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## Note

### **Tortured Language: “Individuals,” Corporate Liability, and the Torture Victim Protection Act**

*Brad Emmons\**

In late May of 1998, a group of approximately 120 Ilaje youths boarded the Parabe oil platform, a site operated by Chevron Nigeria Ltd., to protest the oil company’s destruction of their surrounding community.<sup>1</sup> This “Concerned Ilaje Citizens” group,<sup>2</sup> like other Ilaje tribespeople living in the swamp-land region of Ondo State, Nigeria,<sup>3</sup> had for years helplessly witnessed the destruction of their fishing grounds and water supplies due to Chevron’s dredging activities and numerous oil spills.<sup>4</sup> On May 25, weeks after Chevron refused to meet with members of their community, the exasperated Ilaje youths went to the Parabe platform and refused to leave until Chevron provided compensation for the environmental damage.<sup>5</sup> Undaunted, Chevron reported the occupation to the federal and state law enforcement agencies, and on May 28, the company

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1. See HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES 135 (1999), available at <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf>.

2. *Id.*

3. See EARTHRIGHTS INT’L & CTR. FOR CONSTITUTIONAL RIGHTS, FIRST THEY POISONED OUR LAND: WHEN WE PROTESTED, THEY SHOT US 2 (2006), available at <http://www.earthrights.org/sites/default/files/documents/Chevron-first-they-poisoned-our-land.pdf>.

4. See HUMAN RIGHTS WATCH, *supra* note 1.

5. See *id.* at 135–36.

flew members of the nation's navy and Mobile Police to the platform.<sup>6</sup> Upon arriving, these security forces opened fire on the protesters, killing two youths.<sup>7</sup> Later, they allegedly tortured the group's captured leader.<sup>8</sup>

Twelve years later, this bloody labor conflict in Nigeria had transformed into a legal conflict in the United States. Because a suit in Nigerian courts against Chevron and the government actors was almost certain to fail,<sup>9</sup> the surviving victims and their families turned to U.S. courts for help.<sup>10</sup> With the 1992 passage of the Torture Victim Protection Act (TVPA),<sup>11</sup> the United States had expressed its intent to provide an avenue for the pursuit of civil damages for certain acts of torture or extrajudicial killing committed by "[a]n individual . . . under actual or apparent authority, or color of law, of any foreign nation . . ."<sup>12</sup> Yet since the Act's passage, district courts had disagreed vociferously over whether a corporation could be liable as "[a]n individual" under the TVPA.<sup>13</sup> Although in 2005 the Eleventh Circuit had held that a tort action could be brought against corporations under the TVPA,<sup>14</sup> the Ninth Circuit held otherwise when it considered the Ilaje survivors' claims.<sup>15</sup> On September 10, 2010, the latter court found that Chevron could not be held liable for the attack on the Ilaje youths in Ondo State, concluding that corporations could not be considered "individuals" for TVPA purposes.<sup>16</sup> That ruling created a circuit split on the issue—and threatened to derail future efforts to hold corporations liable for torture or extrajudicial killings.<sup>17</sup>

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6. *See id.* at 137.

7. *See id.*

8. *See id.*

9. *See* S. REP. NO. 102-249, at 3 (1991) ("Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law.")

10. *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008), *aff'd*, 621 F.3d 1116 (9th Cir. 2010).

11. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

12. *Id.* § 2(a).

13. *See infra* notes 75–84 and accompanying text.

14. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1247, 1250–53 (11th Cir. 2005) (finding an action under the TVPA and the Alien Tort Statute could be sustained against a corporation).

15. *See Bowoto*, 621 F.3d at 1126–28.

16. *Id.*

17. Indeed, two appellate courts have recently adopted the Ninth Circuit's rationale to reach the same conclusion. *See Aziz v. Alcolac, Inc.*, No. 10-1908,

On one hand, might the Ninth Circuit's decision be technically correct? "Individuals" are usually seen as distinct from corporations in federal law<sup>18</sup>—and yet are not always so.<sup>19</sup> The legislative history directly preceding the TVPA hints that the choice of language had nothing to do with the issue of corporate liability<sup>20</sup>—and yet a committee hearing on the TVPA in an earlier Congress clearly indicates the opposite.<sup>21</sup> The traditional methods of statutory interpretation do not easily resolve the TVPA's ambiguities.

On the other hand, the Ninth Circuit's holding raises troubling concerns about the prospects of relief for victims of corporate-sponsored torture. In the past decade, a large number of well-known corporations have come under legal scrutiny for engaging in human rights abuses in dozens of countries in Asia, Africa, and South America.<sup>22</sup> Yet recent appellate opinions have prohibited tort claims for torture under any statute other than the TVPA<sup>23</sup> and have protected corporations from civil actions under the Alien Tort Statute (ATS),<sup>24</sup> the TVPA's statutory cousin,<sup>25</sup> for such "violation[s] of the law of nations."<sup>26</sup>

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2011 WL 4349356, at \*1 (4th Cir. Sept. 19, 2011) (dismissing a claim against a chemical manufacturer under the TVPA on grounds that the manufacturer was no subject to suit under the TVPA); *Mohamad v. Rajoub*, 634 F.3d 604, 607–09 (D.C. Cir. 2011) (holding that the TVPA does not create a cause of action against an organization), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-88).

18. See, e.g., Dictionary Act, 1 U.S.C. § 1 (2006) (emphasis added) (defining "person" under most federal laws as including "corporations . . . as well as individuals").

19. *Clinton v. City of New York*, 524 U.S. 417, 428 & n.13 (1998) (holding that the term "individual" can be synonymous with "person" and can therefore refer to corporate entities).

20. See S. REP. NO. 102-249, at 3–5 (1991) (failing to address possible corporate liability under the TVPA).

21. See *The Torture Victim Protection Act: Hearing on H.R. 1417 Before the H. Comm. on Foreign Affairs*, 100th Cong. 87–88 (1988) (statements of Rep. Jim Leach, H. Comm. on Foreign Affairs, and Doug Bellis, Legis. Counsel).

22. See Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 160 (2003).

23. See, e.g., *Enahoro v. Abubakar*, 408 F.3d 877, 884–85 (7th Cir. 2005) (finding that the TVPA "occup[ies] the field" with regard to civil claims seeking redress for torture).

24. 28 U.S.C. § 1350 (2006).

25. The TVPA is nestled in the historical notes of the Alien Tort Statute. See *id.* § 1350 note.

26. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (finding that the ATS does not serve as a jurisdictional basis for suits against corporations since "the law of nations" has not historically embraced corporate liability), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491).

Now the Supreme Court is set to consider the question of organizational liability under the TVPA in *Mohamad v. Rajoub*,<sup>27</sup> but a holding that preserves Congress's anti-torture intentions is not guaranteed.

Consequently, despite the seriousness of the plague of corporate-sponsored torture under the color of State law, possible avenues of relief for torture victims are being blocked in jurisdiction after jurisdiction. Because corporations will otherwise have no economic disincentive to discourage torture and extrajudicial killings, the need to preserve an avenue that provides for civil liability for these crimes is especially vital. This Note argues that while the language of the TVPA is ambiguous and open to opposing, yet equally valid, interpretations, strong policy interests weigh in favor of recognizing corporate liability for violations of the Act's provisions. Part I of this Note discusses the history of the TVPA and the ATS and corporate liability under each. Part II examines the unclear nature of the TVPA's statutory language and accompanying legislative history as well as the policy implications weighing in favor of corporate liability under the TVPA. Part III embraces these policy interests, calls for the Supreme Court to recognize organizational liability under the Act, yet reserves the possibility that Congress may also step in to modify the statute's language if necessary. Specifically, this Note argues that although the TVPA does not clearly support or foreclose liability for corporations engaged in human rights abuses, the nation's policy interests in eliminating torture and providing redress for its victims are best supported by judicial recognition of such liability.

#### I. THE HISTORY OF THE TVPA AND ITS NEXUS WITH THE ATS

Though this Note focuses on the TVPA, the history of that Act and the question of corporate liability under it are intertwined with the history of the ATS.<sup>28</sup> After briefly reviewing the

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*Contra* Doe v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011) (holding that corporations can be liable for violations of international law under the ATS).

27. See *Mohamad v. Rajoub*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-88) (granting certiorari); 11-88 *Mohamad v. Rajoub*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/qp/11-00088qp.pdf> (last visited Nov. 6, 2011) (presenting the question on appeal as "[w]hether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons").

28. 28 U.S.C. § 1350.

history of human rights litigation under the ATS, this Section will discuss the passage of the TVPA, the express language of that Act, the emerging question of TVPA actions against corporate defendants, and the potential limitations placed on such suits by recent developments in TVPA and ATS jurisprudence.

#### A. EARLY HISTORY OF THE ATS

The modern era of human rights litigation in U.S. courts began with the rediscovery of the Alien Tort Statute, which has a short but notable pedigree for a statute that dates to the founding of the republic.<sup>29</sup> First passed as part of the Judiciary Act of 1789,<sup>30</sup> the ATS states in full: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>31</sup> No legislative history exists to shed any light on Congress’s intentions for the statute.<sup>32</sup>

Virtually forgotten after its passage, the ATS was only invoked successfully twice in federal courts in the first 190 years that followed.<sup>33</sup> However, the statute received fresh attention following the Second Circuit’s 1980 decision in *Filartiga v. Pena-Irala*.<sup>34</sup> In that case, a Paraguayan woman residing in Washington, D.C., brought a wrongful-death suit against another Paraguayan citizen who, the woman alleged, tortured her brother to death while working as a police official in Asun-

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29. See generally, e.g., Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT’L L. 249 (2004) (providing a brief overview of the statute and its history); Jordan D. Shephard, Note, *When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation*, 95 MINN. L. REV. 2318 (2011) (same).

