CORRECTING *MUJICA*: THE PROPER APPLICATION OF THE FOREIGN AFFAIRS DOCTRINE IN INTERNATIONAL HUMAN RIGHTS LAW

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> The injuries we do and those we suffer are seldom weighed in the same scales.
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> —- Aesop, *Fables*

I. INTRODUCTION

Over the past twenty-five years, U.S. federal courts have been a battleground in international human rights law. A watershed case in the field was *Filártiga v. Peña-Irala*,[1] a 1980 Second Circuit decision which held that the Alien Tort Statute (ATS)[2] permitted claims for modern human rights violations committed outside the United States.[3] *Filártiga* sparked a flurry of litigation throughout the 1980s and early 1990s, as plaintiffs sued foreign generals, dictators, and other individuals on the

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* J.D. Candidate, 2007, University of Wisconsin Law School. I would like to thank Paul Hoffman for introducing me to the concept of the foreign affairs doctrine and providing me the opportunity to help draft a section of an appellate brief in Mujica v. Occidental Petrol. Corp., 381 F.Supp. 2d 1164 (C.D. Cal. 2005). All errors in this article are my own.

1 630 F.2d 876 (2d Cir. 1980) (*Filártiga I*). For a discussion of *Filártiga I*'s implications in a comparative and international context *see* Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

2 The original language of the Alien Tort Claims Act (hereinafter ATS) granted the federal courts "cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations." The Judiciary Act of 1789, 1st Cong. (1st Sess., ch. 20, § 9(b), 1789) (enacted). The ATS is now codified as 28 U.S.C. § 1350 and states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

3 Paul L. Hoffman and Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 49-50 (2003).

basis that they committed human rights abuses abroad.[4] While at least sixteen human rights violators have been sued successfully since 1980, most cases against foreign individuals have either been dismissed or have resulted in unenforceable default judgments.[5] Beginning in the mid-to-late 1990s, plaintiffs in ATS cases shifted their attention away from individuals to corporations.[6] This shift triggered a counterattack by companies seeking to constrain *Filártiga* and derail ATS litigation. To the present day, businesses in ATS cases continue to mount an arsenal of legal defenses such as international comity, the political question doctrine, the forum non conveniens doctrine, and the act of state doctrine.[7]

One defense that may gain prominence in ATS litigation and international human rights litigation in general is the foreign affairs doctrine (FAD).[8] FAD provides that, in the absence of a treaty or federal statute, a state may still violate the U.S. Constitution by passing a law that impermissibly intrudes upon the federal government's power over foreign affairs.[9] Defendant companies may invoke FAD in ATS cases by stating that litigation of their case would disrupt U.S. foreign policy. For example, in *Mujica*, a case involving the tragic aerial bombing of a Colombian village, two defendant corporations persuaded a U.S. federal

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[4] *See, e.g.*, Filártiga v. Peña-Irala, 577 F.Supp. 860 (E.D.N.Y. 1984) (*Filártiga II*); *In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992), *cert denied*, 508 U.S. 972 (1993); *In re* Estate of Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994); Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); Kadic v. Karadžić, 70 F.3d 232 (1995). For an introduction to international human rights causes of action, *see* JENNIFER GREEN & BETH STEPHENS, CTR. FOR CONST. RIGHTS, AN ACTIVIST'S GUIDE: BRINGING INTERNATIONAL HUMAN RIGHTS CLAIMS IN UNITED STATES COURTS (1997), *available at* http://www.ccr-ny.org/v2/legal/docs/Activists%20Guide.pdf. For a discussion of international human rights litigation in the United States, *see* Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169 (2005).

[5] Coliver, Green & Hoffman, *supra* note 4, at 173, 177-80.

[6] *Id.* at 207-08; *Developments in the Law–International Criminal Law*, 114 HARV. L. REV. 1947, 2025 (2001); Beth Stephens, *Corporate Liability Before and After Sosa v. Alvarez-Machain*, 56 RUTGERS L. REV. 995, 1001 (2004). ATS cases against corporations rely on the notion that some international law norms apply to private actors. Private corporations are liable when they act in complicity with state actors and when they commit violations that do not need state action. *See, e.g.*, Doe I. v. Unocal Corp., 395 F.3d 932, 945-6 (9th Cir. 2002).

[7] Coliver, Green & Hoffman, *supra* note 4, at 217-18.

[8] This doctrine is also called "dormant foreign affairs preemption" or the "foreign affairs power" (hereinafter the "foreign affairs doctrine" or FAD). Deutsch v. Turner Corp., 324 F.3d 692, 710 n.6 (9th Cir. 2003) (citing Gerling Global Reins. Corp. of Am. v. Low, 240 F.3d. 739, 751 n. 9 (9th Cir. 2001)).

[9] Zschernig v. Miller, 389 U.S. 429, 440-41 (1968).

court judge to dismiss plaintiffs' state law claims pursuant to FAD.[10] Currently on appeal before the Ninth Circuit Court of Appeals, *Mujica* is being closely followed by human rights experts, multinational corporations, and the United States and Colombian governments. The case provides insight into U.S. involvement in Colombia's prolonged civil war[11] and raises intriguing questions of international human rights law.

This article will argue that *Mujica* was incorrectly decided and that a coherent legal analysis of FAD is necessary.[12] As *Mujica* illustrates, courts may misunderstand and erroneously apply FAD in the context of international human rights litigation.[13] When defendants improperly invoke FAD, judges should not take the bait and dismiss an otherwise legitimate ATS case. Part II of this paper will explicate FAD, and Part III will use *Mujica* as a case study to demonstrate how FAD was improperly evaluated and applied.

II. THE FOREIGN AFFAIRS DOCTRINE

A. INTRODUCTION

The U.S. Constitution allocates powers related to foreign affairs to the executive branch and Congress.[14] It also prohibits the states from

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[10] Mujica v. Occidental Petrol. Corp., 381 F.Supp. 2d 1164, 1188 (C.D. Cal. 2005).

[11] For a concise history of Colombia's civil war, *see* GARRY M. LEECH, KILLING PEACE: COLOMBIA'S CONFLICT AND THE FAILURE OF U.S. INTERVENTION (2002).

[12] In addition to this article, an FAD analysis of *Mujica* can be found in the Brief of Amicus Curiae EarthRights International in Support of Plaintiffs-Appellants and Reversal, Mujica v. Occidental Petrol. Corp., No. 03-2860 (9th Cir. Jan. 3, 2005).

[13] While some of the insights stemming from the following discussion go beyond the context of international human rights law, this article will perhaps most appeal to students, litigators, law professors, and judges who are interested and/or involved in international human rights litigation, including ATS litigation.

