THE WAR ON JURISDICTION: TROUBLING QUESTIONS ABOUT EXECUTIVE ORDER 13303

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I. INTRODUCTION

Despite all the attention given to the war in Iraq, little notice has been given to an extraordinary Executive Order issued in connection with the Iraqi conflict, which arguably challenges our notions of separation of powers, due process and access to the courts.[1] That order (issued on May 22, 2003) is Executive Order 13303, "Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest" (the "Order" or "Executive Order 13303").[2] The Order's simple and straightforward facade masks troubling questions, in particular, whether the President attempted to modify or withdraw federal jurisdiction and whether the Supreme Court should allow him to do so under the current analytical framework.

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1. A recent search of Lexis law reviews, legal periodicals, journals and CLE materials for "Executive Order 13303" resulted in six documents. All of these were newspaper articles referencing the Order in connection with the Bush Administration's attempts to limit the impact of the Alien Tort Claims Act. *See* Jenny B. Davis, *Old Law Bares Its Teeth: Alien Tort Claims Act Bites International Firms*, A.B.A. J., Oct. 2003, at 20; Peter Weiss, *Human Rights Switcheroo*, N.J. L.J., Oct. 13, 2003 at 95; Peter Weiss, *Winners & Sinners*, BROWARD DAILY BUS. REV., September 23, 2003, at 6; Peter Weiss, *Winners & Sinners*, MIAMI DAILY BUS. REV., September 23, 2003, at 6; Peter Weiss, *Winners & Sinners*, PALM BEACH DAILY BUS. REV., September 23, 2003, at 6; Peter Weiss, *Door Closes on Alien Claims*, NAT'L L.J., September 15, 2003, at 38. A more general search for news accounts on Lexis revealed fewer that forty newspaper articles had reported on Executive Order 13303 and there were three broadcast reports. A search of Westlaw found one PLI publication and four law review articles that mentioned the Order. *See* R. Richard Newcomb, *Coping With U.S. Export Controls 2003 Export Control & Sanctions, What Lawyers Need to Know*, 857 PLI/COMM 653 (2003) (discussing the general license issued on the same day as Executive Order 13303 that essentially lifted the prior scheme of sanctions and controls in place with respect to Iraq and describing Executive Order 13303); James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 541–42 (2004) (arguing that it seems the President enacted the Order to immunize the Coalition Provisional Authority (CPA)); David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 858 (2003) (noting a potential challenge to the Order if qualified claimants raise challenges under occupation law); Lucien J. Dhooge, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3 (2003) (mentioning the Order); *Contemporary Practice oftthe United States Relating to International Law Security Council Recognition of U.S. Postwar Role in Iraq*, 97 AM. J. INT'L L. 681 (2003) (mentioning the Order).

2. *See* Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). Executive Order 13303 was issued two months after the Iraqi war began and over one month after it was over. The war began on March 20, 2003 after months of tension over whether U.N. arms inspectors would be allowed back into Iraq. In April, 2003, with the fall of Tikrit (Saddam Hussein's home town and stronghold) the coalition partners declared the war officially over. *See* Patrick E. Tyler, *Threats and Responses: Desert Front; In Day of Waiting, First Surrenders and First Missile Attack*, N.Y. TIMES, Mar. 20, 2003, at A14; *U.S.: Major Battles over in Iraq*, UPI, Apr. 14, 2003, LEXIS, Nexis Library, UPI File.

The Order purports to protect the development of political, administrative and economic institutions in Iraq.[3] Yet, the Order appears to extend perpetual judicial immunity to oil companies doing business in Iraq by precluding a class of claims against private companies without providing an alternative forum for those claims. This Essay examines the terms of the Order and how a court may interpret them, the analytical framework under which a court would evaluate the Order, and the troubling questions that the Order raises.

To illustrate how the Order might work, consider Company *X*, a company organized under the laws of Delaware formed for the purpose of drilling for oil in Iraq. Company *X* fortunately secured the right to extract Iraqi oil and sell it on the world market. Assume further that Company *X* will remit a certain percentage of the proceeds from its oil-related activities to the Development Fund for Iraq (Fund)[4] while some of the oil proceeds will be remitted to Company *X* as profits. Finally, assume that Company *X* issues stocks or bonds and pays dividends to its shareholders.

Suppose that while drilling for oil, a terrible accident occurs in which an American employee of Company *X* is hurt and oil spills, causing environmental damage either in Iraq or elsewhere. Suppose that the injured American employee and the people harmed by the oil spill successfully sue Company *X*, establishing its liability.[5] However, Executive Order 13303 may prevent those parties, or any other injured parties, from enforcing a judgment against Company *X* because the Order appears to extend perpetual immunity to oil companies doing business in Iraq. Arguably, it insulates those companies from liability "arising from or relating to their activities in Iraq."

Initially, one might think that the President, by virtue of his foreign affairs powers, both can and should protect companies dealing with Iraqi oil from costly

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3. Executive Order 13303 provides:

> I, GEORGE W. BUSH, President of the United States of America, find that the threat of attachment or other judicial process against the Development Fund for Iraq, Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq. This situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States and I hereby declare a national emergency to deal with that threat.

Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

4. The Fund was established by United Nations Security Council Resolution 1483 and is administered by the Coalition Provisional Authority in consultation with the Iraqi Governing Council, the Iraqi Minister of Finance, and the Governor of the Central Bank of Iraq. *See* Security Council Res. No. 1483, U.N. Doc. No. S/RES/1483, 42 I.L.M. 1016 (2003), http://www.cpa-iraq.org/budget/DFI_intro1.html.

5. Assume for the sake of argument that Executive Order 13303 will allow the filing of a suit to establish liability. This assumption is supported by cases where that issue has been raised. *See infra* notes 114–125 and accompanying text.

litigation.[6] American litigation can be abusive,[7] and a flood of litigation against companies doing business in Iraq could affect U.S efforts to promote the stable reconstruction of Iraq.[8] Although this is a noble goal, allowing the President to preclude access to the courts by Executive Order threatens our understanding of the doctrines of judicial review and separation of powers.[9] If the President can prevent unknown litigants from enforcing judgments against private companies in the name of foreign affairs, without providing an alternative forum for their claims, then he can do almost anything in the name of foreign affairs. It is the beginning of a war on jurisdiction.

This Essay raises for consideration some of the troubling implications and questions concerning Executive Order 13303. In this Essay, I first consider the plausible implications of Executive Order 13303 and whether it attempts to grant wholesale immunity to oil companies doing business in Iraq. Second, I discuss how the Supreme Court should evaluate Executive Order 13303. Finally, I conclude that Executive Order 13303 attempts to immunize oil companies doing business in Iraq and withdraw or modify federal jurisdiction. Although potential plaintiffs may seek to establish liability against an oil company,[10] they are

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6. U.S. CONST. art. II, §§ 2–3. While the Constitution does not explicitly detail the President's sole powers over foreign affairs, such an independent power has been interpreted as being derived from the general executive powers enumerated under Article II of the Constitution. *See generally* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); and Chi. & S. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

7. *See generally* Shannon P. Duffy, *Third Circuit Watch: Suit over Litigation Tactics Revived, Insured Accuses Carrier's Counsel of Discovery Abuses in Asbestos Cases*, 173 N.J. L.J. 374 (2003) (discussing widespread abuses of the litigation system such as abuse of discovery and bringing frivolous claims in personal injury tort cases that has led to a widespread call for reform); Vice-President Dan Quayle, *Memorandum for the President, Proposed Civil Justice Reform in American, Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979 (1992) (citing the economic costs posed upon the American economy due to abusive litigation); COMMITTEE ON DISCOVERY, NEW YORK STATE BAR ASSOCIATION, SECTION ON COMMERCIAL AND FEDERAL LITIGATION, REPORT ON DISCOVERY UNDER RULE 26(B)(1), 127 F.R.D. 625 (1989) (noting continued abuse of discovery in New York federal courts despite attempts to curb such abuses through amendments to the Federal Rules of Civil Procedure).

8. *See* Davis, *supra* note 1, at 20 (referring to critics' claims that the Order is "the Administration's attempt to circumvent the Alien Tort Claims Act" which can expose companies operating abroad to significant liability in U.S. courts). *See* Gathii, *supra* note 1, at 541–42 (noting the Order preempts the use of the Alien Tort Claims Act). Indeed, if the parties being protected by the President's Order were not private companies, but government instrumentalities (whether U.S. or Iraqi) one might not even question the President's ability to preclude suits relating to the extraction and sale of oil. *See infra* note 42.

9. It also raises questions under the takings clause of the Fifth Amendment of the United States Constitution. *See infra* Section IV.B.

10. *See* Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 362 (11th Cir. 1984) (noting that an in personam suit was not proscribed by the Cuban blocking regulations, since only the entry of judgment triggered the blocking regulations). *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (where the U.S. argued that

perpetually precluded from enforcing any successful judgment without first obtaining permission in the form of a license from the government.[11] Therefore, the Supreme Court should invalidate Executive Order 13303 because the President lacks inherent power to issue the Order and lacks explicit or implicit authorization from Congress. Whether the Department of the Treasury eventually grants a license is irrelevant.[12] The attempt to immunize private companies from potential lawsuits, without congressional permission, and without establishing an alternative forum, is without authority or precedent.[13] Even if the Constitution or Congress authorized the President to issue the Order, the Order goes too far because, by failing to provide an alternative forum, it impermissibly withdraws and modifies federal jurisdiction, raises the possibility of an unconstitutional taking, and improperly immunizes private companies. Although an exhaustive analysis of all these issues is beyond the scope of this Essay, it does provide a platform for the beginning of a much needed discussion.[14]

II. WHY EXECUTIVE ORDER 13303 ISN'T A TYPICAL BLOCKING ORDER

A. Typical Blocking Orders

At first glance, Executive Order 13303 looks like a typical blocking order of foreign assets administered by the Office of Foreign Assets Control (OFAC).[15]

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although assets were blocked, litigation could still proceed). *But see* Chase Manhattan Bank v. United China Syndicate, Ltd., 180 F. Supp. 848 (S.D.N.Y. 1960) (requiring a license for the mere entry of judgment). *See* Carl F. Goodman, *United States Government Foreign Property Controls*, 52 GEO. L.J. 767, 796–797 (1964) (arguing that the decision in *Chase* was erroneous).

11. The Secretary of the Treasury is authorized to issue regulations and eventually to grant licenses. In past cases such as the Iran Hostage situation, the Treasury through the Office of Foreign Assets Control ("OFAC") issued general licenses for a variety of purposes. The Administration has responded to critics of the Executive Order by saying that it will not be used to give immunity to oil companies. *See infra* note 26. But the administration's largesse with respect to licenses cannot cure an otherwise illegal order. *See, e.g.*, Itek Corp. v. First Nat'l Bank of Boston, 704 F.2d 1 (1st Cir. 1983) (noting that a final judgment that no non-fraudulent demand on a letter of credit was made was prohibited because such a judgment would transfer an interest in the blocked property).

