

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Court
Southern District of Texas
FILED

APR 06 2001 [LF]

Michael N. Milby, Clerk

ABOLALA SOUDAVAR,

§
§
§
§
§
§
§
§
§
§

Plaintiff,

vs.

Civil Action No. H-01-0343

THE PRESIDENT OF THE
UNITED STATES,

Defendant.

**DEFENDANT’S MOTION TO DISMISS ORIGINAL COMPLAINT
AND MEMORANDUM OF AUTHORITY**

Defendant “The President of the United States,” by the United States Attorney for the Southern District of Texas, files this motion to dismiss Plaintiff’s Original Complaint for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12 (b)(6), and states in support the following.

I.

Plaintiff Abolala Soudavar (“Soudavar”), a citizen of Iran and legal resident alien living in Houston, Texas, has filed this lawsuit challenging Executive Orders issued by former President Clinton imposing economic sanctions against the Republic of Iran. Soudavar, who claims to be the owner of a local business that imports and manufactures furniture and furnishings, alleges that he “stood to benefit substantially from commerce between Iran and the United States” but has been prevented from doing so due to the Executive Orders issued by President Clinton and similar previous Executive Orders issued by Presidents Carter and Reagan. Soudavar contends he does not challenge the decision to impose sanctions but rather the sanctions themselves, such as their nature

and length, stressing the absence of an emergency (Original Complaint, p. 8). He has predicated his lawsuit on 28 U.S.C. § 1332 (a)(2) and Article X, ¶ 1 of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, June 16, 1957 (Original Complaint, p. 4). Soudavar seeks an injunction against Executive Order No. 13059, \$500,000 in compensatory damages, legal costs and attorney's fees.

II.

A complaint filed by a pro se litigant is construed liberally. *Nerren v. Livingston Police Dept.*, 86 F.3d 469, 472 & n.16 (5th Cir. 1996). A complaint may be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court may consider the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 2001 WL 99807 (5th Cir. Feb. 5, 2001).

A complaint may be dismissed for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). In assessing a motion to dismiss for failure to state a claim, the complaint is construed liberally in plaintiff's favor and facts pleaded in the complaint are taken as true. *Shipp v. McMahon*, 234 F.3d 907, 911 (5th Cir. 2000)(citing *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986)). A plaintiff must plead specific facts, not mere conclusory allegations in order to withstand a motion to dismiss. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). "Conclusory allegations and unwarranted deductions of fact are not admitted as true," by a motion to dismiss." *Id.*, (quoting in part *Associated Builders, Inc. v. Alabama Power Company*, 505 F.2d 97, 100 (5th Cir. 1974)). "The district court may not dismiss a complaint under Rule 12(b)(6) 'unless

it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Shipp*, 234 F.3d at 911 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)). Applying these standards to the allegations set forth in plaintiff’s complaint, the complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted.

III.

Presidents Clinton, Reagan and Carter have issued Executive Orders imposing economic sanctions against Iran. *See, e.g., United States v. Ehsan*, 163 F.3d 855 (4th Cir. 1998)(discussing Executive Order Nos. 12957 and 12959, both issued in 1995, and 13059 issued in 1997); and *Dames & Moore v. Regan*, 453 U.S. 654, 663-67, 101 S.Ct. 2972, 2978-80, 69 L.Ed.2d 918 (1981)(discussing Executive Orders issued by Presidents Carter and Reagan). These Executive Orders were issued pursuant to the International Emergency Economic Powers Act, 91 Stat. 1626, 50 U.S.C. §§ 1701-1706 (“IEEPA”).

As discussed in *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1193 (D. Mass. 1986), *aff’d* 814 F.2d 1 (1st Cir. 1987):

The International Emergency Powers Act (“IEEPA”), 50 U.S.C. § 1701 *et seq.*, grants the President certain powers to deal with ‘any unusual and extraordinary threat which has its source in whole or substantial part outside the United States to the national security, foreign policy, or economy of the United States.’ 50 U.S.C. § 1701(a). Among these powers is the power to prevent the ‘importation or exportation of ... any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.’” 50 U.S.C. § 1702(a)(1). The President’s IEEPA powers may be exercised only when a state of national emergency has been declared. 50 U.S.C. § 1701(b).

IV.

“[T]he President of the United States is absolutely immune from damages liability arising from official acts.” *Forrester v. White*, 484 U.S. 219, 225, 108 S.Ct. 538, 542 (1988). As discussed above, the President of the United States may issue Executive Orders pursuant to his official duties. Soudavar’s claim for \$500,000 damages should be dismissed from the Original Complaint.

V.

Soudavar’s challenge to the sanctions and his contention that no emergency exists raise nonjusticiable political questions. In *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191 (D.Mass. 1986), the plaintiff exporters brought suit claiming that President Reagan had exceeded his statutory and constitutional authority by imposing an embargo on trade with the Republic of Nicaragua. They sought an injunction against enforcement of that embargo. *Id.*, at 1192. The district court determined, *inter alia*, that whether Nicaragua posed a sufficient threat to trigger the President’s IEEPA powers was a nonjusticiable political question. The court’s holding was based on several reasons as stated in the opinion, including that the matter was not susceptible to judicially manageable standards and would indeed require the court to make its own judgments about national security and foreign policy, *Id.*, at 1193-94. Soudavar’s challenge to the nature of the sanctions and whether an emergency exists with Iran present nonjusticiable political issues and his complaint should be dismissed.

VI.