30. Judiciary Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789).

31. 28 U.S.C. § 1350.

32. See Luis Enrique Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea*, 19 TUL. ENVTL. L.J. 151, 163 (2006) (noting that the legislative history of the Judiciary Act of 1789 was not recorded). One suggestion is that the ATS was adopted on the premise that “upholding the law of nations was an obligation of nationhood.” See BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 4 (2d ed. 2008).

33. *Adra v. Clift*, 195 F. Supp. 857, 863–65 (D. Md. 1961) (finding jurisdiction under the statute for a child custody suit between aliens); *Bolchos v. Darrel*, 3 Fed. Cas. 810, 810 (D.S.C. 1795) (No. 1,607) (finding an alternative basis for jurisdiction for a maritime property dispute brought by a French citizen). *Adra* suggests that six earlier cases and an attorney general’s opinion also discussed but dismissed the possibility of jurisdiction under the ATS. See 195 F. Supp. at 863 & n.5 (citing *Khedivial Line v. Seafarers’ Int’l Union*, 278 F.2d 49, 52 (1960)).

34. 630 F.2d 876 (2d Cir. 1980).

cion, Paraguay.<sup>35</sup> Noting the universal condemnation of torture among the governments of the world,<sup>36</sup> the circuit court held that the ATS provided sufficient jurisdiction for the suit.<sup>37</sup> Even though the ATS had rarely been invoked to provide jurisdiction, the court concluded, the Paraguayan decedent had clearly met the statute's requirements.<sup>38</sup>

Although suits for human rights violations under the ATS "significantly increased" following the *Filartiga* decision,<sup>39</sup> not every federal judge was in complete agreement with its holding. Just four years later, the D.C. Circuit Court issued a per curiam opinion in *Tel-Oren v. Libyan Arab Republic*, affirming a lower court's dismissal of a wrongful-death suit brought by Israeli citizens against various Palestinian groups and supporters following an armed attack on an Israeli bus.<sup>40</sup> In a concurring opinion, Judge Robert Bork attacked the use of the ATS as a basis for suits such as the one before his court, arguing that separation-of-powers concerns weighed against finding a cause of action where doing so could interfere with international affairs, a field typically left to the "political branches."<sup>41</sup> Although the other concurring judges distanced themselves from this reasoning,<sup>42</sup> Judge Bork's opinion nonetheless presented the first serious judicial challenge to the use of the ATS to pursue redress against those responsible for torture and extrajudicial killings.

Thus, after almost two centuries of dormancy, a paradigm for using the ATS to redress human rights violations emerged among the circuit courts in the 1980s. However, opinions such

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35. *Id.* at 878.

36. *Id.* at 883 ("Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations." (citation omitted)); *see also id.* at 890 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.").

37. *Id.* at 880–85.

38. *Id.* at 887.

39. *See Paust, supra* note 29, at 250–52. "Approximately 150 lawsuits had been filed under the statute as of late 2006 . . ." STEPHENS ET AL., *supra* note 32, at 12.

40. 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

41. *See id.* at 804–05 (Bork, J., concurring).

42. *See id.* at 777 (Edwards, J., concurring) (supporting dismissal despite agreeing that the ATS provides jurisdiction for cases adjudicating "the rights already recognized by international law"); *id.* at 823 (Robb, J., concurring) (supporting dismissal solely on political question grounds).

as Judge Bork's in *Tel-Oren* raised legitimate concerns that this paradigm was not sustainable.

#### B. CORPORATE LIABILITY UNDER THE ATS

While natural persons remained the focus of ATS case law in the first seventeen years that followed *Filartiga*, such litigation soon shifted to focus primarily on corporate defendants. Through the mid-1990s, most cases brought under the ATS resembled *Filartiga* and *Tel-Oren* in that the alleged wrongful actor was a natural person acting as an agent of a foreign state.<sup>43</sup> This trend changed with the 1997 decision in *Doe v. Unocal Corp.*,<sup>44</sup> where the Central District of California determined that multinational corporations working in tandem with foreign governments could be liable for tort action under the ATS.<sup>45</sup> This decision "opened the floodgates in this arena, so much so that in recent times, ATS jurisprudence has been dominated by cases alleging . . . abuses by multinational corporations operating in the developing world."<sup>46</sup>

However, the feasibility of ATS actions against corporations has been drawn into question by a series of appellate court holdings in recent years. Like all ATS litigation after 2004, such suits were most prominently affected by the U.S. Supreme Court's landmark holding in *Sosa v. Alvarez-Machain*.<sup>47</sup> In that decision, the Court concluded that litigants could rely on a modern understanding of which claims violate "the law of nations"<sup>48</sup> when bringing suits, but that such claims must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the

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43. See Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 6 (2004). For examples of such cases, see *Kadic v. Karadžić*, 70 F.3d 232, 238–45 (2d Cir. 1995) (recognizing ATS jurisdiction in a tort action for genocide against the leader of a Bosnian-Serb region), and *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475–76 (9th Cir. 1994) (recognizing ATS jurisdiction in a tort action for torture and extrajudicial killings against the estate of the former President of the Philippines).

44. 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

45. See Duruigbo, *supra* note 43, at 7 (citing *Doe*, 963 F. Supp. at 880).

46. *Id.*; see also *id.* at 7 n.33 (contending that "[u]p to fifty lawsuits ha[d] been brought against [corporations] under the ATS" by 2004) (citing LINDA A. WILLETT ET AL., NAT'L CTR. FOR THE PUB. INTEREST, *THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS* (2003)).

47. 542 U.S. 692 (2004).

48. Alien Tort Statute, 28 U.S.C. § 1350 (2006).

features of the 18th-century paradigms” already recognized as such violations.<sup>49</sup> These violations included “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>50</sup> Although dicta, the Court conceded that Congress had recently provided “a clear mandate” that torture and extrajudicial killings be considered violations of the law of nations—in other words, the kind of violations covered by the ATS.<sup>51</sup> Left unaddressed, however, was whether such actions also constituted such a violation when committed by corporate actors.

Although the question of corporate liability under the ATS has since been addressed by several circuits, a consensus has not yet emerged. On one hand, three circuits have issued opinions that either assume or expressly recognize corporate liability under the ATS.<sup>52</sup> On the other hand, the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.* recently repudiated such liability when expressly considering the question, finding that customary international law does not yet recognize corporate liability for human rights abuses.<sup>53</sup> Although critics of the ATS immediately celebrated the *Kiobel* holding,<sup>54</sup> the U.S. Supreme Court recently granted certiorari in that case,<sup>55</sup> and it

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49. *Sosa*, 542 U.S. at 725.

50. *Id.* at 724.

51. *See id.* at 728.

52. *See, e.g.*, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009) (holding that a corporate defendant could be sued under the ATS for tortious medical experimentation on human subjects in Nigeria), *cert. denied*, 130 S. Ct. 3541 (2010); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (recognizing corporate liability under the ATS as “the law of this Circuit”); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197 (9th Cir. 2007) (holding that a mining company could be found vicariously liable for, among other things, village destruction and rape in Papua New Guinea).

53. 621 F.3d 111, 131–45 (2d Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491). Notably, “the Second Circuit had routinely considered ATS suits against corporations and other juridical entities” before deciding against corporate liability in *Kiobel*. Petition for cert., *Kiobel*, No. 10-1491 (80 U.S.L.W. 3237) (U.S. June 6, 2011), 2011 WL 2326721, at \*19.

54. *See, e.g.*, Kenneth Anderson, *Further Thoughts on Today’s Second Circuit ATS Decision on Corporate Liability*, THE VOLOKH CONSPIRACY (Sept. 17, 2010, 11:20 PM), <http://volokh.com/2010/09/17/further-thoughts-on-todays-second-circuit-ats-decision-on-corporate-liability/> (regarding the *Kiobel* ruling as “a blockbuster opinion”); Julian Ku, *Goodbye to the Alien Tort Statute?: Second Circuit Rejects Corporate Liability for Violations of Customary International Law*, OPINIO JURIS (Sept. 17, 2010, 1:10 PM), <http://opiniojuris.org/2010/09/17/goodbye-to-ats-litigation-second-circuit-rejects-corporate-liability-for-violations-of-customary-international-law/> (agreeing with the perspective that “there appears to be no serious argument left that customary international law can impose duties on private corporations”).

55. *Kiobel*, 80 U.S.L.W. 3237.

remains unclear whether the Second Circuit's reasoning will prevail.

By the early 1990s, however, the ATS was not the only avenue for a tort action against alleged torturers. In addition to bringing suit under the ATS, noncitizen plaintiffs had started pursuing claims under Congress's "clear mandate" against torture—the TVPA.

### C. THE BIRTH OF THE TVPA

The 1984 *Tel-Oren* decision happened to coincide with a renewed focus on international human rights abuses, both in the United States and in the world at large. That same year, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations.<sup>56</sup> This instrument obligated states to implement measures providing protections against torture for potential extraditees or deportees,<sup>57</sup> criminalizing torture and complicity in torture,<sup>58</sup> and providing a jurisdictional basis for civil actions against torturers.<sup>59</sup> Similarly, 1984 also heralded a series of hearings on torture before several House and Senate committees, followed by the passage of a joint resolution calling for "the enactment and vigorous implementation of laws to reinforce the United States policies with respect to torture."<sup>60</sup>

In this vein, several legislators decided to bypass Judge Bork's concerns by showing express congressional approval of the use of federal courts to litigate tort claims for torture and similar human rights abuses.<sup>61</sup> In May 1986, Representative Gus Yatron introduced a bill which would have allowed suits against "[e]very person who, under actual or apparent authority of any foreign nation, subjects any person to torture or extra-

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56. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]. The U.S. Senate ratified the Convention in 1990. See S. REP. NO. 102-249, at 3 (1991).