12. Executive Order 13303 provides: "Unless licensed or otherwise authorized pursuant to this order . . . ." Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

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

14. A detailed discussion of these issues, executive withdrawal of jurisdiction, takings, and immunizing private companies, is beyond the scope of this Essay. This Essay is meant to raise these issues for examination and further discussion. *See infra* Section III.

15. OFAC is a department of the Treasury that:

> [A]dministers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those

Such orders issued by the Executive in a time of crisis or emergency prohibit the transfer of property belonging to a foreign government,[16] thus pressuring the leadership of a country to resolve a crisis or comport with the Executive's desires.[17]

For example, by blocking Libyan assets,[18] the Executive prevents the Libyan government from voluntarily transferring funds that come within the U.S. or within the control of a U.S. person,[19] whether to protect the funds, pay for goods or services, or simply repatriate them, without U.S. permission.[20] Additionally, judicial process cannot be used to move the funds without permission.[21] Thus, if

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> engaged in activities related to the proliferation of weapons of mass destruction. OFAC acts under Presidential wartime and national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze foreign assets under US jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.

United States Department of the Treasury Website, Office of Foreign Asset Control, *Mission*, *at* http://www.ustreas.gov/offices/eotffc/ofac/.

16. *See, e.g.*, Exec. Order No. 12,544, 51 Fed. Reg. 1,235 (Jan. 8, 1986) (blocking all property and interests in property of the Government of Libya that are in the United States, that "come within the United States," or that "come within the possession or control of U.S. persons, including overseas branches of U.S. persons . . . ."). *See also* International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (1977). A blocking order may also block property of "specially designated nationals." *Id.*

17. *See* Paradissiotis v. Rubin, 171 F.3d 983, 986 (5th Cir. 1999) (arguing that the impetus behind President Reagan's issuance of Executive Orders 12543 and 12544 was to "punish Libyan support for international terrorism" and deal with the threat Libya posed to U.S. national security and foreign policy).

18. *See* Exec. Order No. 12,544, 51 Fed. Reg. 1,235 (Jan. 8, 1986). Pursuant to this Executive Order, the OFAC promulgated the Libyan Sanctions Regulations, which ordered the blocking of all U.S. assets owned by Libya. Libyan Sanctions Regulations, 31 C.F.R. § 550.209 (1997).

19. *See* Libyan Sanctions Regulations, 31 C.F.R. § 550.209. Recently, the U.S. government issued two general licenses that permit a wide variety of transactions with Libya. 31 C.F.R. §§ 550.574, 550.575 (2004).

20. *See id.*

> Except as authorized by regulations, rulings, instructions, licenses, or otherwise, no property or interests in property of the Government of Libya that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches, may be transferred, paid, exported, withdrawn or otherwise dealt in.

Id. Typically blocking orders are accompanied by an order which prohibits the importation or exportation of goods from or to the country in question. *See, e.g.*, Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986) (prohibiting, among other things, the import of any goods or services of Libyan origin and the export of any goods or services to Libya).

21. *E.g.* Treas. Libyan Sanctions Regulations, 31 C.F.R. § 550.210(e) ("Unless licensed or authorized pursuant to this part, any attachment, judgment, decree, lien, execution, garnishment or other judicial process is null and void with respect to any property in which . . . there existed an interest of the Government of Libya.); s*ee also* Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003) (providing that "any

someone obtains a judgment against the Libyan government and seeks to enforce that judgment by attaching Libya's assets in the Bank of New York, for example, that person will not be able to do so without the U.S. government's permission.[22] The U.S. government can thus control and use Libyan assets as leverage in its relations with Libya.[23]

Typical blocking orders, such as the Libyan blocking order, are reasonable tools for supporting and implementing the Executive's foreign policy positions.[24] But Executive Order 13303 is different; instead, its terms are uniquely and deeply troubling. A close examination of the Order's language reveals that it does not block the transfer of property in order to secure leverage over a foreign government; rather, it attempts to extend perpetual immunity to oil companies doing business in Iraq.

B. Executive Order 13303 Isn't a Typical Blocking Order

The language of Executive Order 13303 reveals that this Order intends to discourage, and even preclude lawsuits connected to Iraqi oil. Section 1 of Executive Order 13303 provides:

> Unless licensed or otherwise authorized pursuant to this order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to the following:
>
> (a) the Development Fund for Iraq, and
>
> (b) all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, in which any foreign country or a national thereof has any interest, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons.[25]

The Order then defines "petroleum and petroleum products" as "any petroleum, petroleum products, or natural gas originating in Iraq, including any Iraqi-origin oil inventories, wherever located."[26] The Order does not block transfers of property

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attachment, judgment, decree, lien . . . or *other judicial process* is prohibited.") (emphasis added).

22. *Id.*

23. Dames & Moore v. Regan, 453 U.S. 654, 656 (1981) (holding that blocking orders "permit the President to maintain foreign assets at his disposal for use in negotiating the resolution of a declared national emergency, and the foreign assets serve as a 'bargaining chip' to be used by the President when dealing with a hostile country.").

24. *See, e.g.*, Propper v. Clark, 337 U.S. 472, 493 (1949) (finding the congressional purpose of authorizing blocking orders is "to put control of foreign assets in the hands of the President").

25. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

26. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). The remainder of Section 3 provides:

(a) The term "person" means an individual or entity;

generally, but only the use of judicial process to transfer such property.[27] Voluntary transfers of petroleum and petroleum proceeds are permissible.[28] The Order does not stop a company, such as our hypothetical Company *X*, from repatriating profits or issuing stocks or debt in connection with its activities in Iraq because these are voluntary transfers of property. The Order prohibits only the transfer of petroleum or petroleum proceeds by means of judicial process, including "attachment, judgment, decree, lien, execution, [and] garnishment . . . ."[29] The Order's goal appears to be protecting property from lawsuits, thereby immunizing private companies.[30]

C. Executive Order 13303 Grants Immunity to Oil Companies Operating in Iraq

The combination of the failure to block voluntary transfers and the perpetual grants of transferable protection to all proceeds from or related to the oil indicates the Executive's attempt to immunize oil companies doing business in Iraq.

> (b) The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;
> (c) The term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States . . . .
> (e) The term "Development Fund for Iraq" means the fund established on or about May 22, 2003, on the books of the Central Bank of Iraq, by the Administrator of the Coalition Provisional Authority responsible for the temporary governance of Iraq and all accounts held for the fund or for the Central Bank of Iraq in the name of the fund . . . .

Id.

Although none have yet been issued, the Order provides that the Secretary of the Treasury is authorized to issue regulations. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). *See also Executive Order 13303: Instituting Immunity?*, EARTHRIGHTS INT'L, *at* http://www.earthrights.org/news/institutingimmunity.shtm (last visited Aug. 13, 2003). The Bush Administration has responded to critics of the Executive Order by saying that it will not be used to give immunity to oil companies. *See* Lisa Girion, *Immunity for Iraqi Oil Dealings Raises Alarm*, L.A. TIMES, Aug. 7, 2003, http://www.mtholyoke.edu/acad/intrel/energy/alarm.htm (reporting that Taylor Griffin, a Treasury Department spokesman, stated that Executive Order 13303 is designed to protect proceeds from the sale of Iraqi crude oil destined for a special U.N. fund. She stated "this does not protect the companies' money . . . . It protects the Iraqi people's money.").

27. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

28. In 1990, President George H.W. Bush issued Executive Order 12722 blocking both the voluntary and involuntarily transfer of property. Exec. Order No. 12,722, Fed. Reg. 31,803 (Aug. 2, 1990). This was a typical blocking order. On the same day that President George W. Bush issued Executive Order 13303, OFAC issued a General License substantially lifting the restrictions in Executive Order 12722. *See* 31 C.F.R. § 575.533 (2003).

29. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

30. *Compare id. with* Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Aug. 28, 2003) (blocking all transfers of property of the former Iraqi regime).

First, the Order protects not just oil, or money from oil, but money in any way related to oil. A reasonable construction "arising from or related to the sale or marketing thereof, and interests therein"[31] is that money having any connection with Iraqi oil is immune from judicial process. Thus, the protection could arguably extend beyond the mere sale of the Iraqi oil to the the resale, marketing and retail sale of this oil or products derived from it. Moreover, the Order protects not only money "arising from," but money "related to" the sale of the oil.[32] This immunity could extend as far as an ingenious lawyer could imagine. Consider again the example of Company *X*, and suppose that Company *X* resold its Iraqi oil to a refinery and shipped the oil to the refinery. If an oil spill occurred en route to the refinery, parties harmed by the spill would not be able to enforce a judgment against Company *X* if all of Company *X*'s assets could be traced to the oil. Therefore, one could interpret the language to mean that, although one could sue Company *X* for its conduct in Iraq, one could not satisfy any judgment by moving against monies traceable to Iraqi petroleum products.

Presumably, one could move against Company *X*'s other assets, but Company *X* has two possibilities open to avoid having any judgment enforced against it. First, when Company *X* forms, it may limit its activities to the exploration, sale and resale of Iraqi oil. If its only activities involve Iraqi oil, then it may argue that all of its monies are protected by Executive Order 13303.[33] Second, even if it had other activities or if a plaintiff could pursue related companies, Company *X* could argue that because money is fungible, any action against Company *X* for conduct relating to the Iraqi oil automatically "relates to" the Iraqi oil. If either of these strategies proved successful, Executive Order 13303 would preclude an action to collect the damages of such a suit.

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31. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). The Order would also seem to protect the oil from claims of conversion or breach of contract by parties that had agreements with the prior regime for the oil. *Id.*

32. *Id.*

33. Companies often establish separate companies in order to limit their liability. For instance, "companies choose to create subsidiaries for the purpose of conducting risky activities, while minimizing the risk to parent company assets. Moreover, corporations contemplating entry into a risky industry are traditionally advised to create subsidiaries. While companies may not attempt to become completely judgment-proof, the creation of subsidiaries is a dominant strategy to reduce exposure to claims for environmental injury and other potentially large tort claims." *See* Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 Colum. L. REV. 1203, 1245–46 (2002). Moreover, "anecdotal evidence suggests that even if corporations do not seek complete judgment-proofing, they do use subsidiaries as a means of significantly reducing tort liability exposure." *Id.* at 1246. With respect to the international context especially, "companies often prefer joint venture agreements when investing and operating abroad due to many advantages" including the minimalization of capital commitment and risk. *See* Carolita L. Oliveros, *International Distribution Issues: Contract Materials, A.L.I., Product Distribution and Marketing*, SE47 A.L.I.–A.B.A. 917, 1040 (Mar. 2000) (listing the advantages and disadvantages of joint business ventures).

