No. 03-339

# In the Supreme Court of the United States

JOSÉ FRANCISCO SOSA, PETITIONER

*v.*

HUMBERTO ALVAREZ-MACHAIN, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

**REPLY BRIEF FOR THE**
**UNITED STATES AS RESPONDENT**
**SUPPORTING PETITIONER**

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Section 1350 is solely a grant of jurisdiction: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. That means that, while Section 1350 has ensured since its original enactment as part of the Judiciary Act of 1789 that federal courts are open to the type of civil actions described by the provision, an alien must point to some *other* Act of Congress or treaty of the United States that creates a private right of action under federal law that may be brought under Section 1350. Not until 190 years after its enactment did any federal court definitively interpret or rely on Section 1350 as anything more than a jurisdictional grant.

Section 1350—which speaks in terms of "jurisdiction," and always has been surrounded by other jurisdictional provisions—does not contain any rights-creating language and therefore does not itself create any cause of action. That was as true in 1789 as it is today. Nor does Section 1350 permit federal courts to infer private rights of action directly from sources of customary international law (or to create a federal

common-law cause of action that in turn finds its content in customary international law). This Court has repeatedly recognized that causes of action generally must be created by Congress. That established principle has particular force in the context of the law of nations. Any other understanding would turn on its head the Constitution's separation of powers between the judiciary and the political branches in the vitally important realm of foreign affairs.

The contrary construction of Section 1350 adopted by the Ninth Circuit and urged by respondent is incompatible with the text and history of that provision; gives the courts, rather than the political branches, the primary role for defining and enforcing violations of international law; requires courts to develop an entirely judge-made legal regime to adjudicate Section 1350 actions; and, in just over two decades, has thrust the federal courts into a revolutionary role of arbitrating sensitive human rights disputes arising in foreign lands. That construction should be rejected and the Court should hold that Section 1350 is just what it says: a jurisdictional grant.

## I. SECTION 1350 IS SOLELY A GRANT OF FEDERAL JURISDICTION

1. Respondent, like the Ninth Circuit, construes Section 1350 not only to confer jurisdiction over the civil actions it describes, but also to supply a boundless cause of action on behalf of "aliens who are victimized by tortious violations of international law." Resp. Br. 9, 33-34. As the United States has explained (U.S. Br. 11-24), that position cannot remotely be squared with the language of Section 1350 under the principles that this Court customarily applies in determining whether Congress has created a "private right[] of action to enforce federal law." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Nor does it square with the settled understanding that "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from *other*

sources." *Montana-Dakota Co.* v. *Northwestern Pub. Serv.*, 341 U.S. 246, 249 (1951) (emphasis added).[1]

a. The terminology that respondent uses to describe Section 1350 itself demonstrates the extent to which his ambitions for Section 1350 exceed its text. Respondent—like the

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[1] Respondent states (Br. 30, 40 n.37) that the United States has taken contradictory positions on the scope of Section 1350. In *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the United States filed a brief supporting the result reached by the court of appeals in that case, albeit without specifically addressing the source of a cause of action. Since then, however, the United States has maintained a contrary construction of Section 1350 in other circuits and in this Court. In *Trajano* v. *Marcos*, 978 F.2d 493 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993), the first case after *Filartiga* in which the United States submitted its views on Section 1350, the United States argued that the statute is purely jurisdictional and does not supply a private right of action for alleged violations of international law in other countries. Likewise, in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the United States maintained the same position. See 87-1372 U.S. Br. Pet. Stage 13 n.11 ("[Section 1350] (like the federal question statute) is only jurisdictional in nature" and "does not create a cause of action in favor of an alien for a violation of the law of nations"); see also 87-1372 U.S. Br. 27-28 n.26. In *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996) the United States filed a statement of interest arguing that the district court erred in ruling that Section 1350 was inapplicable because the defendant was not a state actor. The United States did not disavow its position in *Trajano* and *Amerada Hess* on the scope of Section 1350, but instead simply stated (at 2) that it accepted *Filartiga* "as the law of this Circuit and the starting point for the necessary analysis." In June 2003, the United States filed an amicus brief in *Doe I* v. *Unocal Corp.*, Nos. 00-56603 & 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003), vacated & reh'g granted (argued June 11, 2003), taking the same position that the government took in *Trajano* and *Amerada Hess* on the scope of Section 1350. Furthermore, notwithstanding the position that the United States took in *Filartiga*, in the light of the litigation spawned by *Filartiga* and the reactions conveyed to the State Department from other countries affected by such litigation, see U.S. Br. 42-45, the United States (like this Court) is now in a better position to evaluate the serious practical and separation-of-powers problems of the *Filartiga* approach.

