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Awaiting *Doe v. Exxon Mobil Corp.*: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation

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AWAITING *DOE V. EXXON MOBIL CORP.*: ADVOCATING THE CAUTIOUS USE OF EXECUTIVE OPINIONS IN ALIEN TORT CLAIMS ACT LITIGATION

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Abstract: In June 2001, eleven Indonesian villagers filed suit in a U.S. District Court against Exxon Mobil Corporation for its alleged complicity in human rights abuses in the Indonesian province of Aceh. The plaintiffs asserted jurisdiction and a cause of action pursuant to the Alien Tort Claims Act and the Torture Victim Protection Act, both of which enable foreign nationals to bring international human rights claims in U.S. federal courts. The U.S. Department of State intervened in the suit, expressing its view that federal court adjudication of the plaintiffs' claims could complicate U.S. foreign policy. The State Department opinion raises concern that the *Doe v. Exxon Mobil Corp.* suit presents a nonjusticiable political question and is unfit for judicial resolution.

The outcome of the *Exxon Mobil* suit will reflect the power of federal courts to remedy human rights violations committed abroad where the executive branch opposes judicial resolution. This Comment argues that the *Exxon Mobil* court must independently assess the suit's justiciability, disagreeing with executive branch conclusions when necessary. Separation of powers principles prevent the executive branch from mandating which cases federal courts may hear. Justiciability determinations should instead be guided by the principles underlying the political question doctrine, which insist that foreign affairs consequences do not themselves render a suit nonjusticiable. Congress enacted the Alien Tort Claims Act and Torture Victim Protection Act to ensure that individuals harmed by violations of international law could seek a remedy in U.S. courts. The *Exxon Mobil* court should not ignore this congressional mandate, nor should it ignore established judicial and constitutional doctrines, merely to accommodate executive foreign policy interests.

I. INTRODUCTION

In the volatile Aceh province of Indonesia, Exxon Mobil Corporation operates one of the world's largest and most profitable oil fields.[1] Aceh has experienced varying degrees of violence and unrest since 1976, when rebels from the Free Aceh Movement began fighting for the region's independence.[2] In 2000, the rebels turned their attention to Exxon Mobil's oil plant, contending that its revenues rightfully belonged to the Aceh

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1 *See, e.g.*, Jane Perlez, *Indonesia's Guerrilla War Puts Exxon Under Siege*, N.Y. TIMES, July 14, 2002, at A3, LEXIS, News Group File. In the early 1990s, when operated by Mobil, the oil field produced one-quarter of the company's international revenue. *Id.*

2 *E.g.*, *In Aceh, "Indonesian" is a Synonym for Foreigner*, ECONOMIST, Aug. 10, 2002, LEXIS, News Group File.

region.[3] A wave of attacks against Exxon Mobil forced the company to close its Aceh plant for four months.[4]

Following the guerilla attacks, Exxon Mobil relied upon Indonesian military forces to reopen the lucrative Aceh plant and to protect its resources and employees.[5] The government of Indonesia, motivated by annual revenues of over U.S. $1 billion from the Exxon Mobil operation,[6] enhanced its military presence in Aceh by dispatching an additional two thousand troops to Exxon Mobil's oil fields.[7] Villagers and human rights groups allege that the Indonesian security forces, which some dubbed "Exxon's Army,"[8] committed wide-spread abuses in Aceh, including murder, torture and kidnapping.[9]

Based on the military's record of tolerating human rights abuses and the nation's lack of an independent judiciary,[10] Indonesia appeared unlikely to hold its forces accountable for the Aceh atrocities.[11] In June 2001, eleven villagers from Aceh filed suit against Exxon Mobil and its business partners in the federal District Court for Washington, D.C. for genocide, murder, torture, crimes against humanity and other human rights abuses.[12] The villagers asserted jurisdiction and a cause of action pursuant to 28 U.S.C. § 1350, which encompasses the Alien Tort Claims Act ("ATCA") and the Torture Victim Protection Act of 1991 ("TVPA").[13] For over two hundred years, the ATCA has provided U.S. federal district courts with jurisdiction over torts committed in violation of international law.[14] After a long period

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[3] *See, e.g.*, Jay Solomon, *Fueling Fears: Mobil Sees Gas Plant Become Rallying Point for Indonesian Rebels*, WALL ST. J., Sept. 7, 2000, at A1, WL-WSJ 26608865.

[4] *E.g.*, Mark R. Mitchell, *Who Knew? Amid Reports of Increasing Atrocities by Indonesian Troops, Exxon Mobil Prepares to Return to Aceh*, TIME (Asia), Aug. 13, 2001, at 22, LEXIS, News Group File; Perlez, *supra* note 1.

[5] *See, e.g.*, Mitchell, *supra* note 4.

[6] Perlez, *supra* note 1.

[7] Mitchell, *supra* note 4.

[8] *Id.*

[9] *See, e.g.*, Perlez, *supra* note 1.

[10] *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, UNITED STATES DEPT. OF STATE, INDONESIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICE—2000 (2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/eap/707.htm [hereinafter INDONESIA COUNTRY REPORT 2000] (describing the Indonesian judiciary's dependence upon the executive).

[11] *See id.* § 1(a) (concluding that Indonesian "military or police rarely are held accountable for committing extrajudicial killings or using excessive force").

[12] Complaint for Equitable Relief Damages at 1-2, Doe v. Exxon Mobil Corp., (D.D.C. filed June 20, 2001) (No. 01-1357), *available at* http://www.laborrights.org/ [hereinafter *Exxon Mobil* complaint].

[13] 28 U.S.C. § 1350 (2000); *Exxon Mobil* complaint, *supra* note 12, at 2. The villagers also claimed violations of international human rights law and the statutory and common law of the District of Columbia. *Id.*

[14] The Alien Tort Claims Act provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000). The Act has been interpreted to provide foreign nationals with

of dormancy, the ATCA, along with its modern-day counterpart the TVPA, has recently evolved into a potent tool for remedying human rights abuses abroad.[15]

The ATCA and the TVPA now face a critical challenge. The outcome of *Doe v. Exxon Mobil Corp.* will test the power of the federal judiciary to adjudicate ATCA and TVPA claims where the executive branch opposes such action as contrary to U.S. foreign policy interests. At the behest of Exxon Mobil's defense team, the District Court requested the U.S. Department of State's opinion concerning the foreign policy consequences of the *Exxon Mobil* litigation.[16] In a letter to the court, State Department Legal Adviser William Taft, IV conveyed the Department's position that continued adjudication of *Exxon Mobil* could seriously threaten U.S. foreign policy interests.[17]

The State Department opinion raises a concern that *Exxon Mobil* may present a nonjusticiable political question and will be dismissed as unfit for judicial resolution.[18] A recent California District Court opinion, *Sarei v. Rio Tinto PLC*,[19] demonstrated considerable deference to similar executive foreign policy conclusions, dismissing a § 1350 suit as a political question after the State Department noted foreign policy concerns about the case.[20] If federal courts grant undue deference to executive positions concerning § 1350 suits, the executive branch will be able to effectively dictate which international claims may be heard by U.S. courts. Granting such power to the President could hinder the use of § 1350 to hold defendants accountable for international human rights abuses and could unjustly deny victims the opportunity to seek redress for their harms.

This Comment argues that federal courts must independently assess the justiciability of § 1350 claims, and disagree with executive branch conclusions when necessary. Congress enacted the ATCA and the TVPA in order to ensure that victims abused in violation of international law could seek a remedy in U.S. federal courts. The *Exxon Mobil* court should not

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not only jurisdiction, but a cause of action for violations of customary international law. *See, e.g.*, Doe v. Unocal, Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *26-27 (9th Cir. Sept. 18, 2002).

[15] *See* discussion *infra* Part II.

[16] *E.g.*, Perlez, *supra* note 1.

[17] Letter from William H. Taft, IV, Legal Adviser, Department of State, to Honorable Louis F. Oberdorfer, (July 29, 2002), *available at* http://www.laborrights.org/ (last visited Feb. 10, 2003) [hereinafter *Exxon Mobil* letter].

[18] As of February 10, 2003, the *Exxon Mobil* court had not ruled upon the defendants' motion to dismiss.

[19] 221 F. Supp.2d 1116 (C.D. Cal. 2002).

[20] *Id.* at 1178-84, 1195-99.

ignore this congressional mandate, nor should it ignore established judicial and constitutional doctrines, in order to accommodate executive foreign policy interests.

Part II of this Comment addresses the evolving use of ATCA and TVPA litigation as a means to address international human rights abuses. Part III analyzes the use of executive opinions in § 1350 suits, demonstrating that the George W. Bush Administration has fundamentally altered the executive's position concerning ATCA and TVPA litigation. Part III also analyzes the State Department's *Exxon Mobil* opinion, highlighting its inconsistency with previous actions by all branches of the U.S. government.

Part IV argues that separation of powers principles prohibit the executive branch from dictating which suits federal courts may hear. Allowing the executive to determine the justiciability of § 1350 claims would undermine Congress's constitutional authority and would politicize the judiciary. Part IV demonstrates that when the Supreme Court faced similar concerns regarding executive control over the act of state doctrine,[21] the Court asserted the power of the judiciary to independently determine the justiciability of Article III cases.

Part V addresses the parameters of the political question doctrine, arguing that it is not a vague doctrine of abstention under which federal courts may avoid all litigation with foreign affairs consequences. Rather, dismissal is appropriate only in those limited situations where a case presents the factors doctrinally required of a nonjusticiable political question. Part V also addresses the applicability of the political question doctrine to ATCA and TVPA claims, suggesting that the doctrine is generally inapposite to such suits. Part V applies the doctrine's factors to the *Exxon Mobil* suit, concluding that the suit is unlikely to implicate the doctrine.