57. See Convention Against Torture, *supra* note 56, art. 3.

58. *Id.* art. 4.

59. See *id.* art. 14.

60. See 133 CONG. REC. 6670 (1987) (statement of Sen. Arlen Specter) (internal quotation marks omitted).

61. See 134 CONG. REC. 28,613 (1988) (statement of Rep. Patrick Swindall) (expressing concern that "several recent judicial decisions have questioned whether [the ATS] provided a sufficiently clear basis" for such suits); 132 CONG. REC. 12,949 (1986) (statement of Sen. Arlen Specter) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)).

judicial killing . . . ”<sup>62</sup> A month later, Senator Arlen Specter introduced a bill featuring similar language in the Senate.<sup>63</sup> Though no major action was taken on either bill, both sponsors continued to press for the passage of such legislation in subsequent Congresses. Representative Constantine Yatron had more success in the House; that chamber passed similar versions of the original legislation in each of the following three Congresses,<sup>64</sup> at least once in overwhelming numbers.<sup>65</sup> However, despite having the support of several prominent legal and human rights organizations,<sup>66</sup> the legislation did not find sufficient support in the Senate during the 100th and 101st Congresses.<sup>67</sup> Finally, with congressmen concerned about the maltreatment of American soldiers on the battlefield during the 1991 Gulf War,<sup>68</sup> both chambers of the 102nd Congress ultimately passed this legislation as the Torture Victim Protection Act of 1991, codifying the language within the notes of the Alien Tort Statute.<sup>69</sup>

#### D. THE LANGUAGE OF THE TVPA

Section 2(a) of the TVPA, as passed by Congress on March 12, 1992, defines the scope of liability covered by the Act:

Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil ac-

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62. H.R. 4756, 99th Cong. § 2 (1986).

63. S. 2528, 99th Cong. § 2 (1986).

64. See 138 CONG. REC. 4178 (1992) (noting passage of H.R. 2092, 102d Cong. (1991)); 135 CONG. REC. 22,986 (1989) (noting passage of H.R. 1662, 101st Cong. (1989)); 134 CONG. REC. 28,860 (1988) (noting passage of H.R. 1417, 100th Cong. (1987)).

65. See 137 CONG. REC. 2671 (1991) (statement of Sen. Arlen Specter) (noting passage of H.R. 1417 by a vote of 362 to 4).

66. See 134 CONG. REC. 28,613 (statement of Rep. Patrick Swindall) (highlighting the support of the American Bar Association, Amnesty International, and the Lawyers' Committee for Human Rights for the House legislation).

67. 137 CONG. REC. 2671 (statement of Sen. Arlen Specter).

68. See *id.* (“Our soldiers languishing in Saddam Hussein’s prisons have almost certainly been brutally tortured. This bill will give our P.O.W.’s a cause of action . . .”).

69. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)). Though the inclusion of active legislation in a statute’s note section may not be common, it is apparently not unheard of. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 3.4, at 71 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010) (providing citation guidelines for material in a statute’s note section).

tion, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.<sup>70</sup>

The Act also defines "torture" and "extrajudicial killings"<sup>71</sup> and requires that claimants exhaust all available remedies in the jurisdiction in which the actions occurred before pursuing action under the TVPA in the United States.<sup>72</sup>

The legislative history accompanying the TVPA significantly illuminates the factors motivating the Act's passage. First, the accompanying Senate Report notes that enactment of the TVPA would "carry out the intent of the Convention Against Torture" by "making sure that torturers and death squads will no longer have a safe haven in the United States."<sup>73</sup> Second, the legislation was designed to address Judge Bork's insistence that separation-of-powers concerns required an explicit congressional grant of a private right of action for lawsuits which may affect foreign relations.<sup>74</sup> Finally, Congress acted with the intent to put the United States on par with other nations that were already allowing for civil suits against torture occurring outside of the nations' borders.<sup>75</sup>

The legislative history also discusses, although incompletely, the reasoning behind the choice of language regarding which defendants can be sued. In the 100th Congress, the House Committee on Foreign Affairs amended the proposed TVPA by changing the characterization of potential TVPA defendants from "person" to "individual" precisely to prevent corporations from becoming liable under the Act.<sup>76</sup> Subsequent House bills continued to use that latter term,<sup>77</sup> though their reasons for doing so are never explained in the accompanying legislative history. However, the Senate legislation preserved the use of the word "person" to describe potential defendants until the 102nd Congress, when Senate Bill 313 was amended in No-

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70. 28 U.S.C. § 1350 note § 2(a).

71. *Id.* note § 3.

72. *Id.* note § 2(b). The TVPA also provides a statute of limitations of ten years, measured from the time when the cause of action arose. *Id.* note § 2(c).

73. S. REP. NO. 102-249, at 3 (1991).

74. *See id.* at 4-5 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 799, 801-08 (D.C. Cir. 1984) (Bork, J., concurring)).

75. *See id.* at 5.

76. *See Hearing on H.R. 1417, supra* note 21.

77. *See* H.R. 2092, 102d Cong. § 2(a) (2d Sess. 1991) ("individual"); H.R. 1662, 101st Cong. § 2(a) (1st Sess. 1989) (same).

vember 1991 to change this term to “individual” as well.<sup>78</sup> The Senate Report accompanying that chamber’s later amendments notes that “[t]he legislation uses the term ‘individual’ to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued.”<sup>79</sup> As far as the Senate Report is concerned, the language was only altered to clarify that the TVPA does not override traditional protections such as foreign sovereign immunity, diplomatic immunity, and head-of-state immunity.<sup>80</sup>

As explained in the legislative history accompanying the TVPA, the Act was designed to provide a tort remedy for individuals subjected to torture or extrajudicial killings while preserving the immunities traditionally accorded to foreign sovereigns. Soon, however, other potential defendants were seeking refuge in the language that ensured these protections.

#### E. THE TVPA AND THE QUESTION OF CORPORATE LIABILITY

Despite the legislative history discussing questions of sovereign immunity, district courts soon relied on the use of “individual” instead of “person” in the Act to address a different concern—the liability of corporations under the TVPA. For example, in *Beanal v. Freeport-McMoRan, Inc.*, the first TVPA case to consider corporate liability, an Indonesian tribesman brought suit under both the ATS and the TVPA against an American-owned mining subsidiary operating in Indonesia, alleging human rights abuses that included torture and extrajudicial killings.<sup>81</sup> In ruling that corporations could not be held liable under the TVPA, the Eastern District Court of Louisiana expressly refused to rely on anything but the plain language of the statute, pursuant to Fifth Circuit precedent that mandates reliance on plain language unless an absurd result would follow from doing so.<sup>82</sup> Thus, as “the term ‘individual’ does not typical-

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78. Compare S. 313, 102d Cong. § 2(a) (1st Sess. 1991), quoted in 137 CONG. REC. 2671 (1991) (using “person” in the original language of the bill), with *id.*, quoted in S. REP. NO. 102-249, at 2 (using “individual” in the amended version).

79. S. REP. NO. 102-249, at 7.

80. See *id.* at 7–8. For more on these immunities and their relationship with the TVPA and the ATS, see generally STEPHENS ET AL., *supra* note 32, at 365–84.

81. 969 F. Supp. 362, 365–66 (E.D. La. 1997), *aff’d on other grounds*, 197 F.3d 161 (5th Cir. 1999).

82. See *id.* at 381–82 (citing *In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995)).

ly include a corporation,” the court reasoned that it would make no sense to read such a definition into the term.<sup>83</sup> While the court noted the existence of legislative history discussing the choice of the term “individual,” it ultimately held that a limited reading of the term was not inconsistent with that history, as neither the House nor the Senate had expressly considered the issue of corporate liability under the Act.<sup>84</sup> On that basis, the court concluded that there was no reason to recognize corporate liability under the TVPA.<sup>85</sup>

The next reported case that considered the question was brought six years later in the Southern District of Florida. In the context of the decades-long civil war in Colombia, union members accused Coca-Cola of engaging a government-sponsored paramilitary unit to kill union organizers in *Sinaltrainal v. Coca-Cola Co.*<sup>86</sup> In contrast to the Eastern District of Louisiana, this court ruled that corporations meet the definition of “individual” for TVPA purposes. Here, the court relied in part on language from *Beanal* regarding congressional intent, recognizing that “[c]ongress does not appear to have had the intent to exclude private corporations from liability under the TVPA.”<sup>87</sup> Further, the court cited the recent U.S. Supreme Court decision in *Clinton v. City of New York*,<sup>88</sup> a decision that had not been released until after *Beanal*, which recognized that “the term ‘individual’ is synonymous with ‘person’” in many contexts. The district court reasoned that because “a corporation is generally viewed the same as a person in other areas of law, a reading of the term “individual” to encompass corporate liability under the TVPA would be consistent with legislative intent.”<sup>89</sup>

In the following years, district courts continued to disagree over whether the TVPA subjected corporations to liability un-

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83. *See id.* at 382.

84. *See id.* (citing S. REP. NO. 102-249, at 6; H.R. REP. NO. 102-367, at 4 (1991)).

85. *See id.*

86. 256 F. Supp. 2d 1345, 1348–50 (S.D. Fla. 2003).

87. *See id.* at 1358–59 (citing *Beanal*, 969 F. Supp. at 382) (alteration in original).

88. *See id.* (citing *Clinton v. City of New York*, 524 U.S. 417, 428 & n.13 (1998)).

