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*

## BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONER


THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*

STUART E. SCHIFFER
*Acting Assistant Attorney General*

PAUL D. CLEMENT
EDWIN S. KNEEDLER
*Deputy Solicitors General*

GREGORY G. KATSAS
*Deputy Assistant Attorney General*

GREGORY G. GARRE
*Assistant to the Solicitor General*

DOUGLAS N. LETTER
BARBARA L. HERWIG
ROBERT M. LOEB
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514–2217*

WILLIAM H. TAFT IV
*Legal Adviser*
*Department of State*
*Washington, D.C. 20520-6419*

## QUESTIONS PRESENTED

Section 1350 of Title 28 of the United States Code provides: "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." The questions presented are:

1. Whether Section 1350 creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action.

2. Whether, to the extent that Section 1350 is not merely jurisdictional in nature, the challenged arrest in this case is actionable under Section 1350.

TABLE OF CONTENTS


| | Page |
|---|---|
| Statement | 1 |
| Summary of argument | 6 |
| Argument | 9 |
| The Ninth Circuit erred in holding that Alvarez-Machain has stated an actionable claim to recover damages for alleged vioations of customary international law norms in connection with his arrest in Mexico | 9 |
| I. 28 U.S.C. 1350 is purely a grant of jurisdiction and thus provides no basis for inferring a cause of action | 11 |
| A. This Court has refused to infer a private right of action in the absence of specific statutory language creating a cause of action | 11 |
| B. The text and statutory history of Section 1350 establish that it is strictly a jurisdictional measure | 14 |
| C. The limited judicial experience with Section 1350 from its original enactment until 1980 supports the conclusion that it is strictly a jurisdictional grant | 16 |
| D. The TVPA exemplifies the type of rights-creating language that Congress uses when it creates a cause of action | 21 |
| II. No cause of action may be infered from customary international law norms that have not been affirmatively adopted and made enforceable by the political branches | 24 |

TABLE OF CONTENTS—Continued: Page

A. The U.N. declarations and other sources of international law relied on by the Ninth Circuit furnish no basis for inferring a a private right of action ..... 24
B. Judicial inference of a private right directly from sources of customary international law is fundamentally inconsistent with the Constitution's separation of powers ..... 31
C. The litigation under Section 1350 that has proliferated in the federal courts in the past two decades underscores the gravity of those separation of powers problems ..... 40
III. No cause of action may be inferred from Section 1350 based on the alleged conduct of aliens in foreign countries ..... 46
Conclusion ..... 50

## TABLE OF AUTHORITIES

Cases:

*Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 534 (Nos. 03-334 & 03-343) (Nov. 10, 2003) ..... 23, 27, 33, 38, 40, 45
*Alexander* v. *Sandoval*, 532 U.S. 275 (2001) ..... *passim*
*Alvarez-Machain* v. *United States*, 504 U.S. 655 (1992) ..... 2-3
*American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374 (2003) ..... 31
*Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) ..... 18, 41
*Bano* v. *Union Carbide*, 273 F.3d 120 (2d Cir. 2001) ..... 41

Cases—Continued: Page

*Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) ..... 41
*Beazley* v. *Johnson*, 242 F.3d 248 (5th Cir.), cert. denied, 534 U.S. 945 (2001) ..... 27
*Bigio* v. *Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001) ..... 41
*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ..... 11
*Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) ..... 17
*Buell* v. *Mitchell*, 274 F.3d 337 (6th Cir. 2001) ..... 27
*Buzard* v. *Houston*, 119 U.S. 347 (1886) ..... 15
*Chicago & So. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) ..... 32
*Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001) ..... 11, 12
*Cort* v. *Ash*, 422 U.S. 66 (1975) ..... 20
*Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000) ..... 44
*Doe I* v. *Unocal Corp.*, Nos. 00-56603 & 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003), vacated and reh'g granted (argued June 11, 2003) ..... 45
*EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991) ..... 47
*Erie R.R.* v. *Thompkins*, 304 U.S. 64 (1938) ..... 29
*Estate of Ferdinand E. Marcos Human Rights Ligitation, In re*, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995) ..... 41
*FDIC* v. *Meyer*, 510 U.S. 471 (1994) ..... 12
*Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) ..... 7, 9
*Flores* v. *Southern Peru Cooper Corp.*, 343 F.3d 140 (2d Cir. 2003) ..... 18, 27, 28, 41