courts and commentators that have adopted his view—refers to Section 1350 as the "Alien Tort Claims Act." But respondent cannot convert the bare terms of Section 1350 into an Alien Tort Claims Act simply by labeling it as such. That is certainly not the title that Congress gave to Section 1350, either when it first enacted the provision as Chapter 20, § 9, 1 Stat. 77, of the First Judiciary Act or when it recodified it in 1911 or 1948 in chapters addressing the jurisdiction of district courts. See U.S. Br. 15-16. Moreover, any comparison between the jurisdictional language of Section 1350 and the rights-creating language of the "Federal Tort Claims Act," see 28 U.S.C. 2671-2680—which in its entirety also addresses, *inter alia*, exhaustion of remedies, availability of punitive damages, and choice of law—underscores just how much respondent's position would require the Court to engraft onto Section 1350 to create an "Alien Tort Claims Act."

b. Respondent attaches significance to Section 1350's reference to a "violation." See Resp. Br. 13 ("[T]he 'violation' language of section 1350 may be interpreted as explicitly granting a cause of action even if the 'arising under' language of section 1331 cannot.") (internal quotation marks omitted). That argument is refuted by *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). In *Touche Ross*, the Court held that Section 27 of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78aa, only "grants jurisdiction to the federal courts" and "creates no cause of action of its own force and effect," 442 U.S. at 577, even though it grants district courts "exclusive jurisdiction of *violations* of this chapter or the rules and regulations thereunder * * * ," 15 U.S.C. 78aa (emphasis added). See U.S. Br. 12-13. Section 1350's bare reference to "tort" does not suffice for the same reason that its reference to "violation" does not. Although there is some debate as to what "tort" meant in 1789, at best the reference to "tort" could be read to refer simply to a specific type of violation and not a grant of substantive rights.

c. Respondent states (Br. 33) that "the difference between the vocabulary of rights in 1789 and the approach embodied in *Sandoval* cautions against using the convenient analysis offered by Petitioner." However, *Sandoval* is more than "convenient analysis"; it is the law that governs whether a statute, including a statute enacted while a different view may have held sway, creates a cause of action. *Sandoval*, 532 U.S. at 288. In any event, as the United States has explained (U.S. Br. 15), the First Congress knew full well how to create private rights of action when it wanted to. Furthermore, no federal court inferred a cause of action from the language of Section 1350 until *after* this Court had itself "sworn off the habit of venturing beyond Congress's intent" in determining when a statute creates private rights. *Id.* at 287. Those two facts strongly counsel in favor of giving effect to the plain language of Section 1350's *jurisdictional* grant. U.S. Br. 19-20.

d. Respondent's effort to account for the Torture Victim Protection Act (TVPA), 28 U.S.C. 1350 note, is similarly unavailing. See Resp. Br. 34-37. The legislative history of the TVPA cannot supply any cause of action that Section 1350 itself does not. U.S. Br. 23-24. Moreover, although respondent attempts (Br. 36) to draw "similarities between [Section 1350] and the TVPA," the *contrast* between Section 1350's "jurisdiction" language and the TVPA's "establishment of civil action" language (and the accompanying specification of a statute of limitations and exhaustion requirement) underscores that Section 1350 is purely jurisdictional. See U.S. Br. 21. At the same time, if Section 1350 supplies the cause of action inferred by the Ninth Circuit, then the explicit cause of action created by the TVPA for the specified offenses of "torture" and "extrajudicial killing" not only was unnecessary for aliens, but the TVPA—by including an exhaustion requirement and statute of limitations not set forth in Section 1350—makes it *more* difficult to recover for the most despicable type of conduct—torture and extrajudicial

killing—relative to less egregious transgressions governed by Section 1350.