II. SECTION 1350: THE EVOLUTION OF ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT LITIGATION

The *Exxon Mobil* suit reflects a growing trend among plaintiffs to use § 1350 as a means of holding defendants liable for human rights abuses committed abroad. Although the statute was enacted by the First Congress in 1789, it has only recently become a viable legal tool for human rights

[21] The act of state doctrine bars courts from questioning the validity of foreign nations' sovereign acts that occur within their own jurisdictions. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972).

advocates.[22] The Second Circuit resurrected § 1350 in 1980 with its landmark *Filartiga v. Pena-Irala*[23] opinion. *Filartiga* has been called the *Brown v. Board of Education* of international human rights[24] because it established that the ATCA creates a cause of action for human rights abuses that violate customary international law.[25] The *Filartiga* court exercised jurisdiction over Paraguayan plaintiffs' claims that a Paraguayan official tortured their relative.[26]

In *Filartiga*, the Second Circuit adopted an evolving view of international law. The court insisted that in determining what conduct violates customary international law, and thus creates a cause of action under the ATCA, federal courts should evaluate contemporary societal standards rather than applying the norms that prevailed at the time of the ATCA's origin.[27] Federal courts have since recognized causes of action under the ATCA for a variety of abuses, including war crimes,[28] genocide,[29] unlawful detention,[30] forced labor,[31] sexual assault,[32] systematic racial discrimination,[33] and environmental damage.[34] In 1992, Congress enhanced § 1350 by enacting the Torture Victim Protection Act of 1991, which created

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[22] Prior to 1980, less than two dozen reported cases relied upon § 1350. BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 8 (1996). The statute was invoked successfully only twice prior to that point. *Id.*

[23] 630 F.2d 876 (2d Cir. 1980).

[24] William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 687 (2002).

[25] *Filartiga*, 630 F.2d at 880 (holding that torture by a state actor violated "established norms of the international law of human rights, and hence the law of nations").

[26] *Id.* at 878. Since *Filartiga*, federal courts faced with ATCA claims have consistently held that the statute confers a cause of action for violations of customary international law. *See, e.g.*, Doe v. Unocal, Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *26-27 (9th Cir. Sept. 18, 2002). *But see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring). Judge Robert Bork's view that the ATCA did not create a cause of action has been heavily criticized and has not been followed by subsequent opinions. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (eschewing Bork's "rather categorical" rejection of the ATCA).

[27] *Filartiga*, 630 F.2d at 881.

[28] *See, e.g., Kadic*, 70 F.3d at 242-43; Doe I v. Islamic Salvation Front (FIS), 993 F. Supp. 3, 8 (D.D.C. 1998).

[29] *See, e.g., Kadic*, 70 F.3d at 241-42.

[30] *See, e.g.*, Alvarez-Machain v. United States, 266 F.3d 1045, 1052 (9th Cir. 2001).

[31] *See, e.g., Unocal*, 2002 U.S. App. LEXIS 19263, at *32-35.

[32] *See, e.g., Kadic*, 70 F.3d at 242-43.

[33] *See, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987)).

[34] *See* Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116, 1155-62 (C.D. Cal. 2002) (holding environmental harms a violation of international law where the harms contravened the United Nations Convention on the Law of the Sea).

an explicit federal cause of action for torture and extrajudicial killings committed under color of foreign law.[35]

The Second Circuit in 1995 again expanded § 1350 liability in *Kadic v. Karadzic*,[36] holding that violations of international law do not always require state action.[37] The court allowed suit against the leader of the Bosnian-Serb military forces in his private capacity for war crimes, genocide and crimes against humanity,[38] concluding that certain conduct creates individual liability under international law.[39] The Ninth Circuit in 2002 extended *Kadic* in *Doe v. Unocal Corp.*,[40] holding that Unocal Corporation could be held liable for aiding and abetting human rights abuses committed by the military of Myanmar (Burma).[41] The *Unocal* court also noted that corporations could potentially be held liable for violations of international law under other theories of liability, including joint venture, agency, negligence, and recklessness.[42]

The prospect of holding corporations liable for human rights abuses committed abroad promises to greatly expand the use of § 1350. Leading human rights advocates have stated that ATCA and TVPA litigation represents an integral part of their strategy to enforce international human rights and have filed suits against a number of multinational corporations.[43] American legal methods, including liberal discovery, jury trials and class action suits, provide additional incentives for foreign plaintiffs to file suit in

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[35] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)). U.S. citizens as well as foreign nationals may sue under the TVPA. *Id.*

[36] 70 F.3d 232 (2d Cir. 1995).

[37] *Id.* at 239-41 (documenting "a substantial body of law . . . that renders private individuals liable for some international law violations"). The Second Circuit rejected the District Court's holding that the ATCA was inapplicable because the defendant was not an official state actor. *Id.* at 239.

[38] *Id.* at 236.

[39] *Id.* at 239-41. Certain violations render an individual "hostis humani generis" or an enemy of all mankind. *Id.* at 239.

[40] Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002).

[41] *Id.* at *35-36. In order to create liability for "aiding and abetting" violations of international law, the Ninth Circuit required "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime." *Id.*

[42] *Id.* at *36 n.20.

[43] *See, e.g.*, Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 187-95 (2002). Collingsworth, the general counsel and executive director of the International Labor Rights Fund ("ILRF"), addresses the following ILRF § 1350 suits: *Doe v. Unocal*; *Doe v. Exxon Mobil*; a suit against the Coca-Cola Company for their alleged support of "death squads" in Colombia; a claim against Fresh Del Monte Produce for the alleged torture of union leaders and a suit against DynCorp Corporation for purportedly spraying toxic herbicide in Ecuador. *Id.* at 188-96.

U.S. courts.[44] Legal experts have predicted that up to 1000 U.S. and foreign companies could face § 1350 claims following the Ninth Circuit's *Unocal* decision.[45]

As plaintiffs advance an increasing number of international legal claims for human rights abuses under the ATCA and the TVPA, they will likely encounter a judiciary reluctant to become involved in foreign affairs. Whether caused by doubts regarding their constitutional powers or their competence, courts are exceptionally wary of adjudicating disputes involving international affairs.[46] In order to avoid infringing upon the foreign affairs authority of Congress or the President, courts have proven mindful of the political branches' interests when determining the justiciability of § 1350 suits.[47]

III. SECTION 1350 AND THE PERSUASIVE POWER OF EXECUTIVE COMMUNICATION

Given the traditional dominance of the executive branch in international affairs,[48] courts have demonstrated a special concern for the President's foreign affairs prerogatives when evaluating the justiciability of ATCA and TVPA suits. To determine the President's interests, courts often directly solicit the executive's views of ongoing litigation with potential international consequences.[49] In contrast to previous administrations, the George W. Bush Administration has aggressively employed executive opinions to defeat § 1350 litigation. The State Department's *Rio Tinto* and

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[44] *See, e.g.*, Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 12 (2002); Joshua Kurlantzick, *Globalism in the Dock: Burmese Villagers Sue Unocal in an L.A. Courtroom*, AM. PROSPECT, Nov. 4, 2002, at 19, LEXIS, News Group File.

[45] Paul Magnusson, *Making a Federal Case Out of Overseas Abuses*, BUS. WK., Nov. 25, 2002, at 78, LEXIS, News Group File.

[46] *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[47] *See* Kadic v. Karadzic, 70 F.3d 232, 248-49 (2d Cir. 1995) ("We do not read *Filartiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations."). The court acknowledged that certain § 1350 suits could implicate foreign policy matters more appropriate for legislative or executive resolution. *Id.*

[48] *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 26-29 (1990); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 31-62 (2d ed. 1996); Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 158 (David G. Adler & Larry N. George eds., 1996).

[49] *E.g.*, *Kadic*, 70 F.3d at 250; Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116, 1180-81 (C.D.Cal. 2002); Nat'l Coalition Gov't of Burma v. Unocal, Inc., 176 F.R.D. 329, 361 (C.D. Cal. 1997); Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 585 (1980) [hereinafter *Filartiga* memorandum]; *Exxon Mobil* letter, *supra* note 17.

Exxon Mobil opinions raise special concern regarding the extent of the executive power to influence courts' justiciability determinations.

A. *Cautious Practice: Previous Executive Positions Concerning § 1350 Litigation*

Regardless of their views concerning the scope of the ATCA and the TVPA, previous presidential administrations have declined to invoke foreign policy objections to § 1350 suits. The Carter Administration strongly supported federal court jurisdiction under the ATCA to hold foreign nationals liable for human rights abuses abroad.[50] The government's *amicus curiae* brief in *Filartiga v. Pena-Irala* dismissed concerns regarding the possibility of judicial interference in foreign affairs, arguing that judicial recognition and enforcement of international law would strengthen U.S. foreign policy by demonstrating the nation's commitment to human rights.[51]

Although the Reagan Administration opposed a broad application of § 1350, it did not oppose such suits on foreign policy grounds. In contrast to the Carter Administration's vigorous support of the ATCA, the Reagan Administration advanced a narrow interpretation of the Act. Addressing *Trajano v. Marcos*,[52] a private suit against former Philippine President Ferdinand Marcos and his daughter, the Justice Department under Reagan argued via *amicus curiae* that the ATCA was a purely jurisdictional statute and did not create a cause of action.[53] Despite this interpretation, the Justice Department expressly declined to comment on the applicability of the political question doctrine or other justiciability doctrines to the *Marcos* suit.[54] The government brief stated that continued adjudication against Marcos would not complicate U.S.-Philippine relations.[55]

The Clinton Administration also declined to oppose the adjudication of § 1350 suits, even where such suits had potentially serious foreign policy consequences. In *Kadic v. Karadzic*,[56] the Second Circuit heard claims against Radovan Karadzic, the President of the self-proclaimed Bosnian-

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[50] *See Filartiga* memorandum, *supra* note 49.

[51] *Id.* at 604 (arguing that when a court addresses violations of fundamental rights, "there is little danger that judicial enforcement will impair our foreign policy efforts").

[52] Trajano v. Marcos, 878 F.2d 1438 (9th Cir. 1989) (unpublished opinion).

[53] Brief for the United States of America as Amicus Curiae at 5, Trajano v. Marcos, 878 F.2d 1438 (9th Cir. 1989) (Nos. 86-2448, 86-2449, 86-2496, 86-15039, 87-1706, 87-1707) [hereinafter *Trajano* amicus brief]. No court has followed the § 1350 interpretation advanced by the Reagan administration. STEPHENS & RATNER, *supra* note 22, at 19.

[54] *Trajano* amicus brief, *supra* note 53, at 6-7, 33-34.

[55] *Id.* at 32.