Second, the failure to block voluntary transfers allows the immunity that first attaches to the oil to transfer as the oil changes hands.[34] The Order allows persons to transfer both the property and the protection afforded to the property.[35] Oil that is immune from judicial process when owned by Company *X* remains immune if Company *X* chooses to sell or otherwise transfer it to Company *G*. Further, two clauses suggest that interests within the U.S., or in the control of U.S. persons, are immune: "that are in the United States . . .. "and, or "come within the control or possession of United States persons."[36] Finally, because "persons" include corporations,[37] any interest held by Company *X*, such as Company *X*'s profit, is protected by the Order.

Third, the immunity arguably follows property even after it is transformed. The Order protects from judicial process all "Iraqi petroleum and petroleum products and interests [including] proceeds, obligations, or any financial instruments of any nature whatsoever . . . ."[38] This broad language appears to cover everything: crude oil, refined gasoline, profits, stocks and debt. Thus, if Company *X* issues stock in its oil exploration efforts in Iraq, the immunity that attached first to the oil and then to the money from the oil, now attaches to the stock because the stock is a proceed of the oil. If immunity flows from purchaser to purchaser, courts will be unable to reach any instrument traceable to Iraqi oil. The plaintiffs in a suit against Company *X* may be able to obtain a judgment that Company *X* wrongfully harmed them, but Executive Order 13303 will thwart their efforts to satisfy their judgments.

The overly broad and ambiguous phrasing of this Order renders these strategies possible. The combination of "arising from or related to the sale or marketing thereof, and interests therein" and "proceeds, obligations, or any financial instruments of any nature whatsoever" seems intended to thwart all claims against companies doing business in Iraq. Money from oil is protected, and

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34. Compare this protection with that given under U.N. Resolution 1483, which protects Iraqi oil only up to the point of its first sale. Security Council Res. No. 1483, U.N. Doc. No. S/RES/1483, 42 I.L.M. 1016 (2003). *See infra* note 44 and accompanying text. The Order creates a transferable protection that is antithetical to the policies underlying blocking orders. As discussed above, the primary purpose of blocking orders is to put property in the Executive's control to enable it to resolve a crisis.

35. Typical blocking orders not only block transfers of property via judicial process they block voluntary transfers of property in order to effectuate a freeze of the property. *See, e.g.*, Exec. Order 12,722, Fed. Reg. 31,803 (Aug. 2, 1990) (blocking Iraqi property generally).

36. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). It is unclear what "in which any foreign country or a national thereof has any interest" means. The word "foreign" could mean: (i) "foreign to Iraq," or (ii) "foreign to the U.S." The latter interpretation seems less persuasive since it would mean "non-U.S.," and it would seem much more reasonable to use the phrase "non-U.S." if that were the intended meaning. "U.S." is used as an adjective throughout the Order. More likely, the phrase refers to non-Iraqi interests. Thus, the immunity attaches once the proceeds are held by non-Iraqis.

37. *Id.*

38. *Id.*

the phrase "from oil" includes any money relating to oil.[39] The protection afforded to the money is transferable,[40] and thus, seems to create perpetual protection from enforcement of all lawsuits arising from or relating to activities involving the production, sale or marketing of Iraqi oil.

One could argue that the Order's broad language strives to achieve a noble objective: to protect money needed for Iraqi redevelopment from costly, possibly frivolous, lawsuits.[41] Although such an argument would explain the need for Section 1(a) of the Order, which protects the Development Fund for Iraq, it fails to explain Section 1(b),[42] which is unnecessary if the Executive sought solely to protect the Development Fund for Iraq. This goal does not require protecting proceeds, obligations or interests "of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein . . . ."[43] If the Order only contained Section 1(a), monies flowing into the Development Fund from the sale of oil would be protected and monies that went to U.S. oil companies would not. Like U.N. Resolution 1483, Executive Order 13303 could have similarly protected the oil from suit until its first sale.[44] Protecting Iraqi oil up to the point where title passes to the first purchaser would effectively protect the assets intended for rebuilding Iraq. But Executive Order 13303 goes further, extending that immunity to private parties having any subsequent interest in the oil, and in doing so, apparently immunizing private parties from future suits any way related to Iraqi oil.

III. THE ANALYTIC FRAMEWORK TO EVALUATE EXECUTIVE ORDER 13303

Executive Order 13303 exceeds the parameters sanctioned by the Supreme Court because it goes beyond the boundaries of *Dames & Moore v. Regan*[45] and *Youngstown Sheet & Tube Co. v. Sawyer*,[46] the two principal cases

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39. *Id.*

40. *See supra* notes 34–37 and accompanying text.

41. *See, e.g.*, Davis, supra note 1, at 20 (explaining that the Order may seek to protect companies from suits brought under the Alien Tort Claims Act).

42. Indeed, if instead of protecting private actors, Executive Order 13303 protected government actors the Order would seem less troubling. The idea that a sovereign is generally immune from suit is well accepted. *See, e.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1601–1611 (2004). The sovereign at least is held accountable in the political process. *See* 28 U.S.C. § 2680 (2004) (waiving sovereign immunity under certain limited circumstances). *See also* Gathii, *supra* note 1, at 541–42 (noting a possible effect of the Order on the CPA).

43. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). Arguably, protecting oil companies from potentially abusive suits will encourage those companies to invest in the redevelopment of Iraq. But such protection could be achieved by transferring potential claims to an arbitral tribunal rather than attempting to preclude review altogether. Such a tribunal could be constructed so that it would not be open to the same litigation abuses found in U.S. courts. See *infra* Section IV.B.

44. *See, e.g.*, Security Council Res. No. 1483, U.N. Doc. No. S/RES/1483, 42 I.L.M. 1016 (2003).

45. 453 U.S. 654 (1981).

that establish the criteria for evaluating the Order's constitutionality.[47] These cases support the view that in certain times of crisis, the Executive may settle its nationals' claims based upon its inherent powers and the implicit consent of Congress,[48] by effectuating a "change in law" so that an alternative forum can resolve these claims.[49] The Executive might argue this framework should expand to include Executive Order 13303 and that the change of law paradigm adopted in that case should apply here. However, a court should reject such an argument because the President likely lacks inherent, explicit or implicit authority to issue the Order. Further, even if the President had authority, Executive Order 13303 lacks the criteria for extending the change of law analysis.

A. The Analytic Framework

Youngstown Sheet & Tube Co. v. Sawyer involved President Truman's effort to seize steel mills in the wake of a nationwide strike. [50] The Court found that the President must act either pursuant to an act of Congress or pursuant to his inherent constitutional authority.[51] Justice Jackson's concurring opinion in *Youngstown* noted that where express or implied authorization from Congress exists, the President's powers are strongest because he is exercising his own

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46. 343 U.S. 579 (1952).

47. *See Youngstown*, 343 U.S. at 871–72 (1952) (Jackson, J., concurring); *see also Dames & Moore*, 453 U.S.at 668–69 (citing *Youngstown*).

48. *See Dames & Moore*, 453 U.S. at 672 (holding that the legislative history and the cases interpreting the Trading With the Enemy Act "fully sustain the broad authority of the Executive when acting under this congressional grant of power."). As will be discussed more fully below, *Dames & Moore*, involved a challenge to a series of Executive Orders that were necessary to settle the Iranian Hostage Crisis. Some have commented that the holding in *Dames & Moore* is limited given the circumstances surrounding the case. *See, e.g.*, Phillip R. Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L. L. 750 (1989); Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185, 194 (2002). *But see* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 767 (1998). The circumstances surrounding *Dames & Moore* were certainly compelling. As one commentator points out:

> The unanimity and terseness of the opinion might also suggest a Court unwilling to pursue any legal conclusion that would compromise the President's authority in foreign affairs. The United States had already surrendered almost $8 billion in Iranian assets on January 20, 1981, the day of President Reagan's inauguration, in exchange for the already-executed release of the hostages. A Supreme Court decision that invalidated the Agreement made by the Executive Branch could have done considerable damage to the President's ability to deal with foreign sovereigns.

Rebecca A. D'Arcy, *The Legacy of Dames & Moore v. Regan: the Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 293 (2003).

49. *See Dames & Moore*, 453 U.S. at 684–85 (noting that the President's order did not withdraw federal jurisdiction but merely caused a change in the law to be applied).

50. 343 U.S. 579 (1952).

51. *Id.* at 585.

powers as well as those delegated to him by Congress.[52] Absent congressional authorization, the President may enter a "'zone of twilight' where he and Congress may have concurrent authority, or in which its distribution is uncertain."[53] In a separate *Youngstown* concurrence, Justice Frankfurter noted that a pattern of long-standing congressional acceptance of Presidential practice could be viewed as a gloss on executive power.[54]

In *Dames & Moore*, the Court applied the *Youngstown* framework to suits arising out of the Iranian Hostage Crisis. On November 4, 1979, Iranian militants seized the American Embassy in Tehran, Iran and held fifty-two Americans as hostage for over one year.[55] After the hostages' taking, President Jimmy Carter, pursuant to the International Emergency Economic Powers Act (the IEEPA),[56] declared a national emergency and blocked the removal or transfer of all Iranian property subject to U.S. jurisdiction.[57] President Carter's Executive Order Blocking Iranian Assets (The "Iranian Blocking Order") provided:

> I, JIMMY CARTER, President of the United States, find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.
>
> I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.[58]

The President authorized the Secretary of the Treasury to promulgate regulations to carry out the Iranian Blocking Order.[59] Shortly thereafter, the OFAC issued regulations to carry out the Iranian Blocking Order that provided "unless licensed or authorized . . . any attachment, judgment decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on

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52. *Id.* at 635–37.
53. *Id.* at 637.
54. *Id.* at 637 (Jackson, J., concurring).
55. *See* STANSFIELD TURNER, TERRORISM AND DEMOCRACY 26–154 (1991); Public Broadcasting Service, The American Experience, Jimmy Carter, People & Events: The Iranian Hostage Crisis, November 1979–January 1981, at http://www.pbs.org/wgbh/amex/carter/peopleevents/e_hostage.html (last visited April 8, 2004).
56. At the time IEEPA provided that the President's authority under the Act "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a) (2004).
57. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).
58. *Id.*
59. *Id.*

or since [November 14, 1979,] there existed an interest of Iran."[60] On November 26, 1979, President Carter granted a general license authorizing certain judicial proceedings, but not allowing the entry of any judgment or decree or order.[61]

The hostage crisis lasted a total of 444 days until the hostages' release on January 20, 1981.[62] Early in the saga, Americans expected to learn of the hostages' release when they turned on the evening news.[63] After more than a year, the country was less sanguine.[64] A failed rescue attempt only emphasized the country's impotence.[65] After a frustrating year,[66] finally, in January 1981, the Algiers Accords secured the release of the hostages.[67]

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60. Iranian Assets Control Regulations, 31 C.F.R. § 535.203(e) (1983).

