Set Up for Abduction and Extortion by the IRS: Does the Reporting of Interest Paid on U.S. Bank Deposits Undermine the Government's Obligation to Avoid Instigating Terrorism by Foreign Criminal Gangs and Drug Cartels?

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ARTICLES

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I. INTRODUCTION

Overturning ninety years of foreign and tax policy while initiating a possible exodus of huge sums of private investment funds from financial institutions in the United States due to numerous concerns over corruption in foreign governments, the Internal Revenue Service (IRS) finalized and codified its efforts to report interest income earned at domestic banks for accounts held by nonresident aliens.\(^1\) This effort by the IRS to require the reporting of interest income began under the Clinton administration,\(^2\) stalled under the Bush administration,\(^3\)

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and became finalized by the Obama administration on April 19, 2012, because the agency deemed the policy as vital to its efforts to fight against offshore tax evasion.4

Ignoring strong opposition from industry5 and members of Congress representing both political parties,6 the IRS felt that its need to collect data outweighed any concerns raised against its proposal.7 However, this decision by the IRS has the potential to trigger broad consequences across many facets of tax, commerce, and international policy and law, as well as the war against terrorism.

Since many nonresident aliens routinely face political unrest in their home countries, they highly value the confidentiality and stability afforded by this U.S. policy.8 Thus, even a small threat to their safety and security will invariably lead to the repositioning of their investment funds. This is especially true considering that they will now rely on the IRS to safeguard their private information, and any miscalculation or lapse in judgment when the IRS exchanges this data with foreign governments could lead to a disastrous personal situation in a nonresident alien’s home country. Consequently, a nonresident alien will not take such risks when they can easily move their funds to another country’s financial institution that need not adhere to the IRS’s policies and does not pose such potentially severe liabilities.

In reviewing the scholarly legal literature on this new reporting policy by the IRS, one commentator explored the early proposals in the context of privacy concerns,9 whereas other scholars examined a combination of the tax and/or international law aspects of such a

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8. See Letter from the Florida Congressional Delegation to President Barack Obama, supra note 6. Mexico provides a perfect example of such a country because of its proximity to the United States coupled with the violence, kidnappings, and extortion that now frequently occur there. See Goulder, supra note 5, at 740 (describing the violence in Mexico that has resulted from a crackdown on the illegal drug trade). Many Mexican citizens are less concerned with paying taxes than with the terrorist threat of being extorted by someone who knows the balance of your bank account, so they deposit their savings and investment funds into U.S. financial institutions as a security measure. Id. (“The appeal of U.S. bank secrecy . . . exists for the many thousands of affluent or middle-class Mexicans who earn legitimate incomes. Why would they put their money in a Mexican bank? U.S. banks are widely regarded as more secure, better regulated, and better managed.”).

policy but did not apply their analysis to this particular issue. With this in mind, this article explores the history and policy decisions that created the current bank secrecy provisions for earned interest on nonresident alien bank accounts held at domestic financial institutions while also examining how the new reporting requirements adopted by the IRS will produce claims against the U.S. government under the Federal Torts Claims Act and the Alien Tort Claims Act, as well as give ground in the war against global terrorism.


As such, we cover the U.S. government’s policy on the reporting of earned interest in domestic banks held by nonresident aliens in section I. The history of this particular tax policy starts with the passage of the XVI Amendment to the U.S. Constitution, evolves over the past century until the proposals put forward by the IRS starting in 2001, and concludes with the adoption of a final rule in 2012.

In section II, we assess the current threat posed by foreign criminal gangs and drug cartels with respect to the IRS reporting requirements for earned interest on nonresident alien accounts held in U.S. financial institutions. Given the immediate and real threat posed by these organizations, we describe the past and current rise in power and influence of these criminal gangs and drug cartels while spelling out how lucrative this information could be when targeting, kidnapping, and extorting innocent victims.

In section III, we discuss the aggressive response of the United States government to the Mexican drug cartels and transnational criminal organizations through its cooperation with Mexico in the Merida Initiative, and that the United States government acknowledges that the drug cartels remain an ever-present and serious threat to national security. Section IV contends that the rule change will result in increased litigation in the federal courts with claims arising from the Federal Tort Claims Act and Alien Tort Claims Act and analyzes potential causes of action under both statutes. In section V, we contend that the policy weakens longstanding U.S. economic policies that encourage foreign bank deposits and threatens a fragile economy in recovery, violates international legal obligations of the United States under the Convention Against Torture, and hinders the fight against terrorism. In conclusion, with the balancing of policy considerations regarding the rule change, change in a longstanding policy significantly hinders U.S. economic and foreign policy interests—change is truly not better here.

II. Reporting of Interest Paid to Nonresident Aliens

In its second attempt in 11 years, the IRS finally succeeded in adopting regulations that require the reporting of accrued interest by U.S. banks on accounts held by nonresident alien individuals.\(^\text{12}\) Despite vigorous opposition and a policy founded on encouraging investment in the U.S. and its competitiveness around the world, the IRS decided that its need to gather data and the ability to exchange it with foreign governments outweigh the need to follow a longstanding and thoroughly discussed approach.\(^\text{13}\) Prior to any discussion on the implications of such an important decision by the IRS, the historical rationale and modern

\(^{12}\) See Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,394-95 (setting forth the amendments to the relevant regulations).

\(^{13}\) See id. (discussing the rationale behind and adoption of the IRS’s new reporting policy).
A. Tax Policy in the United States

In examining the treatment of the interest earned by nonresident alien account holders in U.S. banks, three distinct periods of public policy exist. With the passage of the XVI Amendment to the U.S. Constitution making an income tax legal, the U.S. government deferred to common law principles in developing source rules that determined to treat this type of interest as taxable income. However, Congress decided to adopt a policy that followed a state income tax approach and that encouraged investment by implementing new source rules that classified the interest earned from nonresident alien bank account holders as foreign subsequent to World War I. This approach lasted until 1966 when Congress modified its philosophy to declare all bank interest generated in the U.S. as taxable income; but it provided an exemption for nonresident aliens. Accordingly, the proposal and finalized regulations by the IRS that require the reporting of interest with respect to nonresident alien bank accounts in the U.S. undermines congressional intent over the past 90 years.

1. Policy Origins

Regarding the decision to exclude the reporting of interest for bank accounts held by nonresident aliens, the origins of the policy date back to Congress’ inquiries into supporting World War I efforts through the imposition of a war profits or excess profits tax and the Treasury Department’s Professor Thomas S. Adams’ effort to change the country’s international tax policy by creating the foreign tax credit (FTC). In 1918, taxation on the same interest income from both foreign and U.S. governments posed serious obstacles to those Americans doing business and investing outside the country because World War I triggered a global escalation in tax rates. As such, Congress passed the Revenue Act of 1918, which included the foreign tax credit; it allowed U.S. citizens to claim the credit against their domestic income taxes and permitted resident aliens to do the same, so long as their

14. See Graetz & O’Hear, supra note 10, at 1044-45 (highlighting Adams’ contributions to international tax policy). Professor Thomas S. Adams served as the Treasury Department’s principal advisor on tax policy and administration from 1917 until 1923. Id. at 1029. Prior to his time at the Treasury Department, Professor Adams assisted with formulating and drafting the first successful progressive income tax in the country, the Wisconsin Income Tax Law. Id. As the Treasury Department’s spokesman before the House Ways and Means Committee and the Senate Finance Committee, Professor Adams played a central role in shaping tax policy in the early days after the adoption of an income tax. Id. at 1029-30. After serving in the Treasury Department, Professor Adams became the main spokesman for the U.S. government in the international tax treaty movement. Id. at 1030.
15. Id. at 1045.
home country provided a similar policy to ex-patriot Americans. Moreover, the legislation required the payors of fixed or determinable annual or periodic income to withhold a percentage of the income for nonresident aliens.

Following this legislation, Congress and Professor Adams quickly recognized the need to adjust the credit and clarify the applicable source rules because the FTC offered American investors very generous tax relief and some policymakers feared imminent abuse by savvy taxpayers. In the meantime, the Attorney General established source rules through written opinions based on common law principles on how to classify income as foreign or domestic due to the lack of direction from the Revenue Act of 1918.

As expected, a difference of opinion emerged between the Attorney General’s Office and Professor Adams at the Department of Treasury with respect to the source rules for business income and interest income. Under the Attorney General’s approach, the origination point of the interest income served as the jurisdiction in which to levy taxes, whereas Professor Adams looked to the states for precedent in his effort to change the taxation policy. Professor Adams advocated for an approach where the residence of the taxpayer served as the foundation for determining the payment of taxes and not the jurisdiction that generated the income.

To bolster his arguments, Professor Adams explained that the Departments of State and Commerce maintained a “very active interest” in this policy as it aligned with the economic and political interests of the country. Those interests included a focus on funneling private capital to assist in rebuilding post-war Europe, providing a means to payoff the

16. Compare Revenue Act of 1918, Pub. L. No. 65-254, ch. 18, § 222(a)(1), 40 Stat. 1057, 1073 (1919) (crediting U.S. citizens with “the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, by any any possession of the United States”), with id. § 222(a)(3) (crediting alien residents of the United States with “the amount of any such taxes paid during the taxable year to [their home country], upon income derived from sources therein, if such country, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country”).
17. Id. § 221(a).
18. See Graetz & O’Hear, supra note 10, at 1057 (describing the reaction of Congress and Adams to the FTC legislation).
20. See Hearings, supra note 19, at 66-67. The difference of opinion emanated from the use of precedent. Id. The Attorney General used common law traditions, whereas Professor Adams followed tax policy considerations. Id.
21. Id.
22. Id.
23. Id.
wartime debt owed to the U.S. government, and helping facilitate peace.24 In effect, adopting the policy meant that lenders from the United States would receive credits against their tax liability in our country for the taxes on interest income they paid to a foreign government.

To assuage any concerns, Professor Adams testified to Congress that he developed his source rules from existing domestic and international practices and that he studied this provision more so than any other in the legislation.25 With this in mind, Congress included a comprehensive set of source rules provided by Professor Adams in the legislation that explained the treatment of interest, dividends, rents and royalties from real, personal and intangible property, personal services, gains from the sale of real and personal property and the manufacture and sale of personal property.26 Hence, the source rules included in the Revenue Act of 1921 set the modern policy that treats the interest earned by nonresident alien account holders in U.S. banks as foreign income.