Soudavar has no standing to challenge the lawful authority of the Executive Orders or the sanctions imposed by them. To have standing a plaintiff must establish three elements: (a) that he

has suffered injury in fact, that is, a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical; (b) causation, that is, a fairly traceable connection between the plaintiff's injury and the complained of conduct of the defendant; and (c) redressibility, that is, a likelihood that the requested relief will redress the alleged injury. *Pederson v. Louisiana State University*, 213 F.3d 858, 869 (5th Cir. 2000)(citing *Sierra Club v. Peterson*, 185 F.3d 349, 360 (5th Cir. 1999)). ““A question of standing raises the issue of whether the plaintiff is entitled to have the court decide the merits of the dispute or of particular issues. Standing is a jurisdictional requirement that focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.”” *Id.*, (quoting *Cook v. Reno*, 74 F.3d 97, 98-99 (5th Cir. 1996).

Soudavar contends that he has been deprived of potential economic business opportunity as a result of the sanctions against Iran. He has not shown, however, economic injury in fact. Neither has he shown a substantial likelihood that lifting the sanctions against Iran would redress the alleged injury by resulting in a business opportunity for him as opposed to his competitors. *Dellums v. U.S. Nuclear Regulatory Commission*, 863 F.2d 968, 972-73 (D.C. Cir. 1988)(noting that “[a] favorable change in economic incentives alone, without an additional showing that the change will be likely to redress the alleged injury, is not sufficient to establish the required causal nexus” for standing). Courts have consistently refused to adjudicate cases that raise only generalized grievances, that is, a harm shared in substantially equal measure by all or a large class of citizens. *Pederson*, 213 F.3d at 869. Soudavar lacks standing to bring this lawsuit and the complaint should be dismissed.

VII.

Soudavar cites as the jurisdictional basis for this suit diversity of citizenship under 28 U.S.C.

§ 1332(a)(2) and Article X, ¶ 1 of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, 8 U.S.T. 899. Jurisdiction based on diversity of citizenship is not appropriate in this case. Article X, ¶ 1 of the Treaty of Amity confers no jurisdictional basis for a suit by a citizen of a foreign state against the President of the United States. See e.g., *Soudavar v. Islamic Republic of Iran*, 186 F.3d 671, 674-75 (5th Cir. 1999), cert. denied, 528 U.S. 1157 (2000); *National Iranian Oil Company v. Ashland Oil, Inc.*, 716 F. Supp. 268, 274-75 (S.D. Miss. 1989).

VIII.

Soudavar has not alleged that he is pursuing a tort claim against the United States. However, to the extent that the court may construe Soudavar's complaint as alleging a tort claim against the United States, the undersigned attorney offers the following discussion.

The Federal Tort Claims Act ("FTCA") is a limited waiver of sovereign immunity. *Ross v. Runyon*, 858 F. Supp. 630, 634-35 (S.D. Tex. 1994). The FTCA is the exclusive means provided by statute for recovery of money damages against the United States in tort. *Id.* at 635; 28 U.S.C. § 2674. The FTCA imposes liability on the United States for personal injuries, death, or injuries to or loss of property caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. *Id.* at 635.

Under the FTCA, a lawsuit cannot be initiated against the United States unless the plaintiff has first exhausted his administrative remedies. 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 107, 113 S.Ct. 1980, 1981, 124 L.Ed.2d 21 (1993).¹ A plaintiff must file an administrative

¹ 28 U.S.C. § 2675(a) provides, in pertinent part: "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

claim against the United States with the appropriate federal agency within two years after the claim accrues and file suit within six months of the claim being denied. 28 U.S.C. § 2401(b); *Houston v. United States Postal Service*, 823 F.2d 896, 902 (5th Cir. 1987).² Once a plaintiff files a claim, he is prohibited from filing a lawsuit until the agency has denied the claim or six months have passed since the claim was filed. 28 U.S.C. § 2675(a). Compliance with the administrative claim process is a jurisdictional prerequisite to filing a lawsuit under the FTCA. *Ross v. Runyon*, 858 F. Supp. 630, 636 (S.D. Tex. 1994); *MacMillan v. United States*, 46 F.3d 377, 380 n. 3 (5th Cir. 1995). The plaintiff bears the burden of proving that he has complied with this jurisdictional prerequisite. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 210, 214 (2nd Cir. 1987). The failure of a claimant to exhaust his administrative remedies before filing an action under the FTCA deprives the court of subject matter jurisdiction over the suit. *Ross*, 858 F. Supp. at 636; *Reynolds v. United States*, 748 F.2d 291, 292 (5th Cir. 1984); *Taylor v. Administrator of Small Business Admin.*, 722 F.2d 105, 110 (5th Cir. 1983).

Soudavar has not alleged or demonstrated that he has exhausted his administrative remedies. This is fatal to his cause of action. *Bullion v. Livesay*, 83 F.R.D. 291 (E.D. Tenn. 1979); *Baritsky v.*

Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.”

² 28 U.S.C. § 2401(b) provides: “A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.”

United States, 72 F.3d 132 (7th Cir. 1995); *Chatman, Jr. v. Hernandez*, 805 F.2d 453 (1st Cir. 1986).


IX.

For the foregoing reasons, defendant requests that the Court enter an order granting this motion to dismiss the Original Complaint and dismissing Soudavar's lawsuit with prejudice.

Respectfully submitted,

Mervyn M. Mosbacher
United States Attorney

Keith E. Wyatt
Chief, Civil Division

By: 
Alice Ann Burns

Assistant United States Attorney
Federal ID No. 24251
910 Travis, Suite 1500
P. O. Box 61129
Houston, Texas 77208
Phone: (713) 567-9515
Fax: (713) 718-3303

Attorneys for United States