Cases—Continued: Page

*Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281 (1949) ..... 47
*Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893) ..... 31
*Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253 (1829) ..... 36
*Goldstair (Panama) S.A.* v. *United State*s, 967 F.2d 965 (4th Cir. 1992) ..... 41
*Gomez* v. *Toledo*, 446 U.S. 635 (1979) ..... 26
*Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2003) ..... 14, 26
*Hwang Geum Joo* v. *Japan*, 332 F.3d 679 (D.C. Cir. 2003) ..... 41
*Igartua De La Rosa* v. *United States*, 32 F.3d 8 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995) ..... 27
*ITT* v. *Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) ..... 9
*J.I Case Co.* v. *Borak*, 377 U.S. 426 (1964) ..... 13
*Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996) ..... 41
*Koohi* v. *United State*s, 976 F.2d 1328 (9th Cir. 1995), cert. denied, 508 U.S. 960 (1993) ..... 41
*Lampf, Pleva, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991) ..... 26
*Montana-Dakota Co.* v. *Northwestern Pub. Serv.*, 342 U.S. 246 (1951) ..... 12
*Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) ..... 17
*Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981) ..... 25, 29, 30
*O'Reilly de Camara* v. *Brooke*, 209 U.S. 45 (1908) ..... 18
*Oetjen* v. C*entral Leather Co.*, 246 U.S. 297 (1918) ..... 31
*R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943 (4th Cir. 2000) ..... 30
*Romero* v. *Internatoinal Terminal Operating Co.*, 358 U.S. 354 (1959) ..... 7, 19
*Rose* v. *Himely*, 8 U.S. (4 Cranch) 241 (1808) ..... 47
*Sale* v. *Haitians Ctrs. Council, Inc.*, 509 U.S. 155 (1993) ..... 47

Cases—Continued: Page

*Saltany* v. *Reagan*, 886 F.2d 438 (D.C. Cir. 1989) ..... 42
*Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001) ..... 35
*Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir 1985) ..... 42
*South African Aparteid Litigation, In re*, 238 F. Supp. 2d 1379 (Jud. Pan. Mult. Lit. 2002) ..... 43
*Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) ... 23, 41, 49
*The Paquete Habana*, 175 U.S. 677 (1900) ..... 34, 35
*Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979) ..... 12, 13
*United States* v. *Bowman*, 260 U.S. 94 (1922) ..... 47
*United States* v. *Carlton*, 512 U.S. 26 (1994) ..... 23
*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) ..... 31, 46
*United States* v. *Flores*, 289 U.S. 137 (1933) ..... 30
*United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832 (D. Mass. 1822) (No. 15,551) ..... 47
*United States* v. *Mitchell*, 445 U.S. 535 (1980) ..... 13
*United States* v. *Navajo Nation*, 537 U.S. 488 (2003) ..... 13
*United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818) ..... 47
*United States* v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820) ..... 35
*United States* v. *Testan*, 424 U.S. 392 (1976) ..... 13
*United States ex rel. Perez* v. *Warden*, 286 F.3d 1059 (8th Cir.), cert. denied, 537 U.S. 869 (2000) ..... 27
*Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) ..... 23
*Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001) ..... 41

Constitution, treaties, statutes and rule: Page

U.S. Const.:
Art. I:
§ 8, Cl. 3 ..... 31
§ 8, Cl. 10 ..... 8, 29, 30, 31, 32, 33
§ 8, Cl. 11 ..... 31
§ 8, Cl. 12 ..... 31
§ 8, Cl. 13 ..... 31
Art. II:
§ 2 ..... 31
§ 2, Cl. 2 ..... 36
Art. III ..... 29, 30, 39
§ 2 ..... 30
American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 ..... 27
Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. 100-20, 1988, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985) ..... 34
International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21st Sess, U.N. Doc. A/6316 (1966) ..... 4
Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/10, at 71 (1948) ..... 4
Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087 ..... 16
§ 24, para. 17, 36 Stat. 1093 ..... 16
36 Stat. 927 ..... 16
Act of June 25, 1948, ch. 646, 62 Stat. 869 ..... 16
An Act for the encouragement of learning, ch. 15, § 6, 1 Stat. 125-126 ..... 15
An Act for the government and regulation of Seaman in the merchants Service, ch. 29, § 5, 1 Stat. 133 ..... 15
An Act for the Punishment of certain Crimes against the United States, 1 Stat. 113-115 ..... 33
1 Stat. 117-118 ..... 33

| Statutes and rule—Continued: | Page |
|---|---|
| An Act to promote the progress of useful Arts, ch. 7, § 4, 1 Stat. 111 | 15 |
| Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Tit. X: | |
| § 1003(a), 106 Stat. 4522 | 24 |
| § 1003(a)(3), 106 Stat. 4521(1) | 24 |
| § 1003(a)(4), 106 Stat. 4522 | 24 |
| Federal Tort Claims Act: | |
| 28 U.S.C. 1346(b)(1) | 3 |
| 28 U.S.C. 2671-2680 | 3 |
| Indian Tucker Act, 28 U.S.C. 1498 | 13 |
| Judiciary Act of 1789, ch. 20, 1 Stat. 73 | 9 |
| 1 Stat. 73-81 | 15 |
| § 9, 1 Stat. 77 | 14 |
| Securities Exchange Act of 1934: | |
| § 17(a), 15 U.S.C. 78q(a) | 12 |
| § 27, 15 U.S.C. 78aa | 12, 13 |
| Tucker Act, 28 U.S.C. 1491 | 13 |
| Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73: | |
| § 2(a), 106 Stat. 73 | 21 |
| § 2(b), 106 Stat. 73 | 22 |
| § 2(c), 106 Stat. 73 | 22 |
| § 3, 106 Stat. 73 | 21 |
| 18 U.S.C. 1091-1092 | 34 |
| 18 U.S.C. 1091(a) | 34 |
| 18 U.S.C. 1091(d) | 34 |
| 18 U.S.C. 1092 | 34 |
| 18 U.S.C. 1201(a)(4) (1988) | 2 |
| 18 U.S.C. 1203(a) (1988) | 2 |
| 18 U.S.C. 2331 | 24 |
| 18 U.S.C. 2331(1) | 24 |
| 18 U.S.C. 2333 | 24 |
| 18 U.S.C. 2333-2334 | 24 |
| 28 U.S.C. 1332 | 12 |
| 28 U.S.C. 1350 | *passim* |
| 42 U.S.C. 1983 | 26 |
| S. Ct. R. 12.6 | 1 |