2. Respondent and his amici devote considerable effort to reconstructing a history of Section 1350 that supports their far-reaching interpretation of that statute. But no amount of historical research or speculation can overcome the fact that Section 1350 in its plain terms confers jurisdiction, and not a cause of action. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (when a statute's language is plain, the "sole function of the courts" is to give effect to its terms). In any event, although the origins and purpose of Section 1350 are shrouded in academic debate, what *is* known about the 215-year history of the provision directly refutes respondent's position in the following respect: Section 1350 was only rarely referred to in judicial decisions during the first 190 years of its existence, and not until the 1980s did any federal court discover a cause of action in Section 1350's jurisdictional terms. See U.S. Br. 19-20. That fact is the most clear and therefore compelling facet of Section 1350's past, and it points to the conclusion that the cause of action inferred by courts only in the past two decades never existed in the first place. See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370 (1959).

3. Respondent argues (Br. 4) that a plain-meaning construction of Section 1350 "renders it meaningless from its inception." But Congress did not enact a general federal question statute until 1875 (Act of Mar. 3, 1875, ch. 137, §1, 18 Stat. 470), and from 1789 until then Section 1350 ensured that the federal trial courts had jurisdiction over a significant class of potential civil actions by an alien.[2] Moreover, as explained by amici National Foreign Trade Council et al. (NFTC), when Congress passed the provision there

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[2] The First Judiciary Act created federal alienage jurisdiction, but imposed a $500 amount-in-controversy requirement on the exercise of that jurisdiction, which would have effectively barred many controversies that might otherwise be covered by Section 1350.

were several ratified treaties already in existence that conferred private rights for violations of the treaty provisions. One example is the Treaty of Amity and Commerce, July 9, 1785, U.S.-Prussia, art. 15, 8 Bevans 78, 83, which was designed to protect each nation's ships from the other nation's privateers, and created a private right for individuals injured by a violation of the treaty to be compensated in "damages and interest." See 2 *Treaties & Other Int'l Acts of the United States of America* 1 (Hunter Miller ed. 1931) (*Treaties*) (reproducing treaties from 1776-1818); NFTC Br. 26-27 (citing additional examples).[3]

## II. CUSTOMARY INTERNATIONAL LAW DOES NOT SUPPLY A BASIS FOR INFERRING A PRIVATE RIGHT OF ACTION

Because Section 1350 is purely jurisdictional, respondent must identify a private right of action "arising from other sources." *Montana-Dakota Co.*, 341 U.S. at 249. As this Court has made clear in cases like *Sandoval*, the only potential source of a private right under federal law is an Act of Congress or self-executing treaty of the United States. Courts have no license to infer private rights of action directly from the indeterminate body of customary international law or, for that matter, to create federal common-law causes of action that rely on customary international law for their content.

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[3] That those treaties all provided a right to damages for tortious wrongs committed by privateers is consistent with one historical theory that the language that became Section 1350 was addressed solely to the law of prize and was designed primarily to preserve a degree of concurrent state court jurisdiction over claims that might otherwise fall within the exclusive federal jurisdiction governing admiralty and maritime. See Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995). Under this view, the provision's rare usage would be consistent with the abolishment of privateering. *Id.* at 462. Section 1350 also may have provided an additional source of potential federal jurisdiction in such cases. See U.S. Br. 17.

1. Although respondent acknowledges that Congress may "specify" what violations of international law are privately actionable and may override or "correct" judicial decisions it deems erroneous, he maintains that federal courts may infer private rights of action from customary international law when Congress has not acted. Resp. Br. 30; see *id.* at 31 ("[E]ven when Congress is silent," courts may infer private rights of action under customary international law). That understanding is profoundly mistaken.