[14] *See* Deutsch v. Turner Corp., 324 F.3d 692, 708-09 (9th Cir. 2003) (The U.S. Constitution "appoints the President as 'Commander in Chief of the Army and Navy of the United States,' and authorizes him to 'make Treaties, provided two thirds of the Senators present concur,' to 'appoint Ambassadors' with the 'Advice and Consent of the Senate,' and to 'receive Ambassadors and other public Ministers'. It grants to Congress the power to 'lay and collect . . . Duties, Imposts, and Excises,' to 'provide for the common Defence,' to 'regulate Commerce with foreign Nations,' to 'establish an uniform Rule of Naturalization,' to 'define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,' to 'declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on

exercising certain foreign relations powers.[15] The Supreme Court has stated that the power to conduct foreign affairs is reserved to the federal government,[16] and courts have repeatedly held that a state law must yield if it impairs either Congress's or the executive branch's ability to conduct foreign relations.[17] Controversy arises, however, when courts preempt a state law in the absence of a conflicting federal law, treaty, or action by the federal government.[18]

Consequently, there are two categories of preemption: statutory and dormant.[19] Statutory preemption refers to situations in which federal

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Land and Water,' to 'raise and support Armies,' to 'provide and maintain a Navy,' and to regulate 'the land and naval forces.'" (quoting U.S. CONST., art. II) (citations omitted)).

[15] *See id.* at 709 ("'No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal' or, without consent of Congress, 'lay any Imposts or Duties on Imports or Exports,' 'keep Troops or Ships of War in time of Peace,' 'enter into any Agreement or Compact . . . with a foreign Power,' or 'engage in War, unless actually invaded.'" (quoting U.S. CONST., art. I § 10)); *see also* U.S. CONST., art. VI (granting the federal government preemptive power over state actions inconsistent with federal law).

[16] *See, e.g.*, United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference"); United States v. Belmont, 301 U.S. 324, 331 (1937) ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states").

[17] *See, e.g.*, Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999) (Massachusetts Burma Law was held unconstitutional as intruding upon the federal government's exclusive power over foreign relations); *In re* World War II Era Japanese Forced Labor Litig., 164 F.Supp. 2d 1160 (N.D. Cal. 2001) (California statute allowing for lawsuit against Japanese corporations seeking compensation for forced labor during World War II was held unconstitutional as intruding upon the federal government's exclusive power over foreign affairs); *Deutsch*, 324 F.3d 692 (California statute allowing for lawsuit against Japanese corporations for forced labor during World War II was held unconstitutional); Taiheiyo Cement Corp. v. Super. Ct., 12 Cal. Rptr. 3d 32 (Cal. Ct. App. 2004) (1951 peace treaty that formally ended World War II between the United States and Japan preempted a state statute that would have otherwise permitted the claim); Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill. 2d 221, 236-37 (1986) (state statute excluding South African coins from otherwise generally applicable state tax exemptions was invalidated); Miami Light Project v. Miami-Dade County, 97 F. Supp. 2d 1174 (S.D. Fla. 2000) (a substantial likelihood that a provision in an ordinance disqualifying persons transacting business with Cuba would violate the federal government's power to conduct foreign relations). *But see* Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990) (Pennsylvania's "Buy American" law did not violate the federal government's power to conduct foreign affairs); K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n of N.J., 75 N.J. 272 (1977) (New Jersey's "Buy American" statute did not violate the federal government's power to conduct foreign affairs).

[18] Joseph B. Crace, Jr., Note, *Gara-mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 207 (2004).

[19] *Id.* Statutory preemption is also called affirmative preemption. Ryan Patton, Note, *Federal Preemption in an Age of Globalization*, 37 CASE W. RES. J. INT'L L. 111, 113 (2005).

law plainly "occupies the field" of legislation relating to the subject matter.[20] Most preemption decisions are decided by statutory preemption.[21]

Dormant preemption concerns a court's capacity to invalidate state laws even when the federal government has taken no clear action on the subject matter.[22] The Supreme Court has neither endorsed nor dismissed dormant preemption, and little existing case law clarifies the doctrine.[23] Jack Goldsmith identifies several specific dormant preemption doctrines: the "federal common law of foreign relations", the "Dormant Foreign Commerce Clause", and "dormant foreign affairs preemption" (i.e., FAD).[24]

FAD does not directly stem from a particular clause of the U.S. Constitution.[25] Rather, FAD derives its authority from the overall structure of the constitution, which delegates foreign affairs powers to the federal government.[26] As the Supreme Court has noted:

> At some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.[27]

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[20] Crace, *supra* note 18, at 207. There are four different sub-categories of statutory preemption: "express preemption" (which occurs when a federal statute expressly deals with the preemption question), "conflict preemption" (which occurs when a state statute "conflicts" with a federal statute), "obstacle preemption" (which occurs when a state statute hinders the accomplishment of the purposes of a federal statute), and "field preemption" (which occurs when the federal government has either acted so definitively within an area so as to leave no room for the states to supplement the area, or when the federal interest in controlling a subject is so dominant as to presume that federal law precludes any state action on the same matter). *Id.* at 208-09; Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 205-08.

[21] Crace, *supra* note 18, at 211.

[22] *Id.* at 210.

[23] *Id.*

[24] Goldsmith, *supra* note 20, at 203-04.

[25] Deutsch v. Turner Corp., 324 F.3d 692, 709 (9th Cir. 2003).

[26] Crace, *supra* note 18, at 210.

[27] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427, n.25 (1964)). At its core, "the notion of 'dormant foreign affairs preemption'. . . resonates most audibly when a state action 'reflect[s] a state policy critical of foreign governments and involve[s] 'sitting in judgment' on them." *Id.* at 439 (Ginsburg, J., dissenting) (quoting L. HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (2d ed. 1996)). *See also* United States v. Pink, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement"); 315 U.S. 203, 240 (Frankfurter, J., concurring) (state law may not be allowed to "interfer[e] with the conduct of our foreign relations by the Executive").

Scholars contest the legitimacy and utility of FAD. Some dismiss FAD as a method of executing illegitimate judge-made law and unjustly limiting a state's power to legislate.[28] Others believe FAD rightfully protects the federal government from unlawful state encroachment.[29] The Supreme Court sides with the latter view. *Zschernig* v. *Miller*[30] and *American Insurance Association v. Garamendi*[31] constitute the Supreme Court's chief FAD jurisprudence. These cases demonstrate the Court's willingness to invoke FAD to strike down state legislation it feels exceedingly encroaches upon the federal government's power to conduct foreign relations.