Miscellaneous: Page

6 Annals of Cong. 613 (1800) ..... 46
William Blackstone, *Blackstone's Commentaries on the Laws of England* (Wayne Morrison ed., 2001) (1783) .....
Vol. 3 ..... 14-15
Vol. 4 ..... 33
William R. Casto, *The Federal Court's Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467 (1986) ..... 17
*Commentaries on the Constitution of the United States* (Ronald D. Rotunda & John E. Nowak eds. 1987) ..... 32
132 Cong. Rec. 2350 (1986) ..... 27
136 Cong. Rec. 36,198 (1990) ..... 27
137 Cong. Rec. (1991):
p. 2670 ..... 22
pp. 34,785-34,794 ..... 22
138 Cong. Rec. (1992):
p. 4176 ..... 22
p. 8068 ..... 27, 37
pp. 8070-8071 ..... 27, 37
140 Cong. Rec. 14,326 (1994) ..... 27
I. Samuel Johnson, *A Dictionary of the English Language* (1755) ..... 14
Letter of George Washington to James Monnroe, Aug. 25, 1796 <http://memory.loc.gov/ammem/gwhtml/gwhome.html> ..... 48
Restatement (Third) of the Foreign Relations Law of the United States (1987) ..... 4
The Federalist Nos. 3, 64 (John Jay) ..... 39, 49
2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) ..... 32
35 *The Writings of George Washington from the Original Manuscript Sources 1745-1799* (John C. Fitzpatrick, ed 1940) ..... 48

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## BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONER

Pursuant to Rule 12.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, a respondent in this case (No. 03-339), respectfully submits this brief in support of petitioner Sosa.[1]

## STATEMENT

1. In 1985, Special Agent Enrique Camarena-Salazar of the Drug Enforcement Administration (DEA) was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico. He was tortured there for two days to extract information concerning the DEA's knowledge about the cartel, and then he was murdered. Eyewitnesses

[1] The United States is a party to this action and filed its own petition for a writ of certiorari (No. 03-485) seeking review of the court of appeals' decision in this case, raising additional questions concerning respondent Alvarez-Machain's separate claims against the United States. On December 1, 2003, this Court granted the United States' petition. The United States is filing a separate brief in No. 03-485.

placed Alvarez-Machain, a Mexican citizen, at the house while Camarena-Salazar was being tortured. DEA officials believed that Alvarez-Machain, "a medical doctor, participated in the murder by prolonging Camarena-Salazar's life so that others could further torture and interrogate him." *Alvarez-Machain* v. *United States*, 504 U.S. 655, 657 (1992); see Pet. App. 4a.[2]

In 1990, a federal grand jury indicted Alvarez-Machain for the torture and murder of Camarena-Salazar in violation of, *inter alia*, 18 U.S.C. 1201(a)(4) and 1203(a) (1988). The United States District Court for the Central District of California issued a warrant for his arrest. The DEA attempted to obtain Alvarez-Machain's presence in the United States through informal negotiations with Mexican officials. *Alvarez-Machain*, 504 U.S. at 657 n.2. After those efforts failed, the DEA approved the use of Mexican nationals, including Sosa, to take custody of Alvarez-Machain in Mexico and transport him to the United States. Several Mexican nationals, acting at the behest of the DEA, seized Alvarez-Machain in Mexico. In less than 24 hours, they transported him to the United States in a private plane, and into the custody of United States law enforcement officials. Pet. App. 5a.

Alvarez-Machain moved for dismissal of the indictment against him, arguing that he could not be tried in the United States because his seizure from Mexico was contrary to international law and the extradition treaty between the United States and Mexico. The district court and the Ninth Circuit agreed, ordering that the charges be dismissed and that Alvarez-Machain be returned to Mexico. This Court reversed. Alvarez-Machain's arrest, the Court held, "was not in violation of the Extradition Treaty." *Alvarez-*

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[2] The "Pet. App." citations in this brief are to the appendix to the petition in No. 03-339.

