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EXECUTIVE ORDER 13303: IS THE BUSH ADMINISTRATION CHOOSING CORPORATIONS OVER HUMAN RIGHTS ACTIONS INSTITUTED VIA THE ALIEN TORT CLAIMS ACT?

*Rod Khavari**

I. INTRODUCTION

The United States, along with the combined efforts of the United Kingdom and several other nations, invaded Iraq on March 20, 2003.¹ On December 14, 2003, the United States achieved a military victory, successfully ousting the government of Saddam Hussein.² Although the U.S. and the U.K. claim to have acted in accordance with international law, many thought otherwise.³ Thus far, the U.S. armed forces' occupation has encountered increased resistance, while subsequently there is growing controversy over the continued presence in Iraq.⁴ Among the controversy is Executive Order 13303 (E.O. 13303), signed by

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1. The White House, President Bush Addresses the Nation (Mar. 19, 2003), <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html> (last visited Dec. 28, 2006).

2. The White House, President Bush Addresses Nation on the Capture of Saddam Hussein, <http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html> (last visited Dec. 20, 2006).

3. See Global Policy Forum, Iraq, <http://www.globalpolicy.org/security/issues/irqindx.htm> (last visited Dec. 28, 2006).

4. *Id.*

President Bush on May 22, 2003.⁵ In short, the order is designed to immunize U.S. corporations for any activity, including environmental damage and even human rights, undertaken while operating in Iraq.⁶ E.O. 13303 prevents lawsuits to be brought by U.S. citizens against these corporations, and also precludes foreign citizens from invoking the Alien Tort Claims Act.⁷

Black's Law Dictionary defines an Executive Order (E.O.) as "[a]n order issued by or on behalf of the President, usu. intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow."⁸ "Executive orders are official documents, numbered consecutively," which appear in the daily Federal Register as they are signed by the President and received by the Federal Register.⁹ Executive orders have been issued by various Presidents of the United States since the time of George Washington.¹⁰ Although no Constitutional provision or statute specifically grants the President this power,¹¹ Article II, section 1 of the United States Constitution provides, "[t]he executive Power shall be vested in a President of the United States of America."¹² Furthermore, Article II, section 3 states that the President "shall take Care that the Laws be faithfully executed . . ."¹³ The President issues executive orders as a means to help executive officers direct their operation.¹⁴ Although having no legal force, failure to comply with an order may result in dismissal from office.¹⁵ In some

5. EarthRights International, *Outrageous Bush Executive Order on Iraq Oil Must be Investigated* (July 28, 2003), http://www.earthrights.org/campaignfeature/bush_executive_order_13303_on_iraq_oil_must_be_investigated.html (last visited Dec. 28, 2006) (EarthRights International is a nonprofit, nongovernmental organization, combining the power of law and individuals to defend human rights and the environment).

6. *See* Exec. Order No. 13,303, 3 C.F.R. 227-29 (2004), *reprinted in* 50 U.S.C. § 1701, at 86-87 (2000).

7. Anthony J. Sebok and Claire R. Kelly, *Does a Presidential Iraq Executive Order Take Away Tort Victims' Right to Sue?* (Nov. 3, 2003), http://writ.news.findlaw.com/commentary/20031103_kelly.html (last visited Dec. 20, 2006).

8. BLACK'S LAW DICTIONARY 610 (8th ed. 2004).

9. Federal Register, *FAQ's About Executive Orders*, <http://www.archives.gov/federal-register/executive-orders/about.html> (last visited Nov. 22, 2006) (The Federal Register is the official daily compilation of federal regulations and legal notices of Federal agencies and organizations, as well as Executive Orders and other presidential proclamations).

10. Thisnation.com, *What is an Executive Order?*, <http://www.thisnation.com/question/040.html> (last visited Dec. 28, 2006).

11. *Id.*

12. U.S. CONST. art. II, § 1, cl. 1.

13. U.S. CONST. art. II, § 3.

14. *What is an Executive Order?*, *supra* note 10.

15. *Id.*

cases, when executive orders are made pursuant to certain Acts of Congress, they may have the force of law and thus provide the President with discretionary power.¹⁶

Historically, until the early 1900s, executive orders were mostly unannounced and extended only to the agencies they were directed towards.¹⁷ Additionally, a poor record keeping system and decay arising from the aged documents led to the State Department developing a numbering system.¹⁸ Until the early 1950s, Presidents had carte blanche to do what they pleased with regard to Executive Orders, as there were no rules or guidelines specifically outlining the Presidential powers concerning executive orders.¹⁹ This was changed by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*,²⁰ which determined that President Truman's order to place all steel mills in the country under federal control was an invalid exercise of the presidential power under the constitutional provisions granting executive power.²¹ The Supreme Court held the President had overstepped his boundaries in attempting to make law, rather than clarify a law already put forth by Congress or the Constitution.²² In a similar case, *Dames & Moore v. Regan*,²³ the Supreme Court established that "the Executive may settle its nationals' claims based upon its inherent powers and the implicit consent of Congress, by effectuating a 'change in law' so that an alternative forum can resolve these claims."²⁴ The decisions of Presidents Truman and Reagan have led subsequent presidents to exercise greater caution when citing laws relied upon to issue the executive orders.²⁵ However, the power to issue executive orders still remains under heavy criticism.²⁶ Critics argue that

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

21. Robert Higgs, *Truman's Attempt to Seize the Steel Industry*, THE FREEMAN, (Mar. 1, 2004), <http://www.fee.org/pdf/the-freeman/higgs0304.pdf> (last visited Nov. 24, 2005).

22. *See Youngstown Sheet & Tube Co.*, 343 U.S. 579.

23. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

24. Claire R. Kelly, *The War on Jurisdiction: Troubling Questions About Executive Order 13303*, 46 ARIZ. L. REV. 483, 494 (2004) (describing how Executive Orders may be utilized by the President in times of emergency).

25. *The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?: Hearing Before the Subcomm. on the Legislative and Budget Process of the H. Comm. on Rules*, 106th Cong. (1999) available at http://rules.house.gov/archives/rules_olso08.htm (last visited Dec. 22, 2006) (statement of William Olson, President, William Olson P.C.),

26. *See generally* CATO Institute, *Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power*, <http://www.cato.org/pubs/pas/pa-358es.html> (last visited Dec. 22, 2006).

Presidents use Executive Orders not to enforce law, but to create law, moving existing laws away from their original mandates.²⁷

The purpose of this comment is to provide an analysis of the Bush Administration's intentions by the passage of E.O. 13303 and whether it is an attempt to bar suits under the Alien Tort Claims Act (A.T.C.A.). Section II provides an in-depth analysis of E.O. 13303 and raises unsettling implications. Issues that will be examined in this section include whether E.O. 13303 attempts to grant total immunity to companies assisting in the Iraq reconstruction process and how it would be evaluated if challenged. Section III provides an introduction of the A.T.C.A. and its development since 1979 from law to the basis for victims of human rights abuses to sue. Section III also analyzes whether the Bush Administration is revoking the rights of victims of human rights abuses by the passage of E.O. 13303. Section IV briefly looks to legal precedents which provided a two-steps-analysis that courts derived when determining the validity of an executive order. Finally, Section V first provides an analysis of the most recent Supreme Court decision where the jurisdiction of the A.T.C.A. was at issue, and predicts the decision's effect on E.O. 13303.

II. EXECUTIVE ORDER 13303

The War on Terror taking place in Iraq has attracted a significant amount of attention, but one of the most controversial Executive Orders has almost been overlooked.²⁸ Its implications were originally unnoticed,²⁹ but E.O. 13303 "arguably challenges our notion of separation of powers, due process and access to the courts."³⁰ Specifically, President Bush passed E.O. 13303 on May 22, 2003 with the aim of "[p]rotecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has An Interest."³¹

The scope of protection provided by the E.O. is only "limited only by the imagination."³² This is expressed by its introductory statement of Section 1, which states that "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and

27. *Id.*

28. Kelly, *supra* note 24, at 484.

29. André Verlöy, *Oil Immunity?*, THE CENTER FOR PUBLIC INTEGRITY, Oct. 30, 2003, available at <http://www.publicintegrity.org/wow/report.aspx?aid=69> (last visited Dec. 20, 2006).

30. Kelly, *supra* note 24, at 483.

31. Exec. Order No. 13,303, 3 C.F.R. 227 (2004), *reprinted in* 50 U.S.C. § 1701, at 86 (2000).

32. Memorandum from Tom Devine, Government Accountability Project legal director, to Sustainable Energy and Economy Network (July 18, 2003), *available at* <http://www.seen.org/GAPEO.pdf> (last visited Dec. 28, 2006) [hereinafter Government Accountability Project].

void”³³ In terms of coverage, E.O. 13303 was written broadly to confer protection upon a wide range of profits or items of value, petroleum products, legal documents, financial interests, and contracts.³⁴ It seems as if E.O. 13303 was not issued as an attempt to “block transfers of property generally, but only the use of judicial process to transfer such property.”³⁵ Thus, the overall goal of E.O. 13303 appears to be an ultimate protection of Iraqi “property from lawsuits, thereby immunizing private companies.”³⁶ Furthermore, the Executive Order protects “the U.S. government from . . . liability for the acts of the U.S. military.”³⁷ Clearly, E.O. 13303 removes the ability to enforce international law and any civil or criminal liability with respect to protected activities for associations or corporations immune by the Executive Order.³⁸ Thus, E.O. 13303 raises troubling implications.³⁹

Executive Order 13303 has led to increased controversy over what has come as a result of its issuance and the purpose of our presence in Iraq.⁴⁰ First, in order for potential plaintiffs to attempt to establish liability against any corporation immunized under the E.O. 13303, they must “obtain[] permission in the form of a license” from the Department of Treasury.⁴¹ However, whether the government grants permission via this required license for plaintiffs attempting to establish liability is irrelevant;⁴² this attempt to immunize corporations otherwise liable not only lacks congressional consent, but also leaves plaintiffs without an alternative forum.⁴³ Thus far, history has yet to provide the authority or precedent for such actions.⁴⁴ Arguably, the failure to provide an alternative forum raises questions of whether a taking of this magnitude is constitutional,

33. 3 C.F.R. 228, *reprinted in* § 1701, at 86.

34. Kelly, *supra* note 24, at 492.

35. *Id.* at 489-90.

36. *Id.* at 490.

37. James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT’L ECON. L. 491, 548 (2004).

38. Government Accountability Project, *supra* note 32.

39. *See* Kelly, *supra* note 24, at 486.