2. Modern Approach

Left alone for 45 years, Congress agreed to modify its attitude towards exempting the interest earned by nonresident alien account holders in U.S. banks in 1966. Congress underwent a philosophical adjustment in its position, leading it to amend its treatment of these situations by implementing an explicit tax and exemption rather than following a sourcing rule approach.27 The resulting legislation imposed a thirty percent tax coupled with an exemption that would sunset at a later date.28 In order to “provide an opportunity to review the exemption in view of developments in the balance-of-payments situation and other factors,” Congress selected a termination date of December 31, 1972 to soften any residual effects from this change in philosophy.29

In continuing to monitor the effects of removing the special treatment for nonresident alien account holders in U.S. banks, the Committee on Ways and Means

24. See Graetz & O’Hear, supra note 10, at 1051-53 (describing the arguments in favor of Adams’ proposed approach).
25. See Hearings, supra note 9, at 67.
29. H.R. Rep. No. 89-2327, at 5-6 (1966) (Conf. Rep.). This decision to move towards a change in policy with regard to the taxation of interest received by nonresident alien bank accounts held in the United States became more apparent in the 1976 Senate debate on whether to make the exemption permanent or to continue studying it. See 122 Cong. Rec. 23,874-77 (daily ed. July 26, 1976).
reported in 1969 the need to postpone the termination date because the country continued to run deficits in its balance of payments.\textsuperscript{30} The report explained:

In anticipation of the elimination of the special treatment, foreign persons might withdraw their bank deposits from the United States during the next year or two. This outflow of funds from the United States, if it were to occur, would further harm the balance of payments. The further postponement of the effective date of the removal of the special treatment will forestall this possibility and will provide your committee with an additional opportunity to reconsider the balance-of-payments situation and the impact on that situation of the removal of this exemption.\textsuperscript{31}

Consequently, Congress agreed to lengthen the time to evaluate the policy and changed the termination date of the special treatment for nonresident alien account holders in U.S. banks to December 31, 1975.\textsuperscript{32}

With the special treatment for bank interest earned by nonresident aliens sunsetting, Congress debated the fate of the policy during its 1976 session. The Senate wanted to continue the approach started in 1966 and extend the exemption three more years\textsuperscript{33} while the House of Representatives desired to make it permanent.\textsuperscript{34} Senators Robert Packwood of Oregon and Edward Kennedy of Massachusetts felt the disparity in treatment between nonresident aliens and U.S. taxpayers required eventual elimination of the exemption but felt that the existing economic concerns overshadowed their ideology, so they advanced the three-year continuation provision.\textsuperscript{35}

In response, Senator Richard Stone of Florida explained that in gateway cities like Miami, bank deposits from Latin Americans amount to as much as one-third of all balances.\textsuperscript{36} Senator William Brock of Tennessee responded by commenting that no U.S. financial institution could survive the loss of one-third of its deposits in a short period of months.\textsuperscript{37} The Senate voted to extend the exemption for three years, and the conference report followed the House bill.\textsuperscript{38} As a result, the 1976 Tax Reform Act made the exemption permanent.\textsuperscript{39}

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31. \textit{Id.}
33. 122 CONG. REC. 23,874-75 (statement of Sen. Packwood).
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Subsequently, Congress tackled tax reform again in 1986 and subtly addressed the issues related to bank interest earned by nonresident alien account holders. During this policy review, the Senate committee explained, “[W]here it is desirable to provide a U.S. tax exemption for specific classes of interest income, it should generally be done directly rather than through modifications to the general source rules. The committee, therefore, grants overt exemptions for appropriate classes of income.”

This viewpoint continued with the tax overhaul of 1986 and led Congress to treat bank deposits established in the United States by nonresident aliens as domestically sourced income but exempt from the withholding tax. Therefore, the present law originates from and continues to build upon a policy designed to encourage investment in the United States and strengthen the country’s competitiveness while avoiding actions that might drive bank deposits elsewhere.

B. The Clinton Administration’s Proposal

For many years, the IRS wanted to require U.S. banks to report the interest paid on deposits held by nonresident alien individuals. On January 17, 2001, in the waning hours of the Clinton administration, the IRS announced its intention to expand its prior decision that compelled the reporting of interest paid on bank accounts owned by Canadian citizens not residing in the United States to those from other countries. In taking a more inclusive approach to gathering financial information, the IRS believed that it could strengthen its existing compliance efforts through a broader reporting requirement that included all nonresident alien account holders.

In proposing this expanded treatment, the IRS explained its actions as a natural extension of the current program for Canadian citizens, since it could assist in domestic compliance efforts and aid in the transfer of financial data and transparency with respect to

42. See Guidance on Reporting Interest Paid to Nonresident Aliens, 76 Fed. Reg. 1106 (Jan. 7, 2011) (to be codified at 26 C.F.R. pts. 1, 31) (providing some background on the proposed regulations). The publication of this proposed regulation occurred in the last three days of the Clinton administration, making it an immediate issue for the incoming Bush administration to resolve. See Goulder, supra note 5, at 743 (describing the proposed regulation and response to it).
43. See Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens, 66 Fed. Reg. 3925, 3926 (Jan. 17, 2001) (to be codified at 26 C.F.R. pts. 1, 31) (“The proposed regulations extend the information reporting requirement for bank deposit interest paid to nonresident alien individuals who are residents of other foreign countries.”).
44. See id. (“[R]equire routing reporting to the IRS of all bank deposit interest paid within the United States will help to ensure voluntary compliance by U.S. taxpayers by minimizing the possibility of avoidance of the U.S. information reporting system.”).
international tax treaties. With respect to assisting the IRS’s compliance efforts, the agency asserted that this type of reporting could dissuade some individuals from wrongly claiming foreign status because they will know the government receives information on the amount of money earned from a bank account.

Moreover, the IRS defended the requirement as part of a comprehensive foreign policy to advance the country’s cooperative efforts through existing international tax treaties. The IRS acknowledged the receipt of requests from other nations to turn over information relating to the bank deposits of individual residents of another country via bilateral tax treaties they maintain with the U.S. government. The IRS turned to this new expansion in the reporting policy to “facilitate . . . the effective exchange of all relevant tax information with our treaty partners” as a means towards “encouraging voluntary compliance and furthering transparency.” The IRS based this secondary position on a U.S. Senate Executive Report that evaluated whether to support ratification of a tax convention with the Republic of Italy.

In the Senate report, the committee compared the exchange of information language supplied by the Organization for Economic Co-operation and Development (OECD) model with one advanced by the U.S. government. The Committee found that the two different models generally maintained similar language, but the proposed treaty’s bank secrecy provision constituted a significant departure from that articulated by the U.S. government. The Committee believed the ability of the two countries to exchange information obtained from banks and other financial institutions to be essential, and it thus viewed this difference as contrary to the treaty’s purpose in preventing tax avoidance or evasion systems.

Upon weighing alternative solutions to the policy dilemma, the Committee weighed the ramifications of striking the provision altogether from the treaty against allowing its inclusion based on written assurances from the Italian government. However, the policy

45. See id. (providing justifications for the proposed regulatory action).
46. See id. (mentioning the significance of the exchange of tax information with respect to voluntary compliance).
47. See id. (“Several countries that have tax treaties or other agreements with the United States have requested information concerning bank deposits of individual residents of their countries.”).
48. Id.
49. Id.
50. See id. (citing to S. EXEC. REP. NO. 106-8, at 15 (1st Sess. 1999)).
52. Id. The committee noted that the preferred language of the U.S. government states, “[N]otwithstanding the limitations described in the preceding paragraph, a country has the authority to obtain and provide information held by financial institutions, nominees, or persons acting in a fiduciary capacity. This information must be provided to the requesting country notwithstanding any laws or practices of the requested country that would otherwise preclude acquiring or disclosing such information.” Id.
53. See id. (discussing the significance of the provision as included in the proposed treaty).
54. Id.
objectives of the U.S. government created a significant obstacle with respect to the issue of transparency. Should the Committee follow a strategy that removed the bank secrecy provision, other nations might interpret such an action as a lack of commitment towards increased transparency of transactions from third parties, which could create difficulties when negotiating similar treaties in the future. The removal of such a provision by another country against the United States would also create reservations with the Committee as to willingness of the other nation to accommodate full exchanges of information regardless of its internal laws. Despite giving a reluctant recommendation to approve the tax treaty without the bank secrecy provision and attach a condition that the Italian government provide requested information obtained from financial institutions when asked, the Committee reiterated its unwavering support for the policy requiring full exchanges of information from other treaty partners.

Thus, the IRS’s proposed rule to expand the policy that U.S. banks report the interest income to comprise all nonresident alien account holders appears to emanate from a deterrence perspective on both a basic and more sophisticated level that includes broader policy objectives.

C. The Bush Administration’s Counterproposal

Following this rule announcement by the preceding administration, the IRS entered an evaluation period of its January 17, 2001 proposal, during which it held meetings and solicited written opinions on the expansion of reporting requirements for U.S. banks to include nonresident alien account holders. During this time, the IRS collected and analyzed comments from the public to aid in its determination of a proper course of action with respect to the proposed regulations. As a result, under the Bush administration, the IRS decided to withdraw the original regulations and proposed new ones for ratification.

In its analysis of the 2001 proposal, the IRS noted that the majority of comments it received took a highly critical tone. Some of the responses held the position that the admin-

55. See id. at 16 (“The broader issue of transparency of transactions involving third parties is a significant issue internationally. The United States has attempted to advance greater transparency in its treaty negotiations.”).
56. See id. (expressing concerns about the implications for future treaty negotiations).
57. Id.
58. Id.
59. See Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens, 67 Fed. Reg. at 50,386-87 (describing hearings on and comments received regarding the previously proposed regulations).
60. Id. at 50,386.
61. Id. at 50,387.
62. See id. (“Most of the comments received on the 2001 proposed regulations were highly critical of the regulations.”)
Administrative imposition caused by reporting and collecting the information would overshadow any benefits the IRS could derive, while other replies expressed technical concerns over how joint accounts would be handled. Finally, a number of comments expressed concern that this policy would cause nonresident aliens to withdraw their deposits in U.S. banks due to apprehensions of misuse by the government or by others who obtained their personal information.

Based on the public’s backlash and guidance from the Bush administration, the IRS determined that the original regulations requiring U.S. banks to report deposit interest paid to a nonresident alien were “overly broad.” In response, the agency basically chose to narrow the original requirement that included citizens of all nations to only those residents of Australia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the United Kingdom. The IRS justified this new proposal as a more narrowly tailored approach that could assist in achieving the government’s foreign policy goal of collecting financial information from U.S. banks without imposing too heavy of an administrative burden while giving it the necessary data for information exchanges when necessary.

However, the IRS also reserved the right to propose a modification to the list of countries included in the reporting program when warranted. Hence, the IRS found a compromise position to the 2001 proposal when it announced a more targeted approach in August 2002 but never chose to finalize or withdraw it from implementation.

D. The Obama Administration’s Proposal and Final Rule

Most recently, under the leadership of the Obama administration, the IRS served notice in the Federal Register on January 7, 2011, that it desired to once again expand the reporting requirements to nonresident aliens of all nations. This time, the IRS justified the reevaluation of the application of the reporting program to all nations for three reasons.