The Constitution gives Congress, not the courts, the authority to create causes of action. That principle applies with even greater force in contexts that implicate foreign affairs because the Constitution commits to the political branches, not the courts, the responsibility for managing the Nation's foreign affairs. For example, Article I, § 8, Cl. 10—which grants Congress the authority to "define and punish * * * Offenses against the Law of Nations"—"makes it abundantly clear that Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations ought to be cognizable in the courts." *Al Odah* v. *United States*, 321 F.3d 1134, 1147 (D.C. Cir.) (Randolph, J., concurring), cert. granted, 124 S. Ct. 534 (2003) (Nos. 03-334 & 03-434); see U.S. Br. 32. The TVPA underscores that Congress knows how to exercise that power. U.S. Br. 34. Likewise, the Constitution (U.S. Const. Art. II, § 2, Cl. 2) vests in the political branches, not the courts, the authority to enter into treaties or international agreements with other nations—and to define any privately enforceable features of those agreements. See U.S. Br. 36.

Respondent's position that courts may infer private rights of action either directly from customary international law or indirectly under the guise of federal common-law decisionmaking would eviscerate those fundamental textual constitutional commitments. In arguing that he has stated an actionable claim for damages, respondent relies on the same sources of customary international law as the Ninth Circuit. See Resp. Br. 48 n.48. They include: a non-binding U.N.

resolution (the Universal Declaration of Human Rights); a regional convention to which the Senate has refused to give its consent (the American Convention on Human Rights); two other regional conventions governing signatory nations in Europe and Africa; and a non-self-executing treaty that the Senate ratified only with the express understanding that it did *not* create private rights of action (the International Covenant on Civil and Political Rights (ICCPR)). See U.S. Br. 25-27. As Judge Randolph has observed, inferring private rights of action from such sources is fundamentally "anti-democratic and at odds with principles of separation of powers." *Al Odah*, 321 F.3d at 1148 (concurring).

Indeed, respondent's position not only would grant authority to the courts to engage in a function that the Constitution vests in the political branches, but it would permit the courts effectively to *nullify* the actions of the political branches in the realm of foreign affairs. In deciding whether to ratify a human rights treaty or convention, there often is extended debate in the political branches on whether to make such provisions self-executing or whether to express conditions or reservations on the United States' ratification of an international agreement. See U.S. Br. 37-38; Br. for Professors of Int'l Law et al. 19-20 & n.16. In ratifying the ICCPR, for instance, the Senate and the Executive specifically "clarified that the Covenant will *not* create a private cause of action in U.S. courts." S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 19 (1992); U.S. Br. 37. However, under respondent's view (Br. 48 n.48), the Ninth Circuit nonetheless appropriately relied on the ICCPR (along with the other provisions discussed above) in finding an actionable violation of customary international law under Section 1350.

2. Respondent defends that counterintuitive and anti-democratic result by arguing that, when Section 1350 was first enacted as part of the Judiciary Act of 1789, there was no understanding that the enforcement of international law "required further definition by statute." Resp. Br. 11; see *id.* at 14, 30-31. To begin with, even if that were an accurate

characterization of the First Congress's understanding, that historical understanding would supply no basis for inferring a private right of action from Section 1350's jurisdictional language *more than 200 years later*, when this Court has made unmistakably clear that "private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. Nor would it provide any basis to interpret Section 1350's jurisdictional grant as a grant of federal common-law decisional authority to the courts.

In any event, the available evidence indicates that the founding generation did not share respondent's view that the courts were free to entertain actions to enforce offenses against the law of nations as they saw fit, and that there was no need for any specific "statutory authorization to sue." Resp. Br. 11. As petitioner Sosa has explained (Pet. Br. 20-22), in 1781 the Continental Congress was concerned about the ability of existing legal institutions in the States to adjudicate and defuse sensitive international disputes—such as assaults on ambassadors in this country—by providing redress for individual wrongs against the law of nations. The Continental Congress responded by passing a resolution calling on "the legislatures of the several states" not only to enact criminal penalties for offenses against the law of nations, but also "to *authorise suits* to be instituted by damages for the party injured" for such offenses. 21 *Journals of the Continental Congress 1774-1789*, at 1136-1137 (Gaillard Hunt ed. 1912) (reproduced at Pet. Br. 3a-4a). There would have been no need for state legislatures "to authorise" such damages actions if courts were free to infer such a private right of action directly from the law of nations.