40. *See id.* at 487.

41. *Id.*

42. *Id.*

43. *Compare* Dames & Moore v. Regan, 453 U.S. 654 (1981) (noting the establishment of the Iran-U.S. Claims Tribunal as an alternative forum for litigants with claims against the government of Iran) *with* Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (allowing for the settlement of claims against private companies and noting the establishment of an alternative forum for Holocaust claims).

44. Kelly, *supra* note 24, at 487.

whether federal jurisdiction has been withdrawn or modified, and whether this failure to provide a forum improperly immunizes companies.⁴⁵

A. *Analysis of the Order*

Executive Order 13303 can be read as immunizing *everything* associated with the sales and marketing of petroleum and petroleum products from Iraq.⁴⁶ Specifically, Section 1(b) protects “all Iraqi petroleum and petroleum products, and interests therein . . . of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein”⁴⁷ This “means all corporate activities with roots or any connection to Iraqi” petroleum or petroleum products are covered.⁴⁸ Such corporate activities include petroleum “extraction . . . transportation, manufactur[ing], customer service, corporate records and payment of taxes.”⁴⁹ Not only is petroleum protected, but is all downstream “commerce such as plastics in the petrochemical industry,” or any other development which includes the use of Iraqi oil.⁵⁰

With the passage of E.O. 13303, employees injured by corporations operating in violation of environmental or human rights laws will no longer have legal recourse.⁵¹ Furthermore, not only are employees of transnational corporations injured and left without legal redress, but so is any future Iraqi government;⁵² E.O. 13303 eliminates the ability of any future Iraqi government to sue immune U.S. oil companies operating in Iraq.⁵³ The passage of E.O. 13303 suggests that the Administration is concerned that lawsuits could negatively impact U.S. corporations, and because of this concern E.O. 13303 prohibits any future Iraqi government from suing U.S. oil companies for compensation and damages caused by U.S. corporation presence in Iraq.⁵⁴ By enacting the E.O., the President’s intentions seemed to be aimed at “immuniz[ing] the [Coalition Provisional Authority], private contractors, and other [parties] engaged in the occupation and reconstruction of Iraq from

45. *Id.*

46. Compare Kelly *supra* note 24 with Exec. Order No. 13,315, 3 C.F.R. 252-55 (2004), reprinted in 50 U.S.C. § 1701, at 88-90 (2000) (blocking all transfers of property of the former Iraqi regime).

47. Exec. Order No. 13,303, 3 C.F.R. 228 (2004), reprinted in 50 U.S.C. § 1701, at 86 (2000).

48. Government Accountability Project, *supra* note 32.

49. *Id.*

50. *Id.*

51. Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations For Extraterritorial Abuses*, 26 NW. J. INT'L L. & BUS. 43, 45 n.11 (2005).

52. See 3 C.F.R. 227-29, reprinted in § 1701, at 86-87.

53. See *id.*

54. See *id.*

lawsuits [initiated by a variety of torts] committed in Iraq for which liability would be imposed by U.S. or international law.”⁵⁵ The Administration has labeled the threat of lawsuits as so extreme that it declared a *national emergency* in order to address it.⁵⁶ E.O. 13303 expressly invokes an “unusual and extraordinary threat to the national security and foreign policy of the United States”⁵⁷

As mentioned earlier, E.O. 13303 went unnoticed outside the government until it was discovered in July 2003 by the Institute for Policy Studies.⁵⁸ The Institute for Policy Studies assists by providing long-term planning and responding to world events.⁵⁹ At this point, rumors were raised over whether the Bush Administration had provided full immunity to U.S. oil companies operating in Iraq “for the consequences of any of their actions in exploiting the oil.”⁶⁰ By the proposal of E.O. 13303, the Bush Administration appears to be automatically nullifying any claims of breach of contract, labor rights violations, and payment of taxes owed to Iraq.⁶¹ Many public interest organizations, such as the Institute for Policy Studies and Government Accountability Project, urged Congress to repeal the order as it overreaches the goals of U.N. Resolution 1483.⁶² According to Tom Devine, legal director of Government Accountability Project, E.O. 13303 constitutes a “blank check for corporate anarchy [as it] cancels the concept of corporate accountability and abandons the rule of law.”⁶³

1. The Development Fund of Iraq

The Development Fund of Iraq (“the Fund”) was initially administered by the Coalition Provisional Authority (“C.P.A.”).⁶⁴ The C.P.A. administrator then requested from the U.S. Federal Reserve Bank of New York to establish the

55. Gathii, *supra* note 37, at 542.

56. 3 C.F.R. 228, *reprinted in* § 1701, at 86.

57. *Id.*

58. Verlöy, *supra* note 29.

59. Institute for Policy Studies Overview, <http://www.ips-dc.org/overview.htm> (last visited Dec. 20, 2006).

60. Kenneth Davidson, *How Many Americans Will Die For Oil?*, THE AGE, Aug. 4, 2003, <http://www.theage.com.au/articles/2003/08/03/1059849273357.html> (last visited Dec. 20, 2006).

61. Sandra T. Vreedburgh, *The Saddam Oil Contracts and What Can Be Done*, 2 DEPAUL BUS. & COM. L.J. 559, 577 (2004).

62. Sustainable Energy & Economy Network, Groups Demand Repeal of Bush Immunity for U.S. Oil Companies in Iraq (July 23, 2003), <http://www.seen.org/BushEO.shtml> (last visited Dec. 20, 2005) (The Sustainable Energy & Economy Network works in partnership with citizen groups globally on human rights issues while placing focus on energy, economic issues, gender equity, and environmental justice).

63. Vreedburgh, *supra* note 61, at 577.

64. *See generally* Gathii, *supra* note 37.

“Central Bank of Iraq-Development Fund for Iraq.”⁶⁵ The C.P.A. was led by Paul Bremer, who established a Program Review Board, whose “duty was to be ‘responsible for recommending expenditures of resources from the Development Fund for Iraq.’” Representatives of multilateral institutions such as the World Bank and the International Monetary Fund could attend the board meetings as nonvoting members.⁶⁶ The Fund, which consists mainly of oil revenues, is expected to finance the reconstruction of Iraq.⁶⁷ Taking that into consideration along with E.O. 13303, the Fund is subject to “watertight protection from any claims whatsoever, insofar as they relate to claims on oil-related entities.”⁶⁸

Placing establishment and control of the Fund in hands of U.S. officials could prove to bear significant implications for the way Iraqi reconstruction contracts would be distributed among companies involved in the reconstruction process.⁶⁹ In fact, Robert Stein, a former official holding a senior position in the C.P.A., recently “admitted [in a Washington court] to stealing more than \$2m [from reconstruction funds] and taking bribes in return for contracts.”⁷⁰ Mr. Stein also received gifts and other benefits from his position.⁷¹ Reports show that as of June 2004, more than twenty billion dollars in income had been received into the Development Fund of Iraq—of which only eleven billion dollars have been spent, and the remainder is not fully accounted for.⁷² Due to this unaccountability of expenses, the Iraq Revenue Watch has been setup to account for the largely secretive and unaccountable expenditures.⁷³

65. The Coalition Provisional Authority, *The Development Fund for Iraq*, http://www.cpa-iraq.org/budget/DFI_intro1.html (last visited Dec. 20, 2006) (The C.P.A. is the transitional government that governed Iraq from April 2003 to June 2004. During its existence, the C.P.A. assisted in building the foundation for sovereignty which includes security, essential services, economy, and governance.).

66. L. ELAINE HALCHIN, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES CRS-22 — CRS-23 (June 6, 2005), available at <http://fpc.state.gov/documents/organization/48620.pdf> (last visited Dec. 20, 2006).

67. *Id.* at CRS-21.

68. V. Shridhar, *The Oil Order*, FRONTLINE, Aug. 2003, available at <http://www.flonnet.com/fl2017/stories/20030829001405300.htm> (last visited Dec. 20, 2006).

69. *Id.*

70. Adam Brookes, *US Official Admits Iraq Aid Theft*, BBC NEWS, Feb. 2, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/4675902.stm (last visited Dec. 20, 2006).

71. *Id.*

72. CNN.com, *Audit: U.S. Lost Track of \$9 Billion in Iraq Funds*, Jan. 31, 2005, available at <http://edition.cnn.com/2005/WORLD/meast/01/30/iraq.audit> (last visited Dec. 20, 2006).

73. See Iraq Revenue Watch: Monitoring Iraq Reconstruction Funds, Contracts, Oil, <http://www.iraqrevenuewatch.org/index.shtml> (last visited Dec. 20, 2006).

2. The Role of U.N. Resolution 1483

Just a few hours prior to the issuance of E.O. 13303, the United Nations Security Council adopted U.N. Resolution 1483, which would subsequently lift sanctions against Iraq, create a Development Fund for the country, and simultaneously provide a limited immunity through 2007 for the protection of oil-generated revenues.⁷⁴ The Development Fund for Iraq, housed in the Central Bank of Iraq, was created in an effort to administer proceeds from the export sales of Iraq's oil.⁷⁵ To help clear up the ambiguity, U.N. Resolution 1483 proposed protecting the initial purchase of Iraqi oil from any claims resulting in attachment until the end of 2007.⁷⁶ The plan was to direct profits from future sales of Iraqi petroleum into the Development Fund, which would later "be disbursed at the direction of the Authority, in consultation with the interim Iraqi administration."⁷⁷ On the same day the UN Resolution was adopted, President Bush issued E.O. 13303 in order to give this Resolution the force of U.S. law; however, E.O. 13303 has no sunset date.⁷⁸ This explains the need for Section 1(a) of the Order; however, it fails to explain the rationale behind Section 1(b), which is unnecessary if the Executive's sole purpose was to protect the Fund.⁷⁹ Key differences between U.N. Resolution 1483 and E.O. 13303 include: the scope of coverage, time limitations, and the level of protection from sale to sale.⁸⁰

III. THE A.T.C.A.: THE EVOLUTION FROM LAW TO LAWSUITS

The United States' enactment of the Alien Tort Claims Act as part of the Judiciary Act of 1789 (A.T.C.A.)⁸¹ remained dormant for almost 200 years until its revival in 1980.⁸² Although left untouched for almost 200 years, the A.T.C.A. plays an important role in promoting compliance "with fundamental

74. U.S. Department of State, UN Security Council Resolution 1483 Lifts Sanctions on Iraq; International Community Pledges Assistance for People of Iraq (Mar. 22, 2003), <http://www.state.gov/r/pa/prs/ps/2003/20888.htm> (last visited Dec. 20, 2006).