*Machain*, 504 U.S. at 670. Even if the arrest violated international law, the Court further held, Alvarez-Machain could be tried in this country. *Ibid.* The case was remanded for trial, which took place in 1992. At the close of the government's case, the district court granted Alvarez-Machain's motion for a judgment of acquittal. Pet. App. 6a.

2. In 1993, after returning to Mexico, Alvarez-Machain filed this civil action in the United States District Court for the Central District of California, asserting tort claims against the United States, DEA officials, Sosa, and certain unnamed Mexican civilians. The complaint sought, *inter alia*, to hold the United States liable for false arrest under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), 2671-2680, and Sosa liable for an asserted tort in violation of international law. He based the latter claim on 28 U.S.C. 1350 (Section 1350), which is sometimes referred to as the Alien Tort Statute (ATS). The district court dismissed Alvarez-Machain's FTCA claims against the United States. However, the court granted summary judgment for Alvarez-Machain on his claim against Sosa, reasoning that recovery was available because, the court believed, Alvarez-Machain's arrest and detention violated international law. After a trial, the court awarded $25,000 in damages against Sosa for the transborder abduction of Alvarez-Machain and his detention in Mexico. Pet. App. 6a-7a.

3. Alvarez-Machain and Sosa filed separate appeals. In 2001, the Ninth Circuit affirmed in part and reversed in part. Pet. App. 109a-139a. The court affirmed "the district court's judgment with respect to [petitioner] Sosa's liability under [Section 1350]." *Id.* at 139a. In so holding, the court concluded that Alvarez-Machain's "detention was arbitrary and, therefore, violated the 'law of nations.'" *Id.* at 119a. In addition, the court reversed the district court's dismissal of Alvarez-Machain's FTCA claims against the United States

and held that Alvarez-Machain could sue the United States for the tort of false arrest. *Id.* at 139a.

4. The Ninth Circuit granted rehearing en banc, withdrew the initial panel's decision, and, in a 6-5 decision, reached the same result as the initial panel. Pet. App. 1a-108a.

a. In considering Alvarez-Machain's claim against Sosa, the en banc court reaffirmed its prior case law concerning the scope of Section 1350. Pet. App. 8a-14a. The court explained that the Ninth Circuit has "resolved that [Section 1350] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Id.* at 10a. Furthermore, drawing from its case law, the Ninth Circuit rejected as too "restrictive" Sosa's argument "that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently 'universal' and 'obligatory' to be actionable as violations of 'the law of nations' under [Section 1350]." *Id.* at 11a.

Applying that understanding, the en banc court held that an "arbitrary" extraterritorial arrest is an actionable violation of international law pursuant to Section 1350. The court first concluded that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention," relying in particular on provisions of the Universal Declaration of Human Rights (Universal Declaration), G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948); the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A, 21st Sess., U.N. Doc. A/6316 (1966); and the Restatement (Third) of the Foreign Relations Law of the United States (1987). See Pet. App. 25a-26a & n.18. The court then concluded that Alvarez-Machain's arrest was arbitrary, and thus an actionable violation of the law of nations under the Ninth Circuit's construction of

Section 1350, because, the court held, the arrest was not authorized by United States or Mexican law. *Id.* at 29a-44a.

b. Judge O'Scannlain, joined by Judges Rymer, Kleinfeld, and Tallman, dissented. Pet. App. 72a-96a. Judge O'Scannlain found "astounding" the majority's decision "divin[ing] the entitlement to recovery from [Section 1350]" based on the alleged violation of international law in this case. *Id.* at 73a. Although he assumed that some violations of international law may be actionable under Section 1350, Judge O'Scannlain concluded that a "norm" of international law "to which the political branches of our government have refused to assent" is not actionable under Section 1350, and that "[i]t is not the judiciary's place to enforce such a norm contrary to their will." *Id.* at 81a; see *id.* at 80a.

After considering the actions of the political branches in this area, Judge O'Scannlain concluded that "[t]he United States does not, as a matter of law, consider itself forbidden by the law of nations to engage in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws." Pet. App. 86a-87a (footnote omitted). Regarding the claimed private right of action, Judge O'Scannlain observed that the ICCPR "was signed and ratified in 1992 but with the understanding by the Senate and Executive Branch that [the relevant provisions] are not self-executing and may not be relied on by individuals," and that the political branches have refused to recognize that the Universal Declaration creates "binding legal obligations." *Id.* at 87a n.12. Judge O'Scannlain also concluded that "the DEA was well within its delegated powers [under domestic law] when arresting Alvarez." *Id.* at 92a.

In Judge O'Scannlain's view, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make." Pet. App. 96a. He explained that the political

branches, "unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security," *ibid.*, including, Judge O'Scannlain observed, the "international war on terrorism." *Id.* at 72a.

c. Judge Gould filed a separate dissent. Pet. App. 97a-108a. He concluded that "this case presents a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision." *Id.* at 97a; see *id.* at 103a-104a.