B. SEMINAL CASES: ZSCHERNIG V. MILLER AND AMERICAN INSURANCE ASSOCIATION V. GARAMENDI

1. ZSCHERNIG V. MILLER

Zschernig was the first time the Supreme Court relied solely on FAD to preempt a state law.[32] When an Oregon resident died intestate in 1962, the decedent's sole heirs were residents of East Germany who sought to claim the decedent's estate.[33] However, Oregon had previously passed a law providing for escheat in cases in which a nonresident alien was to inherit property.[34] The purpose of this probate statute was to make it extremely difficult for residents of Communist countries to inherit land from Oregon residents.[35] No federal statute or treaty prohibited such a state probate statute.[36]

Writing for the Court's majority, Justice Douglas dismissed the probate statute as unconstitutional.[37] He held that "it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."[38] The statute troubled

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[28] Crace, *supra* note 18, at 210.
[29] *Id.*
[30] 389 U.S. 429 (1968).
[31] 539 U.S. 396 (2003).
[32] Patton, *supra* note 19, at 123.
[33] Zschernig v. Miller, 389 U.S. 429, 430 (1968).
[34] *Id.* at 430-31.
[35] *Id.* at 437 n.8.
[36] Crace, *supra* note 18, at 212-13.
[37] *Zschernig*, 389 U.S. at 441.
[38] *Id.*

the Supreme Court because it allowed a state court to sit in judgment of foreign governments and "establish its own foreign policy."[39] Justice Douglas reasoned, "The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy."[40] Thus, *Zschernig*'s main proposition was that if a state law "impair[s] the effective exercise of the Nation's foreign policy," the law should be preempted, even in the absence of an on-point treaty, a federal law, or an express foreign policy of the executive branch.[41]

Concurring in the judgment, Justice Harlan contended that the existence of a 1923 treaty justified *statutory* preemption of the Oregon statute.[42] He then wrote, "in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations."[43] Since probate law is undeniably within the domain of state authority, Justice Harlan believed that had the 1923 treaty not existed, preemption of the Oregon statute would have been unjustified.[44]

After *Zschernig*, the Supreme Court continued to invalidate state actions that intruded into the field of foreign affairs, but it did so based on statutory preemption, not dormant preemption.[45] Thirty-five years passed after *Zschernig* before the Supreme Court revisited FAD in any meaningful way.[46]

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[39] *Id.* Justice Harlan writes in his concurring opinion: "Essentially, the Court's basis for decision appears to be that alien inheritance laws afford state court judges an opportunity to criticize in dictum the policies of foreign governments, and that these dicta may adversely affect our foreign relations." *Id.* at 461 (Harlan, J., concurring).

[40] *Id.* at 440.

[41] *Id.* The phrase "impair[ing] the effective exercise of the Nation's foreign policy" is interchangeable with the phrases "[having] a direct impact upon foreign relations," *id.* at 440-41, and "[having] more than 'some incidental or indirect effect in foreign countries,'" *id.* at 433 (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)).

[42] *Id.* at 443.

[43] *Id.* at 458-59 (Harlan, J., concurring).

[44] *Id.* at 443-44 (Harlan, J., concurring).

[45] Patton, *supra* note 19, at 125.

[46] *Id.*

2. AMERICAN INSURANCE ASSOCIATION V. GARAMENDI

Unlike *Zschernig*, *Garamendi* was not technically a FAD case. The reason is that whereas *Zschernig* involved no federal legislation on the relevant subject matter, *Garamendi* involved executive agreements on the relevant subject matter.[47] *Garamendi* is most accurately characterized as a case of statutory preemption, specifically conflict preemption. However, it is worthwhile to consider *Garamendi* in the context of FAD because the *Garamendi* Court revisited *Zschernig* and the *Garamendi* decision has strong implications for FAD's future application.[48]

Garamendi arose out of several insurance entities' challenge to California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which required "any insurer doing business in [California] to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one 'related' to it."[49] While states traditionally have the power to regulate insurers operating within its boundaries, HVIRA addressed an issue the executive branch had already addressed in a series of executive agreements with foreign governments.[50] Writing for a five to four majority, Justice Souter held that HVIRA "interferes with the National Government's conduct of foreign relations," and, therefore, that HVIRA is preempted.[51] He stated, "The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two" and that "the express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield."[52] Justice Souter believed the negotiation towards the executive agreements illustrated a consistent presidential foreign policy that squarely conflicted with HVIRA.[53] He observed, "The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves."[54]

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[47] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003).

[48] *Id.* at 417.

[49] *Id.* at 401.

[50] *Id.* at 405-08; Patton, *supra* note 19, at 128. On July 17, 2000, President Clinton and German Chancellor Schroeder signed the German Foundation Agreement in the hope of averting nonstop litigation and providing closure to Holocaust victims. Crace, *supra* note 18, at 215. To be sure, the President's power to make such agreements has "been exercised since the early years of the Republic," and they carry the force of law. *Garamendi*, 539 U.S. at 415-16.

[51] *Garamendi*, 539 U.S. at 401.

[52] *Id.* at 421, 425

[53] *Id.* at 421. Justice Souter noted that with respect to the insurance claims, the "national position" was "expressed unmistakably in the executive agreements signed by the President" and "has also

Garamendi holds that FAD preemption should be reserved for cases where a state has enacted legislation that creates a "sufficiently clear conflict" with the federal government's power to conduct foreign affairs.[55] This proposition stems from Souter's analysis of *Zschernig*, the quintessential FAD case.[56] Justice Souter discussed *Zschernig* to find common ground between "the contrasting theories of field and conflict preemption evident in the Zschernig opinions" of Justices Douglas and Harlan, respectively.[57] Souter found the common intersection to be that "state laws 'must give way if they impair the effective exercise of the Nation's foreign policy.'"[58] He explained, "For even on Justice Harlan's view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law."[59] Justice Souter elaborated in a footnote:

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government has acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. Where, however, a State has acted within

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been consistently supported in the high levels of the Executive Branch." *Id.* at 421-22. Justice Souter further found that "there is no serious doubt that the state interest actually underlying HVIRA is concern for the several thousand Holocaust survivors said to be living in the State [of California]" and that "HVIRA effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." *Id.* at 425-26.

54 *Id.* at 427.

55 *Id.* at 420. Interestingly, some see the connection between the executive agreement and HVIRA in *Garamendi* as attenuated and proof that Justice Souter essentially invoked the FAD under the guise of conflict preemption. Crace, *supra* note 18, at 213.

56 *Garamendi*, 539 U.S. at 417-20.