89. *Sinaltrainal*, 256 F. Supp. 2d at 1359; *see also* Dictionary Act, 1 U.S.C. § 1 (2006) (defining the words “person” and “whoever” in any congressional act to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies” unless context would indicate another reading).

der its terms, with the majority finding no such liability.<sup>90</sup> Still, no circuit court ruled on the issue until the 2005 decision in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*<sup>91</sup> In that case, the Eleventh Circuit considered an action by Guatemalan labor activists against a corporate employer under both the ATS and the TVPA for torture and other alleged human rights violations.<sup>92</sup> In overturning the district court's decision to dismiss the claims, the Eleventh Circuit held that some of the acts described could constitute torture for purposes of each provision.<sup>93</sup> Notably, however, while concluding that the plaintiffs could bring the claims under either statute,<sup>94</sup> the court did *not* expressly consider whether an "individual" under the TVPA could include corporate defendants. The court realized this omission three years later in *Romero v. Drummond Co.*, when considering a tort action under the TVPA by a Colombian labor organization against an American corporation's Colombian subsidiary for alleged human rights abuses.<sup>95</sup> Still, in response to the defendant's argument that its corporate status allowed it to escape liability, the Eleventh Circuit remarked that it had implicitly recognized the liability of corporations in *Aldana*, and it concluded that it was "bound by that precedent."<sup>96</sup>

Thus, it appears that until 2010, the only circuit court to have ruled on the question of corporate liability under the TVPA did so accidentally.<sup>97</sup> However, the Ninth Circuit's deci-

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90. *Compare* *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) (relying on the plain language of the TVPA to conclude that "individual" does not encompass corporations), *and* *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005) (same), *rev'd in part*, 654 F.3d 11 (D.C. Cir. 2011); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175–76 (C.D. Cal. 2005) (same), *and* *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004) (same), *with* *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1266–67 (N.D. Ala. 2003) (relying on *Sinaltrainal* and the TVPA's legislative history to conclude that corporations could be liable under the TVPA).

91. 416 F.3d 1242 (11th Cir. 2005) (*per curiam*).

92. *Id.* at 1245–46.

93. *See id.* at 1250–53.

94. *Id.*

95. 552 F.3d 1303, 1308–09, 1315 (11th Cir. 2008).

96. *See id.*

97. Before the Ninth Circuit's *Bowoto* opinion, the Eleventh Circuit was indeed the only circuit court to have considered the question of corporate liability under the TVPA. However, the record on this question is significantly confused by a recent pre-*Bowoto* Note on this topic that claims otherwise. Emily Martin states that a "circuit split" already existed between the Eleventh Circuit, which had held that corporations could be liable under the TVPA, and the Fifth, Ninth, and D.C. Circuits, which she claims had held that corpora-

sion in *Bowoto v. Chevron Corp.*<sup>98</sup> represented both the first express appellate court consideration of corporate liability under the TVPA and a clear rejection of the Eleventh Circuit position. In that opinion, where the court decided the appeal of the Ilaje youths against Chevron,<sup>99</sup> the Ninth Circuit rejected the Southern District of Florida's equation of "person" with "individual" in *Sinaltrainal*, noting that Congress's official definition of "person" refers to "individual[s]" as distinct from "corporations" and other entities.<sup>100</sup> While acknowledging the Supreme Court's precedent in *Clinton*, which held that "individual" and "person" are often used synonymously in legislation, the Ninth Circuit also observed that the holding in that case relied on the context of the use of the term "individual."<sup>101</sup> In the TVPA, the court noted, the term "individual" is also used "to refer both to the torturer and the victim of torture," and it would be absurd to conclude that a corporate "person" could be a torture victim.<sup>102</sup> Finally, the court noted that the first iterations of the TVPA subjected any "person" to liability under the

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tions were *not* subject to TVPA liability. See Emily M. Martin, Note, *Torture, Inc.: Corporate Liability Under the Torture Victim Protection Act*, 31 N. ILL. U. L. REV. 175, 186–90 (2010). However, in each of the anti-corporate-liability cases cited, Martin conflates the *district court* opinions with each case's respective *appellate court* opinion. See *id.* at 189 (stating that "[t]he Fifth Circuit held" against corporate liability but citing to a district court ruling); *id.* (claiming that "[t]he Ninth Circuit adopted the position of the Fifth Circuit" but citing to another district court ruling); *id.* at 190 (stating again that the Ninth Circuit's position "was upheld by the D.C. Circuit" but citing again to a district court opinion). In fact, in each of the cases cited by Martin, the circuit courts never ruled on the question of corporate liability under the TVPA, deciding each case on other grounds or giving none at all. See *Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190, 1192 (9th Cir. 2009), *remanding on other grounds* 381 F. Supp. 2d 1164 (C.D. Cal. 2005); *Bao v. Li*, 35 F. App'x. 1, 1 (D.C. Cir. 2002) (per curiam), *aff'g without comment* 201 F. Supp. 2d 14 (D.D.C. 2000); *Beanal v. Freeport-McMoRan, Inc.*, 197 F.3d 161, 169 (5th Cir. 1999) ("[W]e need not reach the question of whether a cause of action for individual human rights violations is actionable against a corporation under the TVPA."), *aff'g on other grounds* 969 F. Supp. 362 (E.D. La. 1997). When an argument has never been "squarely addressed" by an appellate court, that court is not bound by the argument, even if its holdings may implicitly accept the argument. See *Brecht v. Abrahamson*, 507 U.S. 619, 630–31 (1993). As the Ninth Circuit correctly recognized, the Eleventh Circuit was "the one Circuit court to mention the issue" prior to the *Bowoto* decision. See *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010).

98. *Bowoto*, 621 F.3d at 1116.

99. See *id.* at 1126–28.

100. See *id.* at 1126–27 (citing Dictionary Act, 1 U.S.C. § 1 (2006)).

101. *Id.* at 1127 (citing *Clinton v. City of New York*, 524 U.S. 417, 429 (1998)).

102. See *id.*

Act, but that subsequent amendments changed this term to “individual,” indicating clear congressional intent to exclude corporations from liability under the Act.<sup>103</sup> Thus, rejecting the Eleventh Circuit ruling and embracing the majority position, the Ninth Circuit held that corporations cannot be held liable for torture or extrajudicial killings under the TVPA.<sup>104</sup>

The Ninth Circuit’s logic, since adopted by two other circuits,<sup>105</sup> appears to seriously undermine future human rights suits against corporate defendants when combined with *Kiobel* and other cases. Under *Kiobel*, such claims cannot be brought against corporations under the ATS;<sup>106</sup> under *Bowoto*, such claims cannot be brought against corporations under the TVPA.<sup>107</sup> To add to the confusion, the appellate courts disagree as to whether the existence of the TVPA rules out suits against any actor for torture or extrajudicial killings,<sup>108</sup> since that law’s

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103. See *id.* at 1127–28.

104. See *id.* at 1128.

105. See *Aziz v. Alcolac, Inc.*, No. 10-1908, 2011 WL 4349356, at \*3–5 (4th Cir. Sept. 19, 2011) (relying on *Bowoto*’s analysis to find that a corporation cannot be held liable under the TVPA); *Mohamad v. Rajoub*, 634 F.3d 604, 606–09 (D.C. Cir. 2011) (similarly relying on *Bowoto* to rule out liability for organizations under the TVPA), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-88).

106. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 131–45 (2d Cir. 2010) (holding that the ATS does not allow for actions against corporations), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491). Indeed, because several circuits have concluded that the TVPA does not have a jurisdictional provision, the foreclosure of corporate liability under the ATS may have implications for some actions against corporations under the TVPA. See, e.g., *Kadic v. Karadžić*, 70 F.3d 232, 246 (2d Cir. 1995) (“Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of section 1331 . . . .” (citing 28 U.S.C. § 1331 (2006))). Under this logic, if the Supreme Court rules that the ATS does not contemplate corporate liability, TVPA litigants may be limited to an action pursued under § 1331’s federal-question jurisdiction. See *generally* 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

107. See *Bowoto*, 621 F.3d at 1126–28.

108. Compare *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 259–63 (2d Cir. 2007) (per curiam) (dismissing a torture claim on other grounds under the TVPA while finding the claim actionable under the ATS), with *Enahoro v. Abubakar*, 408 F.3d 877, 884–85 (7th Cir. 2005) (holding that the TVPA “preempts” claims of relief for torture or extrajudicial killing that would otherwise be litigated under the ATS).

focus might mean that the TVPA “occup[ies] the field” on these subjects.<sup>109</sup>

Thus the viability of torture or extrajudicial claims against corporate actors is threatened on three fronts—suits against corporate actors under the TVPA, suits against corporate actors under the ATS, and any suit at all for these wrongful acts under the ATS. With the Supreme Court poised to consider the question of such suits under either the ATS<sup>110</sup> or the TVPA,<sup>111</sup> victims of human rights abuses perpetrated at the behest of corporate entities may soon find themselves unable to seek redress in U.S. courts.

## II. THE TVPA IS AMBIGUOUS ON THE QUESTION OF CORPORATE LIABILITY

By specifically establishing a basis for civil actions to recover for torture or extrajudicial killings, Congress intended for the TVPA to strengthen the domestic prohibition against these crimes in a manner that allows the nation to fulfill its international human rights obligations.<sup>112</sup> This Part argues that while policy considerations weigh in favor of recognizing corporate liability under the TVPA, the Act’s language and the relevant legislative history are ambiguous on the issue and have thus created confusion in the district and appellate courts.

### A. ANALYSIS OF STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

#### 1. Statutory Language

As noted in *Beanal*, the first case to consider the question of corporate liability under the TVPA, courts should first turn to the plain language of the statute being examined when seeking to interpret the provision’s meaning.<sup>113</sup> Under federal law, “individual” is a term that may generally be understood as distinct from the term “corporation.” The Dictionary Act, the first

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109. *Enahoro*, 408 F.3d at 884–85.