75. *Id.*

76. S.C. Res. 1483, ¶ 22, U.N. Doc. S/RES/1483 (May 22, 2003).

77. *Id.* at ¶ 20, ¶ 13.

78. Anna Gelpern, *What Iraq and Argentina Might Learn From Each Other*, 6 CHI. J. INT'L L. 391, 395 (2005).

79. Kelly, *supra* note 24, at 493.

80. Compare S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) with Exec. Order No. 13,303, 3 C.F.R. 227-29 (2004), reprinted in 50 U.S.C. § 1701, at 86-87 (2000).

81. Lucien J. Dhooze, *The Alien Tort Claims Act And The Modern Transnational Enterprise: Deconstructing The Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3, 6 (2003).

82. Kenneth J. Rose, *The World Gets a Little Smaller; International Employers May Find Themselves Sued in the U.S. for Egregious Overseas Labor Practices*, <http://library.findlaw.com/2004/Sep/27/133590.html> (last visited Dec. 20, 2006).

treaty-based and customary international law.”⁸³ Since the Second Circuit’s decision in *Filartiga v. Pena-Irala* in 1980, the A.T.C.A. has allowed citizens of other countries to sue in U.S. courts for human rights abuses.⁸⁴ Other courts, including the Ninth and Eleventh Circuits, have followed the rationale used by the Second Circuit in *Filartiga*, subsequently providing victims the ability to seek civil damages for human rights abuses.⁸⁵ Most recently, human rights supporters awaited one of the last rulings in the case of *Sosa v. Alvarez-Machain*,⁸⁶ which reaffirmed that the A.T.C.A. is a jurisdictional statute granting subject matter jurisdiction in a certain narrow class of claims.⁸⁷ To many victims and survivors of human rights abuses, the A.T.C.A. provides the only chance for justice⁸⁸ and a means to help ease the healing process.⁸⁹ Plaintiffs feel empowered and gain strength by being given a chance to tell their stories and confront their abusers.⁹⁰ Over the past twenty-five years, the A.T.C.A. has allowed foreign victims of international human rights abuses—such as summary executions, genocide, war crimes, and inhumane treatment—to sue for such violations of international law.⁹¹ The Act, codified in 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.”⁹²

A. Background of the Alien Tort Claims Act

Although the Act has been utilized to prevent human rights abuses, invoking the Act still remains difficult, absent some controlling exception, since the traditional immunity granted to foreign states and their leaders remains

83. Jordan J. Paust *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 835 (2005).

84. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-90 (2d Cir. 1980) (non-citizens can sue in United States under the A.T.C.A. for violations of the law of nations).

85. Human Rights First, *The Alien Claims Act and the Torture Victim Protection Act: Important Tools in the Fight Against Impunity*, http://www.humanrightsfirst.org/international_justice/w_context/w_cont_12.htm (last visited Dec. 20, 2006).

86. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

87. *Id.* at 714.

88. See EARTHRIGHTS INTERNATIONAL, *IN OUR COURT: ATCA, SOSA AND THE TRIUMPH OF HUMAN RIGHTS 1* (July 2004), available at <http://www.earthrights.org/files/Reports/inourcourt.pdf> (last visited Dec. 20, 2006) [hereinafter *Earthrights International*].

89. Michael Ratner, *Civil Remedies for Gross Human Rights Violations*, PBS, http://www.pbs.org/wnet/justice/law_background_torture.html (last visited Dec. 20, 2006).

90. *Id.*

91. Rose, *supra* note 82.

92. 28 U.S.C. § 1350 (2000).

intact.⁹³ However, important advances have been made since the *Filartiga* case, notably the expansion of the range of defendants responsible for human rights abuses as opposed to the actual perpetrator.⁹⁴ This was demonstrated in *Xuncax v. Gramajo*, where “refugee survivors . . . sued the general they alleged was responsible” for genocide crimes.⁹⁵ Although the defendant did not personally commit the murders, the court found him liable due to the doctrine of command responsibility, finding that he had knowledge and initiated the terror campaign.⁹⁶ Now, under the A.T.C.A., commanders or generals who authorize the violations and know or should know of these violations will also be liable.⁹⁷ Since its revival, the A.T.C.A. has also been used as a basis for relief against governments and private parties.⁹⁸

Corporations have been held accountable when involved in extreme violations of labor practices.⁹⁹ Legal scholars suggest the passage of E.O. 13303 was prompted by the increasing number of transnational corporations involved in A.T.C.A. suits alleging human rights violations.¹⁰⁰ There has been a rising fear that transnational corporations, such as Halliburton, operating in the War on Terror on Iraqi soil may be sued in U.S. District Courts by foreign citizens invoking the A.T.C.A.¹⁰¹ Possibly, E.O. 13303 has finally granted the wish for tort reform that corporations have been unsuccessful in getting past the Senate for years.¹⁰² Of course, corporations operating in Iraq wish they “could insulate [themselves] from tort actions in the United States.”¹⁰³ Transnational corporations and the U.S. government have felt that the A.T.C.A. is an awakening monster, threatening corporations and their investments as opposed to being the savior for human rights victims and survivors.¹⁰⁴ Most recently, the A.T.C.A. has been heavily utilized as a means of relief against transnational

93. Caroline Davidson, *Tort Au Canadien: A Proposal For Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law*, 38 VAND. J. TRANSNAT'L L. 1403, 1415 (2005).

94. Ratner, *supra* note 89.

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.*

99. Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 246-47 (2003).

100. Sebok, *supra* note 7.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See* GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (2003).

enterprises for complicity in human rights violations.¹⁰⁵ Cases filed recently include a claim against the Coca-Cola Company alleging liability for parliamentary forces that terrorized and murdered union members in Columbia.¹⁰⁶ Another case alleges that Exxon Mobil “aided and abetted civil rights abuses of Indonesian army by hiring components to guard natural gas pipeline.”¹⁰⁷ With the passage of E.O. 13303, the Bush Administration is barring A.T.C.A. suits brought by foreign citizens who are injured by U.S. transnational corporations’ alleged complicity in human rights violations.¹⁰⁸

B. Elements of the Alien Tort Claims Act

The elements of the A.T.C.A. seem relatively simple at first glance, requiring an alien plaintiff alleging “a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁰⁹ As explicitly written in the statute, only torts in violation of a U.S. treaty or the law of nations can successfully be brought under the A.T.C.A.¹¹⁰ Courts have demonstrated a stringent threshold in determining whether the alleged conduct satisfies this requirement.¹¹¹

1. Law of Nations

A violation of the law of nations requires the tort to violate a norm of customary international law.¹¹² To determine whether there has been a violation of the law of nations, the courts examine contemporary international law as suggested by international conventions, international custom, and “the general principles of law recognized by civilized nations.”¹¹³ Moreover, since the Nuremberg Trials, international law has universally categorized certain crimes as egregious, thus automatically making those prosecutable offenses.¹¹⁴ These acts

105. Genevieve Sheehan, *Globalizing Law: The ATCA Out of The Attic*, 26 HARV. INT'L REV. 6 (2004), available at <http://hir.harvard.edu/articles/1241/> (last visited Dec. 20, 2006) [hereinafter Sheehan].

106. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003).

107. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005).

108. Peter Weiss, *Human Rights Switcheroo*, 174 N.J. L.J. 95 (2003) (discussing the Bush Administration’s attack on the A.T.C.A. and its attempt to repeal the Act).

109. 28 U.S.C. § 1350 (2000).

110. *Id.*

111. See Dhooge, *supra* note 81.

112. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980).

113. *Filartiga*, 630 F.2d at 881.

114. Center for Constitutional Rights, Plain Responses to Attacks on the Alien Tort Claims Act (ATCA), http://www.ccr-ny.org/v2/legal/human_rights/docs/atcaQ&A.pdf (last visited on Dec. 14, 2006) [hereinafter Responses to ATCA].

include war crimes,¹¹⁵ crimes against humanity,¹¹⁶ genocide,¹¹⁷ summary execution,¹¹⁸ and torture.¹¹⁹ A high threshold of what constitutes a violation has been established to prevent courts of any one nation from imposing idiosyncratic laws on other countries in guise of international law.¹²⁰ The theory is that a broader interpretation of the law of nations poses a greater risk of imposing American, as opposed to universal, norms on other countries.¹²¹ Furthermore, the Supreme Court's ruling in *Sosa* assures that frivolous actions will be struck down, as demonstrated by the dismissal of Alvarez-Machain's claim, in which the U.S. Supreme Court held Alvarez-Machain's twenty-four hour arrest did not violate international law.¹²²

C. A.T.C.A.: The Objective

Originally, the objective of the A.T.C.A. was to provide recourse for victims and survivors by bringing former officials and military officers to justice.¹²³ The *Filartiga* case set forth important advances for the A.T.C.A. in establishing civil liability of those responsible for egregious violations of human rights.¹²⁴ Cases following *Filartiga* have had an expanded range of defendants including those who ordered violations and those who knew or should have known of ongoing violations, yet failed to prevent them from continuing.¹²⁵ After having recognized that the A.T.C.A. can apply to both private parties and governments, fear has arisen for the possibility of claims against transnational corporations for human rights abuses.¹²⁶ That fear has quickly become a reality, with tort lawsuits aimed at businesses rising a staggering fourteen percent in 2001 and thirteen percent in 2002 after a rise of only three percent the previous

115. Kadic, 70 F.3d at 242-43.

116. *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986).

117. Kadic, 70 F.3d at 242-43.

118. *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (victims of Marcos regime sued for abuses by soldiers and government authorities of the Philippines in the 1970s and 1980s).

119. *Filartiga*, 630 F.2d 876, 884 (2d Cir. 1980).

120. Developments in the Law – International Criminal Law, *Corporate Liability for Violations of International Human Rights Law*, 114 HAR. L. REV. 2025, 2042 (2001) [hereinafter *Developments in the Law – International Criminal Law*].

121. *Id.* at 2042.

122. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004).