57 *Id.* at 419. Strictly speaking, Justice Souter's reasoning is doctrinally suspect. Justice Douglas's *Zschernig* opinion was rooted in dormant, not field, preemption (though the two are very similar). Thus, the debate between Justices Douglas and Harlan was not actually between field and conflict preemption, but rather constituted a larger debate between dormant and statutory preemption. Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 877. Moreover, Justice Souter misstated Justice Harlan's position in *Zschernig*. *Id.* at 878. Whereas Justice Souter made it seem that Justice Harlan endorsed preemption where *any* federal policy existed, Justice Harlan was probably referring to a federal policy expressed in either a treaty or congressional statute (thus triggering preemption pursuant to the Supremacy Clause). *Id.* That said, Justice Souter's underlying point—that a state law must at a minimum "affect foreign relations" in some way for there to be any consideration about whether FAD preemption is justified—is sound and constitutes the take-home message.

58 *Garamendi*, 539 U.S. at 419 (quoting Zschernig v. Miller, 389 U.S. 429, 440 (1968)).

59 *Id.* at 420.

> what Justice Harlan called its "traditional competence," *but in a way that affects foreign relations*, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted.[60]

Based on Justice Souter's analysis, it is clear that, at a minimum, a state law must "affect foreign relations" in some way for there to be any consideration about whether FAD preemption is justified.[61] Should a state law not "affect foreign relations" in any apparently discernable fashion, the court's FAD analysis is finished; the court should immediately conclude that FAD preemption is inapplicable.[62] Where there is no potential conflict between state law and federal foreign policy, a court need not "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."[63]

Garamendi's standard for FAD preemption is simple. The court must identify a "sufficiently clear conflict" between a state law or regulation and an "express federal policy."[64] The burden of demonstrating this "sufficiently clear conflict" rests with the challengers of the state law.[65] The "sufficiently clear conflict" threshold is not met if the state law at issue only has "some incidental or indirect effect" upon a federal foreign policy relating to the issue at hand.[66] If doubt remains about the clarity of the conflict, the court should examine the strength of the state's interest in creating the statute at issue.[67]

The following case study is an example of a court's FAD analysis gone awry.

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[60] *Id.* at 420 n.1 (emphasis added) (citations omitted).
[61] *Id.*
[62] *Id.*
[63] *Id.* at 420.
[64] *Id.* at 420, 425.
[65] *Id.* at 420.
[66] *Id.*; Zschernig v. Miller, 389 U.S. 429, 433-34 (1968) (quoting Clark v Allen, 331 U.S. 503, 517 (1947)).
[67] *Garamendi*, 539 U.S. at 425-26.

III. MUJICA V. OCCIDENTAL PETROLEUM CORPORATION

This case stems from a war crime that took place in Colombia in 1998.[68] The facts in *Mujica* are a grim illustration of the human rights abuses that occur every day in Colombia.

A. FACTS

Plaintiffs' tale begins in 1983 when Defendant Occidental Petroleum Corporation (Occidental), headquartered in Los Angeles, California, discovered a billion-barrel oil field called Caño Limon in Arauca Province in northeastern Colombia, South America.[69] Since 1986 Occidental has operated in Caño Limon in a joint venture with the Colombian government.[70] The area along Occidental's five hundred mile pipeline to Covenas, a Caribbean port, is filled with conflict among leftist guerrillas, illegal right-wing paramilitary organizations, and the Colombian military.[71] Occidental gives direct funding to the administrative bodies of the Colombian government and the Colombian Air Force (CAF), an official branch of the Colombian military, in return for protecting Occidental's facilities.[72] Occidental has also enlisted the support of Aracua's police and judiciary to protect Occidental's oil interests, and since 1997 Defendant AirScan, Inc. (AirScan) has provided security for Occidental's oil production facility and pipeline.[73]

In 1998 Occidental provided an office at its Caño Limon site for AirScan and CAF to plan a bombing raid of Santo Domingo, a village

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[68] Mujica v. Occidental Petrol. Corp., 381 F.Supp. 2d 1164, 1168-69, 1181 (C.D. Cal. 2005). For background on *Mujica*, *see* John Gibeaut, *A Foreign Fight*, A.B.A.J., July 2005, at 29; Lisa Girion, *Occidental Sued in Human Rights Case*, L.A. TIMES, Apr. 25, 2003, at C1; and Interview by Amy Goodman with Luis Alberto Galvis Mujica, a plaintiff in *Mujica*, and Dan Kovalik, plaintiff's attorney, New York, N.Y. (May 2, 2003), http://www.democracynow.org/article.pl?sid=03/05/03/0028225.

[69] Gibeaut, *supra* note 68, at 30.

[70] *Mujica*, 381 F.Supp. 2d at 1168.

[71] Gibeaut, *supra* note 68, at 30-31. Regarding the conflict in Arauca, Gibeaut notes: "Human rights activists attribute most of the abuses to the paramilitaries and the [Colombian] army." *Id.* at 31. Moreover, Amnesty International has recently stated that Arauca is filled with human rights abuses and fierce reprisals against those who confront the abuses. Amnesty Int'l, *Colombia, A Laboratory of War: Repression and Violence in Arauca*, 1-3, AI Index AMR23/004/2004, Apr. 20, 2004, *available at* http://web.amnesty.org/library/pdf/AMR230042004ENGLISH/$File/AMR2300404.pdf.

[72] *Mujica*, 381 F.Supp. 2d at 1168.

[73] *Id.*

located in the municipality of Tame in Arauca, twenty miles from an Occidental oil field.[74] The bombing's declared goal: to protect Occidental's pipeline from insurgent sabotage.[75]

On December 13, 1998, AirScan and the CAF jointly participated in the Santo Domingo raid.[76] The raid was conducted by a Skymaster plane, which was provided by Occidental and flown by three American employees of AirScan.[77] The raid consisted of machine-gun fire and twenty-pound U.S.-made cluster bombs.[78] One or more of these bombs exploded in the village, killing seventeen unarmed and innocent civilians, wounding twenty-five more, and destroying homes.[79]

The raid was wholly indiscriminate.[80] No insurgents were killed in the massacre, and defendants knew at the time of attack that no insurgents lived or were present in Santo Domingo.[81] During the raid, residents of Santo Domingo observed helicopters flying overhead and tried to demonstrate they were civilians by lying down in the road leading into Santo Domingo and covering their heads with white shirts.[82] Low-flying CAF helicopters fired at fleeing civilians and prevented their escape.[83] Soon after the raid, Colombian troops entered Santo Domingo, looted and destroyed civilian homes, and prevented exit from the village.[84]

Mario Galvis Gelvez and his sons Luis Alberto Galvis Mujica and John Mario Galvis Mujica (Plaintiffs) suffered enormously from the bombing.[85] Among those killed were Teresa Mujica Hernandez (wife of Mario Galvis and mother of Luis Alberto Galvis and John Mario Galvis), Edilma Leal Pacheco (daughter of Mario Galvis and sister of Luis

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[74] *Id.*; Gibeaut, *supra* note 68, at 29.