110. *Kiobel*, 80 U.S.L.W. 3237.

111. *Mohamad v. Rajoub*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-88). The viability of such suits against corporations under either the ATS or the TVPA will be considered by the Court in tandem. *Id.*

112. See *Cuervo*, *supra* note 32, at 173.

113. *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 381–82 (E.D. La. 1997) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–42 (1989)), *aff’d on other grounds*, 197 F.3d 161 (5th Cir. 1999).

statute in the United States Code, provides general definitions for a number of terms used in federal law, applying such definitions to “any Act of Congress, unless the context indicates otherwise.”<sup>114</sup> In that statute, Congress has defined the term “person” to “include *corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*.”<sup>115</sup> According to the Ninth Circuit in *Bowoto*, this definition implies that “corporations” and “individuals” should be understood “as distinct terms,” leading that court to conclude that “we must therefore presume those terms have different meanings.”<sup>116</sup> With this understanding, the baseline presumption is that the TVPA does not provide for corporate liability, as the Act only allows for tort actions against “individual[s].”<sup>117</sup>

However, courts that have recognized corporate liability under the TVPA have pointed out that this presumption is rebuttable. As the Ninth Circuit itself had previously acknowledged, the term “individual” “does not necessarily exclude corporations.”<sup>118</sup> In *Clinton*, the Supreme Court concluded that the context of the word’s usage can make “individual” synonymous with “person”—the broader term that generally includes corporations—where doing otherwise would lead to “an absurd and unjust result which Congress could not have intended.”<sup>119</sup> The cornerstone, then, is congressional intent—if “Congress undoubtedly intended the word ‘individual’ to be construed as synonymous with the word ‘person,’” then the particular word choice should make little difference.<sup>120</sup>

Based on its understanding of *Clinton*, the Southern District of Florida concluded in *Sinaltrainal* that for purposes of the TVPA, the terms “individual” and “person” were synonymous.<sup>121</sup> After all, in everyday parlance, “corporations are generally treated as persons in other areas of law,” and Congress could have expressly excluded corporations from TVPA liability

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114. 1 U.S.C. § 1 (2006).

115. *Id.* (emphasis added).

116. *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010).

117. 28 U.S.C. 1350 note § 2(a) (2006).

118. *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000).

119. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)).

120. *Id.* at 428.

121. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358–59 (S.D. Fla. 2003).

if it had preferred to do so.<sup>122</sup> Indeed, there are many examples in federal law where Congress has used different terms to make it clear that corporations were not contemplated by the statute in question.<sup>123</sup> That it chose not to use such terms in the TVPA, the district court concluded, demonstrates that Congress intended that the Act could be applied against corporate defendants.<sup>124</sup>

Still, the *Sinaltrainal* interpretation is vulnerable to criticism—while it rests its holding on congressional intent, it overlooks the fact that such intent is manifested in the Dictionary Act as well as the TVPA. The former statute can be seen as evidence that Congress intended for “corporations” and “individuals” to be seen as distinct creatures, since they are defined as two separate concepts encompassed by the word “person.”<sup>125</sup> If this is the case, the onus is not on Congress to establish that corporations should be *excluded* from the term “individual”; rather, the onus is on outside parties to establish that the terms should be synonymous.<sup>126</sup> Although it might be considered “unjust” to find that corporations are not liable under the TVPA, such a reading is not necessarily “absurd”;<sup>127</sup> Congress may have had good reasons for excluding corporations from liability.<sup>128</sup> Therefore, the presumption against equating the terms “individual” and “corporation” has not necessarily been disposed of.

On the other hand, is this presumption accurate? The Dictionary Act does not expressly state that the terms covered by the word “person” are all distinct entities. Indeed, several of the entities cited in that definition are plainly understood to be interchangeable in everyday language. For example, a “firm” can also be a partnership or a company,<sup>129</sup> while a “partnership”

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122. *Id.*

123. *See, e.g.*, 15 U.S.C. § 1693(a)(5) (2006) (defining “consumer” as “a *natural person*” (emphasis added)); 18 U.S.C. § 1111(a) (2006) (defining “murder” as “unlawful killing of a *human being* with malice aforethought” (emphasis added)).

124. *See Sinaltrainal*, 256 F. Supp. 2d at 1359.

125. *See* Dictionary Act, 1 U.S.C. § 1 (2006).

126. *See* *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010) (noting the “presumption of the Dictionary Act” that the terms have different meanings).

127. *See supra* note 119 and accompanying text.

128. *See infra* Part II.A.2 (discussing the TVPA’s legislative history).

129. *See* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 472 (11th ed. 2003) (defining “firm” as “the name or title under which a company transacts

can also include companies or associations.<sup>130</sup> The definition of the word “person” in the Dictionary Act might reasonably be understood as a “liberal approach” that includes a nonexhaustive list of terms so as to include all relevant entities,<sup>131</sup> rather than as a means to distinguish certain types of entities from each other, such as “corporations” and “individuals.” An understanding that the word “individuals” may also refer to “corporations,” therefore, is not necessarily precluded by the language of the Dictionary Act.

In fact, even the common legal understanding of the term “individual” includes both natural persons as well as nonnatural persons. The district court in *Beanal*<sup>132</sup> relies on the sixth edition of *Black’s Law Dictionary*, which specifies that “individual” means “a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a . . . corporation . . . .”<sup>133</sup> However, the same definition goes on to note that the word “may, in proper cases, include artificial persons.”<sup>134</sup> Because policy concerns here weigh in favor of understanding the word to include corporations,<sup>135</sup> this language suffices to show that the broad definition of “individual” is not contrary to a common legal understanding of the term. Additionally, it is worth noting that the modern edition of *Black’s Law Dictionary* abandons both the distinctions and the clarification present in the sixth edition, instead limiting the definition to either “[e]xisting as an indivisible entity” or “a single person or thing, as opposed to a group.”<sup>136</sup> Thus, a definition of “individual” that includes corporations is consistent with the second definition (as a single entity) and is thereby acceptable when used to interpret statutes.

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business” or “a partnership . . . that is not recognized as a legal person distinct from the members composing it”).

130. See *id.* at 904 (defining “partnership” as “a legal relation existing between two or more persons contractually associated as joint principals in a business”).

131. Michael Gerardi, *The “Person” at Federal Law: A Framework and a RICO Test Suite*, 84 NOTRE DAME L. REV. 2239, 2251–52, 2252 n.56 (2009) (noting the “open-ended” nature of the definition).

132. *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999).

133. BLACK’S LAW DICTIONARY 773 (6th ed. 1996), *cited in* *Jove Eng’g, Inc. v. I.R.S.*, 92 F.3d 1539, 1551 (11th Cir. 1996).

134. *Id.*

135. See *infra* Part II.B.

136. BLACK’S LAW DICTIONARY 843 (9th ed. 2009).

Still, whether or not a presumption exists against finding the two terms to be synonymous, critics of finding corporations liable under the TVPA argue that the way in which the term “individual” is used in the Act precludes such a finding. As the Ninth Circuit concluded in *Bowoto*,

The TVPA consistently uses “individual” throughout the statute to refer both to the torturer and the victim of torture. Corporations, of course, cannot be tortured. Plaintiffs ask us to give the same word different meanings in the same statute. They ask us to interpret “individual” to mean a natural person when referring to the victim, but to mean either a natural person or a corporation when referring to the torturer. This interpretation of the statute runs counter to the “normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.”<sup>137</sup>

Although this logic is persuasive, it is not unassailable. The presumption that identical words must have the same strict meaning throughout a statute “‘is not rigid,’ and ‘the meaning [of the same words] well may vary to meet the purposes of the law.’”<sup>138</sup> After all, “[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.”<sup>139</sup> Indeed, as human rights legal scholars have pointed out, “The United States Code is replete with examples of the use of different subsets of a term’s full meaning in the same statute.”<sup>140</sup> For example, one statute concerned with water pollution subjects “[a]ny person who knowingly violates” several related statutes to criminal liability if that person “knows at that time that he thereby places *another person* in imminent danger of death or serious bodily injury.”<sup>141</sup> Although the second use of the word *person* is clearly only limited to natural

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137. *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010) (quoting *Comm’r v. Lundy*, 516 U.S. 235, 250 (1996)) (internal citations omitted).

138. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

139. *Env’tl. Def. Fund v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quoting *Atl. Cleaners & Dyers*, 286 U.S. at 433).

140. See Brief for University of Minnesota Law School International Human Rights Clinic and Legal Scholars Michael Avery et al., as Amici Curiae Supporting Appellants, at 4, *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (Nos. 09-7125, 09-7127, 09-7134, 09-7135).

141. 33 U.S.C. § 1319(c)(3)(A) (2006) (emphasis added); see also 8 U.S.C. § 1324 (2006) (subjecting “[a]ny person who—knowing that a person is an alien, brings or attempts to bring to the United States in any manner whatsoever such person” through prohibited means to liability (emphasis added)).

persons, since only natural persons can experience “death or serious bodily injury,” the first use of the term encompasses corporations as well as natural persons.<sup>142</sup> Therefore, the fact that a term is used twice in an act does not mean that it must have the same meaning throughout the act.

Ultimately, the “plain language” of the TVPA remains muddled. There may or may not be a presumption that “individuals” and “corporations” are two separate entities. If that presumption exists, it may or may not have been overcome by clear congressional intent; if the presumption does not exist, the multiple uses of the word “individual” may or may not preclude corporate liability. The persistence of these ambiguities implies that reference to the statutory language alone is not sufficient for divining congressional intent.