123. Ratner, *supra* note 89.

124. *Id.*

125. *Id.*

126. Theodore R. Lee & Littler Mendelson, P.C., *Global Employment Claims: Emerging International Labor and Employment Issues*, 730 PLI/Lit 681, 712 (2005).

decade.¹²⁷ This growth has not only affected the United States, but seems to be rising internationally as well.¹²⁸ Although most of the cases against corporations have been dismissed, the increase in lawsuits will ultimately affect international business relationships.¹²⁹ Until the recent outpour of lawsuits against potential corporations, the A.T.C.A. had been well supported by both the Carter and Clinton Administrations.¹³⁰ Furthermore, despite concerns of the impact of the A.T.C.A., President George H. W. Bush also supported the doctrine by signing legislation authorizing the expansion of human rights accountability.¹³¹ However, the Bush Administration holds a differing view.¹³² Prior to the recent appellate decision of *Unocal*, the Bush Administration's Justice Department had several choices.¹³³ They could have chosen to support the plaintiffs; they could have stayed neutral towards the issue, or they could have supported the defendants only in this case.¹³⁴ Instead, the Administration formed a radical re-interpretation of the A.T.C.A., in which it sought reversal of twenty-five years of legal precedent.¹³⁵ The Justice Department took the view that victims of gross abuse could not sue under the A.T.C.A. because the harm occurred outside of the United States and the detrimental effects a ruling against a corporation would have on foreign relations.¹³⁶

IV. THE ALIEN TORT CLAIMS ACT & EXECUTIVE ORDER 13303: THE BATTLE AGAINST FOREIGN POLICY & THE WAR ON TERROR

The debate surrounding the future of the A.T.C.A. has become increasingly heated amidst the United States War on Terror and the Bush Administration's

127. Leon Gettler, Liability Forges a New Morality, <http://www.globalpolicy.org/intljustice/atca/2005/0803morality.htm> (last visited Dec. 20, 2006).

128. See Gettler, *supra* note 127.

129. Jonathon Huneke, Alien Tort Lawsuits Rest on Shaky Legal Ground, Industry Leader Asserts (2003), <http://www.uscib.org/index.asp?documentID=2627> (last visited Dec. 20, 2006).

130. Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

131. *Id.*

132. See *id.*

133. Harold Hongju Koh, Wrong on Rights (July 18, 2003), <http://yaleglobal.yale.edu/display.article?id=2121> (last visited Dec. 20, 2006) (Mr. Koh is a "Professor of International Law at Yale University and former US Assistant Secretary of State for Democracy, Human Rights, and Labor." *Id.*).

134. *Id.*

135. *Id.*

136. *Id.*

foreign policy objectives.¹³⁷ With its attacks on the A.T.C.A., the Bush Administration is demonstrating a principled legal objective or desire to end cases against corporations.¹³⁸ Opponents of the A.T.C.A. fear that further use of the 214 year-old law could lead to a decreased presence of American business abroad and a rise in frivolous lawsuits.¹³⁹ Supporters suggest that the A.T.C.A. is the only means of holding violators, whether corporations or private parties, responsible for their actions.¹⁴⁰ Without the A.T.C.A., corporate violations of human rights would go unredressed, as they frequently do as a result of gaps in domestic and international law regimes.¹⁴¹ Furthermore, with an increased presence of U.S. corporations in Iraq, and in particular U.S. oil corporations, E.O. 13303 attempts to bar lawsuits invoking the A.T.C.A.¹⁴²

A. Attacks on the A.T.C.A.

The opposition of the A.T.C.A. has raised several key issues and invoked fears concerning its effects on foreign policy.¹⁴³ The most recent decisions raise the possibility that American courts may begin to hold U.S. corporations liable for human rights violations.¹⁴⁴ Actions brought under the A.T.C.A. against a corporation are especially important due to the impact a significant judgment could have on the corporation.¹⁴⁵ Recently, the A.T.C.A. has been under heavy attack by those opposing the A.T.C.A., claiming its effects on foreign policy could be drastic.¹⁴⁶ One commentator states, “[i]t empowers aliens and ill-informed federal judges to confound U.S. foreign policy through decrees that adjudicate the legality of foreign acts of state under elastic and protean international law.”¹⁴⁷ As the founding fathers understood and is reflected in the Constitution,¹⁴⁸ U.S. foreign policy and its international affairs should be

137. See Jim Lobe, *Villagers vs. Oil Giant: Ashcroft to The Rescue*, ASIAN TIMES, May 17, 2003, available at http://www.atimes.com/atimes/Southeast_Asia/EE17Ae03.html (last visited Dec. 20, 2006).

138. EarthRights International, *supra* note 88, at 6.

139. Debating the Tort Claims Act, PBS, Sept. 1, 2006, <http://www.pbs.org/now/politics/alientortdebate.html> (last visited Dec. 20, 2006).

140. Shaw W. Scott, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 MINN. L. REV. 1497, 1543 (2005).

141. Developments in the Law – International Criminal Law, *supra* note 120.

142. Weiss, *supra* note 108.

143. See Developments in the Law – International Criminal Law, *supra* note 120.

144. *Id.*

145. Igor Fuks, *Sosa v. Alvarez-Machain and The Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 116 (2006).

146. Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005.

147. Bruce Fein, *Foreign Policy Engine Tune-Up*, WASH. TIMES, Aug. 12, 2003.

148. *Id.*

represented by a unitary authority, the President.¹⁴⁹ This was further established by the 1936 Supreme Court case, *United States v. Curtiss-Wright Export Corporation*, which held “the President alone has the power to speak or listen as a representative of the nation”¹⁵⁰

In an August 2004 response to *Doe v. Unocal*,¹⁵¹ the U.S. Department of Justice (D.O.J.) filed an amicus curiae brief in the U.S. Court of Appeals for the Ninth Circuit.¹⁵² The D.O.J.’s role is to “enforce the law and defend the interests of the United States,” as well as to ensure public safety against domestic and foreign threats.¹⁵³ In its amicus curiae brief, the D.O.J. contends that the A.T.C.A. has been “transformed by lower courts from a rarely invoked statutory provision into a prodigious font of litigation involving efforts by aliens to bring claims for alleged violations of their human rights in the United States courts even with respect to events that are entirely extraterritorial”¹⁵⁴ By lower courts inferring a right of action from the jurisdictional provision of the Act, federal courts are forced to determine what violations of customary international law are privately actionable.¹⁵⁵ The Administration contends that currently, the means of A.T.C.A. litigation allows *courts*, not the *political branches*, “to bring about change in anti-democratic policies and human rights violations.”¹⁵⁶

1. United States Public Officials

Misuse of the Act will not only affect U.S. involvement in international affairs, but it could backfire and come back to haunt U.S. public officials

149. Jake Kreilkamp, *Suing Saddam – And Others – In U.S. Courts: The Controversy Over the Alien Tort Claims Act* (July 9, 2003), http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/student/20030709_kreilkamp.html (last visited Dec. 20, 2006).

150. Fein, *supra* note 147.

151. *John Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (Plaintiffs alleged that defendants were liable for international human rights violations perpetrated by the Burmese military in furtherance and for the benefit of the pipeline portion of the joint venture project. Defendants moved for summary judgment. Summary judgment was granted due to plaintiffs failure to prove that a violation of international law had occurred).

152. Joanne Mariner, *Ashcroft’s Justice, Burma’s Crimes and Bork’s Revenge* (2003), <http://writ.news.findlaw.com/mariner/20030526.html> (last visited Dec. 20, 2006).

153. USDOJ: About DOJ, <http://www.usdoj.gov/02organizations/index.html> (last visited Dec. 20, 2006).

154. Brief for the United States Supporting the Petition, at 9, *Sosa v. Alvarez-Machain*, et al., No. 03-339 (9th Cir. Sept. 2003).

155. *Id.*

156. Dhooge, *supra* note 81, at 83.

themselves.¹⁵⁷ U.S. law enforcement agencies are already being criticized for their use of excessive force in many cases.¹⁵⁸ Imagine what may come about if countries are given the chance to try U.S. officials.¹⁵⁹ Once U.S. courts begin to assert jurisdiction over cases by enforcing U.S. laws over sovereign governments, other countries will begin to follow suit.¹⁶⁰ To illustrate this idea, take into consideration the death penalty, which is legal in the U.S., but viewed as an egregious act in most of the world.¹⁶¹ If a judge presiding over such a case travels to a foreign country that asserts jurisdiction over human rights violations, it is possible for a lawsuit to be filed against that judge by a family member of the deceased seeking damages.¹⁶² Such a scenario would endanger our public officials, placing them at great risk.¹⁶³

2. Transnational Corporations

Those who oppose the A.T.C.A. contend that if the A.T.C.A. is left unaltered, it would ultimately affect the way transnational corporations do business, “creat[ing] enormous problems that, when added together, amount to unilateral justice bordering on imperialism.”¹⁶⁴ Moreover, the D.O.J. and the Bush Administration fear the effects of the A.T.C.A., believing it has exceeded its originally-intended reach.¹⁶⁵ The Administration feels its greatest threat is the harmful effect of the A.T.C.A. potentially placing allies and foreign relations at risk in the War on Terror,¹⁶⁶ thereby circumventing U.S. foreign policy.¹⁶⁷ Allies may also take offense to being implicated in human rights violations; making them reluctant to participate with the U.S. in the War on Terror.¹⁶⁸

157. Thomas Niles, *The Very Long Arm of American Law*, USA ENGAGE, Nov. 5, 2002, http://www.usaengage.org/news/2002/20021105_atcaniles.html (last visited Dec. 20, 2006).

158. *Debating the Tort Claims Act*, *supra* note 139.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. HUFBAUER, *supra* note 104, at 46.

165. See Lorelle Londis, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141 (2005).

166. *Id.*

167. Sheehan, *supra* note 105.

168. Terry Collingsworth, *Worker Rights News*, 7 INTERNATIONAL LABOR RIGHTS FUND 2 (2004), available at <http://www.laborrights.org/publications/WRN%20Fall04.pdf> (last visited Dec. 20, 2006).

3. Separation of Powers

Furthermore, A.T.C.A. lawsuits will result in a violation of the separation of powers.¹⁶⁹ “The Constitution assigns to the political branches, not the courts, responsibility for managing the nation’s foreign” relations.¹⁷⁰ Thus, both the Administration and the D.O.J. seek to not only provide immunity to corporations, but also to narrow the scope of the A.T.C.A. by denying disputes that have no connection whatsoever with the United States.¹⁷¹ Since 2003, “plaintiffs using the [A.T.C.A.] have sued more than 50 multinational corporations doing business in developing countries, alleging more than 200 billion dollars in actual and punitive damages.”¹⁷² By adopting this view, critics contend that the Administration is disregarding human rights worldwide.¹⁷³

B. A.T.C.A. Proponents

A.T.C.A. supporters believe that the Administration’s contention—increased litigation would constitute interference in foreign relations and the War on Terror—bears no evidence and is unconvincing.¹⁷⁴ In order to lay a foundation, it must first be established that foreign policy is multi-faceted, and does not occur on just one level.¹⁷⁵ Having one strategy implemented on a human rights level does not preclude relations on other levels.¹⁷⁶ Foreign nations are aware of the U.S. system of separation of powers, which means that cases decided by federal courts are not indicative of the U.S. government’s actions.¹⁷⁷

The A.T.C.A. has emerged as a critical law for the promotion of human rights in U.S. courts,¹⁷⁸ defining a common goal of justice and relief to victims of human rights violators around the world.¹⁷⁹ Furthermore, no evidence has

169. Marcia Coyle, *Justices Weigh Alien Tort Act*, THE NAT’L L.J., Mar. 29, 2004, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1080334938936> (last visited Dec. 20, 2006).