61. *See* 31 C.F.R. § 535.504(a); *see also* Dames & Moore v. Regan, 453 U.S. 654, 663-67 (1981). The license permitted certain judicial proceedings against Iran, but it did not allow the entry of judgment. It did allow for pre-judgment attachment. The plaintiffs in *Dames & Moore* had obtained pre-judgment attachment orders against Iranian property. The plaintiffs also won a summary judgment motion and were awarded the amount of damages they had claimed in their complaint plus interest. The subsequent executive orders in *Dames & Moore* invalidated these attachments and relegated the plaintiffs to the Iran-U.S. Claims Tribunal. *Id.*

62. *See* TURNER, *supra* note 55, at 155; Public Broadcasting Service, The American Experience, Jimmy Carter, People & Events: The Iranian Hostage Crisis, November 1979–January 1981, at http://www.pbs.org/wgbh/amex/carter/peopleevents/e_hostage.html (last visited April 8, 2004). For a description of the event see Public Broadcasting Service, The American Experience, Jimmy Carter, People & Events: The Iranian Hostage Crisis, November 1979–January 1981, at http://www.pbs.org/wgbh/amex/carter/peopleevents/e_hostage.html (last visited April 8, 2004).

63. *See* GARY SICK, ALL FALL DOWN: AMERICA'S TRAGIC ENCOUNTER WITH IRAN 229 (2001) (noting that from the very start there was assurance "that the events at the embassy were comparable to a sit-in at a U.S. university and that the situation would be resolved 'within 48 hours'").

64. *See id.* at 357–75 (2001) (noting that attempts by Iran to manipulate U.S. politics "served only to remind the American public of a long year of anger, frustration and policy failures"); Public Broadcasting Service, The American Experience, Jimmy Carter, People & Events: The Iranian Hostage Crisis, November 1979–January 1981, at http://www.pbs.org/wgbh/amex/carter/peopleevents/e_hostage.html (last visited April 8, 2004).

65. A failed rescue attempt followed a series of failed negotiations and economic pressure working towards the release of the Iranian hostages. The failed rescue attempt seemed to epitomize the helplessness of the American actions. *See* DAVID PATRICK HOUGHTON, U.S. FOREIGN POLICY AND THE IRAN HOSTAGE CRISIS 139 (2001) (discussing the Carter administration's options). *See also* TURNER, supra note 55 at 148 (stating "none of us would admit that the United States could be stymied by a theocracy run by a group of extremist clerics . . . . [W]e certainly did not want to acknowledge our impotence before the American public").

66. *See generally* SICK, supra note 63, at 229 (chronicling the crisis).

67. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, U.S.–Iran, DEP'T ST. BULL., Feb. 1981, *available at* http://www.iusct.org/general-declaration.pdf [hereinafter Algiers Accords 1981].

The Accords called for the creation of a claims tribunal and a termination of all legal proceedings in the U.S. courts involving claims of U.S. persons against Iran.[68] They nullified all attachments and judgments, prohibited further litigation based on such claims[69] and called for the termination of claims through binding arbitration.[70] On January 19, 1981, President Carter issued a series of Executive Orders implementing the Accords.[71] These orders (i) revoked all licenses permitting the exercise of any right with respect to Iranian funds;[72] (ii) nullified all non-Iranian interests in such assets acquired subsequent to the blocking order; (iii) required banks holding Iranian assets to transfer them to the Federal Reserve;[73] and (iv) prohibited all claims by U.S. nationals, including the former hostages, against Iran.[74]

In February 1981, President Ronald Reagan issued Executive Order 12294 that ratified Carter's January 19, 1981 orders and suspended all claims covered by the Algiers Accords (the "Iranian Suspension Order").[75] Executive Order 12294 provided that "such claims shall have no legal effect in any action now pending in any court of the United States."[76] However, the suspension of a

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68. *Id.*

69. *Id.*

70. *Id.*

71. Exec. Order Nos.12,276, 46 Fed. Reg. 7,913 (Jan. 19, 1981); 12,277, 46 Fed. Reg. 7,915 (Jan. 19, 1981); 12,278, 46 Fed. Reg. 7,917 (Jan. 19, 1981); 12,279, 46 Fed. Reg. 7,919 (Jan. 19, 1981); 12,280, 46 Fed. Reg. 7,921 (Jan. 19, 1981); 12,281, 46 Fed. Reg. 7,923 (Jan. 19, 1981); 12,282, 46 Fed. Reg. 7,925 (Jan. 19, 1981); 12,283, 46 Fed. Reg. 7,927 (Jan. 19, 1981); 12,284, 46 Fed. Reg. 7,929 (Jan. 19, 1981); 12,285, 46 Fed. Reg. 7,931 (Jan. 19, 1981).

72. Exec. Order No. 12,277, 46 Fed. Reg. 7,915 (Jan. 19, 1981).

73. Exec. Order No. 12,278, 46 Fed. Reg. 7,917 (Jan. 19, 1981).

74. Exec. Order No. 12,283, 46 Fed. Reg. 7,927 (Jan. 19, 1981). Executive Order 12283 required the Secretary of the Treasury to promulgate regulations:

> (a) prohibiting . . . any claim against the Government of Iran . . . (b) prohibiting any person not a U.S. national from prosecuting any such claim in any court within the United States; (c) ordering the termination of any previously instituted judicial proceedings based upon such claims; and (d) prohibiting the enforcement of any judicial order issued in the course of such proceedings. *Id.*

75. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981). Order 12294 required that:

> All claims which may be presented to the Iran-United States Claims Tribunal under the terms of [the Algiers Accords] . . . and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States . . . .

Id.

76. *Id.* The Algiers Accords provided:

> It is the purpose of both parties . . . to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declarations,

claim ceased, and the claim was revived, if the Iran-U.S. Claims Tribunal determined that it did not have jurisdiction.[77]

The plaintiffs in *Dames & Moore* challenged the Iranian Blocking Order and the Iranian Suspension Order by claiming that the President lacked authority for the orders and that the orders violated the separation of powers doctrine by divesting the federal courts of jurisdiction.[78] The Court found that the IEEPA specifically authorized the President to block the transfer of funds,[79] and noted the IEEPA's purpose:

> This Court has previously recognized that the congressional purpose in authorizing blocking orders is 'to put control of foreign assets in the hands of the President . . . .' Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve

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> relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration . . . .
>
> The United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

Algiers Accords 1981, *supra* note 67.

77. *See* Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981); Dames & Moore v. Regan, 453 U.S. 654, 684–85 (1981) (explaining that the suspension of claims was not a divestiture of jurisdiction because claims that were not cognizable before the Iran-U.S. Claims Tribunal would be "revived" in the federal courts).

78. Dames & Moore v. Regan, 453 U.S. 654, 666–67 (1981). The plaintiffs in *Dames & Moore* had contracted for and performed services for the Iran Atomic Energy Organization (AEO) and were owed money for their services. Plaintiffs sued the Government of Iran, the AEO and several Iranian banks (the defendants) for the money owed to them and had been awarded a prejudgment attachment against the defendants, and summary judgment. However, their interests in these assets were nullified and their claims suspended by the Iranian Blocking Order and the Iranian Suspension Order. *Id.* at 654–65.

79. *Id.* at 674–75.

> as a 'bargaining chip' to be used by the President when dealing with a hostile country.[80]

Because the President used the Iranian Blocking Order to place Iranian assets within the President's control for use as leverage, the Iranian Blocking Order fell squarely within the IEEPA and was therefore constitutional.[81]

The Iranian Suspension Order faced more serious challenges than the Iranian Blocking Order because the IEEPA did not directly support it. As the Supreme Court noted:

> The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts.[82]

The IEEPA did not confer power to the President to suspend and transfer claims to the Iran-U.S. Claims Tribunal.[83] In order to uphold the Suspension Order, the Court had to find that the President either acted within his inherent powers or with the implicit consent of Congress.[84]

In *Dames & Moore*, the Court found that the President acted both within his inherent powers and with Congress's implicit consent.[85] The Court acknowledged the President's inherent authority to enter into executive agreements such as the Algiers Accords.[86] Yet, in reading the Court's opinion, one senses that this recognition of the President's inherent power pales in comparison to its recognition of Congress's implicit approval of Presidential claim settlement.[87] The Court stated, "[c]rucial to our decision today is the conclusion that Congress has

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80. *Id.* at 673. The IEEPA was amended in 2001 to provide that the President could confiscate and vest property of foreign governments. *See* 50 U.S.C. § 1702(a)(1)(c). *See also* Estate of Smith v. Fed. Reserve Bank of N.Y., 346 F.3d 264, 271 (2d Cir. 2003) (explaining that IEEPA "authorizes the President, in his discretion, both to block *and* to confiscate terrorist assets as circumstances warrant.") (emphasis original).

81. *Dames & Moore*, 453 U.S. at 675.

82. *Id.* at 675.

83. *Id.* at 675 (concluding that "although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims.").

84. *See id.* at 668 (citing *Youngstown* for the proposition that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

85. *See id.* at 679–80, 686 (finding inherent presidential authority and implicit congressional consent).

86. *Id.* at 682 (noting that the President had "some measure" of power to enter into agreements to settle claims without the advice and consent of the Senate).

87. *Id.* at 679–80 (noting the "general tenor" or congressional action and that congressional acquiescence is "crucial" to the Court's decision).

implicitly approved the practice of claim settlement by executive agreement.[88] The Iranian Suspension Order helped settle an ongoing crisis (and the claims that arose from it) by implementing this executive agreement.[89]

The Court emphasized various statutes and past Congressional practice that demonstrated Congress's implicit grant of authority to the President. Although the IEEPA did not explicitly authorize the President to suspend claims, it recognized the importance of the President's ability to resolve a national emergency.[90] Moreover, there had been long-standing congressional acquiescence to the Presidential practice of claim settlement between U.S. nationals and foreign sovereigns.[91] The Court viewed this silent congressional acceptance of Presidential practice as "consent."[92] Therefore, the Court found that the President had explicit authority from the IEEPA to issue the Iranian Blocking Order, and that the President possessed both inherent and implicit authority to issue the Iranian Suspension Order.

In order to uphold the Suspension Order, the Court still had to find that the suspension of claims was not a withdrawal or modification of federal jurisdiction because such a withdrawal or modification would raise serious separation of powers and potential takings problems.[93] In *Dames & Moore*, the

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88. *Id.* at 680.