## 2. Legislative History

When the plain text of a statute is “inescapably ambiguous,” legislative history may be consulted to ascertain congressional intent.<sup>143</sup> The TVPA is accompanied by committee reports from each congressional chamber, several floor speeches by the Act’s sponsors, and even some reports from earlier Congresses. Unfortunately, none of the legislative materials accompanying the adopted version of the TVPA actually discusses the issue of corporate liability, and the one document that does discuss it hails from four years (and two Congresses) earlier. In short, the legislative history is as unclear on the issue of corporate liability under the TVPA as the statutory language itself.

Each chamber in the 102nd Congress gives the same reason for choosing the language found in the TVPA. As previously noted, the Senate’s accompanying report explains that the term “individual” was used “to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances.”<sup>144</sup> The Congressional Record indicates that the possibility of such interference in foreign affairs was of special concern to the Senate, which had in previous years failed to pass similar legislation that used the term “person” instead of “individual.”<sup>145</sup> Similarly, the House Report from that Congress

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142. See § 1319(c)(3)(A) (subjecting “[a] person which is an organization” to criminal liability).

143. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring).

144. See *supra* note 79 and accompanying text.

145. See 137 CONG. REC. 2671 (1991) (statement by Sen. Arlen Specter).

states that “[o]nly ‘individuals,’ not foreign states, can be sued under the bill,”<sup>146</sup> implying that the later body gave fresh consideration to the language in its legislation. It is entirely possible, therefore, that the 102nd House chose to use the word “individual” for completely different reasons than did the 100th House. Further, as the 102nd Senate’s accompanying report gives a completely different explanation for choosing the term, there is no indication that the 100th House’s reasoning played any role in the 102nd Senate’s choice of language. Although the earlier committee’s rationale may hint at the reason for choosing “individual” over “person” when describing liable parties, that hint is by no means dispositive and may indeed be irrelevant.

Finally, as even the *Beanal* opinion notes, the legislative history accompanying the 102nd Congress’s legislation does not expressly note an intention to exclude corporations from liability.<sup>147</sup> In fact, the issue of corporate liability was never explicitly addressed in any of the legislative history accompanying the version of the TVPA that was eventually passed. Courts have alternately considered this omission to be either of great importance or of no importance at all.<sup>148</sup> Such a wide range of reactions indicates that the omission is as ambiguous as the statutory language itself.

In summary, the relevant legislative history does not squarely address the question of corporate liability under the TVPA. Earlier legislative materials hint that the TVPA’s wording was chosen to exclude corporations from such liability, but the relevance of those materials is unclear, and later materials indicate that the language in question was adopted for altogether different reasons. Just as the statutory language alone gives no real guidance on the issue of corporate liability, the legislative history similarly does little to resolve the issue. Without further clarification, the statute remains a *tabula rasa*, ready for any court to read its biases into the question.

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146. H.R. REP. NO. 102-367, pt. 1, at 4 (1991).

147. See *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348–50 (S.D. Fla. 2003) (citing *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997)).

148. Compare, e.g., *id.* at 1358–59 (determining that corporations can be held liable under the TVPA on grounds that the legislative history does not exempt private corporations, with *Beanal*, 969 F. Supp. at 382 (determining that the TVPA’s plain language precludes corporate liability), *aff’d on other grounds*, 197 F.3d 161 (5th Cir. 1999).

## B. PUBLIC POLICY INTERESTS

The ambiguous nature of the statutory language and legislative history is especially disappointing considering the public policy concerns that weigh heavily in favor of holding corporations liable for human rights abuses under the TVPA. “Several dozen” actions involving allegations of human rights abuses by corporations have been filed in recent years,<sup>149</sup> suggesting that corporate involvement with such abuses is not uncommon and that Congress’s intent to eliminate torture and extrajudicial killings would be best preserved if the TVPA were understood to encompass corporate liability. Evolving understandings of liability under the ATS, and of corporate rights and responsibilities, provide additional support for preserving a remedy for victims of corporate torturers under the TVPA. Finally, the preservation of corporate liability under this Act would avoid the unintentional elimination of liability for a host of other juridical entities. This Section considers each of these concerns in turn.

### 1. Corporate Liability Under the TVPA Would Support Congressional Intent

An interpretation that includes corporate liability under the TVPA is consistent with congressional intent, which seeks to provide tort remedies for those who suffer human rights abuses. As the legislative history accompanying the TVPA explains, Congress had several interrelated goals when passing the Act. First, the TVPA exists to provide “enforcement measures” to address “human rights violations” like torture and extrajudicial killings.<sup>150</sup> Second, the legislation was designed to meet the nation’s requirement under international law, including the Convention Against Torture “to adopt measures to ensure that torturers are held legally accountable for their acts.”<sup>151</sup> Third, the TVPA was designed “to provide means of civil redress to victims of torture” in case the victims’ home nations did not feature a functioning or effective judiciary, as “[t]he general collapse of democratic institutions [is] characteristic of countries scourged by massive violations of fundamental rights . . . .”<sup>152</sup> Fourth, the legislation was designed to “extend a civil remedy also to U.S. citizens who may have been

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149. See STEPHENS ET AL., *supra* note 32, at 312.

150. See H.R. REP. NO. 102-367, pt. 1, at 3.

151. See *id.*

152. See *id.*

tortured abroad,” as the ATS “provides a remedy to aliens only.”<sup>153</sup> Finally, the TVPA was “intended to deny torturers a safe haven” in the United States, as a suit can only be pursued if the federal government has personal jurisdiction over the defendant.<sup>154</sup>

Treating corporate wrongdoers as liable under the TVPA supports each of these goals. By allowing civil suits against any entity, whether a natural or a nonnatural person, who engages in torture or extrajudicial killing, the TVPA provides appropriate enforcement measures to meet the nation’s international law obligations to hold such actors accountable. Doing so also promotes the rule of law by discouraging corporate entities from taking advantage of a nation’s failing legal infrastructure by engaging in brutal human rights violations in the furtherance of business goals.<sup>155</sup> Finally, a rule allowing corporate liability provides strong incentives for American corporations to monitor their foreign subsidiaries in order to make sure that these entities are not responsible for torture or extrajudicial killings in other countries,<sup>156</sup> as a failure to do so subjects the corporations to personal jurisdiction under the TVPA.<sup>157</sup> Far from contravening Congress’s express and implied intent, a recognition of corporate liability for torture and other human rights abuses under the TVPA would fully support the goals of the 102nd Congress upon passage of that Act.

## 2. Corporate Liability Under the TVPA Would Allow That Statute to Serve as an Alternative to the ATS

With the viability of ATS actions against corporations very much in question, the TVPA remains necessary as an alternative means of redress for victims of human rights abuses. In discussing the relationship between the TVPA and the ATS, the legislative record demonstrates Congress’s intention that

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153. *See id.* at 4.

154. 138 CONG. REC. 4176 (1992) (statement of Sen. Arlen Specter).

155. *See, e.g., Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005) (noting allegations that an oil company contracted with the Indonesian military to suppress a rebellion that interfered with the defendant’s pipeline), *rev’d in part*, 654 F.3d 11 (D.C. Cir. 2011).

156. *See, e.g., Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 365–66 (E.D. La. 1997) (describing allegations that an American mining company’s subsidiary engaged in human rights violations in Indonesia), *aff’d on other grounds*, 197 F.3d 161 (5th Cir. 1999).

157. *See Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1266 (N.D. Ala. 2003) (finding jurisdiction under the TVPA for a suit against an Alabama mining company for actions by the company’s Colombian subsidiary).

the TVPA serve to complement, not replace, the ATS as “a clear and specific remedy . . . for torture and extrajudicial killing.”<sup>158</sup> In recent years, however, appellate courts have begun to severely constrain the applicability of the ATS. Although tort actions against aliens for claims of torture or extrajudicial killing once served as the most common basis for an ATS claim,<sup>159</sup> a circuit split now exists as to whether such actions can go forward in light of the passage of the TVPA.<sup>160</sup> Additionally, though actions against corporations for human rights violations have dominated ATS litigation for well over a decade,<sup>161</sup> the Second Circuit’s decision in *Kiobel* has created another circuit split that threatens to close off that avenue for redress as well.<sup>162</sup>

Corporate liability under the TVPA provides an alternative mechanism for redressing these wrongs when they are also committed in violation of the ATS, a necessary safeguard in jurisdictions that bar actions for torture<sup>163</sup> or torts against corporate defendants<sup>164</sup> under the latter statute. If the Supreme Court ultimately agrees with the Second Circuit’s conclusion that the law of nations does not provide for an action against corporations, the availability of a remedy under the TVPA would prove vital to protect citizens of the world against deadly, unscrupulous business practices. Similarly, if the Supreme Court were to agree with the Seventh Circuit’s holding that the TVPA provides the only channel for litigation against those engaging in torture or extrajudicial killing, the effectiveness of the latter Act would be severely diminished if an entire class of potential defendants proved immune to the sole remaining civil action that can be brought against them for human rights abuses. Without the protection against corporate and state-

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158. See H.R. REP. NO. 102-367, pt. 1, at 3 (1991).

159. See Duruigbo, *supra* note 43. (“For some time, use of the ATS remained limited to cases involving agents of the state who abused the power of government to oppress their people, often with impunity.”).

160. See *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

161. See STEPHENS ET AL., *supra* note 32, at 312.

162. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (holding that the ATS does not allow for actions against corporations), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491); Ku, *supra* note 54 (celebrating the potential demise of corporate liability under the ATS).