170. *Id.*

171. Katrin Dauenhauer, *Experts Defend Law from Business Attack*, IPS, July 29, 2003, <http://domino.ips.org/ips%5Ceng.nsf/vwWebMainView/675AD4EDEAC517F9C1256D72007B452D/?OpenDocument> (last visited Dec. 20, 2006).

172. *Id.*

173. *See id.*

174. *See* Dhooge, *supra* note 81.

175. Responses to ATCA, *supra* note 114, at 4.

176. *Id.*

177. *Id.*

178. Fuks, *supra* note 145, at 117.

179. Human Rights First, *The Alien Claims Act and the Torture Victim Protection Act: Important Tools in the Fight Against Impunity*, http://www.humanrightsfirst.org/international_justice/w_context/w_cont_12.htm (last visited on Dec. 20, 2006) (Human Rights First is a non-profit organization designed to promote security and

been presented supporting the argument that the continuation of litigation against transnational corporations will have catastrophic effects on U.S. foreign policy, arising as a result of the A.T.C.A.¹⁸⁰ Most importantly, federal judges have repeatedly demonstrated their capability of analyzing these claims under the relevant statute to determine whether the strict standards required to proceed have been sufficiently met.¹⁸¹ Moreover, judges have not hesitated to dismiss cases at an early stage, where plaintiffs did not meet their high burden of proof.¹⁸²

Statistically, more than twenty A.T.C.A. cases have been filed against private corporations since 1993; however, such a fierce attack on the A.T.C.A. by the Administration is uncalled for since none of the cases have been heard on the merits, much less “resulted in a final judgment against a U.S. company.”¹⁸³ Up until 2003, all cases filed against corporations operating overseas have been dismissed due to deficiencies in the claims.¹⁸⁴ U.S. courts are capable of dismissing frivolous cases.¹⁸⁵ Also, transnational corporations facing A.T.C.A. lawsuits will only be held liable for involvement as principals or accomplices in abusive environments.¹⁸⁶ In contrast, when such crimes occur within the United States, corporate perpetrators are held liable for their involvement in illegal conspiracies under either criminal law or civil law.¹⁸⁷ With that in mind, transnational corporations in violation of international law should be held equally liable.¹⁸⁸

“Allowing the rule of law to govern knowing violations of human rights by multinational firms is an important first step in establishing a global economy based on the values of those companies, and all civilized societies, claim to support in principle.”¹⁸⁹ Advancement of the human rights rhetoric in the War on Terror could be reached with the U.S. government enforcing laws designed to

humane treatment by advancing justice, human dignity, and respect for the law in the United States and the world) [hereinafter Human Rights First].

180. Dhooge, *supra* note 81, at 80.

181. Human Rights First, *supra* note 179.

182. *Id.*

183. Koh, *supra* note 133.

184. Abdallah Simaika, *The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas*, 38 COLUM. J.L. & SOC. PROBS. 321, 323 (2005).

185. Koh, *supra* note 133.

186. Ruben J. Garcia, *Transnationalism as a Social Movement Strategy: Institutions, Actors and International Labor Standards*, 10 U.C. DAVIS J. INT'L L. & POL'Y 1, 9 (2003).

187. No Safe Haven, *The Attack on ATCA*, <http://www.nosafehaven.org/attack.html> (last visited Dec. 20, 2006).

188. *Id.*

189. Terry Collingsworth, *Separating Fact From Fiction in the Debate Over Application of The Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563, 578 (2003).

protect innocent victims and survivors.¹⁹⁰ Supporters believe utilizing the A.T.C.A. to put an end to human rights violations is actually a *necessary* element to the War on Terror.¹⁹¹ Allowing U.S. corporations to act with immunity sends the wrong message to our allies in the War on Terror.¹⁹²

1. The Torture Victim Protection Act and the Alien Tort Claims Act

The Torture Victim Protection Act (T.V.P.A.) was enacted as a legislative response to a concurring opinion in an early A.T.C.A. case challenging the use of the A.T.C.A. in human rights litigation.¹⁹³ The legislative history of the T.V.P.A. indicates that Congress essentially sought to reaffirm the line of cases inaugurated by *Filartiga* in the face of judicial resistance.¹⁹⁴ The T.V.P.A. allows both U.S. citizens and aliens to bring suit against a person who subjects an individual to torture or extrajudicial killing.¹⁹⁵ For example, potential plaintiffs include victims who have suffered repeated torture for their mere involvement in assisting their community.¹⁹⁶ Community assistance encompasses “providing healthcare or religious counseling to the poor,” encouraging literacy, and failing to follow the orders of security forces.¹⁹⁷ However, the T.V.P.A. is in a way more restricted than the A.T.C.A.¹⁹⁸ The T.V.P.A. only permits suits to be brought under two violations of international law (torture and/or extrajudicial killing), requires the plaintiff to exhaust local remedies, and the defendant must to act under the authority or law of a foreign nation.¹⁹⁹

Congress’ objective in passing the T.V.P.A. was to promote and protect human rights—an objective consistent with the other objectives found in the Foreign Assistance Act of 1961.²⁰⁰ Such an achievement by Congress not only reinforces the A.T.C.A., but also puts a stamp of approval on judicial remedy for

190. *See id.*

191. Dauenhauer, *supra* note 171.

192. *See id.*

193. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

194. *See* Torture Victim Protection Act of 1991, H. R. REP. NO. 102-367 pt 1, at 3 (1991); The Torture Victim Protection Act of 1991, S. REP. NO. 102-249, at 3-4, 5 (1991) (becoming public law 102-256).

195. Ratner, *supra* note 89, at 3.

196. Human Rights First, *supra* note 179.

197. *Id.*

198. Ratner, *supra* note 89.

199. *See* Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

200. Human Rights First, *supra* note 179.

some of these most heinous acts.²⁰¹ Attacking the A.T.C.A. “through judicial interpretation or congressional repeal offer[s] a non-solution to a non-problem . . . [by not only] underestimating the ability of the courts to derail abusive or frivolous lawsuits, [but also by] underestimating the value of the A.T.C.A. in assuring that the United States does not become a safe haven for abusers.”²⁰² When taking into consideration the objectives in enacting the T.V.P.A. pursuant to the A.T.C.A., the repeal of either one of these acts could prove disastrous.²⁰³ If repealed, lawsuits such as those filed by 9/11 victims against Saudi banks and institutions for their involvement in the terrorist attacks would be prohibited.²⁰⁴ Elimination of the act would grant full immunity to all human rights abusers for any act, so long as the act was committed outside of the U.S.²⁰⁵ Subsequently, the efforts of the War on Terror would potentially be hampered by essentially granting immunity to terrorist groups such as Al Qaeda and state sponsors of terrorism.²⁰⁶

C. Proponents of Executive Order 13303

The United States and its private contractors who have undertaken Iraqi reconstruction projects may have exposed themselves to an onslaught of lawsuits.²⁰⁷ This explains why many companies are not making a commitment to the Iraqi reconstruction, for fear that attorneys pursuing human rights violators stand ready to invoke the A.T.C.A.²⁰⁸ In fact, the possibility of lawsuits claiming millions of dollars in damages posed an inherent risk in taking on the reconstruction project.²⁰⁹ Businesses such as energy, transportation, and construction have taken a step back to re-think their decisions to assist in the revival of post-war Iraq in light of A.T.C.A. pending cases.²¹⁰ Moreover, this

201. *Id.*

202. Ralph G. Steinhardt, *The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Claims Act and its Discontents: A Reality Check*, 16 ST. THOMAS L. REV. 585, 605 (2004).

203. Koh, *supra* note 133.

204. No Safe Haven, *supra* note 187.

205. Koh, *supra* note 133.

206. *Id.*

207. George C. Wilson, Operation Iraqi Lawsuit, Govexec.com, Nov. 3, 2003, http://www.govexec.com/story_page.cfm?articleid=26983&printerfriendlyVers=1& (last visited Dec. 20, 2006).

208. Paul Rosenzweig, *Trial Lawyers Could Stymie Rebuilding of Iraq*, THE HERITAGE FOUNDATION, Apr. 18, 2004, *available at* <http://www.heritage.org/Press/Commentary/ed062003b.cfm> (last visited Dec. 20, 2006).

