
53 See id. at 778 (quoting *Sosa*, 542 U.S. at 729). Based on the language in *Sosa*, the *Ali* dissent reasoned that because the ATS “incorporates the law of nations,” a violation of the law of nations constitutes a violation of the ATS within the meaning of the Westfall Act’s statutory violation exception. Id. at 788–91 (Edwards, J., dissenting).
54 See id. at 778 (majority opinion).
55 See id. at 776–78.
56 See *Ali*, 649 F.3d at 775. The plaintiffs failed to exhaust administrative remedies as required by the FTCA because they did not file administrative claims with the military or the Department of Defense before bringing suit. Id.
Republic. In *Tel-Oren*, a D.C. Circuit case that predates the Supreme Court’s decision in *Sosa* by approximately twenty years, Judge Edwards reasoned that the ATS provides both federal jurisdiction and “a right to sue for alleged violations of the law of nations.” Judge Edwards also noted his disagreement with Judge Bork, who filed a separate concurrence in *Tel-Oren* reasoning that the ATS required “an explicit grant of a cause of action . . . to enforce principles of international law . . . .” The impasse led Judges Bork and Edwards to agree that the character and purpose of the ATS required “clarification” from the Supreme Court. Judge Edwards concluded that the Supreme Court provided this clarity in *Sosa* when it rejected Judge Bork’s reading, requiring “an explicit grant of a cause of action” to accompany the ATS, and instead held that claims for violations of the law of nations could be brought under the ATS alone.

With this principle “established,” Judge Edwards asserted that the Westfall Act does not immunize federal employees from ATS actions because such immunity would be contrary to Congress’s intent. Immunizing federal employees from ATS actions would allow plaintiffs to bring suit against foreign officials but not against United States officials. According to Judge Edwards, Congress did not intend this “bizarre result.”

More important is Judge Edwards’s distinction between statutes that can be violated and statutes that merely limit liability. Judge Edwards first distinguished between the plaintiffs’ proposed use of the ATS in *Ali* and the proposed use of the Gonzalez Act in *Smith*, one of the dispositive authorities cited by the *Ali* majority. According to Judge Edwards, *Smith* was “plainly inapposite” because the Gonzalez Act merely limits liability, while the ATS imposes liability by incorporating

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57 See id. at 784 (Edwards, J., dissenting) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 780–81 (D.C. Cir. 1984) (Edwards, J., concurring)).
58 726 F.2d at 780 (Edwards, J., concurring).
59 Id. at 801 (Bork, J., concurring); see *Ali*, 649 F.3d at 784 (Edwards, J., dissenting).
60 See 726 F.2d at 775 (Edwards, J., concurring); id. at 822–23 (Bork, J., concurring).
61 See *Ali*, 649 F.3d at 784–85 (Edwards, J., dissenting).
62 See id. at 785–86.
63 See id. at 789.
64 See id.
65 See id. at 790.
66 See *Ali*, 649 F.3d at 790 (Edwards, J., dissenting). Like the Westfall Act, the Gonzalez Act is a grant of federal employee immunity that substitutes the U.S. government as the defendant in suits against military medical personnel for torts committed in the scope of their employment. Id.
the law of nations.\textsuperscript{67} In Judge Edwards’s analysis, this incorporation means that the ATS is a statute capable of being violated and that it thus falls within the Westfall Act’s statutory violation exception.\textsuperscript{68} Judge Edwards also found that the ATS is unlike the federal question jurisdiction established by 28 U.S.C. § 1331 because the ATS does more than merely extend jurisdiction.\textsuperscript{69} Judge Edwards instead compared the ATS to section 301(a) of the Labor Management Relations Act (LMRA), noting that even though the text of the LMRA only references jurisdiction, the Supreme Court has held that it creates a cause of action.\textsuperscript{70} For these reasons, Judge Edwards found that it would be more in keeping with Congress’s intent and the role of the ATS as a guarantor of human rights to read it as a statute within the meaning of the Westfall Act’s statutory violation exception.\textsuperscript{71} Nevertheless, Judge Edwards maintained that this is “‘an area of the law that cries out for clarification by the Supreme Court.’”\textsuperscript{72}

\textbf{III. Restoring \textit{Sosa}, Rethinking the ATS}

Judge Edwards’s effort to square his interpretation with Congressional intent departed from the binding authority of \textit{Sosa} and produced a dubious conception of the ATS.\textsuperscript{73} By relying on his own interpretation of the ATS in \textit{Tel-Oren} rather than the Supreme Court’s more re-

\textsuperscript{67} See id.
\textsuperscript{68} See id.
\textsuperscript{69} See id. at 790–91; see also 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).
\textsuperscript{70} See Ali, 649 F.3d at 790–91 (Edwards, J., dissenting) (citing Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 451 (1957)). Section 301(a) provides federal jurisdiction for contract disputes involving labor organizations, regardless of the amount in controversy or citizenship of the parties. 29 U.S.C. § 185(a) (2006).
\textsuperscript{71} See Ali, 649 F.3d at 792 (Edwards, J., dissenting); Lin, supra note 9, at 1719.

In the past thirty years, the [ATS] has become an important instrument in advancing human rights claims before U.S. Courts. In light of this exceptional statute, the Westfall Act’s effect of immunizing U.S. officials is doubly ironic: Not only has the country that led the way in allowing aliens to vindicate their rights against foreign officials maintained official immunity for its own officials even in the face of modern human rights accountability, but it has also done so unintentionally.