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63. Id.
64. Id.
65. Id.
66. Id. While the newly proposed regulations compelled reporting on nonresident aliens of specific nations, the IRS explicitly stated that it also allowed U.S. banks to determine at their own discretion whether to include residents of other countries not mentioned in its list. Id.
67. Id.
68. Id.
69. See Guidance on Reporting Interest Paid to Nonresident Aliens, 76 Fed. Reg. at 1106 (“These proposed regulations withdraw the 2002 regulations and provide new proposed regulations that expand the information reporting requirement to include bank deposit interest paid to nonresident alien individuals who are residents of any foreign country.”).
70. See id. (setting forth the three justifications for the rule change).
First, the IRS believed the recently agreed upon international standards for exchanging information would make it feasible for the United States to alter its policies and assuage data security concerns to become more in line with other nations that value these types of cooperative efforts.71 Second, the IRS explained that the expansion of reporting requirements reinforced the U.S. government’s programs for exchanging information.72 Last, the agency claimed once again that taxpayer compliance rates would improve by reducing false claims of foreign status.73

Following this announcement, the IRS entered a comment period and held a public hearing on May 18, 2011.74 The IRS served notice on April 19, 2012, that it would require the reporting of interest paid to certain nonresident alien account holders earning more than $10 during a calendar year at a U.S. bank.75 Pursuant to these regulations, nonresident aliens who reside in countries that maintain an income tax or other convention or bilateral agreement relating to the exchange of tax information with the U.S. government will fall within the mandatory reporting categories.76 This announcement meant that the IRS intends to exchange the collected information with only those governments maintaining an agreement with the United States and only when they satisfy certain additional requirements.77

Moreover, the banks need not report the interest information for nonresident aliens who reside in countries outside of the information-sharing agreement listed in the Revenue Procedure.78 The IRS recognized that this portion of the policy may create an administrative burden for the banks, so it allows for an institution to report interest payments on all of their

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71.  Id.
72.  Id.
73.  Id.
74.  See Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,391 (noting the comment period and public hearing).
75.  Id. The applicable countries whose residents fall under the regulations include: Antigua & Barbuda, Aruba, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Bermuda, British Virgin Islands, Bulgaria, Canada, China, Costa Rica, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Egypt, Estonia, Finland, France, Germany, Gibraltar, Greece, Grenada, Guernsey, Guyana, Honduras, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Jamaica, Japan, Jersey, Kazakhstan, Korea (South), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Morocco, Netherlands, Netherlands island territories: Bonaire, Curacao, Saba, St. Eustatius and St. Maarten (Dutch part), New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Slovak Rep., Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom, and Venezuela. Rev. Proc. 2012-24, 2012-20 I.R.B. 913.
77.  Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,392-93 (discussing the IRS’s options for appropriate forms of exchange). The IRS explained that no requirement exists to compel the exchange of information with a foreign government, but it will determine the appropriateness of the exchange based on the proposed use of the information and other factors, such as the foreign government’s ability to protect the confidentiality of the data. Id.
78.  Id. at 23,393.
nonresident alien account holders. Consequently, a nonresident alien who lives in a non-sharing country can become subject to this reporting requirement even though their circumstances do not compel or merit inclusion under the finalized regulation.

In justifying its actions, the IRS asserts that the end results will help identify potential U.S. taxpayers that evade taxes by hiding income and assets offshore and that the information exchange will bolster these efforts. To this end, this enforcement action will also help improve voluntary compliance by making it more difficult for persons in the United States to avoid the information-reporting system by falsely claiming nonresident alien status.

New to the IRS’s arsenal of arguments, the agency adds further support to its finalized regulation as being necessary to show sympathy with the directives of the Foreign Account Tax Compliance Act (FATCA), which compels foreign financial institutions to report to the IRS information on their U.S. customers. Under FATCA, the United States and other countries began developing a framework that will require signatory governments to cooperate in overcoming legal restraints placed on their resident financial institutions to identify pertinent accounts and report information to the IRS. As a result, the IRS explained that the adoption of these regulations will enable it to have something of value to exchange with foreign governments that also desire to detect offshore tax evasion by their own residents.

Finally, the IRS certifies that its final rule and regulations will not have a significant economic impact. In conducting its analysis, the IRS estimates that the regulations will affect a significant number of small entities, but it disagrees with the notion that it will create new administrative burdens on financial institutions in the United States and disproportionately affect states in which nonresident aliens prefer to conduct business. By responding that financial institutions already maintain systems to collect and report this data, the IRS...

79. See id. (“To address any potential burden associated with reporting on this basis, the final regulations provide that for any year for which the information return under § 1.6049-4(b)(5) is required, a payor may elect to report interest payments to all nonresident alien individuals.”).
80. See id. at 23,391 (“The reporting required by these regulations is essential to the U.S. Government’s efforts to combat offshore tax evasion for several reasons.”).
81. Id. at 23,392.
82. Id.
83. Id.
84. See id. (“These regulations will facilitate intergovernmental cooperation on FATCA implementation by better enabling the IRS, in appropriate circumstances, to reciprocate by exchanging information with foreign governments for tax administration purposes.”).
85. Id. at 23,393-94.
86. Id. at 23,394.
completely dismisses the alternative assertions regarding the economic impact upon business and states that conduct business with nonresident aliens.\footnote{87 See id. (discussing concerns raised in some comments received and why the Treasury Department and IRS disagree with them).}

Thus, the IRS appears to manipulate the responses it gathered during its comment period in favor of its own opinion and chooses to address concerns where it maintains strong arguments in order to support the rule it promulgated. Hence, the question remains as to whether the IRS’s need to gather the data is worth the risks it presents to citizens of other nations, which in turn affect the United States economically. And, in a world that has seen the rise of the Mexican drug cartels, the risks of this policy foreseeably harm not only innocent Mexican civilians but also hinder the war on the cartels.

III. The IRS’s Rule Change and the Threat Posed by Foreign Criminal Gangs and Drug Cartels

The IRS’s rule change concerning reporting of income on accounts of nonresidential aliens unfortunately intersects with the terrorist threat posed by criminal gangs and drug cartels operating in Latin America and in particular, Mexico. Drug cartels, particularly in Mexico, not only utilize bazookas, hand grenades, and semiautomatic weapons in the commission of their crimes but also large military vehicles, such as the “narco tank.”\footnote{88 See William Booth, Mexican Cartels Now Using ‘Tanks,’ Wash. Post (June 7, 2011), http://www.washingtonpost.com/world/americas/mexican-cartels-now-using-tanks/2011/06/06/AGacrALH_story.html (“The Mexican military has discovered that gangsters south of Texas are building armored assault vehicles, with gun turrets, inch-thick armor plates, firing ports and bulletproof glass.”).} However, with the capturing and exchanging of sensitive financial information under the IRS regulations, criminal gangs and drug cartels will potentially have a resource of another variety—the financial information of U.S. nonresident aliens. With this financial information at hand, the drug cartels could conceivably target individuals on the basis of their financial wealth for extortion, kidnapping, and ransom.

With a variety of sophisticated technological tools and information in their arsenals, the criminal gangs and drug cartels currently pose a significant threat to the safety and security of the United States, Mexico, and Latin America. Today’s threat to the safety and stability of the United States and Latin America by criminal gangs and drug cartels has unfortunately been a longstanding one in history.
A. The History of Criminal Gangs and Drug Cartels in Latin America

For over a century, drug trafficking organizations have operated in Latin America. The narcotics trade within Mexico has been at the forefront and center of the drug trafficking world for decades. By the 1940s, Mexico was a major source of the trade in both marijuana and heroin to the United States. From 1929 to 2000, during the period of essentially one-party rule and governance in Mexico by the PRI (Institutional Revolutionary Party), the Mexican government pursued a policy of “accommodation” during which the government rhetorically continued an official policy of eradicating drug crops. In practice, however, corruption led to a certain degree of cooperation between the Mexican authorities and drug trafficking leaders.

During the 1980s, drug cartels in Colombia became the major contributor to worldwide drug trafficking. Despite the presence of a violent civil war that pitted the government of Colombia against peasant guerrillas of the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN), the Cali and Medellin drug cartels supplied approximately 80 to 90 percent of the cocaine imported to the United States. Pablo Escobar, the “Godfather” of the Medellin cartel, became the most renowned and feared Colombian drug trafficker. He utilized some of his funds to build public housing and contribute to city improvements in Medellin. However, Escobar developed a reputation as one of the most ruthless and vengeful traffickers. He was responsible for the murders of numerous politicians, judges, journalists, and countless innocent civilians. In one particular incident, he struck back at two suspected informers by orchestrating the bombing of an Avi-
anca 727 airplane, which killed the informers as well as approximately 100 passengers and crew.\(^{100}\)

During the 1980s, the administrations of both Presidents Ronald Reagan and George H.W. Bush developed policies in response to the drug cartels. Under the Reagan administration, the Anti-Drug Abuse Act of 1986,\(^{101}\) which appropriated approximately $1.7 billion to fight drugs,\(^{102}\) became one of the first major pieces of congressional legislation in the contemporary war on drugs. The administration of President George H.W. Bush followed in the footsteps of the Reagan administration by pursuing an aggressive anti-drug policy. In one of his first major actions, President Bush established the Office of National Drug Control Policy, which primarily promotes governmental “efforts to reduce illicit drug use, manufacturing and trafficking, drug-related crime and violence, and drug-related health consequences.”\(^{103}\) During his first prime-time speech to the nation during his presidency in September 1989, President Bush reaffirmed his support for the Colombian government and the fight against “cocaine killers,” emphasizing the national security threat to the United States posed by drug traffickers.\(^{104}\)

Just two months later, one of the firmest actions in the war on drugs took place when President Bush ordered a U.S. invasion of Panama in pursuit of Manuel Noriega.\(^{105}\) Despite having an uneasy but coexistent relationship with the United States during the 1970s and 1980s,\(^{106}\) Noriega became a material supporter of the international narcotics trade throughout the 1980s\(^ {107}\) and allowed drug traffickers such as Pablo Escobar to ship cocaine and other illicit narcotics through Panama.\(^ {108}\) The Bush administration articulated several justifications

\(^{100}\) Id. at 119.


\(^{102}\) Timeline: America’s War on Drugs, supra note 94.


\(^{104}\) Gray, supra note 97, at 124.

\(^{105}\) Id. at 126.


\(^{107}\) Id. (“By the mid-1980s, Noriega’s increasingly vicious behavior, above all his involvement in the international narcotics trade, made him a liability to the United States, especially at a time when the American public’s concern about illegal drugs was reaching its peak.”).

\(^{108}\) Timeline: America’s War on Drugs, supra note 94.
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for its decision to intervene, but a key rationale was to bring Noriega to trial for his material support of drug trafficking.

While a number of legal scholars have comprehensively discussed the foreign policy and international implications of the invasion, in historical retrospect, the intervention and capture of Noriega appears to signify a major event in the fight against the drug cartels. Following the invasion, the governments of the United States and Colombia implemented a “kingpin” strategy that targeted the highest-level drug trafficking officials of the Cali and Medellín organizations throughout the 1990s. In December 1993, the Medellín cartel took a fatal hit when its leader, Pablo Escobar, was killed. Soon thereafter, the Colombian and U.S. governments turned their focus to key leaders of the Cali cartel. Today, as a result of such strategy, both the Medellín and Cali cartels have been largely dismantled.

Despite success in the war against the Colombian drug cartels, Mexico has become the epicenter of the war on drugs. In the wake of dismantling the Colombian cartels, new cartels in Mexico, as violent if not even more so than their Colombian counterparts, have begun to dominate the drug trade to the United States.

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109. See William C. Plouffe, Jr., Sovereignty in the “New World Order”: The Once and Future Position of the United States, a Merlinesque Task of Quasi-Legal Definition, 4 Tulsa J. Comp. & Int’L L. 49, 69 (1996) (“The justifications offered for the invasion included: 1) that Noriega himself declared that a ‘state of war’ existed with the United States, 2) the right of self defense, 3) that Noriega’s actions threatened the interests of the United States, i.e., the Panama Canal, 4) to bring Noriega to trial in the United States concerning drug trafficking, to restore democratic government to Panama, and to protect the lives of United States citizens.”).