209. Wilson, *supra* note 207.

210. Rosenzweig, *supra* note 208.

decision is based on the lack of congressional action in controlling A.T.C.A. claims.²¹¹

The U.S. Treasury Department maintains that the sole purpose behind issuing E.O. 13303 is to protect the profits derived from Iraqi oil by ensuring that they are placed into a Development Fund, specifically intended to assist in the reconstruction of Iraq.²¹² This Development Fund, created by E.O. 13303, protects the profits from being legally attached or claimed before Iraqi citizens have an opportunity to claim these profits for themselves.²¹³ Moreover, transnational corporations such as the oil companies that risk entering the country may feel more comfortable knowing there is some level of protection in the federal court.²¹⁴ A legal research scholar, Paul Rosenzweig, from the Heritage Foundation said, "the United States is for now the sovereign government of Iraq and, as such, could not be sued in U.S. federal court."²¹⁵ However, one legal professor "cautioned . . . 'it should not be assumed by anyone in the oil industry that orders of this character can immunize either the federal government or oil companies from the full force of occupation law.'"²¹⁶ It seems unlikely that the federal government would accept E.O. 13303 over occupation law, considering the fact that the latter has statutory force.²¹⁷

D. Executive Order 13303 Opponents

Previously unnoticed, E.O. 13303 is now under heavy scrutiny by human rights groups for fear that corporate accountability is being limited for those conducting business in Iraq.²¹⁸ The belief is that the Administration may have had a motive in issuing the E.O. 13303—ending the recent rise in A.T.C.A. suits for fear that to-be injured Iraqis will utilize the A.T.C.A. against transnational corporations' for their presence in Iraq.²¹⁹ Not only does E.O. 13303 prevent A.T.C.A. suits by Iraqi citizens, but it also goes as far as preventing tort suits by American citizens who have been asked by the government or their employer to assist in the Iraq reconstruction process.²²⁰ Is E.O. 13303 essentially the tort reform corporations with international transactions have been looking for? Translated from legalese, E.O. 13303 "cancels the concept of corporate accountability and abandons the rule of law" in three broad areas which will be

211. *Id.*

212. Wilson, *supra* note 207.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. Sebok and Kelly, *supra* note 7.

219. *Id.*

220. *Id.*

discussed: (1) an unrestrained scope of immunity, (2) lack of foundation in international law, and (3) its scope of legal consequences.²²¹

1. Unrestrained Scope of Immunity

To begin with, there is no restraint on immunity. Section 1 of the Executive Order clearly states that any judicial process is null and void, thereby removing all enforcement for civil *and* criminal liability with respect to the entities protected under the Order.²²² Furthermore, all corporate activities containing roots or having any connection whatsoever with Iraqi oil is protected.²²³ “The scope can be further expanded by taking into consideration the mixing of Iraqi oil with domestic products for a variety of commercial transactions.”²²⁴

2. Lack of Foundation

Arguably, the Order could have arisen from the President’s inherent power to enter into executive agreements or implement foreign policy; however, this rationale falls short.²²⁵ When taking into consideration the Order, “[t]he President did not enter into an agreement with a foreign sovereign as the Executive did in *Dames & Moore*.”²²⁶ When the Order was issued, Iraq was controlled by the U.S.²²⁷ “[T]he Order does not merely implement U.N. Security Council Resolution 1483,” as it differs significantly by crossing the boundaries of international law.²²⁸ Unlike Resolution 1483 that “grants limited immunity for oil related reconstruction activities,” E.O. 13303 provides a “blank

221. See Government Accountability Project, *supra* note 32.

222. See Exec. Order No. 13,303, 3 C.F.R. 228 (2004), *reprinted in* 50 U.S.C. § 1701, at 86 (2000).

223. 3 C.F.R. 228, *reprinted in* § 1701, at 86.

224. Government Accountability Project, *supra* note 32.

225. U.S. CONST. art. II, § 1, cl. 1.

226. Kelly, *supra* note 24, at 508; *see, e.g.*, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (Contrasting the view that the outcome may have been different had the Order established a mechanism by which future claims were to be heard by a tribunal associated with the Development Fund of Iraq. That way, money would not be spent on litigation expenses; however, no such tribunal was established.); *id.* at 417 (Holding that “a California statute [requiring] insurance companies doing business in the state to disclose information about their Holocaust era activities interfered with the President’s power to conduct foreign relations. The President had entered into an agreement with Germany to establish a compensation fund to settle Holocaust error claims” and concluded that “the President had the power to settle claims of its nationals against private companies through negotiations with other states.”).

227. David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT’L L. 842, 858 (2003) (noting that “[t]here is no ‘sovereign authority’ in Iraq during the period of foreign occupation by the United States and United Kingdom.”)

228. Kelly, *supra* note 24, at 508.

check” for transnational corporations to profit.²²⁹ In contrast, the Security Council grants limited immunity, but three limitations sustain liability.²³⁰ First, Resolution 1483 protects only until title passes to the initial purchaser or in this case until the oil is sold for the first time.²³¹ Second, one can sustain liability for any misconduct beyond privileges and immunities enjoyed by the United Nations.²³² Third, for “any legal proceeding in which recourse to such proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident . . . that occurs after the date of adoption of this resolution.”²³³

3. Scope of Legal Consequences

Lastly, E.O. 13303 has overstepped its boundaries in connection with the scope of legal consequences.²³⁴ Under the terms defined by E.O. 13303, accountability for all crimes committed abroad would be erased, including violations of Iraqi civil law, international treaties, and contractual terms with various entities or U.S. laws such as the A.T.C.A.²³⁵ Furthermore, civil and criminal liability would also be eliminated domestically.²³⁶ Examples of liability against which corporations are protected include: job related injuries due to safety violations, employment laws including child labor and equal opportunity, and consumer fraud.²³⁷ David Rivkin, a lawyer for the Bush Administration, has argued that the international rules state nothing in regard to imposing strict liability where one’s actions do not provide a proper result.²³⁸ However, he did acknowledge the fact that had the U.S. occupied Iraq with the blessing of the U.N., it would have been less vulnerable to the onslaught of lawsuits.²³⁹ The breadth of the Executive Order also goes as far as abrogating any possibility of holding international financial institutions liable by exonerating them from enforcement of any appropriations or other congressional checks and balances for U.S. financed spending.²⁴⁰ David Scheffer, Ambassador-at-Large for War Crimes Issues during President Clinton’s second term, contends, “[we] have gone far beyond just patching up Iraq . . . and are

229. Government Accountability Project, *supra* note 32.

230. *Id.*

231. G.A. Res. 1483, ¶ 22, U.N. Doc. S/RES/1483 (May 22, 2003).

232. *Id.*

233. *Id.*

234. See Government Accountability Project, *supra* note 32.

235. *Id.*

236. *Id.*

237. *Id.*

238. Wilson, *supra* note 207.

239. *Id.*

240. Government Accountability Project, *supra* note 32.

now moving onto the forbidden ground of exploiting the oil wealth of the country.”²⁴¹

V. HISTORICAL PRECEDENT: THE VALIDITY OF EXECUTIVE ORDER 13303

Historically, Executive Orders have been issued by Presidents and executive agencies, both of whom utilize the United States Code to justify their actions.²⁴² Another statute utilized by Presidents facing both unusual and extraordinary threats is the International Emergency Economic Powers Act (IEEPA), codified in 50 U.S.C. § 1701.²⁴³ IEEPA grants the President the authority to act on any authority granted under section 1702 of this title to deal with “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to the threat.”²⁴⁴ With such broad powers granted to the executive branch, it is as if the President is “running the country” by temporarily holding legislative power.²⁴⁵

A. Carter & Reagan Administration Orders under Heavy Scrutiny

Executive Orders have historically maintained their validity when challenged.²⁴⁶ In response to Iranian militants seizing the American Embassy in Tehran, Iran,²⁴⁷ President Carter issued a national emergency and invoked IEEPA, thereby blocking the removal of all Iranian property subject to U.S. jurisdiction.²⁴⁸ Upon issuing this order, which “blocked all property and interests in property of the Government of Iran,”²⁴⁹ the Treasury Department restricted judicial process with respect to any foreign interest in property.²⁵⁰ Following Carter’s presidency, President Reagan issued Executive Order 12294, which ratified President Carter’s orders and was aimed at suspending the enforcement of all claims presented to the U.S.-Iran Claims Tribunal.²⁵¹

241. Wilson, *supra* note 207.

242. Sebok and Kelly, *supra* note 7.

243. 50 U.S.C. § 1701 (2005).

244. § 1701(a).

245. *See* § 1701.

246. *See* Sebok and Kelly, *supra* note 7.

247. American Experience, People & Events: The Iranian Hostage Crisis, November 1979 – January 1981, PBS, http://www.pbs.org/wgbh/amex/carter/peopleevents/e_hostage.html (last visited Dec. 20, 2006).

248. Sebok and Kelly, *supra* note 7.

249. Exec. Order No. 12,170, 3 C.F.R. 457 (1979).

250. Sebok and Kelly, *supra* note 7.

251. *Id.*

Specifically, the order issued by President Reagan stated "such claims shall have no legal effect in any action now pending in the United States."²⁵²

1. Developing the Analytic Framework

In the matter of *Dames & Moore v. Regan*, the plaintiff's basis for challenging the claims relied on the belief that the orders conferred by the President were outside the scope of his power, and that these orders violated the doctrine of separation of powers by divesting the courts of jurisdiction.²⁵³ The Supreme Court subsequently determined that IEEPA constituted a specific congressional authorization for the President's order to transfer Iranian assets to the Federal Reserve.²⁵⁴ The basis for the Court's reasoning was found in the purpose of IEEPA itself, which was "to put control of foreign assets in the hands of the President."²⁵⁵ IEEPA permits the President to use foreign assets as a tool when negotiating national emergencies.²⁵⁶ In this case, since the Order was issued to prohibit the transfer of Iranian assets for the President to use as a bargaining chip, the order fell within the guidelines of IEEPA, and was thus found constitutional.²⁵⁷

With regard to President Reagan's order, the Court found insufficient statutory authority;²⁵⁸ however, it determined that both the facts of the case and the applicable statutes, Congress implicitly authorized presidential control of claim settlement.²⁵⁹ Moreover, the Court upheld the orders of both Presidents based on Congressional intent.²⁶⁰ Prior cases recognized that the President does have some power to act independently of Congress,²⁶¹ as demonstrated by the longstanding practice in the area of claim settlement by executive agreement.²⁶²

Based on the foregoing reasons, the actions of President Carter and President Reagan were upheld.²⁶³ Regarding the power to settle claims against foreign governments "where . . . the settlement of the claims has been determined to be a necessary incident to the resolution of a major foreign policy

252. Exec. Order 12,294, 3 C.F.R. 139 (1981).

253. *Dames & Moore v. Regan*, 453 U.S. 654, 684-85 (1981).

254. *Sebok and Kelly*, *supra* note 7.

255. *Dames & Moore*, 453 U.S. at 673.

256. *Kelly*, *supra* note 24, at 498.

257. *Id.* at 499.

258. *Sebok and Kelly*, *supra* note 7.

259. The OYEZ project, *Dame & Moore v. Regan*, 453 U.S. 654 (1981), http://www.oyez.org/cases/case/?case=1980-1989/1980/1980_80_2078 (last visited Dec. 28, 2006).

260. *Sebok and Kelly*, *supra* note 7.

261. *Dames & Moore v. Regan*, 453 U.S. 654, 682. (1981).