[56] 70 F.3d 232 (2d Cir. 1995).

Serb republic of Sprska,[57] as he negotiated the end of that region's civil war. After the court requested the executive branch's views of the suit,[58] the Administration raised no objection to judicial action.[59] The Clinton Administration opposed human rights claims arising under state-law or other federal statutes only in the limited situations in which such suits conflicted with U.S. obligations under treaties or executive agreements.[60]

Executive opinions concerning the propriety of § 1350 litigation have proven influential in courts' justiciability determinations.[61] In *Kadic v. Karadzic*, for example, the government's memorandum helped allay the court's concerns that judicial action would complicate efforts to end the Bosnian civil war.[62] Executive communication provides a valuable means for the judiciary to assess national foreign policy interests and the propriety of federal court adjudication. Because executive opinions are granted substantial weight by the courts, however, they could also be abused as a tool to defeat lawsuits that conflict with executive views or interests.

B. *A Fundamental Shift: Executive Communication Under the George W. Bush Administration*

The George W. Bush Administration has fundamentally shifted the executive position concerning § 1350 litigation, contending that general

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[57] *Id.* at 236-37.

[58] *Id.* at 250.

[59] *Id.* The Statement of Interest issued by the Justice Department and the State Department contended that "[a]lthough there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." *Id.* *See also* notes *infra* 122-124 and accompanying text (describing the Clinton Administration's decision to not oppose the *Unocal* § 1350 litigation).

[60] The Department of Justice under the Clinton Administration opposed state-law claims against Japanese corporations for their use of slave labor during World War II on the grounds that such claims were barred by post-war treaties. *See* Statement of Interest of United States of America, *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp.2d 939 (N.D. Cal. 2000) (No. 1347), *available at* http://www.state.gov/documents/organization/6641.doc (last visited Feb. 10, 2003).

The Administration also opposed claims from Holocaust victims on the grounds that an executive agreement between the United States and Germany had created a foundation to specifically address compensation and restitution claims arising out of the Holocaust. *See* Statement of Interest of the United States, *In Re* Austrian and German Bank Holocaust Litig., No. 98 Civ. 3938 (SWK), 2001 U.S. Dist. LEXIS 2311 (S.D.N.Y. Mar. 7, 2001), *available at* http://www.state.gov/documents/organization/6542.doc (last visited Feb. 10, 2003). In accordance with an executive agreement with Germany, the United States is obligated to file Statements of Interest in pending claims against German companies for their conduct during the Nazi era. *See In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp.2d 370, 380 (D.N.J. 2001) (No.1347 VRW).

[61] *See In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp.2d at 948 (noting that the executive's Statement of Interest "carries significant weight").

[62] *See* Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) (noting that "the Government's reply to our inquiry reinforces our view that adjudication may properly proceed").

foreign policy concerns should prevent federal court adjudication of human rights cases. The Bush Administration[63] has issued executive opinions in a number of § 1350 suits, often through "Statements of Interest" filed with courts by the Department of Justice on behalf of the State Department.[64] The Administration has issued opinions concerning litigation challenging Japan's use of sex slaves in World War II,[65] claims against the Mayor of Beijing for alleged human rights abuses against adherents of the Falun Gong movement,[66] Exxon Mobil's Indonesian practices[67] and the practices of a Papua New Guinean mining operation.[68] These opinions challenge the propriety of federal court jurisdiction, often insisting that the disputes should be resolved through diplomatic rather than judicial means.[69] The current administration's apparent hostility to ATCA and TVPA claims has in fact provoked speculation that the executive branch will engineer efforts to repeal § 1350.[70]

C. Rio Tinto *and* Exxon Mobil *State Department Opinions Reflect Shift in Executive Views*

Not all opinions issued by the Bush Administration diverge from previous executive views. The Administration opposed claims against Japan

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[63] References to the "Bush Administration" within this Comment refer exclusively to the George W. Bush Administration.

[64] Statements of Interest are authorized under the Attorney General's statutory power "to attend to the interests of the United States" in pending federal or state suits. 28 U.S.C. § 517 (2000).

[65] Bill Miller, *U.S. Resists "Comfort Women" Suit; Japan's War Actions Are Covered by Treaties, Officials Say*, WASH. POST, May 14, 2001 at A19, LEXIS, News Group File. The Statement filed by the Justice Department and the State Department argued that court action "could have a potentially serious negative impact on U.S.-Japan relations." *Id.* The statement also contended that Japan was entitled to sovereign immunity from suit. *Id.*

[66] Letter from William H. Taft, IV, Legal Adviser, Department of State, to Honorable Robert D. McCallum, Assistant Attorney General, United States Department of Justice (Sept. 25, 2002), http://cja.org./cases/Liuqi_Docs/Liuqi_StateDept.pdf [hereinafter *Liu* letter]. Taft urged the Department of Justice to convey to the court the State Department's views that suits against the Mayor were barred by the Foreign Sovereign Immunities Act and the act of state doctrine. *Id.* at 3-8. The letter argued that § 1350 suits can lead to "potentially serious adverse foreign policy consequences." *Id.* at 8.

[67] *See Exxon Mobil* letter, *supra* note 17.

[68] Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116, 1181 (C.D. Cal. 2002).

[69] In a State Department opinion concerning abuses of Falun Gong adherents, the Department stated that "[i]n our judgment, adjudication of these multiple lawsuits . . . is not the best way for the United States to advance the cause of human rights in China." *Liu* letter, *supra* note 66, at 7. The letter also asserted that "U.S. *courts* should be cautious when asked to sit in judgment on the acts of foreign officials . . . ." *Id.* (emphasis in original).

[70] Murray Hiebert & John McBeth, *Calculating Human Rights*, FAR E. ECON. REV. 18, Aug. 15, 2002, 2002 WL-FEER 24511769 (quoting an unnamed American mining executive's statement about the future of the ATCA). Repeal of § 1350 has emerged as a potential goal of major business interests. Following the Ninth Circuit's *Unocal* decision, leaders of major corporations met to address efforts to stem future § 1350 litigation. Magnusson, *supra* note 45.

for its conduct in World War II on the premise that post-war treaties conclusively addressed the plaintiffs' claims and precluded further action by the United States.[71] The Clinton Administration opposed similar non-ATCA claims when such suits conflicted with U.S. treaty obligations.[72]

The position that general foreign policy implications should prevent the adjudication of international human rights suits, however, represents a new executive view concerning such litigation. The executive opinions issued in *Sarei v. Rio Tinto PLC* and *Doe v. Exxon Mobil Corp.* make no claim that the suits interfere with U.S. international obligations or the executive's constitutional powers. Rather, the State Department positions contend that possible foreign policy consequences weigh against adjudication of these suits in federal courts. As such, these executive opinions create special concern that executive views, if granted dispositive weight, could inappropriately defeat federal court jurisdiction over § 1350 suits addressing important human rights claims.

1. Sarei v. Rio Tinto PLC

In *Sarei v. Rio Tinto*, former and current villagers from the Papua New Guinea ("PNG") island of Bougainville filed ATCA claims against an international mining group for violations of international law.[73] The villagers alleged that the mining group committed widespread racial discrimination[74] and inflicted severe environmental harm upon Bougainville[75] while operating one of the world's largest copper mines. The plaintiffs also contended that the mining group relied on the PNG government to maintain its mining venture. In return for providing military support, the PNG government allegedly received nearly one-fifth of the mine's profits.[76] Accordingly, the plaintiffs asserted that the mining group was liable for the war crimes and crimes against humanity committed by PNG military forces.[77]

At the request of the District Court, the State Department shared its views concerning the potential foreign policy consequences of adjudicating

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[71] *See* Miller, *supra* note 65.

[72] *See supra* note 60.

[73] *Rio Tinto*, 221 F. Supp.2d at 1120. *See* John Phaceas, *US Firm Sues Rio Tinto: Miner Accused of Human Rights Abuses*, AUSTRALIAN, Sept. 8, 2000, at 22, LEXIS, News Group File; Greg Roberts, *Legal Threat to Bougainville Peace*, AGE (Melbourne), Mar. 23, 2002, at 23, LEXIS, News Group File.

[74] *Rio Tinto*, 221 F. Supp.2d at 1124.

[75] *Id.* at 1123-24.

[76] *Id.* at 1121.

[77] *Id.* at 1124-27.

the *Rio Tinto* suit.[78] The State Department's Statement of Interest raised concerns regarding *Rio Tinto's* justiciability, arguing that continued adjudication would have a "potentially serious adverse impact" on the Bougainville peace process, which State Department Legal Adviser Taft described as "an important United States foreign policy objective."[79]

2. Doe v. Exxon Mobil Corp.

Upon the request of Exxon Mobil's defense team, the District Court hearing *Doe v. Exxon Mobil Corp.* also solicited the views of the State Department regarding the suit's potential foreign affairs consequences.[80] As in *Rio Tinto*, the State Department's opinion raised concerns about *Exxon Mobil's* justiciability. Although Legal Adviser Taft purported not to address the legal issues before the court and did not directly call for dismissal of the suit, his letter strongly suggested that the dispute was not appropriate for judicial resolution.[81]

The State Department asserted that hearing the *Exxon Mobil* litigation would "risk a potentially serious adverse impact on significant" American foreign affairs interests.[82] Taft anticipated that because the *Exxon Mobil* suit would scrutinize Indonesian military conduct, Indonesia would consider the suit an affront to its sovereignty.[83] Taft contended that Indonesian resistance could curtail the country's participation in the war on terrorism, identifying Indonesia as a "focal point" for efforts against Al Qaida.[84] The State Department letter also argued that the *Exxon Mobil* suit could disrupt ongoing U.S. efforts to promote human rights in Indonesia.[85] The majority of the letter addressed concerns that judicial action could impede foreign investments in Indonesia, informing the court that "increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy."[86]

To bolster his claims that Indonesia traditionally reacts with hostility toward perceived intrusions upon its sovereignty, Taft attached a one-page

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[78] *Id.* at 1180-82.

[79] *Id.* at 1181. For general background regarding the Bougainville peace process see Gervase Greene, *The Story So Far: #8 The Bougainville Peace Deal*, AGE (Melbourne), May 4, 1988 at 4, LEXIS, News Group File. *See also* Roberts, *supra* note 73 (addressing pressure on the United States from Papua New Guinea and Australia to oppose the *Rio Tinto* suit).