## SUMMARY OF ARGUMENT

The Ninth Circuit erroneously held that Alvarez-Machain has established an actionable claim against Sosa under 28 U.S.C. 1350 (Section 1350) for alleged violations of customary international law norms in connection with his arrest in Mexico.

I. The Ninth Circuit erred, as a threshold matter, in concluding that Section 1350 is anything other than a grant of jurisdiction. By its terms, Section 1350 simply confers jurisdiction on the federal courts over a specified class of cases. It does not expressly confer any private right of action, it contains no language from which it might be possible to *infer* a private right, and, in particular, it lacks the "rights-creating language" that is "critical" to the creation of a private right of action. *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001). The conclusion that Section 1350 is purely a jurisdictional measure is supported by the fact that when Congress originally enacted Section 1350 it did so as part of the legislation that organized the federal courts and delineated their jurisdiction, and that when Congress has recodified Section 1350 in the past century, it has, again, done so as part of comprehensive legislation addressed to the organization and jurisdiction of the federal courts.

The history of the usage of Section 1350 also strongly suggests that it is strictly jurisdictional and does not, as the Ninth Circuit held, create a cause of action for the violation of the law of nations and treaties. From its enactment in 1789 until 1980, Section 1350 was invoked only rarely in the federal courts and only then as a potential alternative basis for jurisdiction. It was not until *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that the modern conception of Section 1350—a far-reaching cause of action on behalf of aliens for violations of international law anywhere in the world—took life and then spread. As this Court has observed in a similar vein, the most logical reason that a "revolutionary" new meaning of an "old judiciary enactment" was not recognized by judges earlier is that "it is not there." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370 (1959).

II. If Section 1350 is interpreted consistent with its clear terms to provide a grant of jurisdiction, and nothing more, then there is no basis for finding a cause of action in this case. Sources of customary international law, such as the U.N. resolution relied on by the Ninth Circuit, do not remotely provide a basis for inferring a cause of action. Indeed, far from finding any intent to create a cause of action in an Act of Congress, the Ninth Circuit relied on international agreements that the political branches had *refused* to ratify, like the American Convention on Human Rights, or had ratified only on the condition that they were *not* privately enforceable, like the ICCPR. That judicial exercise was profoundly out of line with the separation of powers. Likewise, nothing in Section 1350 provides a charge to federal courts to divine a federal common law of the law of nations, akin to the constitutionally grounded practice in admiralty.

The Constitution commits to the political branches, and not the courts, the responsibility for managing the Nation's

foreign affairs. In particular, the Constitution commits to the Legislative Branch the authority to "define and punish * * * Offences against the Law of Nations." Art. I, § 8, Cl. 10. That textual commitment was based on the Framers' recognition of the indeterminate and malleable nature of customary international law. The Constitution also proscribes special procedures for the consideration and approval of treaties with foreign nations. The Ninth Circuit's decision in this case permits a court to circumvent those constitutional procedures and to both define the law of nations that is enforceable in a damages action in United States courts and recognize private rights that are at odds with the statements and actions of the political branches in deciding to ratify treaties, or not, and on what terms.

The nature and variety of suits under Section 1350 that have proliferated in the lower courts in the two decades since the Second Circuit decided *Filartiga* underscore the potential that such litigation has for interfering with the conduct of sensitive diplomatic matters entrusted to the political branches. That experience magnifies the gravity of the separation-of-powers problems created by the Ninth Circuit's construction of Section 1350, and the need for this Court to correct the fundamentally mistaken understanding of Section 1350 that has emerged in the lower courts in the past two decades and that the Ninth Circuit applied in this case.

III. The Ninth Circuit also erred in concluding that Section 1350 applies to alleged torts, such as the one in this case, that occur outside the United States. The longstanding presumption is that, unless a statute contains a contrary expression or touches on certain special concerns, the statute applies only within the territory of the United States, or, in limited circumstances, on the high seas. That presumption is designed to prevent unintended clashes between the laws of this country and those of other nations and, thereby, to pre-

vent international discord. The presumption accordingly has special force in the context of Section 1350. There is no basis to conclude that Section 1350 establishes a roaming cause of action that permits aliens to come to United States courts and recover money damages for violations of international law anywhere around the globe.

## ARGUMENT

### THE NINTH CIRCUIT ERRED IN HOLDING THAT ALVAREZ-MACHAIN HAS STATED AN ACTIONABLE CLAIM TO RECOVER DAMAGES FOR ALLEGED VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW NORMS IN CONNECTION WITH HIS ARREST IN MEXICO

This case (No. 03-339) concerns the proper interpretation and application of 28 U.S.C. 1350 (Section 1350). What is now Section 1350 originated as part of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, the legislation that laid the foundation for the Nation's federal courts. For the next 190 years, that provision was invoked only rarely in federal cases as a potential source of jurisdiction and thus remained on the books only as an obscure vestige of the First Judiciary Act—"a kind of legal Lohengrin." *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.). In 1980, however, the Second Circuit—the first court of appeals to expound on Section 1350—held that a damages action could be brought under Section 1350 by Paraguayan citizens against a Paraguayan official for the alleged torture and killing of a family member in Paraguay. *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (1980).