89. Although not discussed by the Court, one should not forget when reading the opinion that the hostage crisis was one of the most extraordinary events in American history. Over 100 books have been written about it. The painful and seemingly unending ridicule and national anguish of the event is thought by some to have cost President Carter the 1980 election. *See* Nicholas M. Horrock, *Perspective: The Hostage Effect - Are Iranians Seeking Repeat Role in U.S. Election History?*, CHI. TRIB., Oct. 9, 1988, at A1. Further, having ended the crisis, it was unthinkable that the Supreme Court would invalidate the executive orders that implemented the settlement. Doing so would have seriously damaged the country's standing among nations and would have further dragged out an event that the country wanted to put behind it. *See, e.g.*, Robert S. Greenberger & John Walcott, *U.S. Officials Argue Whether Iran Policy Offers New Opportunity or Old Mistake*, WALL ST. J., June 7, 1988,at 31 (noting that the Iranian Hostage Crisis was a "year-long humiliation").

90. The Court cited a number of statutes which recognized the President's power to settle claims of its nationals. *See Dames & Moore*, 453 U.S. at 680–82 (citing the International Claims Settlement Act of 1949, 22 U.S.C. § 1621, and the Hostage Act, 22 U.S.C. § 1732). *See also* United States v. Pink, 315 U.S. 203 (1942) (involving United States claims settlement with the Soviet Union).

91. *Dames & Moore*, 453 U.S. at 680–82.

92. *Id.* at 686.

93. There are two separate separation of powers problems raised. First, there is the question of whether Congress could withdraw federal jurisdiction. Presumably, since it has the power to create the lower federal courts it has some power with respect to federal jurisdiction. *Ex Parte McCardle*, 74 U.S. 506 (1869). *See also* Webster v. Doe, 486 U.S. 592, 611 (1988) ("We long ago held that the power not to create any lower federal courts includes the power to invest them with less than all of the judicial power") (Scalia, J., dissenting). The second question, though, is whether Congress can then delegate the power to withdraw jurisdiction to the President. *See, e.g.*, Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 810 (D. Del. 1990). However, subsequent Court opinions have "narrowed or questioned broad congressional power." Judith Resnik, *Congress and the Courts:*

Court found that the Iranian Suspension Order implementing the Algiers Accords did not modify federal court jurisdiction because the order suspending and transferring claims merely effectuated a "change in the substantive law":[94]

> In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts. This case, in short, illustrates the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law.[95]

The change in law required that the Iran-U.S. Claims Tribunal hear any claims. The Court concluded that the President had the authority to change the substantive law governing these claims and require the claimants to seek relief in an alternative forum, *i.e.*, the Iran-U.S. Claims Tribunal.[96] If the Iran-U.S. Claims Tribunal did not have jurisdiction, the claim would be "revived" in the U.S. courts.[97] The Court adopted the "change in law" paradigm to find that the President had not withdrawn federal jurisdiction.[98]

Jurisdiction and Remedies: Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations, 86 GEO. L.J. 2589, 2626 (1998).

94. *Dames & Moore*, 453 U.S. at 684–85. *See also* McKesson Corp. v. Iran, 52 F.3d 346, 348 n.4 (D.C. Cir. 1995) (following *Dames & Moore*); Iran v. Boeing Co., 771 F.2d 1279, 1284 (9th Cir. 1985). Following *Dames & Moore*, numerous courts declined to hear cases which were properly before the Iran-U.S. Claims Tribunal. The Third Circuit applied this approach in *Behring Int'l, Inc. v. Imperial Iranian Air Force* when it held that a U.S. company's attempt to enforce a dispute settlement agreement had to be heard in the Hague. 699 F.2d 657, 663 (3d Cir. 1983).

95. *Dames & Moore*, 453 U.S. at 684–85.

96. *Dames & Moore*, 453 U.S. at 685. Subsequent cases adopted this paradigm, even where there was no alternative forum provided. *See, e.g.*, Belk v. United States, 858 F.2d 706, 709 (Fed. Cir. 1988) (holding that although, "the Algiers Accords did not provide any alternative forum in which the hostages could assert their claims, that fact is not sufficient to establish a taking."); Roeder v. Iran, 195 F. Supp. 2d 140, 165 (D.D.C.) (not reaching the question of whether the failure to provide an alternative forum would constitute a taking).

97. *Dames & Moore*, 453 U.S. at 684–85 (explaining that claims brought before the tribunal but determined not to be within its jurisdiction would become enforceable again in the federal courts).

98. A later lower court decision upheld and extended the change in law paradigm in a case involving personal injury claims of the hostages for which no alternative forum had been provided. In *Belk v. United States*, the Court of Appeals for the Federal Circuit applied the change in law paradigm to personal injury claims. 858 F.2d 706, 709 (Fed. Cir. 1988). Under the Algiers Accords and Carter's Executive Order 12283, the hostages were not permitted to bring suit before the Iran-U.S. Claims Tribunal. *Id*. at 707. The court found that these claims had been abrogated by the change in law mandated by the Algiers Accords even though the Algiers Accords did not provide an alternative forum for the hostages' claims. *Id*. at 709. Thus, the change of law paradigm was extended in the absence of an alternative forum, although in that case the government had at least established a

Dames & Moore provides the analytical framework to evaluate Executive Order 13303 by establishing a two step analysis. The first step examines whether Congress authorized the Order; the second, whether the President has inherent authority or Congress has implicitly consented to the Executive's action. The next section applies this framework to Executive Order 13303. However, even if the President's conduct is authorized under either of these two steps, *Dames & Moore* still requires us to consider whether the Order modifies or withdraws federal jurisdiction. This last inquiry will be addressed in Part III along with other questions raised by Executive Order 13303.

B. Applying the Framework to Executive Order 13303

1. The President Lacks Authority Under the IEEPA to Issue Executive Order 13303

The first step in the *Dames & Moore* analysis examines whether Congress has authorized the President to act. Unlike the Iranian Blocking Order in *Dames & Moore*, Executive Order 13303 cannot be justified as authorized under the IEEPA, which grants the President the power to declare a national emergency and block the transfer of property in cases of extraordinary threats to national security, foreign policy or the economy.[99] And unlike the typical blocking order, Executive

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compensation mechanism for the former hostages. *See* President Commission on Hostage Compensation, Exec. Order 12,285, 46 F.R. 7931 (Jan. 19, 1981). Most recently, in *Roeder v. Iran*, a federal district court applied this change in law paradigm to claims by former U.S. hostages. 195 F. Supp. 2d 140, 184 (D.D.C. 2002), *aff'd* 333 F.3d 228 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2836 (2004). In *Roeder*, the plaintiffs brought a class action as former hostages and families of hostages against the Republic of Iran seeking damages for various torts. *Id.* at 144. The case was brought in the wake of an amendment to the Foreign Sovereign Immunities Act which arguably "waived foreign sovereign immunity and created a cause of action for individuals harmed by state sponsored acts of terrorism." *Id.*; *see also* Federal Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 1605(a)(7). Nevertheless, the court rejected the plaintiffs' action on the grounds that the Algiers Accords (and the Executive Orders that implemented the Accords) had extinguished the plaintiffs' claims, had eliminated their cause of action, and that Congress had not explicitly abrogated the Algiers Accords in its recent amendments. *Roeder*, 195 F. Supp. 2d at 183–84. The district court admitted that it would violate Article III to allow the President to divest the court of jurisdiction. *Id.* at 167. But it concluded that extinguishing the hostages' claims was a change in law that was permitted under the President's powers as noted in *Dames & Moore*. *Id.*

99. 50 U.S.C. § 1701(a). Section 1702 gives the President the power to:

> A. investigate, regulate, or prohibit–
>
> i. any transactions in foreign exchange,
>
> ii. transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
>
> iii. the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States;
>
> B. investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition,

Order 13303 does not block the voluntary transfer of property, but only the transfer of property through judicial process.[100] At the same time, the Order both goes too far and not far enough to seek refuge under the IEEPA because it fails to truly block property. Instead, it only blocks lawsuits against private parties.

As previously discussed, the Libyan blocking order is an example of a typical blocking order.[101] The Libyan Sanctions Regulations provide that "no property or interest in property . . . may be transferred, paid, exported, withdrawn or otherwise dealt in."[102] It thus protects a pot of money so that no one can touch it without government permission.[103]

Executive Order 13303 is different: it does not operate as if to bury the money in a bank vault protected by U.S. government guards, so it can be used as leverage by the U.S. Instead, it builds a never-ending tunnel for the money to pass through from private party to private party, protected from interference by the judicial process, perpetually protecting profits from Iraqi oil without necessarily protecting the Development Fund for Iraq. Executive Order 13303 merely masquerades as a blocking order.

Nothing in the Order prohibits our hypothetical Company *X* from moving money, repatriating profits or paying dividends out of Iraqi oil profits. Iraqi property is not blocked. Interests in Iraqi petroleum are not blocked. Profits from oil sales are not blocked. The only things "blocked" are attempts by potential litigants to satisfy a judgment by attaching "oil, oil proceeds, and property arising from or relating to oil or oil proceeds." This protection extends to U.S. "persons," defined by the Order to include entities, *i.e.*, corporations.[104] Thus, the Order both

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> holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702.

100. *See supra* notes 34–37 and accompanying text.

101. Libyan Sanctions Regulations, 31 C.F.R. § 550.209. *See also* Cuban Assets Control Regulations, 31 C.F.R. § 515 (1997) (prohibiting certain enumerated transactions with Cuba); Burmese Sanctions Regulations, 31 C.F.R. § 537 (2004) (prohibiting certain enumerated transactions with Burma).

102. Libyan Sanctions Regulations, 31 C.F.R. § 550.209 (1997). It seems clear that both voluntary and involuntary transfers would fall under the purview of this regulation.

103. *See supra* notes 16–24 and accompanying text. *See also* Itek Corp. v. First Nat'l. Bank of Boston, 704 F.2d 1, 9 (1st Cir. 1983) (noting that the blocking order allowed the President to use the assets as a "bargaining chip"); Paradissiotis v. United States, 304 F.3d 1271, 1275 (Fed. Cir. 2002) (noting that blocking order denies hostile countries "access to funds" which might promote interests inimical to the U.S.).

104. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). The Order provides:

> (a) The term "person" means an individual or entity;
> (b) The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

goes further than the IEEPA would allow by perpetually protecting private persons from suits, and at the same time fails to fulfill the purposes of the IEEPA by not isolating the property so that it can be used as leverage by the U.S. government.

The IEEPA empowers the President to control foreign assets during an emergency and to use these assets as leverage to promote a resolution of a crisis.[105] But Executive Order 13303 does not give any such leverage; it solely gives immunity to private companies receiving profits from petroleum in Iraq. Arguably, Section 1(a) of the Order that protects the Development Fund of Iraq could be sustained under the IEEPA. But Section 1(b) cannot; indeed, it undermines Section 1(a), by allowing companies to transfer oil proceeds without question.[106]

2. The President Lacks Inherent Authority or Implicit Congressional Consent to Justify Executive Order 13303

Without explicit authority to act, the President must either rely upon inherent authority or implicit congressional consent. Arguably, the Order's scope is beyond any claim of inherent Presidential authority or implicit congressional consent. The Order insulates private companies from lawsuits while failing to provide an alternative forum for claims against those companies.[107] The President does not have the authority to issue the portion of the Order that effectively immunizes a select set of private defendants from lawsuits.