The following year, Connecticut enacted a statute "securing to Foreigners in this State, their Rights, according to the Laws of Nations, and to prevent any Infractions of said Laws." Acts and Laws of the State of Connecticut, in America 1784 (reproduced at Pet. Br. 5a-6a). In addition to creating certain criminal offenses for violation of the law of nations (such as infractions against ambassadors), the

statute employed rights-creating language to authorize suits by aliens against persons who damage their "Persons or Property" and stated that such persons "shall be liable to pay and answer all such Damages as shall be occasioned thereby." *Ibid.* Oliver Ellsworth—who drafted the First Judiciary Act—was a member of the Connecticut legislature that passed that act, as well as the Continental Congress that passed the 1781 resolution that led to the Connecticut act. Although Connecticut was the only State to respond to the 1781 resolution, its response bolsters the evidence that the founding generation—not to mention the author of the First Judiciary Act—appreciated that a legislative enactment was needed to create a private right of action to recover redress for a violation of the law of nations, and knew how to draft a statute employing rights-creating language.[4]

Similarly, in his *Commentaries*, Blackstone observed that the "law of nations" in its broadest form is "a system of rules, deductible by natural reason, and established by universal consent among the civilized inhabitants of the world." 1 *Commentaries* *66. However, he also explained that "acts of parliament * * * have from time to time been made to *enforce* this universal law, or to *facilitate the execution of it's decisions*." *Id.* at *67 (emphasis added); see also *id.* at *68 (discussing the three "principal offenses against the law of nations, *animadverted on as such by the municipal laws of England*") (emphasis added). The First Congress likewise enacted positive laws—including those punishing assaults on ambassadors—in order to "enforce" the law of nations in the

[4] Both the 1781 resolution and the 1784 Connecticut statute contained separate provisions that (1) conferred jurisdiction on the courts to hear cases alleging violations of the law of nations, and (2) granted a private right of action to recover damages for any injuries suffered as a result of such a violation. See Pet. Br. 4a, 6a. Section 1350 is modeled on the first (jurisdictional) clause, and does not contain the second (rights-creating) clause.

new Republic, "facilitate the execution of its decisions," and ensure "adequate punishment" for its violation. U.S. Br. 33.

Nor is Attorney General Bradford's 1795 opinion to the contrary. See Resp. Br. 14-15. That opinion, written in connection with a diplomatic protest by the Minister of Great Britain, was addressed to a incident that occurred in 1794 when an American slave-trader "voluntarily joined, conducted, aided, and abetted" a French privateer fleet in attacking the British colony of Sierra Leone, Africa, "plundering and destroying" their property. 1 Op. Att'y Gen. 57, 58 (1795); see William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 502-503 (1986). Attorney General Bradford observed that the alleged actions "against such as are in amity with us" were "in a violation of a treaty" between the United States and Great Britain. 1 Op. Att'y Gen. at 58. Article 7 of the Treaty of Peace of September 3, 1783, provided for peace between Great Britain and the United States and their subjects and citizens, although it did not specify a remedy for a breach. 2 *Treaties* 155 (reproducing treaty). Article 19 of the Treaty of Amity, Commerce, and Navigation between the United States and Great Britain, which was signed on November 19, 1794 (T.S. No. 105), and was before the Senate for its advice and consent at the time of Attorney General Bradford's opinion, provided that the privateers of one nation "shall forbear doing any Damage to those of the other party," and "shall also be bound in their Persons and Estates to make satisfaction and reparation for all Damages, and the interest thereof, of whatever the nature said damages may be." *Id.* at 259 (same). There is no record of any federal action being brought arising out of these incidents. In any event, Attorney General Bradford describes the provision that became Section 1350 as providing "jurisdiction" to the courts, not as a source of causes of action, and nothing in his

opinion supports respondent's sweeping view that federal courts may infer a cause of action under Section 1350 for asserted violations of customary international law norms that have not been adopted by the political branches.