110. See id. at 71 (explaining that the United States likely invaded Panama primarily to arrest Noriega and bring him to trial).


113. Gray, supra note 97, at 128.

114. Id. at 129-130.

B. The Contemporary Rise of Criminal Gangs and Drug Cartels in Mexico

The 2000 election of Vicente Fox of the PAN (National Action Party) to the Mexican presidency ended 71 years of one-party governance in Mexico.\(^{116}\) Greater democratization in Mexico replaced the remnants of a solidly PRI-controlled nation and upset the tenuous balance between the government and drug traffickers.\(^{117}\) As the Colombian cartels fell, Mexican drug cartels replaced them as the major suppliers of heroin, methamphetamine, and marijuana to the United States.\(^{118}\)

Today, the Sinaloa and Los Zetas are the two major drug cartels operating in Mexico among the twelve to twenty different significant organizations.\(^{119}\) The cartels are engaged in an industry that collects billions in profits annually.\(^{120}\) Estimates of annual financial profits from the United States to Mexico resulting from the overall drug trade range from a low of approximately $8 billion by the State Department to a high of $29 billion by the Department of Homeland Security.\(^{121}\)

In addition to the financial growth of the cartels, many cartels now have “de facto” control over large areas of the country. Significant areas of Monterrey, one of Mexico’s finest cities, are under the control of drug cartels. William Finnegan, a renowned international journalist, recently reported that the police have essentially lost control of the streets of Monterrey, as members of the rival Zetas and Gulf cartel have engulfed the city in violence.\(^{122}\) The state of Michoacan has been particularly beset by the influence of cartels.\(^{123}\) The phrase “two Mexicos” has been utilized to describe Michoacan province—one under the influence of the government, and the other under the influence of violent cartels.\(^{124}\)

\(^{116}\) Kate Milner, Profile: Vicente Fox, BBC NEWS (June 6, 2003), http://news.bbc.co.uk/2/hi/americas/1049574.stm.
\(^{117}\) See BEITTEL, supra note 89, at 8 (describing the effects of Vicente Fox’s election).
\(^{118}\) Id.
\(^{119}\) Id. at 10.
\(^{120}\) See id. at 38-39 (providing various estimates on annual profits from drug trafficking).
\(^{121}\) Id. at 38.
\(^{122}\) See William Finnegan, The Kingpins: The Fight for Guadalajara, THE NEW YORKER, July 2, 2012, at 47 (“Some Guadalajarans find cold comfort by looking north, to Monterrey, where security has been in free fall for the past two years. It is Mexico’s third-largest city, and its wealthiest. But the police have lost control of the streets. Kidnapping, extortion, robbery, and murder are commonplace. The number of killings there tripled between 2009 and 2010, then nearly doubled again in 2011. Army checkpoints now lace the city. Guadalajara has experienced nothing close to Monterrey’s nightmare. . . . The Zetas and the Gulf cartel started a war. The local police reportedly went to work en masse for the cartels. Now the Zetas are pillaging the city.”).
\(^{124}\) See id. (discussing the power and impact of cartels in Mexico).
The violence of the Mexican drug cartels is one of their most appalling features. Cartels target not only members of rival cartels but also the Mexican police and even innocent civilians. The shocking incidents are gruesome, numerous, and vary in nature. For example, forty-nine decapitated bodies were discovered on a road outside of Monterrey in 2012. In early 2011, mass graves and the bodies of 177 victims were found in San Fernando in the province of Tamaulipas, sadly evoking memories of mass graves discovered in the wake of the post-Saddam Hussein era in Iraq and the desaparecidos (“disappeared”) of El Salvador and Argentina in recent decades.

Drug cartel-related violence has also led to a number of attempts to assassinate Mexican politicians who speak out or advocate policies against the cartels. In 2012, approximately eight mayors were assassinated throughout the country and a June 2010 assassination cost the life of Dr. Rodolfo Torre Cantú, the PRI gubernatorial candidate in Tamaulipas province. The escalating violence has even cost the lives of U.S. citizens. In March 2010, three individuals associated with the U.S. consulate in Ciudad Juárez were assassinated. In February 2011, U.S. Immigration and Customs Enforcement (ICE) Special Agent Jaime Zapata was killed by members of the Zetas drug cartel while driving between Monterrey and Mexico City. The violence has not only engulfed many parts of Mexico but now threatens the national security of the United States, as violence has spilled over into U.S. territory. In June 2012, five individuals, likely the victims of a hit by the Zetas cartel, were found dead in a
burned vehicle in remote southern Arizona. In the midst of rising cartel violence, the prospect of it spilling over remains a serious foreign policy and national security concern of the United States.

Most alarmingly, to fund their criminal enterprises, the cartels have moved outside of their traditional drug trafficking activities into other criminal actions. Children are now recruited by the cartels to carry out crimes, and an estimated 1,000 children have been victims of the violence over the past several years. Disturbingly, there are also a growing number of instances in which the cartels have forced women into prostitution. Some of the women have endured multiple rapes and others have been killed.

Along with drug and human trafficking, the drug cartels in Mexico are increasingly moving into the crimes of abduction and ransom of wealthy individuals. Recent estimates indicate that since 2007, kidnappings in Mexico have risen by 188% and extortion has grown by 101%. The appalling rise of abductions and extortion has even led to the rise of a new industry where private firms are hired to resolve unsolved abductions and kidnappings. These firms currently receive more cases involving abductions and kidnappings in Mexico than any other foreign country.


138. Anne-Marie O’Connor, Mexican Drug Cartels Targeting and Killing Children, WASH. POST (Apr. 9, 2011), http://articles.washingtonpost.com/2011-04-09/world/35262019_1_drug-violence-mexican-drug-cartels-ciudad-juarez (noting that between 2006 and 2010, nearly 1,000 children were killed in drug-related violence and adding that such estimates are probably low due to the media’s fear of reporting on such issues).


140. Id.

141. BIEFFTEL, supra note 89, at 20.

142. See Nick Miroff, As Kidnappings for Ransom Surge in Mexico, Victims’ Families and Employers Turn to Private U.S. Firms Instead of Law Enforcement, WASH. POST (Feb. 26, 2011), http://www.washingtonpost.com/wpdyn/content/article/2011/02/26/AR2011022603384.html (discussing the evolving role of private U.S. firms hired to help with ransom and abduction cases).

143. Id.
In the wake of escalating cartel violence the past several years, both the governments of Mexico and the United States have taken firm steps of cooperation to curtail the power and influence of the cartels.

IV. The Response of Mexico and the United States to Criminal Gangs and Drug Cartels

A. Felipe Calderón and the Mexican War on Drugs

Following his election in 2006, Mexican President Felipe Calderón launched an aggressive war on organized crime and the drug cartels. A key component of President Calderón’s strategy against the cartels, he deployed approximately 50,000 military and federal police officers throughout the country to combat drug trafficking organizations. Similar to the “kingpin” strategy employed against the Colombian cartels in the 1990s, President Calderón has employed the same strategy in aggressively pursuing the top leaders of the cartels. To date, approximately twenty-two of the top thirty-seven Mexican cartel leaders have been either killed or captured by the Mexican military and police.

In addition to the “kingpin” strategy, the Calderón administration has also made fighting endemic corruption a priority. For years, mordidas (bribes) have been a part of conducting business for some in the country. This can be seen in the de facto “accommodation,” which occurred between the drug cartels and the government of Mexico during the years of PRI-dominated governance. But, even after the end of PRI governance, corruption has continued within elements of the judiciary, police, and government. Today, an estimated $100 million dollars is distributed each month by criminal entities to state and local cops. In response to such corruption, the Calderón administration purged more than 3,000 federal police officers from the police ranks in August 2010 and arrested and charged four former military officers (three former generals) with aiding and abetting drug trafficking organizations in May 2012.

145. Beittel, supra note 89, at 33.
146. Id. at 1 (“In March 2012, the head of the U.S. Northern Command, General Charles Jacoby, testified to the Senate Armed Services Committee that Mexico had at that time succeeded in capturing or killing 22 out of 37 of the Mexican government’s most wanted drug traffickers.”).
149. Beittel, supra note 89, at 34.
150. Id.
Calderón’s administration has not only sought to fight the drug cartels directly but to also address some of the underlying causes of instability in Mexico. The administration pursued a plan entitled “Todos Somos Juárez,” which sought to decrease unemployment and bolster the education system to better combat the cartels.\footnote{Id.}

Despite the successes in capturing or killing top leaders, and the advances in fighting corruption, cartel violence still engulfs Mexico. Approximately 47,000 Mexicans have lost their lives in the violence since 2006.\footnote{See id. (discussing prospects for the drug war under the leadership of Mexican President Nieto).} With the election of Enrique Peña Nieto to the Mexican Presidency in July 2012, it is unclear where the new administration will chart the course of the current drug war.\footnote{See id. (outlining some of the key features of the Merida Initiative).} But, it is clear that the United States will be closely following all developments, as border security and spillover violence from the cartels remain serious concerns.

B. U.S. - Mexico Cooperation: The Merida Initiative

The United States has given strong support to the efforts of the Calderón administration in the war on the cartels through its cooperation with Mexico in the Merida Initiative.\footnote{For a comprehensive discussion of the Merida Initiative, see Steven E. Hendrix, The Mérida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence, 5 LOY. U. CHI. INT’L L. REV. 107 (2008).} Originally proposed by the Bush administration in 2007 and continued by the Obama administration, the initiative is a more than $1.6 billion effort to provide the Mexican government, military and police with training and equipment to curtail the influence of the cartels.\footnote{See Merida Initiative, U.S. DEP’T OF STATE, http://www.state.gov/j/inl/merida/ (last visited July 10, 2013) (highlighting the Merida Initiative’s programs and activities).} It currently revolves around “Four Pillars” of cooperation: (1) Disrupt Organized Criminal Groups; (2) Strengthen Institutions; (3) Build a 21st Century Border, and; (4) Build Strong and Resilient Communities.\footnote{Id.}

While the initiative provides equipment, such as Black Hawk Helicopters, to the Mexican military to be used in their counternarcotics operations, it also furnishes scanners, x-ray machines and other inspection equipment for the Mexican authorities to better detect drugs at checkpoints.\footnote{See id. (outlining some of the key features of the Merida Initiative).} Beyond military and equipment supplies, the program provides for training of officials in the Mexican justice system and strengthens social networks and com-
munity cohesion by promoting civil society. The State Department has been a strong supporter of the initiative.

As noted earlier, despite the joint efforts between the United States and Mexico, the drug cartels pose a growing threat to U.S. national security. Both the Obama administration and Congress have acknowledged this serious threat. On numerous occasions over the past several years, Congress has heard testimony concerning the violence in Mexico, U.S. foreign aid to Mexico, and border security issues. On July 25, 2011, President Barack Obama issued an Executive Order that declared that the transnational criminal organizations constitute “an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.” In addition, the State Department issued a “Travel Warning” for Mexico, and current rules prohibit U.S. government employees from driving from the U.S.-Mexico border to the interior of Mexico for personal reasons. The Warning highlights the threat of abductions and kidnappings, stating:

The number of kidnappings and disappearances throughout Mexico is of particular concern. Both local and expatriate communities have been victimized. In addition, local police have been implicated in some of these incidents. We strongly advise you to lower your profile and avoid displaying any evidence of wealth that might draw attention.