Youngstown and *Dames & Moore* supply the relevant framework for evaluating whether the Order can be justified as a product of inherent Presidential authority or implicit congressional consent. *Youngstown* outlines the scenarios in which a President may be acting: with congressional consent, in direct contravention of congressional action or in a grey area where the President and Congress may share authority.[108] Thus, *Dames & Moore* noted, without legislative action "the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.'"[109]

Id.

105. *Id.* at 673.

106. For example, the language of the Order precludes a suit against a private company for illegal conversion of the oil without a license. Such a suit would be a suit against property as defined by Section 1(b) of the Order. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

107. See *infra* Section IV.A.

108. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

109. Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (citing *Youngstown*, 343 U.S. at 637–38). When the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Youngstown*, 343 U.S. at 637–38.

As with the Iranian Suspension Order in *Dames & Moore*, Executive Order 13303 cannot look to the IEEPA for explicit Congressional authority.[110] In order for the President's acts to be valid he must act either pursuant to his inherent powers or pursuant to implicit consent from Congress. The Court in *Dames & Moore* relied primarily upon the President's acting with the implicit authority of Congress as evidenced by long-standing Congressional acquiescence in matters of claim settlement.[111] It also noted the President's inherent authority to enter into executive agreements.[112] The Order can find no such refuge because no history of Congressional acquiescence exists here, and the Order does not implement any executive agreement for the settlement of claims between a sovereign and the citizens of the U.S.

At least one court has been reluctant to find implicit Congressional authority to suspend claims absent the criteria in *Dames & Moore*.[113] In *National Oil v. Libyan Sun Oil Co.*,[114] National (an entity owned by the Libyan government) sought to enforce an arbitral award against a U.S. company that had violated its contractual obligations.[115] The U.S. company, Sun Oil, claimed that the Libyan regulations barred the entry of judgment without an OFAC license.[116] In response, National argued that the regulations barred only the unlicensed execution of any judgment.[117] In other words, Sun Oil argued that the blocking order precluded the establishment of liability while National argued that the regulations blocked only the use of judicial process to enforce an already entered judgment.

The district court agreed with National and found that the order did not bar the entry of judgment.[118] It likened barring the entry of judgment to the Iranian Suspension Order in *Dames & Moore* and found that the IEEPA did not grant the President such power, and that Congress had not granted power implicitly as it had in *Dames & Moore*.[119] The court distinguished the President's power in *Dames &*

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110. *Dames & Moore*, 453 U.S. at 675. In addition to the IEEPA, Executive Order 13303 also cites the "National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code" as authority for the Order. None of these statutes grants any additional authority to the President in this case. *See* Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

111. *Dames & Moore*, 453 U.S. at 686.

112. *Id.* at 679–80.

113. Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 812 (D. Del. 1990).

114 *Id.*

115. *Id.* at 805. The American company claimed that National could not proceed at all without a license under the Libyan Sanctions Regulations as implemented by the OFAC. *Id.* at 808; *see also* Exec. Order No. 12,543, 51 Fed.Reg. 875 (Jan. 7, 1986); Exec. Order No. 12,544, 51 Fed.Reg. 1235 (Jan. 8, 1986); Libyan Sanctions Regulations, 31 C.F.R. § 550 (1986). That claim was rejected because a retroactive license had been issued allowing Libya to proceed. *Nat'l Oil Corp.*, 733 F. Supp. at 807.

116. *Nat'l Oil Corp.*, 733 F. Supp. at 809.

117. *Id.*

118. *Id.* at 810–12.

119. *Id.*

Moore because in *National Oil* no executive agreement existed to settle claims.[120] Congress had not explicitly or implicitly authorized the President to block lawsuits generally.[121] Barring the entry of judgment would be the equivalent of blocking lawsuits generally or suspending claims (as in *Dames & Moore*).[122] In *National Oil*, the court reminded the parties of *Dames & Moore*'s narrowing language:

> [W]e re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities . . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[123]

Thus, the President's power to settle or preclude claims without explicit authority is limited.[124] Because the President lacks the inherent power to suspend lawsuits generally, he must act at a minimum pursuant to Congressional acquiescence as evidenced by the surrounding facts and circumstances.[125]

With respect to Executive Order 13303, it is unlikely that Congress implicitly consented to the President's immunization of a select group of private U.S. companies from all lawsuits. Never before has the President extended such immunity without objection by Congress so as to imply such acquiescence.[126] At the very least, for the Court to find implicit consent, a more general context of congressional acquiescence should exist,[127] which can be supplied by statutes that

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120. *Id.* at 811–12.

121. *Id.* at 810 (noting that the "statute could *not* also be read to authorize the suspension of claims pending in U.S. courts.") (emphasis original).

122. *Nat'l Oil Corp.*, 733 F. Supp. at 810.

123. *Id.* at 811 (citing Dames & Moore v. Regan, 453 U.S. 654, 688 (1981)).

124. I would argue that this limitation is not only provided in the language of *Dames & Moore*, as well as the cases like *National Oil* that followed it, but by the context of the *Dames & Moore* case. The Iranian Hostage crisis was a national crisis on several levels. The taking of diplomatic personnel was extraordinary and backed the country into an executive agreement needed to end the ongoing crisis. The negotiation of a settlement with the Iranian Government had to be reached and it could not be undermined by the Court. The Iraq situation pales by comparison. Although the redevelopment of Iraq is undoubtedly in the U.S. national interest, unlike the Iranian situation, the U.S. has not been forced into a situation where it needs to ratify an executive agreement reached to end an ongoing national crisis. Even assuming that a prospective grant of immunity could be construed as "settling claims," the potential plaintiffs have received nothing in return and no alternate venue for compensation. As Justice Jackson noted in *Youngstown*: "But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

125. *Dames & Moore*, 453 U.S. at 654.

126. *Id.* at 688.

127. *Id.*

provide a general tone of acquiescence even though they may not provide explicit authorization.[128] In *Dames & Moore*, the Court found that Congress acquiesced to the President's long-standing practice of negotiating and settling claims of its nationals with foreign sovereigns:

> [T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump sum payments or the establishment of arbitration procedures . . . . Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.[129]

Perhaps one could consider the immunity granted to the Development Fund for Iraq, under Section 1(a) of the Order, a settlement of disputes to which Congress has consented with foreign sovereigns under the *Dames & Moore* rationale. At least a United Nations ("U.N.") Resolution supports Section 1(a).[130] However, Congress has not acquiesced to the granting of immunity to private American companies given in Section 1(b). The President has not tried to extend such immunity before, and Congress has not signaled that such an attempt would be welcomed or tolerated. Rather, the Foreign Sovereign Immunities Act (FSIA) suggests the opposite by specifically allowing plaintiffs to bring suits against sovereigns when they act in a commercial fashion.[131] In addition, FSIA specifically calls upon courts to look to the nature and not the purpose of a sovereign's conduct to see whether it is commercial.[132] Thus, Congress allows suits against sovereigns acting in a commercial capacity, and it would be perverse for it to then condone the preclusion of suits against private companies. Although the Executive has previously settled claims of its nationals, here the President would not be settling claims but would be precluding claims that have yet to arise.[133] The context for finding congressional acquiescence to the immunity in Section 1(b) of the Order is simply lacking.[134]

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128. *Id.* at 680–81, 685 (reviewing various acts which lend support to the Presidential power to settle claims with foreign sovereigns, and concluding "the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement" the President was authorized to suspend pending claims.).

129. *Id.* at 679–80.

130. See *infra* note 137 and accompanying text.

131. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2)–(3).

132. 28 U.S.C. § 1605(d).

133. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2388 (2003) (finding that the President had a long recognized power to settle the claims of nationals).

134. Also noteworthy in the *Dames & Moore* context was the ongoing crisis involving a foreign sovereign that necessitated Presidential action. Nat'l Oil Corp. v.Libyan Sun Oil Corp., 733 F. Supp. 800, 810 (D. Del. 1990) (citing *Dames & Moore*, 453 U.S. at

One might imagine that the Order arises from the Executive's inherent power to enter into executive agreements or implement foreign affairs policy, but these justifications also fall short. The President did not enter into an agreement with a foreign sovereign as the Executive did in *Dames & Moore*. [135] When the President issued the Order, the U.S. controlled Iraq.[136] Further, the Order does not merely implement U.N. Resolution 1483, which protects the Development Fund for Iraq.[137] The U.N. Resolution differs significantly from Executive Order 13303.

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688). A hostile sovereign was holding U.S. citizens hostage. This President is not reacting to an imminent crisis, he is issuing a preemptive strike against possible lawsuits. He is not protecting a foreign sovereign, he is protecting private companies.

135. Perhaps it would be different if the order established a mechanism by which any future claims were to be heard by a tribunal established in connection with the Development Fund for Iraq so that monies from Iraqi petroleum would not be spent in extensive U.S. litigation. But the Order established no such tribunal. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 123 S. Ct. 2374 (2003). In *Garamendi*, the Supreme Court held that a California statute that required insurance companies doing business in the state to disclose information about their Holocaust era activities interfered with the President's power to conduct foreign relations. The President had entered into an agreement with Germany to establish a compensation fund to settle Holocaust error claims. The Court found that the President had the power to settle claims of its nationals against private companies through negotiations with other states. *Id.* at 2388.

136. *See* Scheffer, *supra* note 1, at 858 (noting with respect to exceptions under the Federal Tort Claims Act that "[t]here is no 'sovereign authority' in Iraq during the period of foreign occupation by the United States and United Kingdom.") An interim constitution was not established until March, 2004. *See Iraq's Interim Constitution, Breakthrough or Procrastination?* THE ECONOMIST, Mar. 11, 2004, *available at* http://www.economist.com. The military forces in Iraq are an occupying power working toward the transition of power and sovereignty to Iraqis. After the war ended, the coalition of forces in control established a central authority in the Office for Reconstruction and Humanitarian Assistance (Office) first led by Jay Garner and then by L. Paul Bremer. The Office shared some powers with an appointed Iraqi Governing Council. Sovereignty and control of Iraq was passed to an Iraqi government in June, 2004. On March 8, 2004, the governing council created an interim constitution, the Law of Administration for the State of Iraq for the Transitional Period, which provides for the formal transfer of sovereignty. *See id.*

137. Security Council Res. No. 1483, U.N. Doc. No. S/RES/1483, 42 I.L.M. 1016 (2003). The relevant portion of Resolution 1483 provides:

> Noting the relevance of the establishment of an internationally recognized, representative government of Iraq and the desirability of prompt completion of the restructuring of Iraq's debt as referred to in paragraph 15 above, further decides that, until December 31, 2007, unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations except that the above-mentioned privileges and immunities will not apply with respect to any legal proceeding in which recourse to such proceeds or obligations is

First, it limits the immunity's length, which ends in 2007.[138] Second, it protects the Iraqi oil and its proceeds only until the point of first sale.[139] Third, it provides an exemption from immunity for damages necessary to satisfy liability for ecological accidents.[140] Finally, it limits the protection afforded to the oil.[141] Where U.N. Resolution 1483 protects the "proceeds and obligations arising from sales," Executive Order 13303 protects "proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein."[142] Because Executive Order 13303 is considerably broader than U.N. Resolution 1483, the Order exceeds the President's inherent power to implement U.N. Resolution 1483.