[80] *E.g.*, Perlez, *supra* note 1.

[81] *Exxon Mobil* letter, *supra* note 17.

[82] *Id.* at 1.

[83] *Id.* at 2.

[84] *Id.* at 3.

[85] *Id.*

[86] *Id.* at 3-5.

letter from the Indonesian Ambassador to the United States.[87] The Ambassador argued that adjudication of the *Exxon Mobil* suit would compromise Indonesian efforts to guarantee the safety of foreign investments, highlighting U.S. businesses as especially vulnerable.[88] The Ambassador also stated that the suit would impair Indonesia's ability to bring about peace in the Aceh region.[89]

Domestic and international observers reacted with skepticism to the State Department's position that the *Exxon Mobil* suit could significantly complicate U.S. foreign policy.[90] Some commentators noted that the opinions reflected the Administration's animus toward § 1350 and the adjudication of human rights claims in U.S. courts.[91] Other observers questioned the State Department's motives for protecting Exxon Mobil, noting the Administration's close alliances with corporate and oil interests.[92]

The State Department's contention that the *Exxon Mobil* litigation could seriously impair U.S.-Indonesian relations is seemingly contradicted by the earlier actions taken by all three branches of the U.S. government. The State Department, for example, has maintained a long-standing and consistent criticism of Indonesia's human rights record.[93] In 2001,

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[87] Letter from Soemadi Brotodiningrat, Ambassador, Embassy of the Republic of Indonesia, to Richard L. Armitage, Deputy Secretary of State, United States Department of State, (July 15, 2002), *available at* http://www.laborrights.org/ (last visited Feb. 10, 2003). The letter demonstrates confusion regarding the scope of the litigation, addressing concerns regarding the "extra-territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution, e.g. the Indonesian military . . . ." *Id.* The *Exxon Mobil* suit does not in fact attempt to impose liability upon the Indonesian armed forces, which were not named as defendants.

[88] *Id.*

[89] *Id.*

[90] *See, e.g.*, *Human Rights and Terror*, Editorial, WASH. POST, Aug. 10, 2002, at B6, LEXIS, News Group File (declaring the Administration's arguments "troubling" and "not convincing"); Mike O'Donnell, Opinion, *Moral Relativism Won't Defeat Terrorists*, CHRISTIAN SCIENCE MONITOR, Aug. 16, 2002, at 11, LEXIS, News Group File (arguing that "the State Department's reasons for dismissal are not all terribly pressing—or even legitimate"); Heibert & McBeth, *supra* note 70; *Oily Diplomacy*, Editorial, N.Y. TIMES, Aug. 19, 2002, at A14, LEXIS, News Group File; Kenneth Roth, Opinion, *U.S. Hypocrisy in Indonesia*, INT'L HERALD TRIB., Aug. 14, 2002, at 4, LEXIS, News Group File.

[91] Edward Alden, *Unocal Wants Government to Quash Labour Lawsuit*, FIN. TIMES (London), Aug. 9, 2002, at 7, LEXIS, News Group File (quoting an unnamed former State Department official that State Department Legal Adviser Taft "saw an irresistible opportunity to strike a blow against the Alien Tort Claims Act").

[92] *See, e.g.*, *Al Qaeda—Boon to Business: Aceh, Indonesian Villagers Litigate Against Exxon Mobil Corp.*, NATION, Sept. 30, 2002, at 7, LEXIS, News Group File ("Will a consequence of the war on terrorism be a get-out-of-lawsuits-free card for US corporations accused of abuses overseas?"); Heibert & McBeth, *supra* note 70 (arguing that the statements "removed any doubt about what drives American policy toward Indonesia: cold-blooded commercial interest"); *Oily Diplomacy*, *supra* note 90 (observing that the *Exxon Mobil* opinion "reinforces the impression that the administration is too cozy with the oil industry").

[93] *See, e.g.*, INDONESIA COUNTRY REPORT 2000, *supra* note 10 (noting that the Indonesian military "committed numerous serious human rights abuses throughout the year"); BUREAU OF DEMOCRACY,

Department officials concluded that Indonesia's failure to pursue accountability for human rights violations "reinforces the impression that there would be continued impunity for security abuses."[94] Less than a year before the Department's *Exxon Mobil* statement, the then-United States Ambassador-Designate to Indonesia testified that the United States could not ignore the lack of accountability for human rights abuses by the Indonesian military.[95] Congress has similarly denounced the conduct of the Indonesian military, restricting aid to Indonesia's armed forces.[96] The federal courts have previously adjudicated § 1350 human rights claims based on Indonesian military abuses, holding Indonesian generals liable for their conduct in East Timor.[97]

The State Department position concerning the consequences of the *Exxon Mobil* suit thus appears questionable given previous executive, congressional and judicial action toward Indonesia. In light of these concerns, courts must not grant executive opinions dispositive weight. Instead, courts should consider such views with regard to established separation of powers principles and clear doctrines regarding the justiciability of legal claims.

IV. THE SEPARATION OF POWERS DOCTRINE: PREVENTING UNDUE JUDICIAL DEFERENCE TO EXECUTIVE OPINIONS

Courts can and should consider executive branch communication regarding § 1350 litigation. ATCA and TVPA suits often require courts to address significant evidentiary and legal issues, including ascertaining

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HUMAN RIGHTS, AND LABOR, UNITED STATES DEPT. OF STATE, INDONESIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES—1999 (2000), *available at* http://www.state.gov/g/drl/rls/hrrpt/1999/288pf.htm (last visited Feb. 10, 2003).

[94] INDONESIA COUNTRY REPORT 2000, *supra* note 10 ("The Government's human rights record was poor, and the overall human rights situation worsened during the year . . . . Security forces were responsible for numerous instances of, at times indiscriminate, shooting of civilians, torture, rape, beatings and other abuse, and arbitrary detention in Aceh [and other regions].").

[95] *Saudi Arabia, Indonesia, Africa Ambassadorial Nominations: Hearing Before the Senate Comm. on Foreign Relations*, 107th Cong. (2001), 2001 WL 1113283 (statement of Ralph L. "Skip" Boyce, Ambassador-Designate to Indonesia).

[96] The Foreign Operations Appropriations Act for Fiscal Year 2002 continues restrictions on military aid to Indonesia until the President certifies that the Indonesian government and military improve their human rights practices. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 107-115, § 572, 115 Stat. 2118, 2167 (2002).

[97] *See* Todd v. Panjaitan, 1994 WL 827111 (D.Mass. Oct. 26, 1994) (awarding a default judgment against an Indonesian general for his involvement in an East Timor massacre); *Court Orders 14-Million-Dollar Judgment in East Timor Massacre*, AGENCE FR. PRESSE, Oct. 27, 1994, LEXIS, News Group File. In a separate case, a U.S. court awarded a U.S. $66 million judgment against General Jonny Lumintang for what the court deemed "gross human rights violations." *See U.S. Court Holds Indonesian General Liable for 66 Million*, ASCRIBE NEWSWIRE, Oct. 5, 2001, LEXIS, News Group File.

customary international law, weighing the allegations and denials of foreign parties and assessing a case's foreign policy ramifications. To ignore executive concerns would complicate courts' tasks while risking serious interference with the nation's foreign policy. Courts must not, however, cede their adjudicatory power by granting executive communication dispositive weight.[98] The *Rio Tinto* court demonstrated undue deference to the State Department. Citing the President's primacy in foreign affairs, the court contended that questioning the logic of the Department's conclusion would violate settled separation of powers principles.[99] The court refused, for example, to consider statements by negotiators involved with the Bougainville peace process that contradicted the State Department's assessment regarding the suit's effect upon that process.[100]

Permitting the executive branch to dictate the justiciability of § 1350 claims violates the separation of powers doctrine, which is intended to prevent the aggrandizement of power by one branch of government at the expense of another.[101] The Supreme Court has described the doctrine as one that is "at the heart of the Constitution."[102] Excessive judicial deference to executive conclusions upsets the delicate balance of constitutional powers, allowing the President to infringe upon both legislative and judicial authority. Examination of the Court's treatment of the act of state doctrine provides guidance to contemporary courts, counseling them to avoid political control over judicial doctrines.

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[98] *See* Doe v. Unocal, Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *73 (holding that the State Department's Statement of Interest was "not conclusive at this later stage, especially in light of the fact that 'the Executive Branch . . . cannot by simple stipulation change a political question into a cognizable claim'"), *citing* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 788-89 (1972) (Brennan, J., dissenting); Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) ("[E]ven an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication"); *In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp.2d 370, 380 (D.N.J. 2001) (stating that "the Statement of Interest is non-binding on the Court"). In *South African Airways v. Dole*, the Secretary of the Department of Transportation challenged the ability of the federal government to review a final order under the Comprehensive Anti-Apartheid Act of 1986, arguing that the Department's foreign conduct was essentially immune from judicial review. 817 F.2d 119, 123 (D.C. Cir. 1987). The D.C. Court of Appeals rejected the Secretary's claim, determining that the case was justiciable. *Id.*

[99] Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116, 1181-82 (arguing that the court "may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning") (citation omitted).

[100] *Id.* at 1181.

[101] Buckley v. Valeo, 424 U.S. 1, 122 (1976).

[102] *Id.* at 119. *See also* Clinton v. City of New York, 524 U.S. 417, 450-51 (1998) ("Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty.") (Kennedy, J., concurring).

A. Maintaining Congress's Constitutional Authority Over International Law and Federal Courts

If the executive were allowed to dictate the justiciability of § 1350 claims, it would usurp Congress's constitutional role. The Constitution provides Congress with both the authority to "define and punish . . . Offenses against the Law of Nations"[103] and the power to define federal court jurisdiction.[104] Although the legislative debate surrounding the passage of the Alien Tort Claims Act is sparse,[105] the historical record suggests that the First Congress enacted § 1350 in order to give federal courts the power to resolve particular international disputes.[106] By empowering the judiciary to address violations of international law, Congress likely sought to augment the national government's foreign affairs power, which was a critical shortcoming of the Articles of Confederation.[107]

While a limited legislative record arguably obscures the First Congress's intent for the Alien Tort Claims Act,[108] subsequent legislative action indicates a clear congressional willingness to commit the resolution of international torts to the federal courts.[109] Congress explicitly enacted the Torture Victim Protection Act in 1992 to address foreign nations' human rights abuses: the legislative record reflects Congress's desire to provide a federal cause of action for "the thousands of victims of torture and summary

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[103] U.S. CONST. art. I, § 8, cl. 10.