[75] *Mujica*, 381 F.Supp. 2d at 1168.

[76] *Id.* AirScan gave aerial surveillance for the raid, aided the CAF by identifying the bombing coordinates, and picked the places for Colombian military troops to disembark. *Id.* CAF officers involved in the Santo Domingo massacre were not acting pursuant to the Colombian government's official policy. *Id.*

[77] *Id.*

[78] *Id.*; Gibeaut, *supra* note 68, at 31-32. "Cluster bombs are anti-personnel weapons that explode into shrapnel on impact." *Id.*

[79] *Mujica*, 381 F.Supp. 2d at 1168.

[80] First Amended Complaint ¶ 25, Mujica v. Occidental Petrol. Corp., 381 F.Supp.2d 1164 (C.D. Cal. 2005) (on file with author).

[81] *Mujica*, 381 F.Supp. 2d at 1168-69.

[82] *Id.* at 1168.

[83] *Id.*

[84] *Id.*

[85] *Id.*

Alberto Galvis and John Mario Galvis), and Johanny Hernandez Becerra (niece of Mario Galvis and cousin of Luis Alberto Galvis and John Mario Galvis).[86] Mario Galvis Gelvez, who was in Santo Domingo at the time of the bombing, was seriously injured by bomb shrapnel from which he continues to suffer chronic pain, and was forced to watch his wife and daughter die.[87] John Mario Galvis also was in Santo Domingo at the time of the cluster bombing and saw his mother and sister die.[88] Furthermore, Luis Alberto Galvis was within eight hundred to one thousand meters of Santo Domingo at the time of the cluster bombing, and as a result of CAF helicopter fire, he could not return to the village despite attempting to do so.[89] The next day, Luis Alberto Galvis learned that his mother, sister, and cousin had died.[90]

After the raid, Plaintiffs were forced into exile.[91] They were afraid to return to Santo Domingo due to fears of retaliation from the Colombian military after Luis Alberto Galvis publicly called for justice for the victims of the Santo Domingo massacre.[92] Shortly after the massacre, Luis Alberto Galvis was arrested and detained without charge or trial and threatened by the Colombian military to stop speaking out about the raid.[93] He subsequently fled to the United States; most of Plaintiffs' family has received political asylum in Canada.[94]

To this day, Plaintiffs have not received justice in Colombia for the bombing. They commenced penal charges with the regional prosecutor, but he has not yet successfully prosecuted any of the perpetrators of the bombing.[95] For years the Colombian government deflected responsibility for the tragedy, claiming that a car bomb planted by guerillas was to blame.[96] Furthermore, the government kept secret the existence of a video of the raid taken by the Skymaster plane even though CAF possessed the video.[97] The Colombian government also

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[86] *Id.*
[87] *Id.* at 1169.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] First Amended Complaint, *supra* note 80, ¶ 31.
[92] *Id.*
[93] *Id.*
[94] Gibeaut, *supra* note 68, at 32.
[95] Appellants' Opening Brief at 14-15, Mujica v. Occidental Petrol. Corp., No. 03-2860 (9th Cir. Dec. 23, 2005).
[96] *Id.* at 17.
[97] *Id.*

arrested the doctor who performed the autopsies of the bombing victims and who concluded that a cluster bomb caused their deaths.[98] The United States was so troubled about the Colombian government's participation in the raid and its subsequent response that the U.S. government cut off aid to the CAF unit involved in the raid.[99]

Along with the penal charges, Plaintiffs sought civil damages against the Colombian state.[100] The state was the only entity Plaintiffs had cause to believe was responsible for the Santo Domingo raid and, under Colombian law, the only entity from which Plaintiffs could seek damages for the alleged state misfeasance.[101] As a result of this action, Plaintiffs received a judgment that inadequately compensated them for their injuries.[102] The judgment is currently on appeal.[103]

B. PROCEDURAL HISTORY

On April 24, 2003, Luis Alberto Galvis filed a complaint in federal court in Los Angeles against Occidental and AirScan.[104] He sued for the deaths of his sister, niece, and mother, and for his own injuries.[105] On October 6, 2003, Luis Alberto Galvis filed a First Amended Complaint (FAC), adding Plaintiffs Mario Galvis Gelvez and John Mario Galvis Mujica.[106] Plaintiffs brought federal claims under the ATS and the Torture Victim Protection Act (TVPA), and brought state law claims of wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, and violations of California Business & Professional Code section 17200.[107]

On January 20, 2004, the Court granted Occidental's motion requesting that the Court solicit the view of the U.S. State Department regarding possible foreign policy consequences created by Plaintiffs' lawsuit.[108] The State Department responded to the Court's request on April 1, 2004, stating, "[W]e do not believe that we have sufficient basis

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[98] *Id.* at 18.
[99] *Id.*
[100] *Id.* at 15.
[101] *Id.* at 15-16.
[102] *Id.* at 16.
[103] *Id.*
[104] Mujica v. Occidental Petrol. Corp., 381 F.Supp. 2d 1164, 1169 (C.D. Cal. 2005).
[105] Appellants' Opening Brief, *supra* note 95, at 4.
[106] *Mujica*, 381 F.Supp. 2d at 1169.
[107] *Id.*
[108] *Id.*

upon which to make a responsible assessment of the likely impact of the litigation."[109] Subsequently, Occidental and AirScan filed two motions to dismiss: one pursuant to the doctrines of international comity and forum non conveniens, and the other pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.[110]

On December 30, 2004, just three weeks before the January 20, 2005, hearing on Defendants' motions, the State Department issued to the court a supplemental Statement of Interest (SOI).[111] In the SOI, William H. Taft IV, the State Department Legal Advisor, recommended that the court dismiss Plaintiffs' actions because "the adjudication of this case will have an adverse impact on the foreign policy interests of the United States."[112] Within the SOI, the State Department also attached a letter from the Colombian government stating, "[T]he Government of Colombia is of the opinion that any decision in this case may affect the relations between Colombia and the U.S."[113] After a flurry of supplemental briefs and declarations filed by Plaintiffs and Defendants in response to the SOI, on June 28, 2005, Judge Rea, presiding over the district court, denied the Motion to Dismiss under the doctrines of forum non conveniens and international comity,[114] and denied in part and granted in part the Motion to Dismiss Plaintiffs' FAC pursuant to Federal Rule of Civil Procedure 12(b)(6).[115]

C. JUDGE REA'S ANALYSIS

Regarding Defendants' 12(b)(6) motion, Judge Rea analyzed five legal standards: (1) the TVPA, (2) the ATS, (3) FAD, (4) the act of

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[109] Appellants' Opening Brief, *supra* note 95, at 4.