Since *Filartiga*, litigation brought pursuant to Section 1350 has proliferated in the Second Circuit and other federal courts of appeals, like the Ninth Circuit, which have concluded that Section 1350 not only is a grant of jurisdiction, but also creates a cause of action on behalf of aliens for the

violation of customary international law norms—anywhere in the world. That construction of Section 1350 misconstrues the role of the courts in interpreting jurisdictional provisions and, in practical effect, has thrust the courts into foreign-affairs matters that the Constitution assigns to the political branches. In this case, for example, the Ninth Circuit held that an actionable claim exists under Section 1350 based on the alleged violation of customary international norms that the court derived from international agreements and declarations that the political branches either have refused to ratify, or have ratified based only on the condition that the instrument is not self-executing and, thus, not privately enforceable in United States courts. Pet. App. 25a-26a.

As explained below, the Ninth Circuit's understanding and application of Section 1350 is fundamentally flawed in at least three critical respects. First, the terms, statutory history, and sparing usage of the provision from 1789 until 1980 compel the conclusion that it is purely a jurisdictional provision and, thus, not a source of any substantive rights. Second, in our constitutional system, a private right of action under federal law must stem from an Act of Congress that affirmatively confers such rights. Such a right of action cannot be furnished by a federal court drawing from indeterminate and malleable sources of customary international law. None of the instruments on which the Ninth Circuit relied in canvassing international law norms in this case remotely provides an adequate basis for inferring a cause of action. Third, Section 1350 does not apply extraterritorially to claims based on alleged violations of international law occurring in a foreign country. The Ninth Circuit's judgment in this case accordingly should be reversed.

## I. 28 U.S.C. 1350 IS PURELY A GRANT OF JURISDICTION AND THUS PROVIDES NO BASIS FOR INFERRING A CAUSE OF ACTION

### A. This Court Has Refused To Infer A Private Right Of Action In The Absence Of Specific Statutory Language Creating A Cause Of Action

1. This Court has recently articulated the basic principles governing the determination whether a private right of action exists under federal law. First, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Second, in determining whether Congress has created such rights, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"—"[s]tatutory intent * * * is determinative." *Ibid.* Third, in divining Congress's statutory intent, the Court focuses on the text of the statute and, in particular, looks for "'rights-creating' language." *Id.* at 288. Finally, if the statute does not create a cause of action, then "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-287.

In *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 67 n.3 (2001), this Court reiterated that it has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one," and the Court's recent decisions in this area of law exemplify that admonition. In *Malesko* itself, for example, the Court declined to extend the right of action inferred in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a new context, noting that *Bivens* in turn had relied on earlier decisions of this court recognizing private rights of action under federal statutes under a mode of analysis that

this Court has since "abandoned." See 534 U.S. at 74-75. See also, *e.g.*, *Sandoval*, 532 U.S. at 293 (Title VI does not create a private right of action to enforce disparate-impact regulations); *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994) (declining to infer private right of action under *Bivens* against a federal agency).

2. A natural corollary to this Court's refusal to infer a cause of action in the absence of rights-creating language is the Court's recognition that jurisdictional statutes do not create causes of action. For example, 28 U.S.C. 1332 provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds [a certain amount] and is between * * * citizens of different states." But Section 1332 does not contain any rights-creating language and it is beyond dispute that it creates no right of action. Rather, as Justice Jackson wrote for the Court more than 50 years ago, "[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).

Numerous decisions of this Court are to the same effect. For example, in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577 (1979), the Court rejected the contention that Section 27 of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78aa, conferred a private right of action for damages on behalf of brokerage firm customers for losses arising from misstatements in financial reports required by Section 17(a) of the 1934 Act, 15 U.S.C. 78q(a). The Court explained that "Section 27 grants jurisdiction to the federal courts" and "creates no cause of action of its own force and effect; it imposes no liabilities." 442 U.S. at 577.[3] As a result,

[3] Section 27 of the 1934 Act provides in part: "The district courts of the United States * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in

the Court held, "[t]he source of plaintiffs' rights must be found, if at all, in the *substantive* provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision." *Ibid.* (emphasis added). Significantly, in reaching that conclusion, the Court did "not now question the actual holding of [*J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)]"—which the Court has since characterized as exemplifying its prior willingness to "ventur[e] beyond Congress's intent" in inferring rights of action, *Sandoval*, 532 U.S. at 287—but rather emphasized that even *Borak* did not support recognition of a private right of action based on a *jurisdictional* provision of the 1934 Act. 442 U.S. at 577.