262. *Id.*

263. *Sebok and Kelly*, *supra* note 7.

dispute between our country and another, and where . . . [the Court] can conclude that Congress acquiesced in the President's action, [the Court was] not prepared to say that the President lacks the power to settle such claims."²⁶⁴ In fact, the Court found that the order did not modify federal jurisdiction; rather, the order merely effectuated a change in the substantive law.²⁶⁵

Thus, *Dames & Moore v. Regan* provides a two-steps-analysis to determine whether President Bush has overstepped his boundaries by issuing E.O. 13303.²⁶⁶ The first step requires an analysis of whether Congress has in fact authorized the Order.²⁶⁷ Second, it must be determined whether Congress had implicitly granted authority or the President had inherent authority with respect to the Executive's action.²⁶⁸ Moreover, even if the President had the proper authority to issue such an order under the above analysis it must still be considered whether the order modifies or withdraws jurisdiction.²⁶⁹ With such a narrow decision, the question still remains as to the extent of the President's power with respect to claims settlement.²⁷⁰ With the framework devised by the Supreme Court in *Dames & Moore v. Regan*, would the same result arise should Executive Order 13303 be challenged for review?

B. Applying the Framework to Executive Order 13303

Executive Order 13303 issued by President Bush invokes not only the IEEPA, but also the National Emergencies Act (50 U.S.C. § 1601 *et seq.*), section five of the United Nations Participation Act (22 U.S.C. § 287c) (UNPA), and 3 U.S.C. § 301.²⁷¹ To determine the validity of the E.O., the *Dames & Moore* framework must be applied.²⁷² It seems unlikely that President Bush had Congressional authority to issue EO 13303.²⁷³ By invoking IEEPA, the President is essentially providing himself a bargaining chip by blocking the transfer of property in cases of extraordinary threats to national security, foreign policy or the economy.²⁷⁴ However, the language of E.O. 13303 leads some to believe that the E.O. is being used to block the transfer of property through only

264. *Dames & Moore*, 453 U.S. at 688.

265. Kelly, *supra* note 24, at 501.

266. *Id.* at 502.

267. *Id.*

268. *Id.*

269. *Id.*

270. Memorandum from EarthRights Int'l to Interested Persons, *Legal Issues associated with Executive Order 13303*, at 3 (Sept. 19, 2003) (on file with author) [hereinafter EarthRights Memorandum].

271. Order No. 13,303, 3 C.F.R. 227-29 (2004), *reprinted in* 50 U.S.C. § 1701, at 86-87 (2000).

272. Kelly, *supra* note 24, at 502.

273. *Id.*

274. *See* 50 U.S.C. § 1701(a) (2005).

the judicial process, instead of blocking the voluntary transfer of property as was done by President Carter.²⁷⁵

Executive Order 13303 is different in the sense that it does not operate to protect the money so that it can be used as a bargaining chip by the President.²⁷⁶ Rather, it builds a protective barrier for the money to exchange hands between private parties without the possibility of judicial interference.²⁷⁷ This method of protection is effectively protecting profits arising from Iraqi oil and not necessarily from the Development Fund, as stated by the President.²⁷⁸ The order does not prevent corporations from moving money or paying dividends to its shareholders out of the profits.²⁷⁹ The only things blocked are the attempts by injured parties to satisfy judgments by attaching oil, oil proceeds, and property arising from or relating to oil or oil proceeds.²⁸⁰ Based on the initial step of the *Dames & Moore* analysis, the President most likely lacked the authority to issue Executive Order 13303 under the IEEPA.²⁸¹ The next step in the *Dames & Moore* analysis requires a determination of whether the President has the inherent authority or implicit consent of Congress to justify the Executive Order.²⁸²

Arguably, the Executive Order is beyond any inherent Presidential authority or implied Congressional consent.²⁸³ Not only does the order immunize private companies from lawsuits, it goes even further by failing to provide an alternate forum for claims against those private companies involved in the reconstruction project.²⁸⁴ In *Dames & Moore*, the Court believed the order was issued in an attempt to only *suspend* the claims and not in an attempt by the Administration to completely divest the federal courts of jurisdiction.²⁸⁵ The Executive Order at issue in *Dames & Moore* allowed those claims outside the jurisdiction of the Iran-U.S. Claims Tribunal to later be revived and brought to U.S. courts where they would be judicially enforceable.²⁸⁶ Thus, the President had done nothing, but show the exercise of his power acquiesced by Congress, to settle claims.²⁸⁷

275. Kelly, *supra* note 24, at 503.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. Order No. 13,303, 3 C.F.R. 227-29 (2004), *reprinted in* 50 U.S.C. § 1701, at 86-87 (2000).

281. Kelly, *supra* note 24, at 502-503.

282. *Id.* at 504.

283. *Id.*

284. *Id.*

285. *Dames & Moore v. Regan*, 453 U.S. 654, 684-85 (1981).

286. *Id.*

287. *Id.* at 685.

However, President Bush's order does in fact arguably divest the court of federal jurisdiction for two reasons.²⁸⁸

1. Divesting the Courts of Jurisdiction

Executive Order 13303 is similar to President Reagan's order in that it places a freeze on the transfer of Iraqi property.²⁸⁹ But E.O. 13303 can be distinguished in that it goes even further by including products "that are or hereafter come within the possession or control of United States persons."²⁹⁰ By definition, United States persons include "any United States citizen, permanent resident alien," entities established under United States law or *any* person in the United States.²⁹¹ With such an overreaching definition of United States persons, E.O. 13303 can be interpreted as protecting any product or interest that comes into the possession or control of this group.²⁹² If a court is prohibited from hearing a case against a United States person, then it is arguably divested of its jurisdiction over the defendant.²⁹³ However, recall "that the President's power to settle or dismiss claims of U.S. citizens . . . is limited," as held by the Supreme Court.²⁹⁴ But, since the Supreme Court has only addressed claims against foreign governments and has yet to address cases involving claims against private entities, the outcome of a challenge against E.O. 13303 is unclear.²⁹⁵

2. Extinguishing the Claims and the Lack of an Alternative Forum

Another factor distinguishing President Bush's Executive Order from President Reagan's order is that President Bush seeks to nullify²⁹⁶ "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process"²⁹⁷ In a system designed to always provide a forum of relief for the injured party, the claimant in this case is left with no alternative forum to seek relief of his or her damages.²⁹⁸ Arguably, the inability of an injured plaintiff to bring forward his suit is essentially a waiver of claims without compensation.²⁹⁹ If one assumes the claims constitute *property* as defined in the Fifth

288. See Sebok and Kelly, *supra* note 7.

289. *Id.*

290. Order No. 13,303, 3 C.F.R. 227-29 (2004), *reprinted in* 50 U.S.C. § 1701, at 86-87 (2000).

291. 3 C.F.R. 228, *reprinted in* § 1701, at 86.

292. Sebok and Kelly, *supra* note 7.

293. *Id.*

294. EarthRights Memorandum, *supra* note 270.

295. *Id.*

296. Sebok and Kelly, *supra* note 7.

297. Order No. 13,303, 3 C.F.R. 227-29 (2004), *reprinted in* 50 U.S.C. § 1701, at 86-87 (2000).

298. See Sebok and Kelly, *supra* note 7.

299. EarthRights Memorandum, *supra* note 270, at 7.

Amendment, then this is perhaps a taking in violation of the Due Process clause provided by the Fifth Amendment of the United States Constitution.³⁰⁰ The proper analysis required for this issue would be outside the scope of this paper and will not be further analyzed.

C. The Result of the A.T.C.A. & E.O. 13303

The battle over tort victims' right to sue leads some to believe that the E.O. sets bad precedent for an abuse of Executive power over private litigation in the context of national security.³⁰¹ Furthermore, the analysis of E.O. 13303 leads one to categorize the order under the penchant, "sneaky tort reform."³⁰² As mentioned earlier, the issue of E.O. 13303 may have come as a result of the fear that private companies operating in Iraq may be sued by foreign citizens invoking the A.T.C.A.³⁰³ Not only are foreign citizens affected by the E.O., ordinary U.S. citizens who may be grievously injured by working in Iraq to rebuild the country may also be kept from bringing an ordinary tort action.³⁰⁴ However, although judgments may have been successful, recovery in monetary terms has been minimal.³⁰⁵ So, why is the Bush Administration preventing its American citizens from bringing tort actions against the private companies operating in Iraq who may be found liable for human rights violations?³⁰⁶ One theory is that the Bush Administration is implementing the Executive Order as a tax break for corporations involved in Iraq.³⁰⁷ However, the tort victims—among others—are the only individuals supplying the funds for the reconstruction process rather than all taxpayers in general.³⁰⁸ It seems unfair to hold accident victims accountable and responsible for the financial burden, when the money recovered could be put towards medical treatment, rehabilitation, and other needs.³⁰⁹ Although unrecognized by this theory, self-help through the court system for both U.S. citizens and aliens should remain an integral part of our democratic tradition.³¹⁰

300. *Id.*

301. Sebok and Kelly, *supra* note 7.

302. *Id.*

303. *Id.*

304. *Id.*

305. Elizabeth F. Defeis, *Litigating Human Rights Abuses in United States Courts: Recent Developments*, 10 ILSA J. INT'L & COMP. L. 319 (2004).

306. Sebok and Kelly, *supra* note 7.

307. *Id.*

308. *Id.*

309. *Id.*

310. Weiss, *supra* note 108.

VI. *SOSA V. ALVAREZ-MACHAIN*: THE MOST RECENT DECISION
AFFECTING THE A.T.C.A. AND ITS EFFECT ON EXECUTIVE ORDER 13303

In a 2004 decision, the Supreme Court attempted to partially resolve the widely debated issue over what claims are actionable under the A.T.C.A., and whether those claims are violations of the law of nations.³¹¹ Oddly enough, “[b]oth human rights supporters and corporate lobbying organizations . . . applauded the decision.”³¹² However, in answering the long awaited question, the Court avoided many difficult questions that have made the A.T.C.A. one of the most controversial topics in the past ten years.³¹³ Thus, we are still left with the question of whether the A.T.C.A. will be as powerful a threat as human rights activists had hoped for.³¹⁴ Although the *Sosa* decision has provided human rights supporters with a sense of victory, Dr. Humberto Alvarez-Machain’s suit seeking damages for arbitrary arrest was not a personal victory.³¹⁵ The Supreme Court held even that if his detention was illegal, lasting “less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violate[d] no norm of customary international law.”³¹⁶

A. *The Facts of Sosa v. Alvarez-Machain*

The legal predicament arose as a result of a federal grand jury indictment of Alvarez for his role in the torture and murder of a Drug Enforcement Agency (DEA) agent.³¹⁷ The incident took place in 1985 in Mexico, where a Mexican drug cartel tortured and murdered an American DEA agent.³¹⁸ It was believed that the defendant was involved in keeping the agent alive for the purpose of getting more information or prolonging his agony.³¹⁹ The U.S. issued an arrest warrant for Alvarez due to his alleged involvement in the torture, but the Mexican government would not agree to turn him over to the DEA.³²⁰ However, Alvarez was captured in Mexico by the DEA and Mexican nationals, including

311. Scott, *supra* note 140, at 1508-09.

312. Jacqueline Koch, Not in Their Backyard, CorpWatch (July 18, 2004), <http://www.corpwatch.org/article.php?id=11441> (last visited Dec. 19, 2006).