3. Respondent argues that statements in *The Paquete Habana*, 175 U.S. 677 (1900), support the conclusion that courts may define the "scope of customary [international law] norms without the authorization of Congress." However, as the United States explained in its opening brief (U.S. Br. 34-35), nothing in *The Paquete Habana* or other cases from that era holds that federal courts are free to infer private rights of action directly from customary international law. Indeed, the Court's observation in *The Paquete Habana* that "[i]nternational law is part of our law" was followed by language acknowledging that a court's reference to international law cannot override a "controlling executive or legislative act." 175 U.S. at 700. As the United States has explained, in holding that courts may infer private rights from customary international law, the Ninth Circuit's decision in this case has precisely that effect. See U.S. Br. 35-36.

Moreover, although it may be appropriate in certain situations for a court to consult international law as a secondary consideration in a case properly before it, see, *e.g.*, *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), no decision of this Court supports the proposition that a court may infer a private right of action directly from customary international law as a matter of first principles. *The Paquete Habana* only observed that courts could look to international law when a matter was "duly presented" for decision. 175 U.S. at 700. The question at issue in that case—whether fishing vessels could be condemned under the law of prize, U.S. Br. 35 n.10—was "duly presented" by virtue of the lower court's prize jurisdiction, and not because customary international law provided a cause of action of its own force. Indeed, this Court has long recognized that even a ratified treaty does not necessarily create privately en-

forceable rights and that, instead, "the legislature must execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). There is no basis in our constitutional scheme for the Court to adopt a more relaxed approach with respect to the less concrete body of customary international law.

Respondent's reliance on statements from *The Paquete Habana* also fails to account for this Court's decision in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). *Erie* laid to rest the common law role that the federal courts had sometimes played in civil suits. In the aftermath of *Erie*, this Court has expressed a much different understanding. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981). Accordingly, even if respondent and his amici were correct that federal courts would apply international "law merchant" in federal common-law contract actions concerning international contracts prior to *Erie*, that does not mean that such actions somehow survive *Erie*, while ordinary domestic federal common-law contract actions do not.[5] In *Sandoval*, this Court admonished that "[raising] up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." 532 U.S. at 287. Although *Sandoval* did not involve

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[5] Respondent and his amici acknowledge that the practice of bringing common-law criminal actions to redress violations of the law of nations was, if anything, more established in 1789 than any practice of seeking civil redress for such violations. See, *e.g.*, Resp. Br. 21. The notorious attacks on ambassadors that occurred in the framing period were redressed by common-law criminal actions in state court, rather than by civil redress. See *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J. Cont. Cong. 109, 111 (1788). (Arguably, it was the lack of legislative authorization to bring such actions for civil redress that led to the 1781 resolution of Continental Congress discussed above.) Yet no one would contend that such actions, or common-law criminal actions in general, survived this Court's decision in *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812).

an attempt to "raise up" a cause of action from international law, given the clear textual commitment of the authority to define and manage the law of nations and foreign affairs to the political branches, such conjuring is, if anything, even more problematic in the context of Section 1350.[6]

To be sure, "[a] narrow exception * * * is found in admiralty." *Northwest Airlines*, 451 U.S. at 95. However, there is no basis for enlarging the "narrow" lawmaking role that federal courts have played in admiralty to customary international law *en masse*. As the United States has explained, the common law-type role played by the federal courts in admiralty is grounded in the textual grant of authority in Article III, § 2 of the Constitution and the 1000-year history of admiralty law that preceded it. See U.S. Br. 29-31; 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-1, at 166-168 (3d ed. 2001) (quoting *The Ship Catharina*, 23 F. Cas. 1028 (D. Pa. 1795) (N0. 13,949)). As the Fourth Circuit recently observed, "the Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, authorized the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction." *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 961, cert. denied, 528 U.S. 825 (1999). There is no comparable grant of authority in Article III with respect to the "law of nations" in general and, to the contrary, the only reference to the law of nations in the Constitution is in the define and punish clause in

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[6] As the United States has explained, the effect of this Court's statement in *The Paquete Habana* that "international law is part of our law," has been seriously debated in the wake of *Erie* and the limited role that *Erie* allows for any general federal common law. See U.S. Br. 35 n.11; see also *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1153-1154 n.4 (7th Cir. 2001). In any event, because even this Court's pre-*Erie* statements about international law do not support respondent's argument that federal courts may assume the role of inferring causes of action directly from customary international law, there is no need for the Court to revisit those pre-*Erie* statements in this case.