The Court has reached a similar conclusion in construing the jurisdictional grant in the Tucker Act, 28 U.S.C. 1491, and the parallel grant in the Indian Tucker Act, 28 U.S.C. 1498. See, *e.g.*, *United States* v. *Navajo Nation*, 537 U.S. 488, 503 (2003); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 398 (1976). As this Court recently reiterated in *Navajo Nation*, while the Tucker Acts confer jurisdiction on the Court of Federal Claims, the Acts do not themselves create substantive rights to money damages. Rather, to state a claim under the Tucker Acts, a "plaintiff must invoke a rights-creating source of substantive law"—apart from the Tucker Acts—that itself establishes a private right to damages. 537 U.S. at 503; see *Mitchell*, 445 U.S. at 538; *Testan*, 424 U.S. at 398.

3. Applying those fundamental principles to the statute at issue in this case compels the conclusion that the Ninth Circuit erred in holding that "[Section 1350] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." Pet. App. 10a. Section 1350 is, as its plain and

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equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. 78aa.

simple terms suggest, a jurisdictional provision—nothing more and nothing less.

### B. The Text And Statutory History Of Section 1350 Establish That It Is Strictly A Jurisdictional Measure

1. Section 1350 of Title 28 of the United States Code states: "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." By its terms, Section 1350 thus confers subject-matter jurisdiction on the federal district courts over a specified category of cases. It does not purport to confer private rights of action, and it contains no language from which a private right of action could be inferred, let alone the sort of "'rights-creating' language" that this Court has characterized as "critical" to determining that Congress intended to create a private right of action. *Sandoval*, 532 U.S. at 288; see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 n.3 (2003) ("Where a statute does not include * * * explicit 'right-or duty-creating language' we rarely impute to Congress an intent to create a private right of action.") (citing provisions with such rights-creating language).

2. The conclusion that Section 1350 grants only jurisdiction—and not a private right of action—is consistent with the terms of its original enactment in the Judiciary Act of 1789. That provision stated, in pertinent part, that the district courts shall have "*cognizance*, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an Alien sues for a tort only in violation of the law of Nations or a Treaty of the United States." Ch. 20, § 9, 1 Stat. 77 (emphasis added). When the First Congress met, the term "cognizance" was used to connote jurisdiction, *i.e.*, the "judicial authority." I Samuel Johnson, *A Dictionary of the English Language* (1755) ("Cognizance" means "1. Judicial notice; trial; judicial authority.") (1968); 3 William Blackstone, *Blackstone's Commen-*

*taries on the Laws of England* *42 (Wayne Morrison ed., 2001) (1783) (*Commentaries*) (noting that the court of the King's Bench "takes cognizance both of criminal and civil causes"). And Congress used the term cognizance throughout the Judiciary Act of 1789, see 1 Stat. 73-81, which, as this Court has recognized, "established the judicial courts of the United States, and defined their jurisdiction." *Buzard* v. *Houston*, 119 U.S. 347, 351 (1886).

At the same time, the First Congress used demonstrably different language when it intended to create private rights of action. For example, in An Act for the Government and Regulation of Seaman in the Merchants Service, ch. 29, § 5, 1 Stat. 133, Congress provided that a seaman who abandons his vessel "shall be liable to pay [the master] all damages * * * and such damages shall be recovered with costs, in any court * * * having jurisdiction of the recovery of debts." Likewise, in one of the first copyright statutes, Congress provided that any individual who infringed a copyright would be "liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof." An Act for the Encouragement of Learning, ch. 15, § 6, 1 Stat. 125-126; see also An Act to Promote the Progress of Useful Arts, ch. 7, § 4, 1 Stat. 111 (patent infringer "shall forfeit and pay to the said patentee * * * such damages as shall be assessed by a jury * * * which may be recovered in an action on the case founded on this act").

3. Congress's recodifications of Section 1350 from its original form in the First Judiciary Act into its present form in Title 28 of the United States Code confirm that it is just what it says: a jurisdiction-granting provision. Both times Congress reenacted and recodified Section 1350 in the past century, it did so as part of comprehensive legislation addressed to the organization and jurisdiction of the federal

judiciary, and not as part of legislation addressed to the creation (or maintenance) of private rights of action, much less legislation addressed to foreign policy issues. The Act of March 3, 1911, ch. 231, 36 Stat. 1087, was enacted "to codify, revise, and amend the laws relating to the judiciary." Chapter Two of the Act—which governed the "Jurisdiction" of "District Courts"—stated that "[t]he district courts shall have original jurisdiction as follows: * * * Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States." § 24, para. 17, 36 Stat. 1093. Similarly, the Act of June 25, 1948, ch. 646, 62 Stat. 869, was enacted "[t]o revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary.'" Part IV of the Act governed "Jurisdiction and Venue" of the federal courts. 36 Stat. 927. Chapter 85 of Part IV—entitled "District Courts; Jurisdiction"—set forth the current version of the statute found in 28 U.S.C. 1350. 36 Stat. 927. The immediate history of Section 1350—the actual statute before the Court in this case—thus confirms the conclusion that it is solely a jurisdictional grant.