[104] U.S. CONST. art. III, § 2, cl. 2.

[105] Judge Friendly famously remarked that the ATCA was "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, . . . no one seems to know whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

[106] *See In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992) (stating that in enacting the ATCA, Congress intended to make tort actions implicating foreign affairs cognizable in federal courts); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980) (arguing that ATCA represented "part of an articulated scheme of federal control over external affairs"); Dodge, *supra* note 24. *But see* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (arguing that in enacting the ATCA, the First Congress intended only to implement alienage jurisdiction and implicitly intended to limit the statute to suits involving at least one U.S. defendant).

[107] *See* Dodge, *supra* note 24, at 705-10. The Marbois Affair of 1784, involving an assault against a French official in Philadelphia, typified the foreign affairs controversy that Congress sought to resolve through the ATCA. *Id.* at 692-96. Dodge has detailed how many of the original proposals for the federal judiciary presupposed the judicial power to adjudicate issues of international significance. *Id.* at 704-09. *See also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475-80 (1989) (arguing that the ATCA's passage reflected America's interest in fulfilling its responsibilities in the international community).

[108] *See, e.g.*, Burley, *supra* note 107, at 463 (1989) (conceding that "definitive proof of the intended purpose and scope of the Alien Tort Statute is impossible").

[109] The TVPA was explicitly enacted pursuant to Congress's power to define and punish violations of "the law of nations." S. REP. NO. 102-249, at 5 (1991).

executions around the world."[110] In enacting the TVPA, Congress also indicated its support for the ATCA, explicitly stating that the Act should remain a viable cause of action for foreign plaintiffs.[111]

The President may not unilaterally override this congressional delegation of power. As Judge Edwards concluded in *Tel-Oren v. Libyan Arab Republic*,[112] "[i]f Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions 'exacerbate tensions' and should not be heard."[113]

B. Preserving Judicial Independence from Political Control

Although executive opinions are necessary for judicial consideration in certain cases, the separation of powers doctrine mandates that courts make judicial determinations free from political control, even during times of national crisis. The Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*[114] refused to accept President Truman's claims that the Korean War necessitated the seizure of American steel mills.[115] Instead, the Court insisted that the propriety of the President's actions be determined by established constitutional principles.[116] In *Washington Post Co. v. United States Department of State*,[117] the District of Columbia Court of Appeals assessed the State Department's claim that an individual would be significantly harmed if certain Department records were publicly released,[118] ultimately determining that the Department's contention was unfounded.[119] The court concluded that "whatever weight the opinion of the Department, as a presumed expert in the foreign relations field, is able to garner, deference cannot extend to blatant disregard of countervailing evidence."[120]

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[110] S. REP. NO. 102-249, at 3 (1991). The Second Circuit has observed that current law, in addition to merely permitting § 1350 suits, expressly favors District Court receptivity to such suits. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 (2d Cir. 2000).

[111] H.R. REP. NO. 102-367, at 4 (1991) (stating that the ATCA "should remain intact to permit suits based on other norms that already exist or may ripen into rules of customary international law"); *see also* S. REP. NO. 102-249, at 3 (1991) ("Section 1350 has other important uses and should not be replaced.").

[112] 726 F.2d 774 (D.C. Cir. 1982).

[113] *Id.* at 789 (Edwards, J., concurring).

[114] 343 U.S. 579 (1952).

[115] *Id.* at 582, 587-88.

[116] Concurring, Justice Douglas noted that the Court "cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution." *Id.* at 630 (Douglas, J., concurring).

[117] 840 F.2d 26 (1988), *vacated on other grounds*, 898 F.2d 793 (D.C. Cir. 1990).

[118] *Id.* at 27. The court argued that declining to review the State Department claims would amount to "an abdication of judicial responsibility to unbridled Executive Branch discretion." *Id.* at 31.

[119] *Id.* at 37.

[120] *Id.* at 36-37.

If courts were to practice unquestioning adherence to executive communication, they would enable politicization of the judiciary. As the divergent views of the Carter and Reagan Administration demonstrate,[121] political support for § 1350 has differed dramatically among various presidential administrations. If courts do not make justiciability determinations independent from executive control, § 1350 may become little more than a political tool. Instead of objective determinations made according to established principles of law, courts would determine litigants' claims based upon prevailing political views. Presidents would be free to defeat human rights claims or, alternatively, force courts to adjudicate issues inappropriate for judicial resolution.

The potential for politically motivated decision-making and the attendant judicial inconsistency caused by excessive deference to executive opinions is revealed in the divergent positions adopted in the *Unocal* and *Exxon Mobil* suits. Like *Exxon Mobil*, *Doe v. Unocal Corp.* alleged that a major oil corporation facilitated the human rights abuses of foreign military forces.[122] The *Unocal* plaintiffs contended that Unocal Corporation relied upon Myanmar—a regime heavily criticized for its human rights record—to provide military protection for the company's gas pipeline project.[123] Despite the striking similarities between *Unocal* and *Exxon Mobil*, the State Department expressed opposite positions in the two cases. The State Department under the Clinton Administration declined to oppose federal court jurisdiction over the *Unocal* suit.[124] Following the *Exxon Mobil* statement by the Bush State Department, however, Unocal attorneys requested a revised State Department opinion,[125] evidently believing that a change in administrations could influence executive conclusions and courts' justiciability determinations.

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[121] *See* discussion *supra* Part III.A.

[122] Doe v. Unocal, Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002).

[123] *Id.* at *6-11.

[124] In 1997, the Department of Justice informed the District Court of the State Department's position that "at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government" of Myanmar. Nat'l Coalition Gov't of Burma v. Unocal, Inc., 176 F.R.D. 329, 362 (C.D. Cal. 1997).

[125] Unocal lawyers alleged that "[a]s in Exxon Mobil, the litigation seeks to penalize an American company for investing in a country with a record of human rights abuses." Sonni Efron, *Judge Lets Unocal Ask State Dept. to Intervene in Myanmar Lawsuit*, L.A. TIMES, Aug. 9, 2002, at 2, LEXIS, News Group File. *See also California Scheming*, ENERGY COMPASS, Aug. 23, 2002, LEXIS, News Group File (discussing the efforts of Unocal and other oil companies to avoid ATCA litigation by employing the political process). There is no indication that the State Department issued a revised *Unocal* opinion before the Ninth Circuit issued its September 2002 opinion.

C. *Executive Communication and the Act of State Doctrine: Rejecting Executive Control*

Courts faced with executive opinions in § 1350 cases can draw guidance from the Supreme Court's previous insistence that justiciability determinations are not subject to the contemporary preferences of the President. When faced with the prospect of executive control over the act of state doctrine,[126] the Court has insisted that separation of powers principles require courts to independently determine the applicability of this judicial doctrine.

The majority of the Court has rejected the idea that State Department views can dictate which cases federal courts should hear. Under the "Bernstein exception," lower federal courts would decline to dismiss a case under the act of state doctrine when the State Department issued a "Bernstein letter" informing the court that it had no objection to the case's adjudication.[127] In *First National City Bank v. Banco Nacional de Cuba (Citibank)*,[128] six Justices rejected the proposition that the State Department could compel courts to adjudicate issues beyond judicial authority.[129] Justice Brennan argued that blind adherence to executive conclusions would undermine the rule of law and the constitutional separation of powers.[130] Justice Douglas agreed, arguing that the Bernstein exception relegated the Court to "a mere errand boy for the executive branch which may choose to pick some people's chestnuts from the fire, but not others'."[131]

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[126] The act of state doctrine bars courts from questioning the validity of foreign nations' sovereign acts that occur within their own jurisdictions. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972).

[127] The Bernstein exception derives from a 1954 case in which the Second Circuit allowed the plaintiff to pursue his Nazi expropriation suit after the State Department expressly communicated its approval of the court's jurisdiction. *See* Bernstein v. N.V. Nederlandische-Amerikaansche, 210 F.2d 375 (2d Cir. 1954).

[128] 406 U.S. 759, 763 (1972).

[129] *See id.* at 776-77 ("The Court . . . affirms the Court of Appeals' rejection of the 'Bernstein' exception. Four of us in this opinion unequivocally take that step, as do Mr. Justice Douglas and Mr. Justice Powell in their separate opinions") (Brennan, J., dissenting); *see also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 724-25 (1976) ("[S]ix Members of the Court in [Citibank] disapproved finally the so-called Bernstein exception to the act of state doctrine, thus minimizing the significance of any letter from the Department of State.") (Marshall, J., dissenting).

[130] *Citibank*, 406 U.S. at 792-93 (expressing concern that the Bernstein exception encouraged cases to be determined according to constantly-shifting political considerations) (Brennan, J., dissenting).

[131] *Id.* at 773 (Douglas, J., concurring); *see also id.* at 773 ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.") (Powell, J., concurring).

Since *Citibank*, lower courts have applied Bernstein letters inconsistently. *See* Gary Born, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 730 (3d ed. 1996). Born notes that some

In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*,[132] the Court again asserted that judicial doctrines are not subject to manipulation by the executive branch.[133] Although the Justice Department argued that the act of state doctrine should preclude the adjudication of cases that embarrass foreign nations, the Court refused to accommodate the executive's doctrinal interpretation.[134] Writing for a unanimous Court, Justice Scalia asserted the independence of the judiciary, writing that "[t]he short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."[135]

D. *Analysis: The* Exxon Mobil *Court Should Not Consider Executive Views as Determinative of the Case's Justiciability*

The executive branch may not dictate cases' justiciability through the use of "Statements of Interest" any more than it may through the use of "Bernstein letters." As the Supreme Court insisted in *Citibank* and *W.S. Kirkpatrick*, the judiciary must remain an independent and impartial branch of government.[136] The *Exxon Mobil* court should reject the unduly deferential approach adopted by *Rio Tinto* and independently determine whether the case before it is appropriate for judicial resolution. Failure to do so would lead to two harmful consequences for the constitutional balance of powers.