Article I (§ 8, Cl. 10). Nor is there any comparable historical practice of courts fashioning rights of action and applying the law of nations in general.[7]

Respondent's analogy to admiralty and maritime law is apt in one respect. If this Court embraces the Ninth Circuit's decision in this case, then federal courts will have to develop an entire common-law regime to adjudicate Section 1350 litigation akin to the extensive law of admiralty, no doubt with the need for frequent clarification by this Court. Section 1350—which merely grants jurisdiction to the federal courts and contains just 33 words—does not answer any of the questions that a court will necessarily confront in adjudicating a claim brought under the cause of action inferred by the Ninth Circuit. As a result, as respondent readily and necessarily concedes, courts will have to "derive federal common law rules to govern such issues as statutes of limitation, standing to sue, exhaustion of remedies, third party complicity and the like." Resp. Br. 32; see also *id.* at 29.

4. In response to the grave separation-of-powers concerns that stem from respondent's construction of Section 1350 (see U.S. Br. 40-46), respondent states that "[t]he courts are equipped with all the doctrinal machinery necessary to assure that only legal standards, not political judgments, are considered." Resp. Br. 38; see *id.* at 38-42. That assessment is, at a minimum, highly optimistic. But in any event, the existing "machinery" has not proved adequate to alleviate the international tensions that already have been created by the Section 1350 litigation that has followed in the

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[7] Although respondent suggests that the Framers' intent in fostering uniformity in the interpretation of the law of nations supports his view of Section 1350, a provision granting federal courts *concurrent* jurisdiction (as Section 1350 originally did) seems ill-suited to ensuring uniformity. Moreover, the records of the Constitutional Convention establish that the Framers—indeed, Madison himself—acted to instill uniformity by granting Congress the power "to define" the law of nations. See U.S. Br. 32-33.

wake of *Filartiga*. See U.S. Br. 43-45.[8] If this Court endorses the Ninth Circuit's expansive construction of Section 1350 in this case, the volume of Section 1350 litigation in the federal courts (which is now confined primarily to the Second and Ninth Circuits) will in all likelihood grow substantially.

Section 1350 also may interfere with the political branches' own efforts to promote human rights. The United States Government is committed to improving human rights practices around the world and uses a variety of measures to accomplish that goal, including military operations, treaties, formal condemnation, economic sanctions, and less severe penalties and incentives. As this Court has recognized, the political branches must have the flexibility to "calibrate" those measures to accomplish foreign policy objectives. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375-376 (2000); see *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374 (2003). Moreover, the political branches, which deal with foreign governments on the *whole range* of issues, are in a unique position to gauge whether raising human rights issues would interfere with other foreign policy objectives that are simultaneously being pursued. Section 1350 litigation brought by individuals or groups focused on a *single* issue may interfere with the efforts of the political branches to effectuate such foreign policy. For example, the existence of Section 1350 litigation may offend foreign governments or officials at the precise moment when the political branches of this country are trying to encourage them to reform abusive practices or are pursuing needed cooperation on an alternative front. See Br. for Commonwealth of Australia et al. 26-27. Similarly, the threat of Section 1350 litigation may deter U.S. or foreign investment in countries that the political branches here have determined would be

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[8] For instance, the political question doctrine is rarely invoked and, as even the Second Circuit candidly observed, "it would be a rare case in which the act of state doctrine precluded suit under section 1350." *Kadic*, 70 F.3d at 250.

conducive to positive reform in those countries. See U.S. Br. 43-45 & n.14; NFTC Br. 13-19.

