

The Washington Times

www.washingtontimes.com

Alien ambulance-chasers

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Published March 26, 2007

Only in America could enterprising lawyers turn a 218-year old, 32-word statute meant to redress piracy into a weapon of mass tort litigation. This law is the Alien Tort Statute (ATS), a tiny part of the larger 1789 Judiciary Act. Contingent-fee attorneys have commandeered this law and are using it to file massive lawsuits in U.S. courts on behalf of foreign plaintiffs against foreign defendants for alleged harm that occurred far outside our borders.

The suits not only needlessly clog our courts, but they also raise the fundamental question of who should make U.S. foreign-policy decisions: unelected judges and lawyers, or the legislative and executive branches? U.S. Court of Appeals Judge Henry Friendly in 1975 called the ATS a "legal Lohengrin... no one seems to know whence it came." For nearly two centuries it laid fallow until it was given new life by a 1980 federal appeals court decision concluding that the ATS provides a private right to sue for violations of international law.

After that decision, ATS filings exploded. Until the mid-1990s most ATS plaintiffs were human-rights activists suing foreign individuals or foreign governments. Financial damage awards were rare, but the factually sympathetic cases successfully advanced the law in a pro-plaintiff direction. Eventually activists began suing private companies based on a highly novel vicarious liability theory -- because oil companies benefited from the protection of foreign soldiers or companies did business in apartheid-era South Africa, they had "aided and abetted" alleged foreign governments' ATS violations.

Once the focus shifted to deep-pocketed defendants, plaintiffs' lawyers took notice, and filed suits which further probed the limits of the ATS seeking virtually limitless liability. Aided by expansive decision-making of federal appeals courts, the tort lawyers conceived a startling ambition: to convert this obscure one-sentence jurisdictional provision into a source of modern-day mass tort liability.

In 2004, the U.S. Supreme Court finally took up the issue of liability under the ATS. In *Sosa v. Alvarez-Machain*, the Court stated that the law only gave federal courts jurisdiction over a very narrow set of cases involving aliens. The Court wrote strongly about its concern over the "collateral consequences" of ATS suits, especially how they could intrude upon the executive branch's conduct of foreign policy. The *Sosa* opinion didn't foreclose all ATS lawsuits. While it left the "door ajar," the Court instructed lower courts to conduct "vigilant doorkeeping," against intrusion on the conduct of U.S. foreign policy.

With the door ajar, ATS lawsuits continued to proliferate. The Departments of State and Justice have continued their long-standing practice of filing "statements of interest" with

courts overseeing ATS suits, in which they urge the judges to respect the Supreme Court's warning that they not "impinge on the discretion of the Legislative and Executive Branches in managing foreign affairs." Federal trial courts have dismissed ATS suits deemed to interfere with U.S.-Israel relations ("where diplomacy is delicate and U.S. interests are great"), and to upset diplomacy between the U.S. and Colombia ("one of the United States' closest allies in this hemisphere, and our partner in the vital struggle against terrorism and narcotics trafficking").

Regrettably, some courts have waved away the executive branch's concerns and allowed ATS suits against corporations accused of vicarious violations of international law to proceed.

This lack of closure, and the potential for millions in attorneys' fees, has attracted contingent-fee veterans of the tobacco and asbestos liability wars to further test the limits of post-Sosa ATS liability. Cases are pending where classes of plaintiffs from countries or regions as remote as the Horn of Africa or Asia are suing "classes" of deep-pocketed defendants, also often unnamed, numbering up to 500 or more. Other ATS class actions have been filed against classes of state officials and other defendants in Saudi Arabia, the U.A.E., Qatar and other Middle East countries -- predicated, no doubt, on the Willie Sutton theory: that's where the money is.

Of course, that is also where some of America's most serious foreign-policy and national-security challenges reside. The plaintiffs' lawyers seem to think they have that covered, though. As one trial lawyer put it recently, "If we left justice to the U.S. Government, when it has so many commercial and other interests, what action would be taken?"

There's scant hope that the legislative branch will step in and end this intrusion on their foreign policy powers, so we must rely upon federal courts to do far more "vigilant doorkeeping" of our Constitution's separation of powers. They will have ample opportunities, with numerous ATS dismissals on appeal and the emerging ATS class actions in federal trial courts. Judges must resist the urge to appoint themselves, and contingent fee lawyers by proxy, as secretaries of state. They should defer to the views of the actual secretary of state, and put an end to the trial bar's latest entrepreneurial adventure.

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