Lin, supra note 9, at 1719 (internal citations omitted).
\textsuperscript{72} Ali, 649 F.3d at 792 (Edwards, J., dissenting) (quoting \textit{Tel-Oren}, 726 F.2d at 775 (Edwards, J., concurring)).
\textsuperscript{73} See \textit{Sosa} v. Alvarez-Machain, 542 U.S. 692, 724 (2004); Ali v. Rumsfeld, 649 F.3d 762, 778 (D.C. Cir. 2011); id. at 792 (Edwards, J., dissenting).
cent interpretation in *Sosa*, Judge Edwards laid a questionable foundation for his dissent. After all, the Supreme Court’s definitive interpretation of the ATS in *Sosa* obviated Judge Edwards’s concurrence in *Tel-Oren*.

Furthermore, although the *Sosa* Court did not embrace Judge Bork’s contention that the ATS must be paired with a more “explicit grant of a cause of action,” it does not follow that the Court validated Judge Edwards’s view. Rather than confirming Judge Edwards’s view that the ATS incorporated the law of nations as part of U.S. statutory law, *Sosa* designated the common law as the remedy for ATS claims. As the *Ali* majority noted, “[t]he *Sosa* Court’s statement ‘that the domestic law of the United States recognizes the law of nations’ . . . is best understood to refer to the common law of the United States, not its statutory law.” Thus, Judge Edwards’s interpretation of the ATS was right as to the fact of incorporation, but wrong as to the mode of incorporation. *Sosa* made clear, and the *Ali* majority confirmed, that ATS claims are limited to the common law and that the ATS does not create a statutory cause of action within the meaning of the Westfall Act’s statutory violation exception.

Judge Edwards’s comparison of the ATS to the Gonzalez Act, 28 U.S.C. § 1331, and the LMRA is also questionable. Judge Edwards posited that the ATS is less like the Gonzalez Act and 28 U.S.C § 1331 and more like the LMRA because it is not just jurisdictional but also substantive. This is so, Judge Edwards reasoned, because the LMRA and the ATS both provide federal jurisdiction for common law claims. Yet the *Ali* majority established that the mere grant of jurisdiction for

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74 See *Sosa*, 542 U.S. at 724; *Ali*, 649 F.3d at 776–77; *id.* at 784 (Edwards, J., dissenting).
76 See *Ali*, 649 F.3d at 784–85 (Edwards, J., dissenting) (quoting *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring)) (citing *Sosa*, 542 U.S. at 724); see also *In re Jamuna Real Estate*, 445 B.R. 490, 496 (Bankr. E.D. Pa. 2010) (“A concurring opinion, while persuasive, is not binding.”).
77 See *Sosa*, 542 U.S. at 724; *Ali*, 649 F.3d at 788, 790–91 (Edwards, J., dissenting).
78 *Ali*, 649 F.3d at 777–78; see *id.* at 788–91 (Edwards, J., dissenting); see also *Sosa*, 542 U.S. at 714, 726, 729–30; *id.* at 746, 749–50 (Scalia, J., concurring); *id.* at 751 (Ginsburg, J., concurring); *id.* at 760 (Breyer, J., concurring); Erie R.R. v. Tompkins, 304 U.S. 64, 79–80 (1938); *supra* notes 43, 52–54 and accompanying text.
79 See *Sosa*, 542 U.S. at 714, 729–30; *Ali*, 649 F.3d at 778.
80 See *Sosa*, 542 U.S. at 724; *Ali*, 649 F.3d at 776–78.
81 See *Ali*, 649 F.3d at 776–77; *id.* at 790–92 (Edwards, J., dissenting).
83 See *Ali*, 649 F.3d at 791 (Edwards, J., dissenting).
federal common law claims does not create a statutory cause of action. On the contrary, the ATS is “best understood” as merely referencing common law claims, not restyling them as statutory rights. If a statutory grant of jurisdiction does not make the Gonzalez Act or 28 U.S.C § 1331 substantive, it should not make the ATS substantive.

**Conclusion**

The majority in *Ali v. Rumsfeld* correctly determined that the Alien Tort Statute is a grant of jurisdiction that does not create a statutory cause of action. The majority thus affirmed the district court’s decision to apply the Westfall Act to the plaintiffs’ claims, which immunized the individual defendants and substituted the U.S. Government as the sole defendant under the Federal Tort Claims Act. Upon the Government’s motion, the district court dismissed the plaintiffs’ claims for failure to exhaust administrative remedies. Judge Edwards’s reading of the Supreme Court’s holding in *Sosa v. Alvarez-Machain* and the Alien Tort Statute were not adopted by the *Ali* majority, but nonetheless broached the question of redress for noncitizen enemy detainees abused by the U.S. military in foreign theaters of war. Military abuse of detainees undermines established precepts of American foreign policy, but it is unclear whether meaningful recourse is available. Administrative complaints by enemy combatants may not find sympathy in the military or the Department of Defense, and judicial solutions are likely to run afoul of “special factors” such as necessary judicial deference in the realm of foreign policy. Indeed, it appears that the Westfall Act and its victims will continue to cry out for clarification.

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84 See *id.* at 776–77 (majority opinion).
85 See *id.* at 778.
86 See *id.* at 776–78; *id.* at 790–92 (Edwards, J., dissenting).