[110] *Id.* at 5.

[111] *Mujica*, 381 F.Supp. 2d at 1169.

[112] Appellants' Opening Brief, *supra* note 95, at 5; Letter from William H. Taft, U.S. Dep't of State Legal Advisor, to Daniel Meron, Principal Deputy Ass't Att'y Gen., Civil Div., U.S.D.O.J. (Dec. 23, 2004) (on file with author).

[113] *Mujica*, 381 F.Supp. 2d at 1169; Letter from Colombian Ministry of Foreign Affairs to the U.S. Amb'r in Colom. (Feb. 25, 2004) (on file with author).

[114] Mujica v. Occidental Petrol. Corp. (*Mujica non conveniens*), 381 F.Supp. 2d 1134, 1138 (C.D. Cal. 2005). The defendant's motion to dismiss under the doctrines of forum non conveniens and international comity was denied on the same day that the court announced its decision on the remainder of the defendant's motions in *Mujica*. *Mujica*, 381 F.Supp. 2d at 1167-68. This article addresses *Mujica*, not *Mujica non conveniens*.

[115] *Mujica*, 381 F.Supp. 2d at 1167-68.

state doctrine, and (5) the political question doctrine.[116] He found that most of Plaintiffs' ATS claims were actionable[117] and that the act of state doctrine was inapplicable.[118] However, Judge Rea dismissed Plaintiffs' TVPA claims,[119] their state law claims pursuant to FAD,[120] and their section 17200 claims as time-barred,[121] and ultimately dismissed Plaintiffs' entire action because it "raised a non-justiciable political question."[122] The following discussion only considers Judge Rea's examination of FAD.

Judge Rea's FAD analysis was short. First, he properly defined FAD by quoting from *Zschernig*.[123] He then discussed *Zschernig* and *Garamendi*, stating that since the facts of *Garamendi* did not allow for express preemption, the *Garamendi* Court resorted to FAD to preempt HVIRA.[124] Judge Rea referred to footnote 11 of *Garamendi*, where Justice Souter considered when one might use field preemption (i.e., when a state is legislating outside an area of its "traditional competence") versus conflict preemption (i.e., when a state is legislating within an area of its "traditional competence").[125] Judge Rea next examined Plaintiffs' state law claims of wrongful death, intentional infliction of emotional distress, and negligent infliction of emotional distress, stating that California tort law "involve[s] an area of 'traditional competence' for state regulation."[126] Thus, in light of *Garamendi*, Judge Rea considered "the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."[127] Judge Rea found that California has a weak interest with respect to Plaintiffs' state claims because "Plaintiffs have never resided in [California]" and because "the tortious conduct did not take place in California and Defendant is a resident of this state."[128] He then reasoned, "Since California has a weak interest in

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[116] *Id.* at 1170-71.
[117] *Id.* at 1182-83.
[118] *Id.* at 1191.
[119] *Id.* at 1176.
[120] *Id.* at 1188.
[121] *Id.* at 1185.
[122] *Id.* at 1195.
[123] *Id.* at 1171 (quoting Zschernig v. Miller, 389 U.S. 429, 432 (1968)).
[124] *Id.* at 1185-86 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)).
[125] *Id.* at 1187 (quoting *Garamendi*, 539 U.S. at 419 n.11).
[126] *Id.*
[127] *Id.* (quoting *Garamendi*, 539 U.S. at 420).
[128] *Id.* Even though Plaintiffs' claims arose abroad, they fall within California's judicial authority. *See* Filártiga v. Peña-Irala, 630 F.2d 876, 885 (2d Cir. 1980) ("Common law courts of general

Plaintiffs' claims, there does not have to be a strong conflict to preempt their claims."[129] Judge Rea finally looked to the State Department's SOI to suggest that "strong federal foreign policy interests outweigh the weak state interests involved."[130] Ultimately, he dismissed Plaintiffs' state law claims "pursuant to the foreign affairs doctrine."[131]

D. CRITICISM OF JUDGE REA'S DECISION

Judge Rea's FAD analysis and application was flawed because California tort law does not meet *Garamendi*'s "sufficiently clear conflict" threshold for FAD preemption.[132] To be true to *Garamendi* and *Zschernig*, Judge Rea's holding that "Plaintiffs' state law claims [are dismissed] pursuant to the foreign affairs doctrine" must mean that there is a "sufficiently clear conflict" between California tort law and the federal government's power to conduct foreign relations.[133] As the analysis below demonstrates, such a conclusion stretches the limits of imagination.

Plaintiffs' case is distinguishable from *Garamendi* for several reasons. First, Plaintiffs seek only the enforcement of generally applicable state tort laws, not a specific state statute found to influence foreign policy as was the case in *Garamendi* and *Zschernig*.[134] The distinction is critical. Under both statutory and dormant preemption, only state laws may be preempted. Causes of action based on state law cannot be preempted.[135] Until *Mujica* was decided, FAD had never been used to dismiss a cause of action based on generally applicable state tort

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jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred").

[129] *Mujica*, 381 F.Supp. 2d at 1187-88.

[130] *Id.* at 1188.

[131] *Id.*

[132] *Garamendi*, 539 U.S. at 420.

[133] *Mujica*, 381 F. Supp. 2d at 1188; *Garamendi*, 539 U.S. at 420.

[134] *Garamendi*, 539 U.S. at 401; Zschernig v. Miller, 389 U.S. 429, 431 (1968).

[135] *See* Doe v. Exxon Mobil Corp., No. Civ. A.01-1357, 2006 WL 516744, at *3 n.2 (D.D.C. Mar. 2, 2006) (specifically dismissing Judge Rea's view that the "[foreign affairs] doctrine precludes state tort law claims"); *In re* "Agent Orange" Product Liability Litigation, 373 F. Supp. 2d 7, 81 (E.D.N.Y. 2005) (noting that the "the ordinary application of New York tort law" poses no risks of impermissible intrusion into the field of foreign affairs). Similarly, in cases outside the FAD context, the Ninth Circuit has held: "[i]f there is no attempted state action, there is nothing to be pre-empted." Greene v. Mt. Adams Furniture, 980 F.2d 590, 595 (9th Cir. 1992). *See also* Montana v. Gilham, 133 F.3d 1133, 1139 n.7 (9th Cir. 1997) (noting that "the doctrine of preemption cannot apply here because there is no state action").