The Executive could argue that the ability to set up a Development Fund for Iraq and protect oil proceeds is within the inherent powers of the President to conduct foreign relations and act as the Commander in Chief.[143] Even if such an argument could be sustained, it would support only Section 1(a) of the Order, not Section 1(b).[144] But more importantly, such an argument proves too much, because if the President can immunize private companies from potential claims in the name of foreign affairs, then the President can do almost anything in the name of foreign affairs.[145] This would begin the war on jurisdiction. The Executive could unilaterally preclude any potential lawsuit that could interfere, however tangentially, with perceived foreign affairs interests.

Because Congress has not provided any explicit or implicit authority for the Order the Court should invalidate it. However, even if the Court finds that Congress implicitly authorized the President to act or that his inherent powers supported his actions, *Dames & Moore* still requires an inquiry into whether the President modified or withdrew federal jurisdiction. If the Court determines that the President modified or withdrew jurisdiction, it would likely have to invalidate the President's action.[146]

> necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution.

Id. (emphasis added).

138. *Id.*

139. U.N. Resolution 1483 extends the same privileges and immunities extended to the United Nations property to the petroleum up to the point of first sale. Such immunity includes immunity from all judicial process. *See* Convention on the Privileges and Immunities of the United Nations, art. 2, §§ 2–3, Feb. 13, 1946, 21 U.S.T. 1418, 1422, 1 U.N.T.S. 15, 20.

140. Security Council Res. No. 1483, U.N. Doc. No. S/RES/1483, 42 I.L.M. 1016 (2003).

141. *Id.*

142. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

143. U.S. CONST. art. II, § 2, cl. 1, 2.

144. *See supra* notes 41 and 44 and accompanying text.

145. For example, nothing would stop the President from immunizing an American company doing business in the United States that was some way related to the reconstruction efforts in Iraq or "private security forces" operating in Iraq.

146. As previously discussed, a full discussion of all the issues raised by this Executive Order is beyond the scope of this Essay. However, there are two separation of

IV. THE TROUBLING QUESTIONS RAISED BY EXECUTIVE ORDER 13303

A. Has the Executive Withdrawn or Modified Federal Jurisdiction?

Even if the President had explicit, implicit or inherent power to issue Executive Order 13303, the Order goes too far because arguably it does not merely change the law as allowed in *Dames & Moore*;[147] it modifies federal court jurisdiction.[148] The dissimilarities between the language, the origin and the alternatives provided within the Iranian Suspension Order, which was upheld in *Dames & Moore*, and Executive Order 13303 caution against an automatic adoption of the *Dames & Moore* change of law analysis. This is not a mere change in the law—it is the blocking of access to the courts by Executive Order. Whether Congress would have the power to cut off access to the courts is a separate question.[149] One of the most troubling elements of this Executive Order is that the Executive, not Congress, is modifying federal jurisdiction.

The Order's language blocks the use of judicial process against not just specific property, but interests, however transformed or transferred.[150] And it does so indefinitely.[151] The Order thus insulates persons holding money traceable to Iraqi oil from lawsuits to collect damages, making it futile to pursue a remedy against oil companies operating in Iraq, since that remedy cannot be enforced. Perpetually removing the ability to enforce a judgment is tantamount to cutting off federal jurisdiction.[152] One might argue that the President merely suspended a

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powers questions raised by a possible Presidential modification of jurisdiction. First, there is the question of whether Congress could withdraw federal jurisdiction. The second question, though, is whether Congress can then delegate the power to withdraw jurisdiction to the President. *See supra* note 93.

147. Dames & Moore v. Regan, 453 U.S. 654, 684–85 (1981).

148. *Id.* The Court noted in *Dames & Moore*:

> In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order 12294 purports only to 'suspend' the claims, not divest the federal court of 'jurisdiction.' As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts.

Id.

149. Such a question was dealt with by the Supreme Court which determined that Congress did have the power to limit the court's jurisdiction. *Ex Parte McCardle*, 74 U.S. 506 (1869). *See supra* note 93.

150. *See supra* notes 38–40 and accompanying text.

151. *Compare* Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003) *with* U.N. Resolution 1483. *See supra* note 137 and accompanying text.

152. A party with an unenforceable judgment has no further recourse since further court action would be pointless in light of the powerlessness of a judgment. A similar situation often occurs when a U.S. court refuses to enforce a judgment rendered abroad. As one commentator has noted, such a refusal to enforce a judgment not only denies recovery of a foreign plaintiff but also infringes the legal authority of foreign courts and the underlying social policy of foreign law. Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171,172–173 (2004).

remedy, not a right. But at some point, perpetually suspending a remedy destroys the right as well.[153] Because the Order destroys all remedies indefinitely, without providing an alternative remedy, it appears that it has gone beyond the line drawn in *Dames & Moore* and has withdrawn jurisdiction.

Courts have refused to rely upon *Dames & Moore* to extend the application of the change of law paradigm to questions of jurisdiction. In *Dean Witter Reynolds, Inc. v. Fernandez*,[154] the Eleventh Circuit Court of Appeals refused to find that the Cuban Asset Control Regulations required Cuban plaintiffs to get a license in order to cross claim against a U.S. party in an interpleader action.[155] The Cuban parties could, through an in personam suit, establish liability on a fraud claim without a license.[156] OFAC blocking regulations would preclude only actions that transfer property (such as in rem actions or actions to enforce a judgment). The court rejected the argument that the rationale supporting the Executive's right to suspend claims in *Dames & Moore* extends in this case to support Presidential control over in personam claims.[157] The court found that only the entry of judgment triggered the blocking regulations, thereafter precluding the enforcement of judgment.[158] The court distinguished in rem actions, which the blocking regulations preclude from in personam actions that are unaffected by blocking orders and held that:

> [A] Treasury Department authorization or license is not a prerequisite to initiating an *in personam* lawsuit. The Assets Control Regulations forbid only those judicial acts that transfer a property

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153. *See* Gibson v. Bennett, 561 So. 2d 565, 570 (Fla. 1990) (noting that courts have a "duty" of "enforcement of a judgment . . . because a remedy at law that is ineffective in practice is not an adequate remedy"); Pamela Karlan, *David C. Baum Memorial Lecture: Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 195 (2003) (noting that "to the extent that the ability to enforce a right is debased, it is that much less a right"). *See also* Sasha Samberg-Champion, *How To Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1862 (2003) (discussing the position taken by the Supreme Court in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), that enforcement does not limit a right but rather enforcement is not permitted because there is no right).

154. 741 F.2d 355 (11th Cir. 1984).

155. *Id.* at 360. The regulations prohibited all unlicensed financial and commercial transactions with Cuba or Cuban nationals. "A 'transaction' generally includes '[a]ny payment or transfer' of property to Cuba or a national thereof. More specifically, a 'transfer' includes 'the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order.'"*Id.* at 357.

156. *Id. See also* Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 812 (D. Del. 1990).

157. *Dean Witter Reynolds, Inc.*, 741 F.2d at 363 (noting the court's reluctance to extend *Dames & Moore*).

158. "Although in this case Reynolds paid a fund into court in an interpleader action, the litigation between appellant and appellees was *in personam.* It was not until after judgment that a transfer of property became possible. Entry of judgment triggered the application of the Regulations because of the nationality of appellees, and all subsequent proceedings to enforce the judgment must therefore be licensed." *Id.*

> interest. Since an *in personam* lawsuit is merely an attempt to establish liability and fix damages so that one's interests will be protected until a license is secured or until the Regulations are suspended, the action does not focus on any particular property within the jurisdiction.[159]

Thus, neither the IEEPA nor *Dames & Moore* can justify any attempt to preclude lawsuits that establish liability but that do not transfer property.

Arguably, *Dean Witter* stands for the proposition that a blocking order will not be interpreted to deny access to the courts, but only to preclude enforcement of a judgment against an asset.[160] Using our example involving Company *X*, one could argue that Executive Order 13303 would not stop an injured employee, a person harmed by an environmental spill or a party claiming a contractual interest in the oil from suing Company *X*; rather, the Order only prevents a party from moving against the oil or Company *X*'s profits that can trace back to the Iraqi oil. However, if all of Company *X*'s proceeds trace back to the oil, this argument proves a distinction without a difference.

Moreover, the failure to establish an alternative forum reveals this Order for what it is—an attempt to cut off the remedy altogether. The creation of an alternative forum in *Dames & Moore* was essential to the Court's holding that the suspension of claims did not divest jurisdiction. The Iranian Suspension Order only suspended claims so that the Iran-U.S. Claims Tribunal could hear and dispose of them. Without the alternative tribunal in *Dames & Moore*, the Court would have had a more difficult time upholding the Executive Orders.[161]

If the Executive wanted to protect Iraqi oil profits from frivolous American lawsuits and the abusive discovery or damages accompanying them, it could have established an alternative forum such as an Iraqi Oil Arbitral Tribunal.[162] Then the argument that Executive Order 13303 merely changed the law would be more persuasive. It would also help to avoid another troubling question: whether the Order creates an unconstitutional taking.

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159. *Id.* at 361–62.

160. Asset control regulations typically block the use of judicial process to transfer property. Although an initial reading of such regulations might lead one to believe that all judicial process in connection with property is prohibited, such a reading is incorrect. Courts have held that asset control regulations do not preclude suits to establish liability, only suits to transfer property. *E.g.*, *id.* at 361.

161. Dames & Moore v. Regan, 453 U.S. 654, 684–85 (1981).

162. *See, e.g.*, Algiers Accords 1981, *supra* note 67 (establishing the alternative forum for claims against Iran); Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.–F.R.G., 39 I.L.M. 1298, 1299–03 (establishing an alternative forum for holocaust claims) [hereinafter German Foundation Agreement]. U.S. negotiators later modeled agreements with Austria and France on the German Foundation Agreement. Am. Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2383 (2003).