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158. See id. (outlining some of the key features of the Merida Initiative).
160. See Beitteil, supra note 89, at 6 (noting that Congress has held dozens of hearings on these topics in recent years).

are becoming increasingly sophisticated and dangerous to the United States; they are increasingly entrenched in the operations of foreign governments and the international financial system, thereby weakening democratic institutions, degrading the rule of law, and undermining economic markets. These organizations facilitate and aggravate violent civil conflicts and increasingly facilitate the activities of other dangerous persons. I therefore determine that significant transnational criminal organizations constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.

Id.

163. Id.
These actions signify the United States’ acknowledgment that the cartels in Mexico pose a significant threat to national security and that corruption in Mexico is a significant issue. But, despite these concerns, the IRS still moved forward with the rule change.


With the above considerations in mind, abductions and kidnappings for ransom have become increasingly significant problems in Mexico. The U.S. government itself acknowledges that a display of wealth would draw the attention of a would-be kidnapper. In the wake of the Mexican cartels’ use of abductions and ransom, it is certainly foreseeable that the cartels, if they obtain tax information from corrupt Mexican officials, could begin to target nonresident aliens with bank deposits within the United States. And, if a nonresident alien is targeted, abducted and tortured because of tax information released under the IRS’s reporting requirements, there are potential liability issues for U.S. officials, particularly the Commissioner of the IRS, who implemented the rule change.

A. Potential Liability under the Federal Tort Claims Act

Because the information concerning interest income received by nonresident aliens in U.S. banks will be shared with the Mexican government, it is possible that drug cartels could use bribes to or otherwise obtain this tax information to target wealthy Mexicans for abduction, ransom, and even torture. Would the Commissioner of the IRS, or any other federal official, incur any such aiding-and-abetting liability for torture? A possibility exists under the Federal Tort Claims Act and perhaps the Alien Tort Statute.

Enacted in 1946, the Federal Tort Claims Act (“FTCA”) codifies a more limited waiver of the sovereign immunity of the federal government and its agencies.164 The FTCA makes the United States liable under 28 U.S.C. § 1346(b)(1):

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private per-

son, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.\textsuperscript{165}

In addition, pursuant to the Westfall Act, the Attorney General of the United States is required to substitute the U.S. government in the place of government officials as a defendant\textsuperscript{166} upon certification “that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.”\textsuperscript{167}

Today, the FTCA remains the exclusive remedy for common law torts committed by federal employees working within the scope and course of his or her employment.\textsuperscript{168} But, could a plaintiff plead a claim of aiding-and-abetting liability for torture against the United States under the FTCA? Assume a court endorses the Restatement (Second) of Torts § 876 concerning civil aiding-and-abetting liability. It provides that:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.\textsuperscript{169}

Liability under subsection (a) would be difficult to prove, as it would be a stretch to claim that the Commissioner of the IRS acted pursuant “to a common design” with the drug cartels. Similarly, liability under (c) would fail as the promulgation of the rule change, separately considered from the tortious conduct of cartel members, would not constitute a breach of duty to a third person.

\textsuperscript{169} Restatement (second) of Torts § 876 (1979).
However, under (b), it may be possible to bring such a claim against the United States government. The IRS intends to share tax information on nonresident alien income deposits with the Mexican government, despite the fact that it knows elements of the Mexican government are corrupt and that individuals in Mexico are targeted on the basis of their wealth. In essence, information concerning corruption in the Mexican government, the targeting of individuals because of their wealth for abduction, ransom, and torture, and the violence wrought by the drug cartels can be imputed to the United States government by its own statements and conduct. In addition, the release of this confidential tax information by the IRS under the rule change arguably constitutes “substantial assistance” to the drug cartels, as the release of information is a conduit for the drug cartels to target Mexican individuals on the basis of their income and/or wealth for abduction, ransom, and quite possibly, torture.

Even though a claim against the United States for aiding-and-abetting torture might be stated under Restatement (Second) of Torts § 876(b), several applicable exceptions could bar the claims of a plaintiff who is abducted, placed for ransom, and tortured by the members of a drug cartel. Two major exceptions to the FTCA may operate to bar a claim: the “foreign country” exception and the “discretionary function” exception.

1. The “Foreign Country” Exception

The FTCA bars claims “arising in a foreign country.” Under a plain reading of this exception, if an abduction, kidnapping, ransom and torture occurred on Mexican soil, then the claims would be barred. However, what about the argument that an act essential to the completion of the torture occurs on U.S. soil (i.e., the moment when the U.S. government releases the confidential information on interest income)? Is the “foreign country” exception inapplicable when the aiding-and-abetting act of releasing the confidential bank information occurs within the United States?

This question was answered by the United States Supreme Court in the Sosa v. Alvarez-Machain case in 2004. In Sosa, a Mexican citizen sued the United States and the

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170. See Travel Warning: Mexico, supra note 162 (acknowledging that local police in Mexico have been implicated in a number of kidnappings and disappearances and suggesting that those traveling there “avoid displaying any evidence of wealth that might draw attention”).


172. See id. § 2680(a) (noting that the provisions of 28 U.S.C. § 1346(b) do not apply to the exercise, performance, or failure of a discretionary function by a federal agency or employee).

173. Id. § 2680(k); see also Richard Henry Seamon, U.S. Torture as a Tort, 37 Rutgers L.J. 715, 735-37 (2006) (discussing the foreign country exception to the FTCA).

174. See Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (“We therefore hold that the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or
United States Drug Enforcement Agency (DEA) for its role in assisting the Mexican authorities in abducting him and transporting him to the United States to face prosecution for his role in the torture and murder of a DEA agent on Mexican soil. The Supreme Court held that under the FTCA, the “foreign country” exception is applicable if the injury alleged occurred in a foreign country, irrespective of where the tortious act or omission may have taken place. Thus, under Sosa, any claims of torture occurring in Mexico or any other nation other than the United States would be barred by the foreign country exception.

However, what about a claim where torture occurs on United States soil? With the violence from the drug cartels now spilling over into the United States, it is not inconceivable that a situation could arise where because of the release of interest income on deposits under the IRS’s rule change, a wealthy nonresident alien could be targeted by members of a drug cartel while on a visit to the United States. If the drug cartel has operations just north of the U.S.-Mexico border, and torture occurs on United States soil, the foreign country exception would be inapplicable to bar torture claims against the United States.

Assuming a Plaintiff injured within the United States could file a civil aiding-and-abetting liability claim and overcome the foreign country exception, could the claim against the United States then proceed to trial? That Plaintiff could face an additional hurdle under the FTCA’s “discretionary function” exception.

2. The “Discretionary Function” Exception

The FTCA also bars claims arising from an official’s “discretionary function[s].” The FTCA is not applicable to:

175. Sosa, 542 U.S. at 697-98 (providing a factual history of the case); Seamon, supra note 173, at 735 (summarizing the relevant facts from Sosa v. Alvarez-Machain).

176. See Sosa, 542 U.S. at 712 (holding as much); Seamon, supra note 173, at 735 (“For purposes of the foreign country exception, the Court held, an action arises where the injury occurs, even if the tortious conduct occurred elsewhere.”).

177. See Serrano & Hennessy-Fiske, supra note 135 (suggesting that increased deaths in the Arizona desert could be a manifestation of drug-related violence spilling over the border).

178. The IRS’s rule change also exposes another frightening and perverse scenario. Given the amount of violence in Mexico, where members of drug cartels fight members of other drug cartels, a situation could arise where members of one cartel group torture a family member of a rival cartel group on U.S. soil after targeting that individual because of financial information obtained from this rule change. Such a lawsuit is not likely but hypothetically could arise because of the rule change.

179. 28 U.S.C. § 2680(a); see also Seamon, supra note 173, at 737 (discussing the discretionary function exception to the FTCA).
Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.\textsuperscript{180}

Professor Richard Henry Seamon has explained that the exception contains two parts – first, a “due care clause” and second, the “discretionary function clause.”\textsuperscript{181} The first clause, the “due care clause,” protects the government and its officials from suits based upon an employee’s exercise of “due care” in the execution of a statute or regulation.\textsuperscript{182} This first clause would be largely inapplicable to the scenario in question.

However, the “discretionary function” clause protects discretionary decisions that are “susceptible to [public] policy analysis, meaning decisions that, by their nature, call for the making of political, social, and economic judgments.”\textsuperscript{183} The United States Supreme Court discussed the applicability of the FTCA’s “discretionary function” exception in the \textit{Berkovitz v. Gaubert} case, noting:

When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.\textsuperscript{184}

The \textit{Gaubert} test presents a high hurdle for any claim by a nonresident alien tortured within the United States by members of a drug cartel. Empirical research has shown that from approximately 1991 to 2007, the U.S. government succeeded in dismissing approximately 76% of FTCA actions under the “discretionary function” exception in federal courts.
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when that exception was at issue. In essence, the Plaintiff has to make a showing to the court that “no conceivable policy consideration could have justified the allegedly tortious conduct” in order to withstand a motion to dismiss.

Thus, it is probable that the FTCA claims of any nonresident alien injured within the United States would be barred by the discretionary function clause. Despite the high hurdles an FTCA claim presents, a Plaintiff in the scenario discussed may not be out of remedies in a U.S. court—the Alien Tort Claims Act may provide an opportunity for relief.

B. Potential Liability Under the Alien Tort Claims Act (ATCA)

1. The Background of ATCA

The Alien Tort Claims Act (or “Alien Tort Statute”), the “Lohengrin” of the law, is one of the longest-lasting and most intriguing laws of the land. The Alien Tort Statute, 28 U.S.C. § 1350, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” In essence, under a textual reading of the statute there are three jurisdictional requirements: the case must involve (1) a civil action, (2) which involves an alien, and (3) a tort must be committed in violation of a treaty or the “law of nations.”

Prior to 1976, only several reported cases involved allegations under the Alien Tort Claims Act, which has been a part of U.S. law since 1789. Before that time, only two cases were reported in which jurisdiction was sustained. However, in 1980 the Second Circuit Court of Appeals gave renewed vigor to the ATCA with its decision in Filartiga v. Peña-

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185. See Stephen L. Nelson, The King’s Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act, 51 S. Tex. L. Rev. 259, 296 (2009) (providing that after Gaubert, the government dismissed approximately 76.30% of reported federal district court cases under the discretionary function exception by way of summary judgment).


187. See IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (“This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came.”).


In *Filartiga*, the Second Circuit held that official torture constituted a violation of the “law of nations” and was actionable under the ATCA.\(^{191}\)

The effects of *Filartiga* were far-reaching and enabled victims of human rights abuses to seek redress in tort in domestic courts.\(^{192}\) In more recent years, with a number of courts eliminating the requirement of “state action” for a breach of the “law of nations,”\(^{193}\) litigation now includes suits against multinational corporations based upon human rights violations.\(^{194}\)

One of the most commonly litigated questions involving the ATCA today is which norms constitute a violation of the “law of nations” and are actionable. In 2004, the Supreme Court of the United States gave guidance on this issue in *Sosa v. Alvarez-Machain*.\(^{195}\) In *Sosa*, the Supreme Court held that a claim based upon the “law of nations” must meet three requirements: (1) the violation must rest on a norm of an international character; (2) the norm must be “accepted by the civilized world;” and (3) the norm must be specifically defined.\(^{196}\)

Today, most norms of a “jus cogens”\(^{197}\) nature have been held as actionable under the ATCA following the prohibition against torture in the *Filartiga* decision. These norms include the prohibition against genocide,\(^{198}\) the prohibition against war crimes,\(^{199}\) the

\(^{190}\) See *Filartiga* v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (discussing ATCA, the basis of the appellants’ primary argument in support of federal jurisdiction).