law.[136] The reason is that in American jurisprudence, tort law is traditionally a state matter and typically has no bearing on foreign relations.[137] Unlike HVIRA in *Garamendi*, California tort law does not have any discernable international component. Judge Rea himself drew this distinction: "[T]he instant state law claims [in Plaintiffs' case] are different than the HVIRA, a law targeted specifically at the issue of Holocaust-related insurance policies . . . unlike the HVIRA, the California legislature could have hardly envisioned that [California's tort] laws would have implicated any foreign policy concerns."[138]

Second, in *Mujica* the executive branch did not articulate a clear foreign policy interest associated with Plaintiffs' state law claims.[139] Whereas in *Garamendi* the "national position" was "expressed unmistakably in the executive agreements signed by the President,"[140] *Mujica* presented no executive agreement, treaty, provision of the U.S. Constitution, judicial decree, federal statute, international customary norm, or any conceivable federal foreign affairs power that would have the full force of law and hence provide any legitimate basis to preempt California tort law.[141] The State Department's SOI was not a legally

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[136] Assuming *arguendo* it were necessary to gauge whether Plaintiffs' state claims (as opposed to California tort law itself) "clearly conflict" with any relevant foreign affairs powers entrusted to the federal government, one would find that such a "clear conflict" does not exist. *Garamendi*, 539 U.S. at 420. Plaintiffs' state claims rest upon California tort law, which has nothing to do with U.S. foreign policy. Plaintiffs seek state remedies for specific violations of California law committed by U.S. corporations, not by a foreign government or military. To be sure, the Colombian government has not actually challenged the application of California tort law in Plaintiffs' case. *See*, *e.g.*, Breard v. Greene, 523 U.S. 371, 374-75 (1998) (in which Paraguay challenged Virginia's action to execute a Paraguayan national).

[137] *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (It is "the States' traditional authority to provide tort remedies"); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (The power to declare substantive rules of common law lies with the states: "There is no federal general common law" and "Congress has no power to declare substantive rules of common law applicable in a state"). Likewise, the federal government generally "does not intend to pre-empt areas of traditional state regulation." FMC Corp. v. Holliday, 498 U.S. 52, 62 (1990); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (there is no presumed preemption when the federal government acts "in a field which the States have traditionally occupied").

[138] *Mujica*, 381 F.Supp. 2d at 1187.

[139] However, the State Department has strongly and publicly condemned the Santo Domingo massacre and has at various times demanded that the Colombian government take action against those responsible. Appellants' Opening Brief, *supra* note 95, at 4. Holding Occidental and AirScan accountable would thus be consistent with U.S. foreign policy related to issues raised by Plaintiffs' state law claims.

[140] *Garamendi*, 539 U.S. at 421.

[141] Only an action carrying the force of law by the political branches can preempt generally applicable state tort law. S. Pac. Transp. Co. v. Pub. Util. Comm'n, 9 F.3d 807, 812 n.5 (9th Cir. 1993); Wabash Valley Power Ass'n v. Rural Electrification Admin., 903 F.2d 445, 454 (7th Cir.

binding expression of U.S. foreign policy,[142] and "[t]here is comparatively little guidance regarding the appropriate weight to assign to statements . . . that accompany a United States Government statement of interest."[143] It is inconceivable that the Supreme Court would permit FAD preemption of claims wholly rooted in California tort law on the basis that one State Department letter said Plaintiffs' lawsuit "will have an adverse impact on the foreign policy interests of the United States."[144] The State Department's letter neither mentions California tort law nor Plaintiffs' claims rooted in such law.[145] Simply because Plaintiffs' state-based tort claims are part of a lawsuit that, according to a SOI, may have foreign policy implications in no way grants a federal court the power to preempt such claims by invoking FAD.

The crux of Judge Rea's error is that he weighed California's interest in Plaintiffs' state claims without first briefly examining California tort law to see whether that law had anything to do with relevant federal foreign policy. He conducted the *Garamendi* analysis backwards: after concluding that California had a "weak interest" in applying its tort law, Judge Rea weighed California's interests against the federal government's interests, referring to an ambiguous "conflict with foreign policy."[146] Ultimately, he dismissed Plaintiffs' state claims without explaining how California tort law conflicts with federal foreign policy. Judge Rea does not suggest that California's tort legislation "incidentally [a]ffects" federal foreign policy or that California has acted "in a way that affects foreign relations," even though FAD requires an analysis of whether "state legislation will produce something more than incidental effect in conflict with express foreign policy of the National

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1990) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication").

[142] *See In Re* Nazi Era Cases Against German Defendants Litig., 129 F.Supp. 2d 370, 380 (D.N.J. 2001); *see also* Presbyt'n Church v. Talisman Energy, Inc., 2005 WL 2082846 at *1 (S.D.N.Y. Aug. 30, 2005) (denying motion for judgment on the pleadings based on a SOI filed by the State Department); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1236 (11th Cir. 2004) ("A statement of national interest alone . . . does not take the present litigation outside of the competence of the judiciary"); Kadic v. Karadžić, 70 F.3d 232, 250 (2d Cir. 1995) ("[A]n assertion of the political question doctrine by the Executive Branch [would be] entitled to respectful consideration, [but] would not necessarily preclude adjudication"); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 329-30 (1994) ("Executive Branch actions—press releases, letters, and *amicus* briefs" that "express federal policy but lack the force of law" cannot render a state law unconstitutional under the Foreign Commerce Clause).

[143] *Presbyt'n Church*, 2005 WL 2082846, at *4.

[144] Taft, *supra* note 112, at 1.

[145] *Id. passim.*

[146] Mujica v. Occidental Petrol. Corp., 381 F.Supp.2d 1164, 1187-88 (C.D. Cal. 2005).

Government."[147] A discussion of California's interest in Plaintiffs' state claims is no substitute for a discussion of whether California tort law creates a "sufficiently clear conflict" with federal foreign policy.[148]

As it stands, "*Mujica* misconstrues and misapplies the foreign affairs doctrine."[149] Judge Rea's ruling contravened federal precedent[150] concerning FAD and marked the first time a U.S. federal court had used FAD to dismiss a plaintiff's claim without examining the underlying state law upon which the claim was based and without explaining how that law conflicted with federal foreign policy. The ruling also marked the first time in U.S. jurisprudence that a single statement by a sub-cabinet member of the executive branch was used by a judge to preempt facially neutral state-based tort claims. In short, had Judge Rea properly examined Plaintiffs' case he would have found that:

> California tort law does not refer to or single out any foreign country in any way nor do the tort laws' design, intent, or legislative history demonstrate any purpose whatsoever to influence foreign affairs;

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[147] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11, 420 (2003).