To be sure, many Section 1350 actions are aimed at human rights abuses that are despicable and that already have been publicly or privately condemned by the United States Government. However, the variety of policy choices that the political branches of the United States Government routinely make in establishing and attempting to effectuate the Nation's foreign policy with respect to the foreign countries or actors responsible for such abuses makes this an area that is uniquely ill-suited for judicial involvement, oversight, or second-guessing. And these difficult and often nuanced foreign policy choices are precisely the sort of judgments that the Constitution commits to the political branches in conducting the Nation's foreign affairs.

5. Ironically, although the arguments made by respondent and his amici are grounded on a view that international law must play a preeminent role in the United States courts, the boundless right of civil redress for violations of customary international law that respondent infers from Section 1350 has no parallel in the domestic law of any other country of which the United States is aware. See Br. of Int'l Law Prof. 22; Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 Yale J. of Int'l Law 65, 101 (1995) ("no other nation invites such cases into its courts"). Perhaps the closest analogue is a 1993 Belgian law that authorized Belgian courts to hear war crimes cases regardless of where the crimes allegedly occurred or whose nationalities were involved. However, that act was met by a strong international condemnation (including by the United States), and was substantially narrowed. See Br. for Commonwealth of Australia et al. 8-9 & nn.9-10. The broad conception of universal *civil* jurisdiction that respondent advances is even more revolutionary than such controversial efforts to assert universal criminal jurisdiction. *Id.* at 6-7.

The unprecedented nature of the legal regime that the Ninth Circuit has adopted, and that respondent and his amici urge this Court to embrace in this case, is all the more reason for the Court to insist on a clear textual statement from Congress that it intended to create such a regime. Section 1350 does not come close to supplying any such command.

## III. SECTION 1350 DOES NOT APPLY ABROAD

Even if Section 1350 could be read to create a cause of action, or otherwise to permit implication of a cause of action from customary international law, Section 1350 should not be construed to permit such a result the world over. As the United States has explained, such a construction would be incompatible with the presumption against extraterritoriality and the general aversion that the founding generations had to casting judgment on the domestic actions of other countries. U.S. Br. 46-50. If anything, that presumption only gathers force when, as here, construing a statute to have extraterritorial effect would be likely to intrude on matters pertaining to the conduct of foreign affairs by the political branches. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-441 (1989).

Respondent suggests (Br. 27 n.26) that "the explicit references in [Section 1350] to 'aliens' and to the 'law of nations' confirm that Congress intended that the [statute] would apply to conduct outside the United States." That is incorrect. Indeed, the only two reported decisions in which Section 1350's predecessor was mentioned in the decade following its original enactment in 1789 took place on American soil or in United States territorial waters. See U.S. Br. 17, 48 (discussing *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), and *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607)). In addition, the incidents involving assaults on ambassadors that respondent himself recounts (Resp. Br. 18-20) in describing the backdrop of the First Judiciary Act occurred on *domestic soil* and involved the commission of an

offense against the law of nations that Congress explicitly defined and made punishable pursuant to the First Crimes Act in 1790. See 1 Stat. 113-115, 117-118; U.S. Br. 33.[9]

At the same time, if Section 1350 is construed to create a cause of action with respect to violations of international law against aliens anywhere in the world, then Section 1350 would have the effect of transporting United States law (including the United States courts' own interpretation and application of international law norms) to the far reaches of the globe in a manner that there is no indication that Congress intended. Indeed, as explained, the founding generations were particularly sensitive to the prospect of United States courts sitting in judgment on the actions of other nations, especially in foreign lands. See U.S. Br. 47; see also Br. for Commonwealth of Australia et al. 8-10 (discussing friction created by extraterritorial application of United States law). Such sensitivity is no less warranted today, and provides all the more reason to give effect to Section 1350's terms and hold that it is solely a jurisdictional grant.

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For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

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[9] Contrary to respondent's suggestion (Br. 5, 22-24), the "transitory tort doctrine" does not override the typical presumption against extraterritorial application of a federal statute. Cf. *Amerada Hess*, 488 U.S. at 440-441 (applying presumption against extraterritoriality in case involving alleged tort on high seas). Moreover, a practice's uniform condemnation by all nations provides, if anything, less justification for projecting United States law and courts into foreign countries.