\(^{191}\) See id. at 884 (“Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists[,] we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.”).

\(^{192}\) See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 589 (2002) (“The *Filartiga* decision paved the way for international human rights litigation in U.S. courts. Since the decision, numerous lawsuits have been brought in the United States challenging human rights abuses around the world, ranging from political oppression in Ethiopia, to genocide and war crimes in Bosnia, to violence by the Guatemalan military.”).

\(^{193}\) See id. (crediting the expansion of litigation to a Second Circuit decision, which held that a violation of the law of nations may occur without state action).

\(^{194}\) Id.

\(^{195}\) See *Sosa* v. Alvarez-Machain, 542 U.S. 692, 724-28 (2004) (providing reasoning behind the Court’s requirements for claims to successfully be based upon the law of nations).

\(^{196}\) Id. at 725 (setting forth requirements for claims based on the law of nations): Chad G. Marzen, *The Furundzija Judgment and Its Continued Vitality in International Law*, 43 CREIGHTON L. REV. 505, 522 (2010) (noting the three requirements for claims based on the law of nations).

\(^{197}\) Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331 (2009) (“In international law, the term ‘jus cogens’ (literally, ‘compelling law’) refers to norms that command peremptory authority, superseding conflicting treaties and custom.”).

\(^{198}\) See Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995) (“The applicability of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act of 1987 . . . which criminalizes acts of genocide without regard to whether the offender is acting under color of law . . . if the crime is committed within the United States or by a U.S. national.”) (citations omitted).
prohibition against crimes against humanity,\textsuperscript{200} the prohibition against racial
discrimination,\textsuperscript{201} the prohibition against the use of child labor,\textsuperscript{202} and most recently, even
allegations concerning terrorism.\textsuperscript{203}

In the past decade, several landmark cases have expanded the reach of the statute to
private liability, particularly cases against multinational corporations. The Ninth Circuit
Court of Appeals was first to endorse private liability in \textit{Doe I v. Unocal}.\textsuperscript{204} In \textit{Doe I v. Unocal}, a case involving allegations of Unocal working in concert with the Burmese
government to subject villagers to forced labor, murder, rape and torture during the
construction of a gas pipeline in the Tenasserim region,\textsuperscript{205} the Ninth Circuit held that
pleading a theory of aiding-and-abetting liability was permissible under the statute.\textsuperscript{206} The
following year, the United States District Court for the Southern District of New York
followed suit, endorsing the pleading of aiding-and-abetting liability in the \textit{Presbyterian
Church of Sudan v. Talisman Energy} case.\textsuperscript{207} Quite significantly, the Second Circuit Court of
in 2009.\textsuperscript{208} The \textit{Khulumani} court held that aiding and abetting a violation of a norm of the
“law of nations” is actionable if the defendant “(1) provides practical assistance to the
principal which has a substantial effect on the perpetration of the crime, and (2) does so with

\begin{itemize}
\item \textsuperscript{199} See \textit{id.} at 243 (“The liability of private individuals for committing war crimes has been recognized since World
War I and was confirmed at Nuremburg after World War II . . . and remains today an important aspect of international
law.”) (citations omitted).
\item \textsuperscript{200} See \textit{Sarei v. Rio Tinto}, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007) (“Plaintiffs here have alleged several claims
asserting jus cogens violations that form the least controversial core of modern day ATCA jurisdiction, including
allegations of war crimes, crimes against humanity and racial discrimination.”).
\item \textsuperscript{201} See \textit{id.} at 1209 (“Acts of racial discrimination are violations of jus cogens norms.”).
\item \textsuperscript{202} See \textit{Roe I v. Bridgestone}, 492 F. Supp. 2d 988, 1022 (S.D. Ind. 2007) (“In light of ILO Convention 182, the
court believes that the allegations of child labor in Count Two meet the \textit{Sosa} standard for ATS claims. It would not
require ‘judicial creativity’ to find that even paid labor of very young children in these heavy and hazardous jobs would
violate international norms.”).
\item \textsuperscript{203} See \textit{Almog v. Arab Bank}, PLC, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007) (“In sum, in light of the universal
condemnation of organized and systematic suicide bombings and other murderous acts intended to intimidate or coerce
a civilian population, this court finds that such conduct violates an established norm of international law.”). \textit{But see}\textit{Tel-
Oren v. Libyan Arab Republic}, 726 F.2d 774, 795 (D.C. Cir. 1984) (“While this nation unequivocally condemns all
terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy
of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual
responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked
strong alliances among numerous states. Given this division, I do not believe that under current law terrorist attacks
amount to law of nations violations.”).
\item \textsuperscript{204} See \textit{Doe I v. Unocal Corp.}, 395 F.3d 932, 945-46 (9th Cir. 2002) (discussing ATCA liability in cases against
private parties).
\item \textsuperscript{205} \textit{id.} at 939.
\item \textsuperscript{206} \textit{id.} at 953.
\item \textsuperscript{207} \textit{Presbyterian Church of Sudan v. Talisman Energy, Inc.}, 244 F. Supp. 2d 289, 320-21 (S.D.N.Y. 2003) (finding
that aiding and abetting are actionable under the ATCA).
\item \textsuperscript{208} \textit{See Khulumani v. Barclay Nat’l Bank, Ltd.}, 504 F.3d 254, 260 (2d Cir. 2007) (“We hold that in this Circuit, a
plaintiff may plead a theory of aiding and abetting liability under the ATCA.”).
\end{itemize}
the purpose of facilitating the commission of that crime.”209 With the extended reach of the
ATCA to private actors through aiding-and-abetting liability, scholars have comprehensively
discussed the potential reach of the statute to directly address areas as diverse as labor
rights,210 environmental human rights,211 and even the liability of private military contractors
that have assisted the United States military in the conflicts in Iraq and Afghanistan.212

While a significant development, the imposition of civil aiding-and-abetting liability
has left ATCA jurisprudence fractured and murky.213 A circuit split has developed on the
question of whether or not corporations can be held liable under the statute. Caselaw in the
Ninth Circuit reasons that since private actors can be held liable under international law, this
liability extends to corporations as well.214 Similarly, in Romero v. Drummond Company,

209. Id. at 277.
210. See Pagnattaro, supra note 11, at 262 (“There is certain to be opposition to U.S. courts adjudicating ATCA
claims brought by workers who were employed or subject to forced labor outside the United States. Yet, to the extent
that companies under the jurisdiction of U.S. courts treat their international workers with impunity or are knowingly
complicit in acts that violate international law, they should be held accountable.”).
211. See Dhooge I, supra note 11, at 442-47 (examining the right to a healthy environment as set forth in various
international instruments and its potential as a subject of ATCA litigation); James Boeving, Half Full . . . Or Completely
(providing conclusions about the prospects for environmental plaintiffs in light of the Sosa decision); Hari M. Osofsky,
Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational
environmental human rights law have evolved to a point at which suits by indigenous environmental plaintiffs against
multinational corporations appropriately can be brought in U.S. district courts.”).
212. There is a vast new literature concerning the responsibility and liability of private military and security
contractors under the Alien Tort Claims Act. This scholarship includes: Simon Chesterman, Lawyers, Guns, and Money:
The Governance of Business Activities in Conflict Zones, 11 CHI. J. INT’L L. 321 (2011); Efrain Staino, Comment. Suing
Private Military Contractors for Torture: How to Use the Alien Tort Statute Without Granting Sovereign-Immunity
Related Defenses, 50 SANTA CLARA L. REV. 1277 (2010); Jenny S. Lam, Comment, Accountability for Private Military
Contractors Under the Alien Tort Statute, 97 CALIF. L. REV. 1459 (2009); Matthew C. Dahl, Soldiers of Fortune –
Holding Private Security Contractors Accountable: The Alien Tort Claims Act and Its Potential Application to Abtan, et
al. v. Blackwater Lodge and Training Center, Inc., et. al., 37 DENV. J. INT’L L. & POL’Y 119 (2008); Thomas B. Harvey,
Comment, Wrapping Themselves in the American Flag: The Alien Tort Statute, Private Military Contractors, and U.S.
106 COLUM. L. REV. 830 (2006); Laura A. Dickinson, Filartiga’s Legacy in an Era of Military Privatization, 37 RUTGERS
L.J. 703 (2006); Atif Rehman, Note, The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture
Through the Alien Tort Claims Act, 16 IND. INT’L & COMP. L. REV. 493 (2006); Scott J. Borrowman, Comment, Sosa v.
Alvarez-Machain and Abu Ghraib – Civil Remedies for Violations of Extraterritorial Torts by U.S. Military Personnel
and Civilian Contractors, 2005 BYU L. REV. 371 (2005); Mark W. Bina, Comment, Private Military Contractor Liability
213. See Dhooge II, supra note 11, at 294 (“[T]he Second Circuit [in Khulumani] provided minimal guidance to
potential plaintiffs, transnational corporations, and lower courts and largely disregarded the consequences of its
holdings. The corporate liability imposed in Khulumani was undoubtedly beyond the expectations of the corporate
defendants at the time the transactions in question occurred.”).
(“Defendants’ final argument is that international law does not extend to corporations, and that corporations therefore
cannot be held liable under the ATS. The Court disagrees. The divining line for international law has traditionally fallen
between states and private actors. Once this line has crossed and an international norm has become sufficiently
Inc., the Eleventh Circuit held corporations could be held liable under the ATCA.\textsuperscript{215} In the 2010 case of \textit{Kiobel v. Royal Dutch Petroleum Co.}, the Second Circuit came to the opposite conclusion and the stage was set for the U.S. Supreme Court to issue a decision on corporate liability in 2013.\textsuperscript{216}

The United States Supreme Court issued its much anticipated decision in \textit{Kiobel} in April 2013. In \textit{Kiobel}, a group of Nigerian nationals filed a class action suit against certain Nigerian, Dutch, and British corporations under the ATCA, alleging that the corporations aided-and-abetted the Nigerian government in the commission of the following in association with oil exploration activities in Nigeria: “(1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the right to life, liberty, security, and association; (6) forced exile; and (7) property destruction.”\textsuperscript{217}

In a unanimous decision, the Supreme Court held that the petitioners lacked jurisdiction.\textsuperscript{218} Analyzing the text and history of the statute,\textsuperscript{219} the Supreme Court noted that there is a general presumption against the extraterritorial reach of the ATCA.\textsuperscript{220} While the \textit{Kiobel} decision further limits the contours of corporate liability under the ATCA,\textsuperscript{221} the Supreme Court did leave open the possibility that corporate liability could be found under the ATCA where the presumption against extraterritorial application is overturned:

-On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corpor-
rations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.  