[148] *Id.* at 420. As previously stated, since California tort law in no way conflicts with the federal government's power over foreign affairs, it is unnecessary to assess California's interest in Plaintiffs' state claims. Nonetheless, assuming *arguendo* it were necessary to make this assessment, Judge Rea erred in finding that California has a weak interest with respect to Plaintiffs' state claims. First, California has a strong interest in creating generally applicable tort law. *See id.* at 425-26 (evaluating California's interests in creating the statute at issue). Second, California has a strong public policy interest in maintaining corporate accountability among its resident corporations. California courts allow foreign plaintiffs to bring suits against California corporations for torts committed outside California. *See, e.g.*, Roulier v. Cannondale, 124 Cal. Rptr. 2d 877 (Cal. Ct. App. 2002). California's strong interest in corporate accountability among its resident corporations is reflected in Section 17200 of the California Business and Professions Code. Cal. Bus. & Prof. Code § 17200 (2005-06).

[149] Doe v. Exxon Mobil Corp., No. Civ. A.01-1357, 2006 WL 516744, at *3 n.2 (D.D.C. Mar. 2, 2006).

[150] Such precedent is exemplified by Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003), where the Ninth Circuit invoked the FAD after finding a sufficient conflict between California law and the federal government's power over foreign affairs. *Deutsch* concerned section 354.6, a California statute that sought to "redress wrongs committed in the course of the Second World War." *Id.* at 712. The *Deutsch* court held: "Although we agree that section 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. We hold that section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id.* In other words, the *Deutsch* court invoked preemption only because a specific state statute violated specific powers granted to the federal government by the U.S. Constitution. *Id. See also Garamendi*, 539 U.S. at 443 (Ginsburg, J., dissenting) ("[C]ourts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds").

> California tort law provides no opportunity for state officials to comment on the nature of foreign regimes;
>
> No evidence suggests that California tort law has been or would be applied selectively by Plaintiffs on matters concerning foreign policy;
>
> California tort law regulates an area that Congress has expressly delegated to the states the power to regulate;
>
> California tort law has not resulted in any protests from Colombia, other countries, or any organizations;
>
> No plaintiff in *Mujica* is a foreign government or is owned by a foreign government;
>
> No defendant in *Mujica* is a foreign government or is owned by a foreign government; and
>
> There is no specific law Occidental and AirScan could reasonably cite to contend that the tort laws at issue conflict with federal foreign policy or the federal government's power to conduct foreign affairs.

IV.CONCLUSION

Judge Rea distorted FAD and decided *Mujica* incorrectly. The truth is that the law upon which Plaintiffs' state claims rest has nothing to do with foreign policy. Even though Occidental and AirScan did not satisfy their burden of demonstrating a "sufficiently clear conflict" between California tort law and the federal government's power to conduct foreign relations, they convinced Judge Rea that an evaluation of Plaintiffs' state tort claims would create an interference with U.S. foreign policy. [151] Should the decision stand, *Mujica* would portray the disconcerting principle that if the State Department issues a letter suggesting that a lawsuit may have adverse foreign policy implications, the lawsuit should be dismissed pursuant to FAD, even if the state law upon which a plaintiff's various causes of action rest has nothing whatsoever to do with foreign policy.

Judge Rea's ruling in *Mujica* reflects a growing problem. Defendant companies in human rights litigation are increasingly

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[151] *Garamendi*, 539 U.S. at 420.

persuading judges to seek letters from the State Department outlining the foreign policy consequences of allowing a given case to proceed.[152] While it may be lawful for a judge to request a State Department letter, these letters are increasingly being used by the current Bush administration to persuade judges to dismiss ATS lawsuits.[153] The State Department's Legal Advisor should never have the authority to veto any ATS or TVPA case involving state court tort litigation that he or she deems is contrary to U.S. foreign policy interests.[154] No FAD case to date has ever afforded executive branch officials such unlimited power, and judges must not use SOIs to usurp FAD. Since judges are using SOIs as evidence to invoke FAD and dismiss a plaintiff's case, a proper application of FAD potentially has enormous import for international human rights litigation.

There are many negative consequences for getting FAD wrong. For instance, an overly expansive reading of the doctrine would violate the principles of federalism by permitting drastic and unnecessary intrusion into traditional areas of state legislation, giving the federal government almost limitless veto power over state laws.[155] Indeed, bestowing preemptive power upon sub-cabinet executive officials would amount to an extraordinary usurpation of state authority by the executive and judicial branches.[156] To be sure, limits on state authority of the kind affirmed by Judge Rea can typically be created only by Congress.[157] Furthermore, a misreading of FAD would allow courts to be expositors of federal foreign policy, thus violating the separation of powers

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[152] Gibeaut, *supra* note 68, at 33.

[153] Given its strong corporate agenda, the Bush administration tends to treat ATS lawsuits (e.g., litigation against corporations complicit in human rights abuses) as unfavorable to U.S. foreign policy interests. *Id.*

[154] Appellants' Opening Brief, *supra* note 95, at 20-21.

[155] *See, e.g.*, U.S. v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J. and O'Connor, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory"); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 841 (Kennedy, J., concurring) ("That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States").

[156] The Tenth Amendment protects the states from excessive encroachment by the federal government. New York v. United States, 505 U.S. 144, 188 (1992).

[157] To infringe a traditional state power, Congress must make its intent "'unmistakably clear in the language of [a] statute.'" Gregory v. Ashcroft, 501 U.S. 452, 460 (1990) (citations omitted).

doctrine.[158] Ultimately, as *Mujica* demonstrates, by misinterpreting FAD, a court could unjustly dismiss an otherwise legitimate case.

This article has stressed that FAD does not give a judge the power to dismiss a case that may have remote foreign policy implications. Rather, the rarely used FAD[159] only gives a judge the power to preempt a specific state statute that creates a "sufficiently clear conflict" with the federal government's power to conduct foreign relations.[160] Thus, before invoking FAD, a judge must be sure that a state statute sufficiently encroaches upon the federal government's power to conduct foreign relations. Consequently, the Ninth Circuit Court of Appeals must either reverse Judge Rea's ruling that Plaintiffs' state tort claims are barred by FAD or reverse Judge Rea's decision and remand for the court to reconsider FAD. Either way, Plaintiffs are fully entitled to their day in court to adjudicate the merits of their disturbing tale.

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[158] Buckley v. Valeo, 424 U.S. 1, 119, 121 (1976) ("[T]he doctrine of separation of powers . . . is at the heart of [the] Constitution" and is "a vital check against tyranny").

[159] Gerling Global Reins. Corp. of Am. v. Low, 240 F.3d 739, 751-52 (9th Cir. 2001) ("The federal government's foreign affairs power . . . is rarely invoked by the courts").

[160] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003).