B. Is the Failure to Provide an Alternative Forum an Unconstitutional Taking?

The lack of an alternative forum also raises serious concerns of an unconstitutional taking. The President may only dispense with an alternative forum under very limited circumstances.[163] Although *Dames & Moore* required an alternative forum,[164] since then, at least one circuit court has retreated from that requirement. [165] In *Belk v. United States*,[166] former hostages challenged President Carter's failure to provide a forum for the their claims against their captors.[167] The Federal Circuit considered the hostages' claims for personal injury, which the Algiers Accords suspended, and which, unlike the claims in *Dames & Moore*, were not cognizable before the Iran-U.S. Claims Tribunal.[168] The former hostages argued that the failure to provide an alternative forum took their claims for the public benefit and that the Takings Clause entitled them to compensation.[169] The Federal Circuit disagreed, finding that the failure to provide an alternative forum alone did not constitute a taking.[170] Where the particular party was the intended beneficiary of the action in question, the court would not find a taking just because the action also incidentally benefited the public at large.[171] Since hostages secured the greatest advantage from the Algiers Accords, their freedom, the court refused to construe the implementation of the Accords as a taking.[172]

The difference between the Iranian crisis and the present situation is startling when one considers the failure to provide an alternative forum. Here there is no claim that the precluded potential litigants benefit from the Order. Indeed, the potential litigants remain unknown and their claims unrealized.[173] In contrast to the

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163. *See, e.g., id.*

164. *See supra* notes 93–98 and accompanying text.

165. Belk v. United States, 858 F.2d 706, 709 (Fed. Cir. 1988).

166. *Id.*

167. *Id.* at 707.

168. *Id.* at 710. The court explained that President Carter's action resulted in an "extinguishment@ of the appellant's claims and concluded that "[i]f there is to be any compensation of the appellants for the mistreatment and suffering they underwent during their captivity as hostages in Iran, it must be provided by one of the other "coordinate branches of government." *Id.* at 709–10. The court found that the change in substantive law provided by the *Dames & Moore* change of law paradigm simply eliminated the plaintiffs' cause of action. *Id*. at 708. Indeed the President established an alternate forum for compensation. *See* President's Commission on Hostage Compensation, Exec. Order 12,285, 46 Fed. Reg. 7931 (Jan. 19, 1981).

169. *Belk*, 858 F.2d at 708 (appellant's argued that their causes of action constituted valuable private property, which the U.S. had taken for public use without just compensation).

170. *Id.*

171. *Id.* at 709.

172. *Id.*

173. Depending upon the potential litigant, one could possibly construct a theory under which the litigant would benefit from protecting the Development Fund for Iraq, and protecting the companies that deal in the oil connected to the Development Fund for Iraq. One could theorize that the promise of immunity will result in more economic development for the citizens of Iraq, a more stable and less dangerous Iraq. This development and stability will benefit any future potential plaintiffs and those benefits will outweigh the costs

hostages in the Iranian crisis, potential litigants here do not receive any benefit. Therefore, extending *Dames & Moore* to Executive Order 13303 would likely raise a legitimate takings claim.[174]

C. Can the Executive Immunize Private Corporations?

Finally, and perhaps most importantly, Section 1(b) of Executive Order 13303 shields corporations, not sovereigns. *Dames & Moore* upheld the Executive's power to shield the government of Iran from lawsuits in order to resolve a diplomatic crisis.[175] The President's power (in the wake of long-standing congressional acquiescence) enabled the President to "change the law" in order to enter into an agreement with another sovereign. Assuming inherent Presidential power to "settle" potential claims with private individuals is unwarranted and silently supposing congressional acquiescence is troubling. In a suit arising out of the Iran Hostage situation, at least one current Justice questioned the President's inherent powers. Then Circuit Judge Breyer, writing a concurrence in *Chas T. Main International, Inc. v. Khuzestan Water & Power Authority*,[176] argued that the President had specific authorization to suspend claims under the IEEPA and that the First Circuit Court's analysis with respect to the President's inherent powers was unnecessary and unwarranted.[177] In *Chas T. Main*, the plaintiff had breach of contract claims against both the government of Iran and private Iranian nationals. Judge Breyer recoiled at the idea of unnecessarily extending the President's power to include the power to settle claims against private entities.[178] He said, "[o]nce one sees the potential implications of the Court's opinion upon claims against foreign individuals, one becomes uncertain about the validity of its broad assertion of inherent Presidential power."[179]

Despite Justice Breyer's misgivings in *Chas T. Main*, the Court recently ruled that the President could settle the claims of U.S. litigants against foreign companies when those claims implicated important foreign policy issues.[180] In *Garamendi*, the Court considered whether U.S. efforts to settle Holocaust insurance claims against private companies preempted a California state statute

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to those potential plaintiffs. But at this stage such a theory lacks foundation, because events in Iraq have not evolved to the point where we would even know who the potential plaintiff could be, whether the immunity will spur such development, whether such development would not occur otherwise and what the benefits of such development would be.

174. *Cf. In re* Nazi Era Cases, 129 F. Supp. 2d 370, 385 (D.N.J. 2001) (discussing parameters set forth by *Dames & Moore* and *Belk*). *In re Nazi Era Cases* involved a claim against a private company in connection with forced labor during the Holocaust. *Id.* at 371. The plaintiff asserted a takings claim. *Id.* at 384. The district court declined to hear the plaintiff's case and noted that in any event the provision of an alternative forum barred any possible takings claim. *Id.* at 385.

175. Dames & Moore v. Regan, 453 U.S. 654, 688 (1981).

176. 651 F.2d 800 (1st Cir. 1981).

177. *Id.* at 816 (Breyer, J., concurring).

178. *Id.* at 817–18.

179. *Id.* at 817.

180. *See* Am. Ins. Ass'n v. Garamendi, 123 S.Ct. 2374 (2003).

requiring those companies to disclose certain information.[181] Despite plaintiffs' claims that the President lacked the power to settle such claims, the Court found that "[i]nsisting on a sharp line between public and private acts in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies."[182] Thus, the President appears to have some limited power to protect private companies in the interest of foreign policy. Nevertheless, the fact that Executive Order 13303 shields corporations, particularly U.S. corporations, is troubling.[183] Protecting private U.S. companies seems less compelling because claims against those companies raise fewer international concerns.[184] Moreover, unlike *Garamendi* or *Dames & Moore*, there is no settlement in the instant case, only immunity. Both *Garamendi* and *Dames & Moore* involved an alternate mechanism through which potential claimants could obtain relief.[185] Executive Order 13303 gives potential plaintiffs no alternative forum.

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181. *Id.* In *Garamendi*, the Court recognized that wartime claims against foreign private companies could become issues of international diplomacy. *Garamendi* is distinguishable, because in that case there was an alternative settlement for potential litigants.

182. *Id.* at 2377.

183. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). Section 3 provides:

> (a) The term "person" means an individual or entity;
>
> (b) The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

Id.

184. *Garamendi*, 123 S. Ct. at 2387 (discussing the difficulty of untangling foreign government policy from private initiatives during wartime). In *Garamendi*, the court noted that Germany's willingness to enter into an agreement with the United States depended upon a mechanism giving "legal peace desired by the German government and German companies. *Id.* at 2382. As the Supreme Court noted:

> Historically, wartime claims against even nominally private entities have become issues in international diplomacy, and three of the postwar settlements dealing with reparations implicating private parties were made by the Executive alone. Acceptance of this historical practice is supported by a good pragmatic reason for depending on executive agreements to settle claims against foreign corporations associated with wartime experience . . . . Untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments. While a sharp line between public and private acts works for many purposes in the domestic law, insisting on the same line in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies.

Id. at 2388.

185. Dames & Moore v. Regan, 453 U.S. 654, 684–85 (1981); *Garamendi*, 123 S. Ct. 2374, 2382.

The Executive may argue that these corporations are akin to sovereigns because they hold the wealth of the people of Iraq in trust. Also, it is quite possible that OFAC will issue general licenses allowing all types of suits to proceed. But focusing on the role of the corporations or the possibility of licenses misses the point: the Executive did not settle claims but granted pre-claim immunity to these companies without providing potential claimants with an alternative forum.[186] The President extended this immunity without explicit or implicit authority from Congress and without inherent authority to do so. Congressional acquiescence in this Executive Order could have frightening consequences—it could establish a precedent that the President has the unilateral power to deny access to the courts in connection with a select group of private defendants.

V. CONCLUSION

In this Essay, I have considered (i) whether Executive Order 13303 attempts to bar lawsuits against private companies, (ii) whether the President had authority to issue the Order, and (iii) whether the Order merely changed the substantive law or resulted in an impermissible withdrawal or modification of federal jurisdiction.[187] My initial conclusions are that Executive Order 13303 attempts to bar lawsuits against private companies and that the Order lacks authority. President Bush has arguably crossed the line drawn in *Dames & Moore* and withdrawn federal jurisdiction. However, as I indicated at the outset, the purpose of this Essay has been to raise questions for further discussion. There will be other questions that need to be answered, such as whether Congress could delegate its power to modify jurisdiction to the Executive or under what circumstances may the Executive settle claims between private parties. This Essay will only start the discussion about the meaning, scope and authority for Executive Order 13303.

Whatever direction the discussion takes, we should be deeply concerned about the scope of Executive Order 13303 and its implications. In *Dames & Moore*, the Court upheld the Iranian Suspension Order absent explicit congressional authorization because of the President's long-recognized power to settle claims with foreign governments. Here, accepting the President's conduct without question will have a cost even if there are never any injuries, oil spills or suits for conversion. Congressional acceptance leaves a gloss on executive power. Granting the President power to change the law without providing an alternative forum creates a troubling precedent, and silently granting such power to the President with respect to claims against private individuals is dangerous.

Perhaps the Executive will argue that the situation in Iraq is so unique that the Court should find that the *Dames & Moore* paradigm should extend or that

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186. It is possible for the President to settle claims that involve private companies. Indeed, *Garamendi* involved suits against private insurance companies. *Garamendi*, 123 S. Ct. at 2388.

187. I have briefly discussed the preliminary issue of whether an Executive Order that blocks only involuntary transfers of assets of a foreign state is authorized by the IEEPA. 50 U.S.C. §§ 1701–1707.

the foreign affairs concerns justify the immunity given to private companies. Maybe the situation in Iraq *is* unique. But even so, the analytical framework for dealing with Executive Orders mandates that we critically examine Executive Order 13303. *Dames & Moore* and the cases delineating Presidential powers tell us emphatically that past practice matters. Congressional acquiescence in these types of Executive Orders leads to the conclusion that the President is acting within his authority. Congressional silence equals acceptance.[188] The words of Justice Frankfurter in *Youngstown* now sound a chilling warning: "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive power' vested in the President by Section 1 of Article II."[189] We cannot afford to gloss over the questions raised by Executive Order 13303.

188. *Dames & Moore*, 453 U.S. at 684.

189. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (Frankfurter, J., concurring).