Thus, *Kiobel* does not definitively close claims based upon corporate liability under the statute. In addition, *Kiobel* does not completely shut the door on claims based on activity occurring outside of the United States. Such an outcome would bar any liability for the vast majority of claims based upon violations of *jus cogens* norms by any foreign criminal gangs. As the fate of actionable violations outside the territorial sovereignty of the United States still has not been completely resolved by the United States Supreme Court, the ATCA may be a possible source of relief for a nonresident alien seriously harmed by the IRS’s rule change.

2. Potential Liability Under ATCA

Despite significant hurdles with a potential claim under the FTCA, a potential plaintiff tortured by members of a drug cartel because of the release of sensitive bank account information might be able to state a cause of action under the Alien Tort Claims Act (ATCA) in the federal district courts. There are two distinct possible claims that potentially might be pursued. First, there is a claim against the actual torturers themselves, which would be more likely to proceed to the merits. First, there is a claim against the actual torturers themselves, which would be more likely to proceed to the merits. In addition, the Plaintiff may pursue a claim against the federal governmental officials who promulgated the IRS’s rule change, but such claim at present would face an uphill battle.

a. Claims Against Members of Drug Cartels Who Commit Acts of Torture

A victim in the current scenario could possibly assert a civil tort claim against the actual individual(s) who commit the torture. All of the jurisdictional requirements under the ATCA would be met if torture occurred: the claim involves a civil action, the Plaintiff is a nonresident alien, and the commission of torture involves an act violating the “law of nations.” It is important to note that the commission and/or the aiding-and-abetting of torture would be the only actionable tort since the prohibition against kidnapping and abduction does not rise to the level of an international norm under the “law of nations.”

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222. *Kiobel*, 133 S. Ct. at 1669 (citations omitted).
224. See Filartiga v. Peña-Irala, 630 F.2d 876, 884 (2d. Cir. 1980) (“We conclude that official torture is now prohibited by the law of nations.”).
225. See Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (“It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”).
Early landmark cases under the ATCA involved this very situation—a foreign national suing another foreign national in federal district court based upon a violation of the prohibition against torture or another \textit{jus cogens} norm of international law. In the \textit{Filartiga} case, a Paraguayan doctor and opponent of the dictatorial regime of President Alfredo Stroessner brought a successful ATCA claim for the torture and murder of his son by the Inspector-General of the Police of Asuncion, Paraguay.\footnote{Filartiga, 630 F.2d at 878.} Similarly, in \textit{Kadic v. Karadzic}, a group of Bosnian-Serb plaintiffs brought forth claims of torture, rape, war crimes and crimes against humanity against Radovan Karadzic, the former self-proclaimed President of the Republic of “Srpska,” who in fact exercised a significant degree of de facto control over large parts of Bosnia-Herzegovina.\footnote{Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995).}

Despite the Plaintiff having recourse by way of a civil claim under the ATCA for torture or other violation of a \textit{jus cogens} norm against the responsible members of a drug cartel, significant barriers remain with service of process and personal jurisdiction. In almost all cases involving the ATCA, the defendants were personally served with service of process while physically present within the United States.\footnote{See Pamela J. Stephens, \textit{Beyond Torture: Enforcing International Human Rights in Federal Courts}, 51 SYRACUSE L. REV. 941, 963 (2001) (“[O]ther factors which limit the number of [ATCA] suits ... from being brought in U.S. courts are the requirements of valid service of process and good personal jurisdiction.”).} Service of process remains a hurdle given the insidious nature of the operations of drug cartels. However, it is much more likely that a cartel member who participated in committing torture could be served following a police arrest. Also difficult is any potential claim against the Commissioner of the IRS or any other federal governmental officials responsible for promulgating the IRS’s rule change.

\textbf{b. Claims Against Federal Governmental Officials}

Potential claims against the Commissioner of the IRS or other federal governmental officials for aiding-and-abetting acts of torture committed by members of drug cartels because of the rule change are an uphill climb for a plaintiff.

The first major question is whether a court would allow a claim for civil aiding-and-abetting liability for torture to proceed. As mentioned earlier, the courts in \textit{Doe I v. Unocal},\footnote{Doe I v. Unocal Corp., 395 F.3d 932, 953 (9th Cir. 2002).} \textit{Presbyterian Church of Sudan},\footnote{Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 324 (S.D.N.Y. 2003).} and \textit{Khulumani}\footnote{Khulumani v. Barclay Nat’l Bank, Ltd., 504 F.3d 254, 277 (2d Cir. 2007).} have all held that a claim of aiding-and-abetting liability is actionable under ATCA. Assuming this hurdle is overcome, the Westfall Act and sovereign immunity issues once again arise as a formidable roadblock to claims against governmental officials.

\footnote{Filartiga, 630 F.2d at 878.} \footnote{Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995).} \footnote{See Pamela J. Stephens, \textit{Beyond Torture: Enforcing International Human Rights in Federal Courts}, 51 SYRACUSE L. REV. 941, 963 (2001) (“[O]ther factors which limit the number of [ATCA] suits ... from being brought in U.S. courts are the requirements of valid service of process and good personal jurisdiction.”).} \footnote{Doe I v. Unocal Corp., 395 F.3d 932, 953 (9th Cir. 2002).} \footnote{Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 324 (S.D.N.Y. 2003).} \footnote{Khulumani v. Barclay Nat’l Bank, Ltd., 504 F.3d 254, 277 (2d Cir. 2007).}
Under the Westfall Act, federal governmental officials are entitled to absolute immunity if working within the scope and course of their employment when they commit a tort, and the FTCA provides an exclusive remedy. However, under the Westfall Act, immunity is conferred upon a federal governmental official only for a “negligent or wrongful act or omission.”

The question becomes whether a “wrongful” act or omission pursuant to the Westfall Act would encompass civil aiding-and-abetting liability for torture. Lawsuits filed by former Afghan and Iraqi detainees detained during the wars in Afghanistan and Iraq against former Secretary of Defense Donald Rumsfeld and other high-ranking U.S. military officials provide some insight. For instance, in *Ali v. Rumsfeld*, several former Afghan and Iraqi detainees filed claims under the Alien Tort Statute and several other legal theories alleging damages and declaratory relief as a result of alleged torture formulated and implemented by the defendants while in United States custody.

The Court of Appeals for the District of Columbia Circuit held that all of the defendants worked within the scope of their employment and that the Westfall Act does not provide an exception for “egregious torts that violate *jus cogens* norms,” such as torture. Furthermore, the Court of Appeals held that the ATCA is strictly a “jurisdictional statute” and does not confer any new rights or obligations that would trigger the applicability of the Westfall Act’s exception, which does not confer immunity in cases where a suit is “brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.”

Applying this to the present scenario, barring a holding that interprets “wrongful” under the Westfall Act not to encompass torts that violate *jus cogens* norms, any suit against the Commissioner of the IRS or other federal government officials based on an ATCA theory is likely to be governed by the FTCA. Professor Seamon notes that “the FTCA generally provides the exclusive remedy for official misconduct even when it provides no remedy at all” in cases involving torture because of application of the FTCA’s “foreign country” and “discretionary function” exceptions. In essence, these two statutes currently work together to bar most torture claims against U.S. governmental officials.

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233. Id. § 2679(b)(1).
234. Id.
236. Id. at 774-75.
237. *See id.* at 776 (“[T]he Supreme Court has clarified that ‘the ATS is a jurisdictional statute creating no new causes of action.”).
Even though there are significant roadblocks for a plaintiff to prevail under an FTCA or ATCA claim, the IRS's rule change is likely to produce more federal tort claims that challenge current case law and place further pressure on already endangered and precious judicial resources. Significantly, the IRS's new regulations also weaken and harm U.S. economic and foreign policy, and the clear risks presented by the rule change outweigh any benefits that might accrue.

VI. THE IRS REPORTING PROGRAM EFFECTS UPON U.S. ECONOMIC AND FOREIGN POLICY

Outside of the IRS, no one in Congress appears to have thought about the policy exempting the payment of taxes on earned interest held by nonresident aliens at U.S. banks from 1976 until 2001. It seems as if the IRS believed it could quietly adopt a rule that had broad ramifications under the guise that the reporting required by these regulations became “essential to the U.S. government’s efforts to combat offshore tax evasion.”

The IRS’s decision to adopt these regulations maintains the potential to wreak havoc upon an economy in recovery and hinders and harms U.S. foreign policy interests. The sharing of information concerning interest income on deposits of nonresident aliens with the Mexican government is very dangerous considering that corrupt officials within the Mexican government could leak this information to members of drug cartels. The policy, despite repeated governmental acknowledgment of the threats of the Mexican drug cartels, also hinders and runs contrary to U.S. obligations under the Convention Against Torture. Furthermore, in the wake of an aggressive joint effort to fight the drug cartels by the Mexican and United States governments, the policy weakens the United States’ national security strategy and fight against terrorism.

A. The IRS Reporting Program Weakens Longstanding U.S. Economic and Tax Policies

Given the gravity of the policy decision, the determination by the IRS to require the reporting of this bank interest appears to use the need to exchange tax information with foreign governments as a tool that undermines this longstanding approach by Congress on two fronts. First, it shows a complete disregard for the policy espoused by Congress over the


past ninety years to attract capital to the U.S. that could provide additional sources of private investment and stimulate the economy. Support for this policy appears to transcend time because a change in course like the one charted by the IRS can and will cause severe economic harm.

As explained by Senators Stone and Brock in the 1976 debate on the Senate floor, many of the financial institutions in gateway cities count as much as one-third of their deposit base from nonresident aliens and suffering a loss of that proportion would not be survivable. More recently, the Florida congressional delegation sent a letter to President Obama explaining that:

According to the Commerce Department, foreigners have $10.6 trillion passively invested in the American economy, including nearly $3.6 trillion reported by U.S. banks and securities brokers.” In addition, a 2004 study from the Mercatus Center at George Mason University estimated that “a scaled-back version of the rule would drive $88 billion from American financial institutions,” and this version of the regulation will be far more damaging.

Second, it opens the door to remove the exemption for the withholding tax in order to generate a new revenue stream for the government. While it may not seem like a large step, the collection of data on the interest earned by nonresident alien bank accounts held in the United States makes subsequent removal of the exemption easier. The IRS could effortlessly persuade a cash-strapped Congress to remove the exemption by dangling a sizable amount of projected revenue in front of it, basing its estimates on an analysis of the reported data. Aside from the financial impact, the existing infrastructure maintained by the financial institutions and the IRS would make the implementation easy, with very little cost to the public.

Accordingly, the IRS may gain information and revenue by pursuing its policy to require U.S. financial institutions to report the earned interest on accounts held by nonresident aliens, but the steep costs associated with losing the investment funds will undoubtedly cause more economic harm than good.

243. See supra Part I.
244. See, e.g., Letter from the Florida Congressional Delegation to President Barack Obama, supra note 6.
245. Id.
247. See Letter from the Florida Congressional Delegation to President Barack Obama, supra note 6.
B. The IRS Reporting Program Weakens the U.S. Commitment Against Torture and Commitment to International Law

This policy will not only cause economic harm—it also significantly weakens the United States’ commitment against torture and the Obama administration’s fight against terrorism. Entered into force in 1987, the United Nations Convention Against Torture codifies the prohibition against torture as a *jus cogens* norm of international law, irrespective of exigencies. The Convention defines “torture” in Article 1, Paragraph 1 as:

\[
\text{[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.}
\]

Pursuant to Article 1, Paragraph 1, actions inflicted upon an individual that cause severe mental or physical suffering constitute torture. The definition also requires that the act of torture must be committed either by a public official or a private individual acting with the instigation, consent, or acquiescence of a public official.