First, dismissing *Exxon Mobil* would interfere with Congress's intent to provide a domestic remedy for victims in nations that tolerate human rights abuses.[137] If the *Exxon Mobil* suit is held nonjusticiable, the Aceh plaintiffs will be left to pursue their claim in the Indonesian courts, which the State Department has described as subordinate to the executive and

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courts continue to grant executive communication dispositive weight for act of state determinations, while other courts refuse to consider executive conclusions. *Id.* Most courts, however, consider executive opinions as merely one factor in act of state determinations. *Id. See also* Bernard Ilkhanoff, *United States v. Noriega: The Act of State Doctrine and the Relationship Between the Judiciary and the Executive*, 7 TEMP. INT'L & COMP. L.J. 345 (1993) (describing a district court's implicit acceptance of an executive exception to the act of state doctrine).

[132] 493 U.S. 400 (1990).

[133] *See id.*

[134] *See id.* at 408-09 (refusing to expand the act of state doctrine into "new and uncharted fields").

[135] *Id.* at 409.

[136] *See* discussion *supra* Part IV.C.

[137] The Senate Judiciary Committee noted that "[j]udicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent . . . Consequently the [TVPA] is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad." S. REP.NO. 102-249, at 3-4 (1991).

pervasively corrupt.[138] Sixteen House members and two Senators requested that the State Department not become involved in the *Exxon Mobil* suit, arguing that executive intervention in the private litigation "would send precisely the wrong message: that the United States supports the climate of impunity for human-rights abuses in Indonesia."[139]

Second, undue deference to the State Department's *Exxon Mobil* opinion would also signal the judiciary's acquiescence to executive control. Instead, as the Supreme Court maintained in *Youngstown Sheet & Tube Co.*,[140] the *Exxon Mobil* court must assert its competency and exercise its duty to question executive foreign policy assertions about ongoing litigation. Such a review would not require questioning the President's motives or foreign policy wisdom. Although the court should accept executive statements as conclusive of the executive's position, such views should not replace the court's analysis.

The *Exxon Mobil* court may review a variety of sources to determine whether adjudication would in fact unduly complicate U.S. foreign policy.[141] In *Doe v. Unocal*, for example, the Ninth Circuit examined a number of sources—including the Administration's previous imposition of sanctions against Myanmar for human rights abuses—before concluding that the suit presented an issue appropriate for judicial resolution.[142] In *Exxon Mobil*, previous executive and congressional interactions with Indonesia,[143] the testimony of foreign affairs experts[144] and other objective information may be marshaled to evaluate the justiciability of the *Exxon Mobil* suit.

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[138] INDONESIA COUNTRY REPORT 2000, *supra* note 10.

[139] Murray Hiebert, *The Era of Responsibility*, FAR E. ECON. REV. 14, July 11, 2002, 2002 WL-FEER 5170241.

[140] 343 U.S. 579 (1952). *See supra* notes 114-116 and discussion.

[141] Courts unquestionably possess the capacity to determine the foreign policy consequences of judicial action. In the *Pentagon Papers*, the Supreme Court independently determined the foreign affairs and national security implications of allowing the publication of classified Pentagon documents. New York Times Co. v. United States, 403 U.S. 713 (1971). Concurring, Justice Stewart noted that "I cannot say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., concurring). *See also* Zweibon v. Mitchell, 516 F.2d 594, 642-43 (D.C. Cir. 1975) (en banc) (observing that a congressional "vote of confidence in the competence of the judiciary affirms our own belief that judges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation").

[142] Doe v. Unocal, Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *74 (9th Cir. Sept. 18, 2002). In *Kadic v. Karadzic*, the Second Circuit noted that the State Department's Statement of Interest reinforced other indications that adjudication would not unduly interfere with the President's foreign policy, including the Administration's earlier decision to deny the defendant diplomatic immunity and a previous State Department letter expressing "repulsion" at the war crimes alleged within the suit. *See* 70 F.3d 232, 250 (2d Cir. 1995).

[143] *See* discussion *supra* Part III.C.2

[144] *E.g.*, Affidavit of Harold Hongju Koh, Doe v. Exxon Mobil Corp., No. 01-1357 (D.D.C. filed June 20, 2001). Koh, the former Assistant Secretary of State for Democracy, Human Rights, and Labor in the

Unfortunately for the *Exxon Mobil* plaintiffs, judicial reluctance to challenge the foreign policy power of the executive branch may prevent the court from critically analyzing the State Department's position.[145] Certain twentieth century Supreme Court opinions create the perception that foreign affairs are constitutionally exceptional and that courts should defer to the plenary and exclusive powers of the executive branch within this arena.[146] The theory of judicial deference to the President in foreign affairs was advanced most forcefully in *United States v. Curtiss-Wright*, which famously declared the President "the sole organ of the federal government" within international relations.[147] Although *Curtiss-Wright* has little constitutional basis,[148] and is no longer strongly supported by the contemporary Court,[149] the opinion remains the principal guide when lower federal courts determine the allocation of international relations power.[150] The *Exxon Mobil* court's reluctance to challenge State Department views is likely to be especially acute given current concerns regarding global terrorism and international hostilities.[151]

State Department, detailed reasons why the *Exxon Mobil* suit was unlikely to adversely impact U.S. interests, focusing on previous governmental positions regarding Indonesian human rights abuses. *Id.*

[145] *See generally* David G. Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, *supra* note 48, at 25-46 (addressing judicial deference to the executive in foreign affairs); THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 10-20 (1992); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 69-91 (1990).

[146] *See* Adler, *supra* note 145, at 25-27; FRANCK, *supra* note 145, at 10-20. The Supreme Court has argued that foreign affairs "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Regan v. Wald, 468 U.S. 222, 242 (1984), *citing* Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952). The *Regan* Court described the Court's "classical deference to the political branches in matters of foreign policy." *Id.*

[147] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). The Court cautioned the judicial and legislative branches against becoming overly involved in the President's "plenary and exclusive" foreign policy powers, arguing that "participation in the exercise of the power is significantly limited." *Id.* at 319-20.

[148] *See* Adler, *supra* note 145, at 25-26 (attacking the opinion as "a product of Justice Sutherland's imagination"); FRANCK, *supra* note 145, at 15-16 (criticizing the "sole organ" doctrine as having "no perceivable connection with the Constitution"). The opinion represented what one scholar described as a radical shift from the Court's jurisprudence, which had previously subjected both foreign relations and domestic affairs powers to limitations based on the Constitution's allocation of authority. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

[149] *See* FRANCK, *supra* note 145, at 16 (noting that the Supreme Court tends to avoid endorsing the opinion's dictum).

[150] *See* Adler, *supra* note 145, at 25 (noting that *Curtiss-Wright* is likely the case most frequently cited when courts evaluate individual branches' foreign affairs power). *See also* White, *supra* note 148, at 5 (observing that "by the late 1930s federal executive hegemony in foreign relations had become constitutional orthodoxy").

[151] A number of commentators have observed that the George W. Bush Administration has acted forcefully to enhance the power of the Presidency. *See, e.g.*, Adam Nagourney, *Shift of Power to White House Reshapes Political Landscape*, N.Y. TIMES, Dec. 22, 2002, at A1, LEXIS, News Group File; David

Despite these compelling non-doctrinal factors, the *Exxon Mobil* court should continue to be guided by consistent judicial principles. Separation of powers principles dictate that courts should independently determine the justiciability of cases before them. In deciding whether a case presents a nonjusticiable political question, courts must be guided by the established limitations of the doctrine.

V. THE POLITICAL QUESTION DOCTRINE: PERMITTING THE ADJUDICATION OF § 1350 CLAIMS FOR HUMAN RIGHTS ABUSES

Although a number of recent § 1350 suits have been dismissed as political questions, the doctrine is rarely applicable to ATCA or TVPA claims. The political question doctrine does not allow courts to dismiss suits merely because they address controversial issues or involve foreign affairs. Instead, courts must apply the doctrinal factors articulated by the Supreme Court. An examination of *Exxon Mobil*'s facts indicates that the suit is unlikely to implicate the political question doctrine.

A. The Doctrinal Elements of the Political Question Doctrine

When courts invoke the political question doctrine, they defer a determination of an issue to the political branches of government, dismissing the case as nonjusticiable.[152] The doctrine has been part of American jurisprudence since Chief Justice John Marshall introduced it to the nascent federal court system.[153] The Supreme Court provided its clearest articulation of the political question doctrine in 1962, in its *Baker v. Carr* opinion.[154] Although *Baker* determined the Court's ability to adjudicate the legality of a state legislative apportionment plan, the opinion presented the broad contours of the doctrine. Admitting that the Court's previous enunciations of the doctrine failed to present a coherent framework, Justice Brennan documented the factors that render a dispute a nonjusticiable political question:

Rogers, *Executive Privilege: Assertive President Engineers a Shift in Capital's Power*, WALL ST. J., Oct. 22, 2002, at A1, 2002 WL-WSJ 3409362.

[152] *See* Baker v. Carr, 369 U.S. 186, 210 (1962).

[153] Marshall is popularly credited as introducing the doctrine in his 1803 *Marbury v. Madison* opinion. Although generally asserting the power of judicial review, Marshall stated that some acts were by their nature political and beyond judicial review. *See* 5 U.S. 137, 176-78 (1803).

[154] 369 U.S. 186 (1962).

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
> [2] a lack of judicially discoverable and manageable standards for resolving it; or
> [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
> [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
> [5] an unusual need for unquestioning adherence to a political decision already made; or
> [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[155]

The political question doctrine enjoys special potency in foreign affairs.[156] The *Baker* Court noted that such questions are often inappropriate for judicial resolution, as they frequently defy judicial standards or involve powers committed to the political branches.[157]

B. *Political Question Doctrine and § 1350 Suits*

Although defendants frequently challenge § 1350 litigation on the basis of the political question doctrine,[158] courts have historically refused to mechanically employ the doctrine, recognizing that its overly broad application would render the ATCA and the TVPA meaningless.[159] In determining that *Kadic v. Karadzic* was appropriate for judicial resolution, the Second Circuit reasoned that "judges should not reflexively invoke [nonjusticiability] doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights."[160] As of 1999, no § 1350 suits had been dismissed as nonjusticiable political questions.[161]

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[155] *Id.* at 217.