313. Anthony J. Sebok, *Is the Alien Tort Claims Act a Powerful Human Rights Tool?*, CNN, July 12, 2004, available at <http://www.cnn.com/2004/LAW/07/12/sebok.alien.tort.claims/> (last Dec. 20, 2006).

314. *Id.*

315. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

316. *Id.* at 738.

317. *Id.* at 697.

318. Sebok, *supra* note 313.

319. *Id.*

320. *Alvarez-Machain v. United States*, 331 F.3d 604, 609 (9th Cir. 2003).

Francisco Sosa.³²¹ Alvarez was transported to the United States to stand trial for the murder of a DEA agent,³²² however, Alvarez was ultimately acquitted upon the district courts granting a motion for acquittal.³²³ Subsequently, Alvarez brought a civil action³²⁴ alleging a violation of the law of nations under the A.T.C.A.³²⁵ Ultimately, the Supreme Court denied Alvarez relief under the A.T.C.A., and most importantly denied the Court's interpretation in *Sosa*, leaving the statute open to be utilized for the recognition of other claims.³²⁶

B. Supreme Courts Analysis: The A.T.C.A. Applied to Sosa v. Alvarez-Machain

The *Sosa v. Alvarez-Machain* case boiled down to a jurisdictional issue, which left the Court to determine whether the arrest and transport of Alvarez-Machain was truly a violation of the law of nations.³²⁷ If the A.T.C.A. were purely jurisdictional, as argued by the Bush Administration and corporate lobbyists, it would not allow plaintiffs to bring human rights cases.³²⁸ However, if the statute itself provides authority for federal courts to hear these cases, then the argument is moot.³²⁹

Upon reviewing the legislative history of the A.T.C.A., the Court was able to determine that when Congress enacted the A.T.C.A. as part of the Judiciary Act of 1789, it "gave the district courts 'cognizance' of certain causes of action" in terms of "a grant in jurisdiction, not power to mold substantive law."³³⁰ Thus, although the statute is jurisdictional, it only grants courts the authority to hear a narrow class of claims.³³¹ The Court further sums up by stating that "the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject."³³² This is also demonstrated by the placement of the A.T.C.A. in the Judiciary Act in section 9, a statute exclusively concerned with the jurisdiction of federal courts.³³³

321. *Id.*

322. *Id.*

323. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

324. *Alvarez-Machain v. United States*, 331 F.3d 604, 610 (9th Cir. 2003).

325. *Id.* at 608.

326. *Sosa*, 542 U.S. 692.

327. *Id.* at 712-14.

328. See Press Release, Covington & Burling, Second Circuit Victory for Client in Alien Tort Claims Act Case, (Sept. 3, 2003), available at <http://www.cov.com/download/pressrelease/oid29166/030903A.pdf> (last visited Dec. 20, 2006).

329. *Id.*

330. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

331. Borchien Lai, *The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?*, 26 *Nw. J. INT'L L. & BUS.* 139, 150 (2005).

332. *Sosa*, 542 U.S. at 714.

333. *Id.*

The A.T.C.A., being held as a jurisdictional statute, raises a question about the interaction between A.T.C.A. suits at the time of enactment and the ambient law of the era.³³⁴ *Sosa* argued that no claim for relief would be available without a statute validating the cause of action.³³⁵ However, legal history has demonstrated that once a jurisdictional grant was on the books, federal courts could entertain claims because specific international law violations would have been recognized.³³⁶ The *Sosa* decision concluded that the A.T.C.A. has been jurisdictional since its inception, providing courts the power to entertain cases concerned with violations of the law of nations.³³⁷

C. A Crack in the Door, But Not Wide Open

The *Sosa* decision assuaged corporations that the A.T.C.A. would not be unleashed to allow thousands of claims leading to disruption of the world economy.³³⁸ Corporations also felt some sense of safety by the Supreme Court noting that only a “very limited category” of cases is actionable under an A.T.C.A. claim.³³⁹ The Court emphasized the restricted nature of the class of possible claims throughout the opinion by stating the following terms: “cases concerned with a subject,” “a relatively modest set of actions,” “only a very limited set of claims,” “a narrow set of common law actions derive from the law of nations,” and “the modest number of international law violations with a potential for personal liability.”³⁴⁰

To properly ascertain which A.T.C.A. cases are actionable, the Court looked back in time to the inception of the A.T.C.A.³⁴¹ When enacted in 1789, the common law only provided a cause of action for a limited set of international violations, which included piracy, the right to safe conduct, and the rights of ambassadors.³⁴² Until today, these crimes have served as the model as to which violations are actionable. To define what types of actions are currently included in the ‘very limited category’ of cases, the Court determined that the case must be definable, universal and obligatory.³⁴³ To determine whether an international norm meets these standards, it is required that: 1) no state condone the act; 2)

334. *Id.*

335. *Id.*

336. *Id.*

337. Fuks, *supra* note 145, at 121.

338. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

339. *Id.* at 712.

340. *Id.* at 720-21, 724.

341. *Id.* at 725.

342. *Id.* at 694.

343. *See, e.g., Hilao v. Marcos*, In re estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779-80 n.4 (D.C. Cir. 1984) (Edwards, J., concurring).

there be a “universal” consensus in prohibiting the act; 3) there be a concrete criteria for a court to determine whether an international norm is violated; and 4) the prohibition be indispensable and binding at all times.³⁴⁴ In *Alvarez*, the Court found the allegation to be too broad to rise to the level of an international law violation, and thus reversed the case.³⁴⁵ The restricted nature of the possible A.T.C.A. claims is repeatedly emphasized throughout the *Sosa* opinion, further assuring control over future A.T.C.A. claims.³⁴⁶

D. Sosa: The War on Terror

Although the Supreme Court does not explicitly mention the War on Terror, it does address the potential impact of A.T.C.A. on foreign affairs.³⁴⁷ The Court enters into a lengthy analysis of how extra judicial caution should be taken when hearing new claims under the A.T.C.A.³⁴⁸ The Court also discussed the dangers of judicial interference with the foreign policy branches of government, especially between the legislative and executive branches.³⁴⁹ In one instance, the Court stated, “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”³⁵⁰

When determining whether a violation of international law may be invoked by the A.T.C.A., the Court recommends the consideration of “the practical consequences of making that cause available to litigants in the federal courts.”³⁵¹ Where there is fear of a negative foreign policy impact, it is suggested that federal courts place serious emphasis on that opinion.³⁵² The *Sosa* Court further states that deference to political branches should be determined independently on a case-by-case basis.³⁵³ With the *Sosa* decision, the restrictive nature of the A.T.C.A. is apparent, and it is now clear that the A.T.C.A. does not provide a license for plaintiffs to sue.³⁵⁴ The restricted nature of the A.T.C.A. is demonstrated by the Supreme Court in *Sosa*, which required a specific, universal, and obligatory claim while deference was given to political branches on foreign policy matters.³⁵⁵

344. *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995).

345. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004).

346. *See id.*

347. *See id.*

348. *Id.* at 725.

349. *Id.* at 725-28.

350. *Id.* at 727.

351. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004).

352. *Id.* at 727.

353. *Id.* at 732.

354. *See id.* at 733.

355. *See id.*

However, keeping in mind the restrictive nature of the A.T.C.A., the Ninth Circuit noted that “[i]t is error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance.”³⁵⁶ Although adjudication of such claims may have harmful effects on foreign policy, they do not exceed statutory enforcement and judicial review.³⁵⁷

VII. CONCLUSION

This comment provides an analysis of both Executive Order 13303 and the Alien Tort Claims Act, considering (i) whether the Bush Administration’s issuance of the Executive Order is an attempt to repeal the Alien Tort Claims Act, (ii) whether the order was issued as an attempt to bar lawsuits against private companies, (iii) whether the President had the authority to issue such order, (iv) and whether the order resulted in a withdrawal or modification of federal jurisdiction. At first blush, Executive Order 13303 seems to be an attempt by the Administration to repeal the A.T.C.A. The Administration appears to be preventing corporations from being involved in lawsuits arising from alleged human rights violations taking place overseas, including in Iraq.³⁵⁸ The Administration issued E.O. 13303 despite *Dames & Moore*, which provided courts with the criteria necessary to evaluate the constitutionality of an Executive Order.³⁵⁹

The effect and scope of the order raises some concerns in regards to its implications. Granting presidential power to change the law without providing an alternative forum could not only create bad precedent, but also works against traditional democratic principles.³⁶⁰ E.O. 13303 is different than *Dames & Moore*, where the Court upheld the order based on the President’s long-recognized power to settle claims with foreign governments.³⁶¹ E.O. 13303 is essentially a silent grant of presidential power which appears to protect private entities.³⁶²

Fears that the federal courts would unleash the A.T.C.A. against transnational corporations have not been realized.³⁶³ Courts remain fully aware

356. *Alvarez-Machain v. United States*, 331 F.3d 604, 614 n.7 (9th Cir. 2003).

357. Dhooge, *supra* note 81, at 82.

358. See Government Accountability Project, *supra* note 32.

359. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

360. Kelly, *supra* note 24, at 485.

361. See EarthRights International, *Executive Order 13303: Instituting Immunity?*, Aug. 13, 2003,

http://www.earthrights.org/campaignfeature/executive_order_13303_instituting_immunity.html (last visited Dec. 20, 2006).

362. Kelly, *supra* note 24, at 516.

363. Human Rights First, *supra* note 85.

of the potential consequences of their rulings against both the injured plaintiff and the transnational corporation involved.³⁶⁴ However, these rulings affect not only the parties in an A.T.C.A. lawsuit, but also governments.³⁶⁵ Courts are aware of the express language of the statute, and their opinions recognize that not every violation of international law is a tort for purposes of the A.T.C.A. As set forth, the A.T.C.A. may properly be utilized by the plaintiff when the alleged violation achieved specific, universal, and obligatory status.³⁶⁶

364. Dhooge, *supra* note 81, at 101.

365. *Id.*

366. *Id.*