Further, the Convention Against Torture requires foreign states that are parties to the Convention in Article 2, Paragraph 1 to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Finally, Article 4 requires parties to the Convention to “ensure that all acts of torture are offences under its criminal law” and that the same applies “to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”


251. *Id. at 2.*


253. *Id.* art. 4, ¶ 1.
The obligations imposed by these articles are internationally binding on the United States as a signatory and ratifying party to the Convention. Despite the fact that the Convention’s provisions are non-self-executing for juridical effect as part of domestic law, political leaders in the United States remain rhetorically committed to condemning torture. On June 26, 2009, President Barack Obama gave the following statement concerning torture:

Torture violates United States and international law as well as human dignity. Torture is contrary to the founding documents of our country, and the fundamental values of our people. It diminishes the security of those who carry it out, and surrenders the moral authority that must form the basis for just leadership. That is why the United States must never engage in torture, and must stand against torture wherever it takes place.

Despite this rhetorical commitment of the United States government against torture, the IRS’s new regulations will likely lead to the occurrence of more acts of torture, which runs afoul of international treaty obligations imposed by Article 1, Paragraph 1 of the Convention Against Torture. In that article, torture is prohibited in all circumstances in cases where a public official “acquiesces” to the acts of torture. With the IRS’s rule change, it is foreseeable that drug cartels will obtain tax information released and shared with the Mexican government, and that wealthy individuals may be targeted, abducted, and quite possibly tortured because of their wealthy status. In this case, the IRS has arguably done more than actually “acquiesce” in torture for purposes of Article 1, Paragraph 1. In essence the release of the information is an actual facilitator, not merely an acquiescent act, for any torture that occurs.

Guidance on the domestic interpretation of “acquiescence” can be found in the field of immigration law. The U.S. government understands “acquiescence” in the context of torture to mean that a public official must, “prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to

254. See Linnartz, supra note 248, at 1495 (explaining the implementation of the Convention Against Torture in the United States).

255. See id. (“The Senate’s reservations and understandings for the Convention Against Torture included a provision stating that ‘the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing,’ meaning that the obligations imposed by those articles had to be legislatively modified to have the force of law.”) (citations omitted).


257. See Convention Against Torture, supra note 249, art. 1, ¶ 1 (providing a definition of “torture” for the purposes of the Convention).
prevent such activity.” 258 In the area of immigration law, there are regulations that bar the removal of aliens to foreign countries where it is more likely than not that the individuals would face torture. 259 In Zheng v. Ashcroft, the Ninth Circuit Court of Appeals held that for a plaintiff to obtain immigration relief from removal pursuant to the Convention Against Torture, the plaintiff must prove that acts of torture by a third party were carried out while foreign government officials had “awareness” of such acts, a concept that includes both “actual knowledge” and “willful blindness.” 260

In the case of the IRS’s new regulations, Mexican authorities are arguably “aware” of the acts of torture being committed by members of the drug cartels. Certainly, there is “actual knowledge” present, as the Mexican government has acknowledged there is a war against the drug cartels. In addition, there is also a “willful blindness” on the part of many authorities, despite the Calderón administration’s aggressive efforts. Some authorities in Mexico are not “willfully blind” to torture and the crimes committed by the cartels. But, corruption remains a critical concern in Mexico, which is all-too evident by the Calderón administration’s purge of the police force. 261 And, some political scientists even argue that Mexico has fallen into the category of a “failed state,” 262 meaning that it is a nation that is “tense, deeply conflicted, dangerous, and bitterly contested by warring factions.” 263

Despite these concerns, the IRS decided to move forward with a policy that will likely harm innocent Mexican civilians, expose the nature and extent of their wealth, and open the door for cartels to target them. Just as our country should not remove an individual to a foreign nation if it is more likely than not that the individual would be tortured there, so too should the IRS decline to release and share interest income received at U.S. banks with

258. See 8 C.F.R. § 1208.18(a)(7) (“Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”); GARCIA, supra note 250, at 6-7 (citing SEN. EXEC. REP. No. 101-30 (1990)) (emphasis in original).

259. GARCIA, supra note 250, at 7; see 8 C.F.R. §§ 1208.16(c) (explaining eligibility for withholding of removal under the Convention Against Torture), 1208.17(a) (explaining deferral of removal under the Convention Against Torture).

260. See Zheng v. Ashcroft, 332 F.3d 1186, 1195 (9th Cir. 2003) (“The Senate Committee on Foreign Relations expressly stated that the purpose of requiring awareness, and not knowledge, ‘is to make it clear that both actual knowledge and willful blindness’ fall within the definition of the term ‘acquiescence.’” S. EXEC. REP. 101-30, at 9.”).

261. See BIEITTEL, supra note 89, at 34 (discussing the impact of a corrupt police force on Calderón’s anti-drug efforts).

262. See generally GEORGE W. GRAYSON, MEXICO: NARCO-VIOLENCE & A FAILED STATE? 3-4 (2011) (presenting arguments from scholars who believe that Mexico is a “failed state”).

263. Robert I. Rotberg, Failed States, Collapsed States, Weak States: Causes and Indicators, in STATE FAILURE & STATE WEAKNESS IN A TIME OF TERROR 1, 5 (Robert I. Rotberg, ed., 2003). Rotberg explains, “Failed states are tense, deeply conflicted, dangerous, and contested bitterly by warring factions. In most failed states, government troops battle armed revolts led by one or more rivals. Occasionally, the official authorities in a failed state face two or more insurgencies, varieties of civil unrest, different degrees of communal discontent, and a plethora of dissent directed at the state and at groups within the state.” Id. (emphasis in original).
the authorities of nations where torture is more than likely to occur if the information is released and ends up in the wrong hands. With the adoption of the reporting regulations for interest earned by nonresident aliens in domestic banks, the U.S. government is pursuing a policy contrary to the letter and spirit of Article 1, Paragraph 1 of the Convention Against Torture, and the policy runs afoul of U.S. international legal obligations.

C. The IRS Reporting Program Weakens the Obama Administration’s Fight Against Terrorism

The IRS’s rule change weakens the United States’ national security strategy. One of the main tenets of the current national security strategy is to deny Al-Qa’ida and its affiliates safe haven in any foreign state264 and to disable their “financial, human and planning networks.”265 With regard to U.S. national security, much scholarship has focused on the legal implications of the global fight to dismantle Al-Qa’ida.266

A significant part of the Obama administration’s national security strategy also concerns the situation in Mexico. The current National Security Strategy of the United States notes that “[s]tability and security in Mexico are indispensable to building a strong economic partnership, fighting the illicit drug and arms trade, and promoting sound immigration policy.”267

The disabling of the financial, human and planning networks of the Mexican drug cartels is a necessary component of the fight against terrorism. In July 2011, the Obama administration released its Strategy to Combat Transnational Organized Crime, which is


265. Id. at 21.


267. NATIONAL SECURITY STRATEGY, supra note 264, at 42-43.
aimed at dismantling international criminal networks, including the drug cartels in Mexico.\textsuperscript{268} A key part of this strategy focuses directly on eliminating the drug cartels’ use of financial tools and instruments. The Strategy states:

The United States remains intent on improving the transparency of the international financial system, including an effort to expose vulnerabilities that could be exploited by terrorist and other illicit financial networks. At the same time, the United States will enhance and apply our financial tools and sanctions more effectively to close those vulnerabilities, disrupt and dismantle illicit financial networks, and apply pressure on the state entities that directly or indirectly support [transnational organized crime].\textsuperscript{269}

The contemporary fight against terrorism is not only fought with the enactment of executive and congressional policies but also in the courtrooms of the United States. U.S. courts, such as the Eastern District of New York in \textit{Almog v. Arab Bank},\textsuperscript{270} have affirmed the growing principle that corporate banks can incur civil liability for facilitating acts of terrorism.\textsuperscript{271} Just as a corporate entity like a bank was held to complicitly facilitate suicide bombings and other terrorist attacks,\textsuperscript{272} as noted previously, a federal governmental entity in this situation (the IRS) may be arguably complicit facilitating of abduction, ransom, and torture if these acts occur as a result of the release of nonresident interest income from a bank(s) in the United States and this information falls into improper hands.

This potential scenario, foreseeable under the adopted regulations, greatly weakens and undermines the national strategy of the United States to combat the cartels by disrupting their financial networks. If anything, the policy will likely result in the targeting of more wealthy individuals in Mexico and have no effect in deterring acts of terrorism—tragically, it could in fact facilitate those strongly condemned acts.


\textsuperscript{269.} Id. at 20.

\textsuperscript{270.} \textit{Almog v. Arab Bank}, PLC, 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007) ("Civil aiding and abetting liability, as well as conspiracy liability, is available under the ATA, and Arab Bank’s alleged conduct falls within the scope of such liability.").


\textsuperscript{272.} See \textit{Almog}, 471 F. Supp. 2d at 293 ("Arab Bank provided practical assistance to the organizations sponsoring the suicide bombings and helped them further their goal of encouraging bombers to serve as ‘martyrs.’").
VII. CONCLUSION

Four words—“change is not better”—aptly describe the IRS’s rule change requiring nonresident aliens to report income received on bank accounts. For decades, torturers and human rights abusers escaped accountability and prosecution for their crimes as they committed their atrocities in a world which did not yet have established international regimes and laws to prevent the most egregious offenses against human dignity.273 With developments in the twentieth century, including the implementation of international treaties, such as the Convention Against Torture, and judicial enhancement of domestic legislation, such as the Alien Tort Statute in the United States, torturers and human rights abusers can no longer hide from accountability in the shadows of darkness. Much progress toward the advancement of human rights in international and domestic legal contexts has been made. These developments have also been coupled with the rise of the United States throughout the past several decades as a preeminent economic stronghold in the world, as its innovation and investment policies have stimulated growth.

However, the IRS’s adopted regulations will hinder this progress. The IRS’s decision disregards decades of work and advocacy by Congress to attract foreign capital to the United States and provide sources of private investment that will help stimulate the economy. In today’s economy, this policy change has the potential to wreak havoc on a fragile recovery and lead to a steep loss of foreign bank deposits within the United States. The costs of today’s adopted regulations are too great and outweigh any of the purported benefits of additional revenue.

The reporting requirements may also lead to danger for nonresident aliens by criminal gangs and drug cartels, who could obtain financial information to be utilized in targeting individuals for kidnapping, extortion, ransom, and possibly torture. Far from assisting the war on criminal gangs and drug cartels, the policy will undermine it and likely subject the government of the United States to litigation in domestic courts. Moreover, the policy weakens the foreign policy of the United States against torture, deteriorates the United States’ general commitment in the fight against terrorism and drug cartels in the Mexican drug war, and generally weakens international law. For many economic, legal, and moral reasons, the IRS’s rule change is the wrong policy choice. Change is not better.