[156] *See generally* Adler, *supra* note 145, at 35-44; HENKIN, *supra* note 145, at 84-89.

[157] *Baker*, 369 U.S. at 211.

[158] *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995); Philippines v. Marcos, 862 F.2d 1355, 1360-61 (9th Cir. 1988).

[159] *See Kadic*, 70 F.3d at 248-50; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 796-98 (D.C. Cir. 1984) (Edwards, J., concurring); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1471-75 (1999) (noting judicial resistance to the application of the doctrine to § 1350 claims).

[160] *Kadic*, 70 F.3d at 249.

[161] Bederman, *supra* note 159, at 1471.

Recent lower federal court opinions suggest that the political question doctrine may present a new obstacle to ATCA and TVPA litigation.[162] The *Rio Tinto* court dismissed all claims as nonjusticiable political questions.[163] Citing two of the *Baker* factors, the court held that adjudication would express a lack of respect for the executive branch and that the actions of various governmental branches could create potential embarrassment.[164] Human rights claims arising from governmental and business conduct in World War II have also recently been dismissed as nonjusticiable.[165]

Despite these recent dismissals, the political question doctrine is generally inapposite in ATCA or TVPA suits. The political question doctrine is not a vague doctrine of abstention that allows a court to abdicate its Article III powers.[166] Under the doctrine, a court may not decline to hear a case merely because it presents controversial or political issues.[167] Rather, *Baker* requires courts to conduct a "discriminating analysis into the precise facts and posture" of each dispute to determine its suitability for judicial

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[162] *See* Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116, 1195-99 (C.D. Cal. 2002); Iwanowa v. Ford Motor Co., 67 F. Supp.2d 424, 483-89 (D.N.J. 2001) (dismissing plaintiffs' § 1350 claims for forced labor as nonjusticiable political questions); Hwang Geum Joo v. Japan, 172 F. Supp.2d 52, 64-67 (D.D.C. 2001) (holding that § 1350 claims were barred by the political question doctrine in addition to the Foreign Sovereign Immunities Act).

[163] 221 F. Supp.2d at 1198-99 ("The situation is thus quintessentially one that calls for invocation of the political question doctrine."). The court also dismissed the plaintiffs' environmental and racial discrimination claims on the grounds of act of state and international comity. *Id.* at 1208. The court's dismissals were contingent upon the defendant's consent to proceed in PNG and to not raise that nation's legal bars to adjudication. *Id.* This contingency was separate from the defendants' forum non conveniens motion, which the court denied. *Id.* at 1208-09.

[164] *Id.* at 1198.

[165] *See Iwanowa*, 67 F. Supp.2d at 483-89 (dismissing § 1350 claims against Ford Motor Company and its German subsidiary); *Hwang Geum Joo*, 172 F. Supp.2d, at 64-67 (dismissing § 1350 claims against Japan). *Cf. In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp.2d 370, 372, 375-84 (D.N.J. 2001) (dismissing state-law claims against a German company and its American subsidiary); Burger-Fischer v. Siemens AG, 65 F. Supp.2d 248, 282-85 (1999) (dismissing claims based on international law, but not specifically § 1350).

[166] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798 (D.C. Cir. 1984) (Edwards, J., concurring). Under Article III, federal courts have an obligation to adjudicate cases that present justiciable issues. *See, e.g.*, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 409 (1990). As Chief Justice Marshall noted of the federal judiciary: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them." Cohens v. Virginia, 19 U.S. 264, 404 (1821).

[167] *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986); Baker v. Carr, 369 U.S. 186, 217 (1962) (concluding that the political question doctrine "is one of 'political questions,' not one of 'political cases.'"); *Tel-Oren*, 726 F.2d at 798 ("[T]he political question doctrine is a very limited basis for nonjusticiability. It certainly does not provide the judiciary with a carte blanche license to block the adjudication of difficult or controversial cases.") (Edwards, J., concurring).

resolution.[168] Only if one of the *Baker* factors is "inextricable from the case at bar" should a court dismiss the suit as nonjusticiable.[169]

C. *Foreign Affairs Consequences Alone Are Insufficient to Invoke the Political Question Doctrine*

Although *Baker v. Carr* noted that international disputes were often nonjusticiable, the political question doctrine does not wholly bar judicial resolution of foreign disputes.[170] *Baker* eschewed categorical denials of judicial power within particular substantive areas, noting "the impossibility of resolution by any semantic cataloguing."[171] The Court further observed that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[172]

In *Japan Whaling Ass'n v. American Cetacean Society*,[173] the Court again indicated that foreign affairs implications do not themselves place a lawsuit beyond the reach of the judiciary.[174] The Court acknowledged that a dispute over international fishing quotas could influence foreign policy, observing the premier role of the political branches within this realm.[175] Such international consequences did not, however, convert the issue into a political question, and the Court refused to abdicate its constitutional duty of judicial review.[176] The Court observed that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."[177]

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[168] *Baker*, 369 U.S. at 217.

[169] *Id.*

[170] *See id.* at 211-13; Population Inst. v. McPherson, 797 F.2d 1062, 1069 (D.C. Cir. 1986) ("Simply because [a judicial] determination will have an effect on international relations does not completely strip the courts of the power and duty to review the legislative interpretation that supports the decision"); Flynn v. Schultz, 748 F.2d 1186, 1190 (7th Cir. 1984) (observing that the fact that judicial relief would impinge upon the State Department's control over consular immunity and could create "diplomatic repercussions" with a foreign nation did not itself transform the issue into a political question).

[171] 369 U.S. at 217.

[172] *Id.* at 211.

[173] 478 U.S. 221 (1986).

[174] *See id.* at 230.

[175] *Id.*

[176] *See id.*

[177] *Id.*

D. Application of Baker v. Carr Factors to § 1350 Suits

As in *Japan Whaling*, courts hearing § 1350 suits must interpret and apply a congressional statute. Neither the litigants nor the government may convert suits into nonjusticiable issues by invoking the talisman of foreign affairs. Instead, courts must evaluate the facts of the cases before them to determine whether a *Baker* factor is inextricable from the suit.

1. Section 1350's Lack of Textual Commitment to the Political Branches

In determining whether a case presents a nonjusticiable political question, the dominant consideration is whether the Constitution commits resolution of the issue to the political branches.[178] Constitutional limits provide the foundation for the political question doctrine; *Baker v. Carr* observed that the doctrine is "primarily a function of the separation of powers."[179] By identifying issues that federal courts lack the authority to address, the doctrine helps ensure that the judiciary does not usurp power from the political branches.[180]

Concerning § 1350 claims, the Second Circuit noted that "the department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary."[181] As the legislative history of the ATCA and the TVPA demonstrates, Congress intended the federal courts to adjudicate violations of international law.[182] No court has found that Congress is constitutionally incapable of granting this power to the courts.[183]

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[178] Lamont v. Woods, 948 F.2d 825, 831 (2d Cir. 1991); *see also* Nixon v. United States, 506 U.S. 224, 228-29 (1993) ("[C]ourts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed").

[179] 369 U.S. 186, 210 (1962).

[180] *See Japan Whaling Ass'n.*, 478 U.S. at 230 ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."); *Baker*, 369 U.S. at 210 (arguing that whether a case falls within the political question doctrine is determined largely by "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination"), *citing* Coleman v. Miller, 307 U.S. 433, 454-55 (1939).

[181] Kadic v. Karadzic, 70 F.3d 232, 249 (1995), *citing* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991). *See also Filartiga* memorandum, *supra* note 49, at 603 ("Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.").

[182] *See* discussion *supra* Part IV.A.

[183] *See, e.g.*, STEPHENS & RATNER, *supra* note 22, at 109-12 (noting that no court has held § 1350 an unconstitutional grant of federal court jurisdiction). Stephens and Ratner conclude that "[t]here should be little doubt regarding the ATCA's constitutionality." *Id.*

The first *Baker* factor is implicated in § 1350 claims only where the Constitution textually commits resolution of a dispute to Congress or the President. Suits arising from wartime conduct provide one notable example. In *Iwanowa v. Ford Motor Co.*, the District Court dismissed claims against Ford and its German subsidiary for forced labor during World War II as nonjusticiable political questions.[184] The court relied in part upon the grounds that war reparation decisions are constitutionally committed to the executive branch.[185] Because § 1350 suits generally involve private party litigation, they rarely involve powers constitutionally committed to the political branches. Although the political question doctrine may bar adjudication of a suit regardless of the identity of the litigants,[186] a dispute between private parties is less likely to raise the separation of powers concerns that mandate the doctrine.[187]

2. *Judicially Discoverable and Manageable Standards and Lack of Policy Determinations Within § 1350 Suits*

The ATCA and the TVPA's clear judicial standards further indicate that certain international torts are appropriate for judicial resolution.[188] These statutory standards also diminish the *Baker* concern regarding the

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[184] 67 F. Supp.2d 424 (D.N.J. 1999).

[185] *Id.* at 485. The court adopted a narrow view of the judiciary's role in foreign affairs, characterizing nearly all foreign policy matters as political questions. *Id.* at 483-85. *Burger-Fischer v. Siemens AG*, a case relying upon international law, but not specifically § 1350, also dismissed claims for war reparations as "a task which the court does not have the judicial power to perform." 65 F. Supp.2d 248, 282 (1999). Although the court held that the case implicated all the *Baker* factors, it relied primarily upon the fact that the dispute was constitutionally committed to the executive branch. *Id.* at 282-85.

[186] *See* United States v. Munoz-Flores, 495 U.S. 385, 394 (1990).