163. See *Enahoro v. Abubakar*, 408 F.3d 877, 884–86 (7th Cir. 2005).

164. *Kiobel*, 621 F.3d at 148–49. But see *supra* note 106 regarding the possibility that an absence of corporate liability under the ATS may preclude some claims against corporations under the TVPA, regardless of a holding that the term “individuals” as used in the TVPA can include corporations.

sponsored abuses currently recognized by some jurisdictions under the TVPA, the arrival of either or both alternative outcome would spell the end of redress options against some of the world's most notorious abusers.

### 3. Corporate Liability Under the TVPA Would Encourage Corporate Responsibility in an Age of Corporate Rights

Corporate rights appear to have been expanding quickly in the past few decades, and the TVPA provides one mechanism for ensuring that corporate responsibilities remain equally in focus. The concept of corporate personhood has been recognized in federal courts since as early as 1886, when the Supreme Court pronounced that such entities had the same Fourteenth Amendment rights as natural persons.<sup>165</sup> Within ten years of that opinion, the Court had developed enough caselaw supporting the proposition that the Equal Protection and Due Process clauses of the Fourteenth Amendment protected corporations as well as natural persons that the matter was considered “settled.”<sup>166</sup> In the past few decades, these protections have been further recognized as imbuing corporations with virtually the same speech rights as natural persons,<sup>167</sup> culminating in the recent *Citizens United v. Federal Election Commission* decision extending political speech protections to corporate entities.<sup>168</sup> With the trend line established, some observers are concerned that these cases “have created a political atmosphere in which corporations can wield their financial power while the interests of the people has [sic] been relegated to the sidelines.”<sup>169</sup>

To preserve general principles of fairness as well as the interests of such natural persons, the constitutional rights of corporations should be complemented by an understanding that

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165. See *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886). At least one authority has questioned the precedential grounds of this holding on the basis that the statement regarding corporate personhood appears “in the portion of the case before the actual opinion begins.” See Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 554–55 (2010).

166. *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (citing *Charlotte, Columbia & Augusta R.R. Co. v. Gibbes*, 142 U.S. 386, 391 (1892); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 29 (1889); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888); *Santa Clara Cnty.*, 118 U.S. at 396).

167. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978).

168. 130 S. Ct. 876, 913 (2010).

169. See, e.g., Rubin, *supra* note 165, at 584.

such entities also share the same responsibilities as noncorporate persons. For purposes of the TVPA, this translates into pairing the protections of the United States against foreign injury with the responsibility to avoid engaging in injurious behavior in a foreign jurisdiction. Confirmation that corporations are assigned both the same protections and the same responsibilities as natural persons would be consistent with the growing number of authorities that recognize the equivalent personhood of both types of entity.<sup>170</sup> Further, this recognition could go far in dispelling some of the bitterness felt towards corporate entities in the wake of *Citizens United*.<sup>171</sup> From that perspective, responsible corporate entities and subsidiaries would have nothing to fear and everything to gain from such a move, as it would highlight the entities' voluntary acceptance of accountability in a world that continues to apply further rights and protections to such actors.

#### 4. Recognizing Liability for Nonnatural Persons Under the TVPA Would Further Avoid Unintended Consequences

If the plain language of the TVPA forecloses action against any entity but a natural person, might victims who have actually suffered at the hands of such natural persons nonetheless fail to recover damages? As a concurring judge in the Second Circuit's *Kiobel* decision noted, estates and trusts are just as much "juridical entities" (as opposed to natural persons) as corporations.<sup>172</sup> On that basis, the judge warned, a holding that the law of nations does not allow for suits against corporations under the ATS might have the unforeseen consequence of prohibiting such suits against the estates of wrongdoers responsible for torture or extrajudicial killings.<sup>173</sup> Had that principle existed in the mid-1990s, a notable ATS case involving a successful \$2 billion suit against the estate of the former Presi-

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170. See Dictionary Act, 1 U.S.C. § 1 (2006) (defining "person" as used in statutes to include both "corporations" and "individuals" by default, without regard to whether the statute imposes protection or liability); *Clinton v. City of New York*, 524 U.S. 417, 428 & n.13 (1998) (holding that the term "individual" can be synonymous with "person" and can therefore refer to corporate entities).

171. See, e.g., Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner's Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL'Y 311 (2010) (comparing *Citizens United* to the infamous substantive due process case).

172. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 161 n.12 (2d Cir. 2010) (Leval, J., concurring only in the judgment), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491).

173. See *id.*

dent of the Philippines might never have survived pretrial motions, and the President's victims would have never recovered damages for their suffering.<sup>174</sup>

Unlike the ATS, the TVPA relies on statutory language to determine who qualifies as a claimant and a defendant. Still, a strict reading of wording that purportedly distinguishes between "individuals" and other juridical entities<sup>175</sup> might lead to a similar outcome for victims seeking redress under the TVPA from the estates or trusts of their tormentors. Indeed, in granting certiorari in *Mohamad*, the Court indicated that it would consider the question as to whether the TVPA "permits actions against defendants which are not natural persons," a broader question than one limited to the responsibility of corporate entities under the Act.<sup>176</sup> The fact that a victim's torturer may be able to escape liability through death does nothing to help the victim recover and rebuild her life following human rights abuses. Recognition of corporate liability under the TVPA, via either judicial interpretation or statutory modification, may prove integral in preserving this avenue of litigation for victims of torture.

In summary, the plain language of the TVPA and its accompanying legislative history are unclear on the question of corporate liability under the Act. However, the United States has strong policy interests in holding corporations liable for torture or extrajudicial killings that they have committed under the color of foreign law. With these interests in mind, the following Part discusses potential solutions that would resolve the ambiguities of the TVPA while continuing to address the scourge of corporate-sponsored torture.

### III. PRESERVING CORPORATE LIABILITY UNDER THE TVPA: SOLUTIONS

Although the language of the TVPA is unclear, the Supreme Court should recognize the liability of nonnatural persons under the TVPA when it considers the question. While legislative modification of the Act's language might also be appropriate, such efforts may not be necessary if the Supreme Court reaches a decision that is both supported by recent Court holdings and consistent with Congress's anti-torture intentions.

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174. See *id.* (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 776–77 (9th Cir. 1996)).

175. See 1 U.S.C. § 1.

176. See *11-88 Mohamad v. Rajoub*, *supra* note 27.

Additionally, the potential changes to the TVPA's language might be less likely to pass congressional muster in the modern political climate. This Part therefore begins with an examination of how the Supreme Court can resolve these concerns, then moves to a brief review of the problems associated with pursuing legislative remedies.

#### A. SUPREME COURT REVIEW

A Supreme Court decision holding that corporations and other nonnatural persons are liable under the TVPA would be consistent with reasonable interpretations of the Act's language and would support Congress's efforts to eliminate torture and extrajudicial killings. First, such a decision would appropriately signal that the text of the Act contemplates corporate liability, a development that would be welcome in light of the disparate rational interpretations of the TVPA's language.<sup>177</sup> A flexible understanding of the term "individual" to encompass both natural and nonnatural persons in this context, even when used in two distinct segments of an act, would be consistent with recent Supreme Court jurisprudence.<sup>178</sup> Thus, the Supreme Court would be clarifying the appropriate boundaries for the nonstandard use of "individual" while signaling that corporate liability remains feasible under the TVPA.

Second, a Court holding recognizing corporate liability under the TVPA would support Congress's original policy goals.<sup>179</sup> Because so much alleged torture is purportedly committed by corporate actors,<sup>180</sup> a TVPA that unmistakably provides for tort actions against such entities would reduce human rights abuses by imposing liability against some of the most egregious abusers, thereby meeting our nation's international obligations to eliminate torture.<sup>181</sup> Further, because such abuses would be reduced, persons of any nationality would be better protected

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177. See *supra* Part II.A.1 for a discussion of the inconsistent interpretations and applications of the TVPA.

178. See *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (noting that "the meaning [of the same words] well may vary to meet the purposes of the law" (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)) (alteration in original)); *Clinton v. City of New York*, 524 U.S. 417, 428 & n.13 (1998) (holding that the term "individual" can be synonymous with "person" and can therefore refer to corporate entities).

179. See *supra* Part II.B.1.

180. See STEPHENS ET AL., *supra* note 32, at 312 (noting that "several dozen" such cases have been filed since 2001).

181. See *Convention Against Torture*, *supra* note 56, at 85.

against torture and extrajudicial killings; in particular, citizens of failing states could continue to seek justice for such abuses in U.S. courts where their existing judicial system may otherwise falter.<sup>182</sup> Finally, such a holding would signal to potential violators that the United States does not tolerate human rights abuses within its borders.<sup>183</sup> Corporations would recognize that in order to do business in this country while escaping tort liability under this Act, torture and extrajudicial killings would not be available to them as a means for resolving labor disputes. Even if the text and legislative history associated with the TVPA are not models of clarity, the Court's recognition of corporate liability would preserve congressional intent while resolving any questions about the literal meaning of the text.<sup>184</sup>

Third, such a holding would clarify that the TVPA's language does not foreclose suits against other nonnatural persons, such as the estates of deceased natural persons who engage in torture or extrajudicial killings.<sup>185</sup> A Court holding that recognizes the inclusion of juridical entities in the TVPA's use of the term "individual" would have the added benefit of allowing tortured persons or their survivors to seek recompense from the estates and/or trusts of persons responsible for such abuses. Congress's stated intention to provide redress for victims of torture is not effectively met if these victims cannot be compensated for the wrongs suffered at a torturer's hands merely because that torturer has died.<sup>186</sup> Although this rationale is only tangentially related to the issue of *corporate* liability for torture and extrajudicial killings, such recognition nonetheless advances Congress's goals with the TVPA.