[187] *See, e.g.*, Linder v. Portocarrero, 963 F.2d 332, 337 (11th Cir. 1992) (declining to dismiss claims against Nicaraguan leaders as political questions, noting that the complaint was narrowly focused and did not require determining who was at fault in the Nicaraguan civil war); Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) ("The fact that the issues before us arise in a politically charged context *does not convert what is essentially an ordinary tort suit into a non-justiciable political question.*") (emphasis added); McKay v. United States 703 F.2d 464, 470 (10th Cir. 1983) (noting that "the political question theory and the separation of powers doctrines *do not ordinarily prevent individual tort recoveries*") (emphasis added); Eckert Int'l, Inc. v. Gov't of Sovereign Democratic Republic of Fiji, 834 F. Supp. 167, 173 (E.D. Va. 1993) ("The dispute at bar does not involve conflicts between branches of the government, but rather a commercial contract dispute between a foreign government and a private U.S. company. The political question doctrine . . . is *generally inapplicable to such disputes.*") (emphasis added).

[188] The Supreme Court has concluded that the *Baker* requirement that a case must present judicially discoverable and manageable standards is related to the political question doctrine's constitutional underpinnings. Nixon v. United States, 506 U.S. 224, 228-29 (1993) (observing that a lack of judicial standards may strengthen the conclusion that a dispute is textually committed to a political branch).

need for policy determinations that require nonjudicial discretion.[189] For a claim to be cognizable under the Alien Tort Claims Act, a party must allege a violation of a treaty or of a universally recognized norm of international law.[190] Conversely, if a plaintiff presents an ambiguous international legal claim, the ATCA provides no cause of action.[191] The Torture Victim Protection Act provides an even narrower basis of liability, restricting claims to torture and extrajudicial killing committed under color of law.[192]

3. *Inapplicability of the Political Question Doctrine's Prudential Factors to § 1350 Claims*

The remaining *Baker* elements are "prudential" factors, which provide less defensible bases for dismissal and are generally inapposite in § 1350 suits. In addition to the political question doctrine's constitutional basis, the doctrine is also rooted in the Court's perceived institutional weaknesses.[193] A foremost expert in the doctrine, Alexander Bickel, has argued that the doctrine encompasses prudential and discretionary justifications for dismissing cases that threaten judicial power or legitimacy.[194]

The Second Circuit has stated that "[a]lthough prudential considerations may inform a court's justiciability analysis, the political question doctrine is essentially a constitutional limitation on the courts."[195]

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[189] *See* Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (stating that § 1350's clear standard "obviates any need to make initial policy decisions").

[190] 28 U.S.C. § 1350 (2000); *see Kadic*, 70 F.3d at 249; Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987) ("[I]nternational torts . . . are characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms.").

[191] *See, e.g.*, Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167-68 (5th Cir. 1999) (holding that the international community had not recognized "cultural genocide" as a violation of customary international law). Federal courts have a long history of discerning international law. *See* The Paquette Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

[192] Section 3 of the Torture Victim Protection Act of 1991 provides an explicit definition of "extrajudicial killing" and "torture" for the purposes of TVPA litigation. 28 U.S.C. § 1350 note (2000).

[193] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962) (arguing that the basis of the political question doctrine is "the Court's sense of lack of capacity . . . the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.").

[194] *Id.* at 117-26, 183-84 (describing the political question doctrine as one of the Court's "passive virtues").

[195] 767 Third Ave. Assocs. v. Consulate Gen. of the Socialist Fed. Republic of Yugoslavia, 218 F.3d 152 (2d Cir. 2000). Some scholars recognize only the constitutional bases as legitimate grounds for dismissing a case as a nonjusticiable political question. *See* HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 13-14 (1961) ("[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of

Courts' concerns about judicial fragility and other perceived institutional shortcomings are less compelling in an era when courts enjoy political legitimacy and respect.[196] The *Baker* concern that adjudication could indicate a lack of respect for a coordinate political branch, for example, should be rarely invoked, because courts are obligated to oppose executive or legislative actions that contravene the Constitution.[197] As Justice Douglas observed, "[i]t is far more important to be respectful to the Constitution than to a coordinate branch of government."[198]

Federal courts are not powerless to invoke the political question doctrine's prudential grounds to prevent serious foreign policy complications. The *Baker* Court did not envision the judiciary presenting a major obstacle to the foreign conduct of the political branches, counseling courts to consider "the possible consequences of judicial action."[199] The grounds under which a court may raise the doctrine's prudential factors, however, remain narrow. In *Kadic*, the Second Circuit stated that prudential grounds are germane in § 1350 litigation only where judicial action would contradict prior decisions by a political branch and thereby "seriously interfere with important governmental interests."[200]

E. *Analysis:* Doe v. Exxon Mobil *is Unlikely to Present a Nonjusticiable Political Question*

If the *Exxon Mobil* court conducts a truly independent justiciability analysis of the case, it will likely find that the suit does not implicate the political question doctrine. First, the *Exxon Mobil* litigation does not involve

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government than the courts."). *But see* Goldwater v. Carter 444 U.S. 996, 998 (1979) (determining whether "prudential considerations counsel against judicial intervention") (Powell, J., concurring).

[196] *See* Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524, 530 (1987). Henkin argues that there is no modern justification for use of the doctrine "as a means of escape for fearful judges unwilling to address challenges to governmental usurpation of authority in foreign affairs." *Id. See also* Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 A.J.I.L. 814, 816 (1989) ("Few today could seriously believe, for example, that the Court places itself at risk by deciding a controversial case. It may have been true, before widespread public acceptance of judicial review, that an overzealous judiciary might have gotten 'too far out in front' to continue to act as final legal arbiter. But that day has long passed.").

[197] *See* Eain v. Wilkes, 641 F.2d 504, 515 (7th Cir. 1981) ("[T]he Judiciary's conclusions may differ from the Executive's in many areas of law, yet that does not mean that whenever the courts might disagree with the Executive the issue thereby becomes a non-justiciable 'political question.'"); United States v. Lindh, 212 F. Supp.2d 541, 555 (E.D. Va. 2002) ("[I]t is central to the rule of law in our constitutional system that federal courts must, in appropriate circumstances, review or second guess, and indeed sometimes trump, the actions of other governmental branches.").

[198] Massachusetts v. Laird, 400 U.S. 886, 894 (1970) (Douglas, J., dissenting).

[199] Baker v. Carr, 369 U.S. 186, 211-12 (1962).

[200] Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).

a dispute that is constitutionally committed to the political branches. Even the *Rio Tinto* court, faced with similar executive opposition to federal court jurisdiction, did not contend that the federal judiciary was constitutionally powerless to address the issues in question.[201] *Exxon Mobil* neither challenges an exercise of U.S. foreign policy nor requires executive resolution. The case is distinguishable, for example, from *Iwanowa v. Ford*, which involved claims implicating the executive's authority to address war reparations.[202] The fact that the *Exxon Mobil* plaintiffs assert liability against only private entities further decreases the likelihood that the case presents a political question.

Secondly, *Exxon Mobil* presents judicially discoverable and manageable standards that allow the court to adjudicate the suit. These standards allow the court to hear the plaintiffs' claims without making policy determinations. The *Exxon Mobil* plaintiffs allege genocide, torture and crimes against humanity,[203] all of which have been recognized as violations of international law that create causes of action under § 1350.[204] If the *Exxon Mobil* court holds that it is unable to discern international law or to determine liability based upon international events, its decision will represent a direct attack on the competency of the judiciary.

Finally, an objective examination of *Exxon Mobil's* facts suggests that the case would not unduly complicate the conduct of U.S. foreign policy. The suit will not contradict previous action by a political branch. In fact, the executive branch, including the State Department, has consistently criticized Indonesia for the human rights abuses committed by its military.[205] The legislative and judicial branches have similarly censured Indonesia for its poor human rights record.[206] Accordingly, any indirect criticism of the Indonesian forces which may arise from a suit against Exxon Mobil and its subsidiaries is highly unlikely to disrupt critical American foreign affairs interests.

VI. CONCLUSION

The aims of the Alien Tort Claims Act and the Torture Victim Protection Act are not uniformly supported by political actors. However,

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[201] The *Rio Tinto* court instead relied upon the prudential grounds that adjudication would complicate U.S. foreign policy. *See* Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116, 1197-98 (C.D. Cal. 2002).

[202] Iwanowa v. Ford Motor Co., 67 F. Supp.2d 424 (D.N.J. 2001).

[203] *Exxon Mobil* complaint, *supra* note 12, at 1-2.

[204] *See, e.g., Kadic*, 70 F.3d at 241-42; Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

[205] *See supra* notes 93-95 and accompanying text.

[206] *See supra* notes 96-97 and accompanying text.

neither the controversial nature of these acts, nor the presence of international issues allow federal courts to disregard congressional intent, constitutional or judicial doctrines, or the text of the Constitution. In order to maintain the balance of constitutional powers between the branches of government, the *Exxon Mobil* court must independently determine its ability to hear the case. As the Supreme Court insisted in *Citibank* and *W.S. Kirkpatrick*, the judiciary must remain an autonomous and impartial branch of government.[207] Although the President's foreign policy powers are significant, and deserve substantial respect, they are not absolute. *Curtiss-Wright's* vision of an executive hegemony in foreign affairs is contradicted by the Constitution's sharing of governmental power. If objective evidence contradicts State Department conclusions regarding *Exxon Mobil's* foreign policy consequences, the court must not simply defer to the President. For the court to dismiss *Exxon Mobil* as a political question upon executive request degrades the doctrine and the judiciary itself.

If the *Exxon Mobil* court asserts its power to determine the case's justiciability free from political control, it will likely find that the case does not implicate the political question doctrine. The core constitutional basis for the doctrine does not preclude federal court adjudication because the Constitution does not exclusively reserve the resolution of international human rights abuses for the executive branch. Even if one accepts the doctrine's prudential factors, there is little indication that *Exxon Mobil* would pose serious foreign policy consequences. Indeed, any criticism of Indonesian military abuses that exists in the *Exxon Mobil* litigation would be entirely consistent with the practices of all branches of the U.S. government.

Thomas Franck, in his work criticizing excessive judicial deference within foreign affairs, argues that the United States' primary international strength is its rule of law.[208] "To make the law's writ inoperable at the water's edge," Franck argues, "is nothing less than an exercise in unilateral moral disarmament."[209] To suspend established legal principles in order to deny the Aceh plaintiffs access to a judicial forum would represent a further injustice.

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[207] *See* discussion *supra* Part IV.C.
[208] FRANCK, *supra* note 145, at 159.
[209] *Id.*