Fourth, a favorable decision in *Mohamad* would eliminate the need to otherwise pass legislation that could be politically unpalatable. In the last decade, the United States government has shown an increased willingness to tolerate actions that would have previously been condemned as torture if committed by other actors.<sup>187</sup> From this perspective, congressional action

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182. See 28 U.S.C. § 1350 note § 2(b) (2006).

183. *But cf.* DARIUS REJALI, TORTURE AND DEMOCRACY 500–12 (2007) (noting the growing acceptance of torture in American government and policy circles in the early 21st century).

184. See § 1350 note § 2.

185. See *supra* Part II.B.4.

186. See *supra* Part II.B.4.

187. See, e.g., REJALI, *supra* note 183; Glenn Greenwald, *The Inhumane Conditions of Bradley Manning's Detention*, SALON (Dec. 15, 2010, 1:15 AM), [http://www.salon.com/2010/12/15/manning\\_3/](http://www.salon.com/2010/12/15/manning_3/) (describing the alleged mi-

to reduce the prevalence of such abuses would possibly not be a priority, and indeed might be condemned for political purposes.<sup>188</sup> Needless to say, the Supreme Court need not consider such modern political concerns when seeking to uphold Congress's original intentions associated with the passage of the TVPA.

In addition to the foregoing factors, a Supreme Court decision recognizing corporate liability under the TVPA would have other benefits weighing in its favor. First, considering that precedent demonstrates the Court's recognition that corporate personhood entails both rights<sup>189</sup> and responsibilities,<sup>190</sup> it would be appropriate for the Court to find that such liability exists. As with any Court review, there is also the alluring prospect of finality—unless Congress *did* decide to respond by passing legislation to the contrary, the Court's holding would be the last word on the interpretation of the Act's language. On that note, finally, any adverse Court decision on corporate personality under the TVPA can potentially be addressed through legislative means.<sup>191</sup>

This is not to say that the Court is guaranteed to recognize corporate liability under the TVPA. Considering the ambiguity of the Act's language, which opens it up to multiple valid interpretations,<sup>192</sup> a court that is disinclined to extend liability to corporations under the Act would have sufficient precedent to justify this decision.<sup>193</sup> On the other hand, three of the justices currently sitting on the Court ruled with the majority in *Clin-*

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streatment of a U.S. Army Private accused of leaking classified documents to WikiLeaks).

188. Cf. Tweet from Congressman Steve King, *Wonder What President Obama Thinks of Water Boarding Now?*, TWITTER (May 2, 2011, 8:06 AM), <https://twitter.com/#!/SteveKingIA/status/65039561755066369> (mocking President Obama's opposition to torture following the killing of Osama bin Laden).

189. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010) (prohibiting suppression of "political speech on the basis of the speaker's corporate identity").

190. See *Clinton v. City of New York*, 524 U.S. 417, 428–429, 428 n.13 (1998) (holding that the term "individual" can be synonymous with "person" and can therefore refer to corporate entities).

191. See *infra* Part III.B.

192. See *supra* Part II.A.1.

193. See *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) (citing "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning" (internal citation omitted)), *quoted in* *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010) (noting that both the torturer and the victim of torture are referred to as "individual[s]" in the TVPA).

ton,<sup>194</sup> which relied in part on the proposition that the terms “individual” and “person” are synonymous in certain appropriate contexts; only one currently sitting justice explicitly opposed this language.<sup>195</sup> Similarly, four current justices joined the majority in 2001 when the Court reaffirmed that “the meaning [of the same words] well may vary to meet the purposes of the law”;<sup>196</sup> only one current justice did not agree with this proposition.<sup>197</sup> The fact that a significant number of justices have shown flexibility when interpreting the use of similar terms based on the purpose of the law bodes well for those who believe the Act contemplates corporate liability.

Ultimately, although the unclear language of the statute means that no outcome is guaranteed, the textual and policy justifications for a finding of corporate liability under the TVPA should suffice to convince the Court to adopt such a position. However, in the event that the Court holds to the contrary, other means for preserving corporate liability under the TVPA are available.

#### B. LEGISLATIVE MODIFICATION OF THE TVPA

Depending on the Supreme Court’s holding in *Mohamad* during the October 2011 Term, legislative modification of the TVPA may be required to address the ambiguity of the statute’s text while ensuring a cause of action for victims of human rights abuses at the hands of corporate actors. Although several possible changes to the TVPA’s language could be pursued, the easiest and least disruptive approach would be to alter the portion allocating liability so that it covers “any person” rather than “an individual.” Under this proposal, the modified version of the TVPA would read as follows:

Liability.—*Any person* who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to tor-

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194. See *Clinton*, 524 U.S. at 420–49 (majority opinion joined by Justices Kennedy, Thomas, and Ginsburg).

195. See *id.* at 453–55 (Scalia, J., concurring in part and dissenting in part). Although Justice Breyer joined part of Justice Scalia’s opinion, he did not join the part that criticizes this language in particular, and his dissent rested on different grounds. See *id.* at 470–97 (Breyer, J., dissenting).

196. See *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (majority opinion by Justice Ginsburg joined by Justices Kennedy, Thomas, and Breyer, as well as four others) (citing *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

197. See *id.* at 220 (Scalia, J., concurring in the judgment) (refusing to agree with the Court’s decision to “assign[] the identical language a different meaning . . .”).

ture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.<sup>198</sup>

Because the United States Code defines the term "person" to include more than just natural persons in most cases,<sup>199</sup> such revision would embrace liability for both natural and nonnatural persons, including corporations.

This alteration would improve the statute in several ways. Most of the major benefits of a favorable Supreme Court holding—clarification of the statute, preservation of congressional intent, and recognition of liability for various juridical entities<sup>200</sup>—would similarly emerge if the TVPA's language were modified in this manner. In particular, a legislative effort to replace "individual" with "person" when describing the liable actor would leave virtually no room for confusion regarding the applicability of the TVPA to corporate wrongdoers.

Two alternative revisions could also have the same or similar impact on the question of corporate liability, though each presents its own problems. First, Congress could change all instances of the word "individual" to "person," perhaps with the caveat that no foreign state or entity could be liable. Under this option, both the victim and the potential defendant would fall under the term "person," thus opening up the definition to any of the entities described in the Dictionary Act definition of the term.<sup>201</sup> While this move would eliminate the unhelpful specificity of "individual" as it is currently used in the statute, this sort of alteration would leave the statute vulnerable to the attack that the use of identical words "in different parts of the same act [implies] the same meaning" in both cases.<sup>202</sup> Because "[c]orporations, of course, cannot be tortured,"<sup>203</sup> the broader meaning of "person" would likely be narrowed to refer to natural persons so that the term could plausibly mean the same thing in both instances. Because this solution perpetuates the

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198. *Cf.* 28 U.S.C. § 1350 note § 2(a) (2006).

199. *See* Dictionary Act, 1 U.S.C. § 1 (2006).

200. *See supra* Part III.A.

201. *Cf.* § 1350 note § 2(a) (showing that an "individual" can both torture someone and be subject to torture).

202. *See* *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010) (quoting *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996)).

203. *Id.* (quoting *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000)).

problem rather than resolving it, Congress would have little incentive to pursue it.

A second alternative would be to add the phrase “or corporate entity” after the word “individual” in the provision discussing potential defendants, leaving “[a]ny individual or corporate entity” liable under the Act. This option would make it clear that corporations in particular could be liable for torture inflicted on individuals. Although this solution most clearly addresses the problem by expressly specifying the existence of corporate liability, it also would stand only a minimal chance of passing—Congress is unlikely to specifically target corporate entities without having some strong political capital or motivation to allow such a move. Further, this alteration does nothing to address the concerns of those who would seek redress from other juridical entities, such as the estates of deceased torturers. These issues can best be avoided by adopting the more modest approach of changing the word “individual” to “person” when describing the liable actor.

Of course, even if this suggested change to the TVPA’s text were pursued, passage of such a statutory revision is by no means guaranteed. As noted earlier, the current Congress may not see the elimination of torture and extrajudicial killings as a priority.<sup>204</sup> Although the TVPA reflects the will of Congress that such human rights violations be eliminated, this does not mean that the current Congress shares the 102nd Congress’s sense of urgency on the matter. Unless an unfavorable Supreme Court decision somehow compels Congress to take action, the motivation to act may not be present.

That said, legislative modification of the TVPA remains a viable option if the Supreme Court does not recognize organizational liability in *Mohamad*. Such legislation, if necessary, would meet all of Congress’s stated policy goals and uphold the nation’s international treaty obligations while requiring little more than the changing of a single word. Because such a simple change could have such a significant impact, those who believe that corporations should be held liable for human rights abuses should be prepared to pursue the legislative-modification option in the event that the Supreme Court fails to recognize nonnatural persons as liable under the TVPA.

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204. See *supra* notes 187–89 and accompanying text.

## CONCLUSION

The intertwined history of the ATS and the TVPA demonstrates the congressional desire that *some* forum or fora exist for the litigation of civil actions brought against any entity that engages in torture or extrajudicial killings. However, the ambiguities in the existing text of the TVPA have allowed courts to create a circuit split that threatens to eliminate any and all avenues for recovering damages from corporate wrongdoers. Because this foreclosure of remedies would be contrary to congressional purpose and public policy, the Supreme Court should recognize that nonnatural persons are liable under the TVPA when it considers the question in the October 2011 Term. Alternatively, proponents of corporate liability for human rights abuses should pursue legislative action to clearly codify such liability under the Act. Regardless, in an era where corporations are operating virtually unfettered, the focus on preventing such actors from engaging in the worst forms of human rights abuses should be renewed. Only then can we truly say that the United States is doing everything within its power to live up to its international obligations, provide appropriate forms of redress for the most horrendous abuses, and expand the rule of law and respect for human rights across the globe.