### C. The Limited Judicial Experience With Section 1350 From Its Original Enactment Until 1980 Supports The Conclusion That It Is Strictly A Jurisdictional Grant

Given that the plain text of Section 1350 and the statutory history discussed above point unmistakably to the conclusion that it is solely a jurisdiction-granting provision, it is highly doubtful that any secondary consideration could support the conclusion that Section 1350 not only grants jurisdiction, but also supplies a cause of action. That is especially true given the far-reaching foreign-policy and fundamental separation-of-power consequences of the interpretation—adopted by courts of appeals such as the Ninth Circuit—that Section 1350 supplies a cause of action for alleged violations of various U.N. declarations and treaties that themselves do not supply such a right. See Part II, *infra*. In any event, as

explained below, the exceedingly rare invocation of Section 1350 (and its statutory predecessors) from 1789 to 1980 powerfully confirms that it simply supplies jurisdiction, and not the free-ranging cause of action that the courts of appeals have recognized in the past two decades.

1. Although a great deal has been written about the history of Section 1350 since the Second Circuit's decision in *Filartiga*, not much is known for certain about the origins or original purpose of the law. Neither the recorded history of the Judiciary Act of 1789 nor the private writings of the Members of the First Congress expound in any depth on the provision. Moreover, the sparing invocation of the provision from 1790 to 1980 confirms that it was not designed to create the extraordinary cause of action that was ostensibly discovered by federal courts 190 years after the First Judiciary Act was passed. Likewise, Congress's decision to recodify the provision twice—in 1911 and 1948—after 122 and 159 years of relative judicial inactivity belies any claim that Congress intended the courts to infer causes of actions from the basic terms of Section 1350's jurisdictional grant.

In the decade following the enactment of the Judiciary Act of 1789, only two reported cases referred to the statutory provision now embodied in Section 1350—*Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). *Moxon* involved the capture of a foreign ship in United States territorial waters, and *Bolchos* involved the seizure of slaves on a foreign ship at a United States port. In each case, the courts considered Section 1350's predecessor only as a potential alternative basis for exercising subject-matter jurisdiction, in addition to the grant of exclusive jurisdiction in the First Judiciary Act over admiralty actions.

Then, from 1795 to 1980, the provision essentially "lapsed into desuetude." William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of*

*the Law of Nations*, 18 Conn. L. Rev. 467, 468 (1986); see *id.* at 469 n.7 (citing smattering of reported cases in which federal courts declined to exercise jurisdiction under what is now Section 1350 during the twentieth century). That changed only in 1980, when the Second Circuit issued its decision in *Filartiga*. Although there has been some debate about the scope of the court's holding in *Filartiga*, the Second Circuit has recently stated that, "[b]y allowing the plaintiffs' claim to proceed, the *Filartiga* Court not only held that [Section 1350] provides a jurisdictional basis for suit, but also recognized the existence of a private right of action *for aliens only* seeking to remedy violations of customary international law or of a treaty of the United States." *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 149-150 (2d Cir. 2003) (emphasis in original).

Since *Filartiga*, litigation asserting claims under Section 1350 for alleged violations of international law—relating to events and human rights abuses around the globe—has proliferated in the federal courts in this country that, like the Ninth Circuit, have construed Section 1350 and, through it, customary international law, as a source of private rights enforceable in a cause of action for damages in United States courts. See *Flores*, 343 F.3d at 149 ("Questions regarding the purpose and scope of the [ATS] did not attract substantial judicial attention until the latter part of the Twentieth Century, when the [ATS] was first recognized by a federal appellate court as a viable basis for relief in *Filartiga*."); Pet. App. 9a-10a; note 13, *infra*.[4]

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[4] This Court has not considered Section 1350, or any of its statutory predecessors, in detail. The underlying claim in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which sought damages for the sinking of an oil tanker during the Falklands War, was brought under Section 1350. This Court, however, decided the case on foreign sovereign immunity grounds and therefore did not consider Section 1350. See *id.* at 434-435. In *O'Reilly de Camara* v. *Brooke*, 209 U.S. 45 (1908),

2. This Court has previously expressed skepticism about the sudden "discovery of new, revolutionary meaning in reading an old judiciary enactment." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959). In *Romero*, the Court rejected a novel assertion of maritime jurisdiction under an 1875 Act of Congress. In writing for the Court, Justice Frankfurter observed:

> The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the [Judiciary] Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there.

*Id.* at 370-371. That presumption is also "powerful" with respect to the discovery made by the *Filartiga* court in 1980. Indeed, in the case of Section 1350, the passage of nearly *two centuries*, and not just 75 years, supports the conclusion that *Filartiga*'s discovery of a "revolutionary," new rights-creating dimension of Section 1350 was not uncovered earlier because it is not there.

The timing of the lower courts' discovery of a cause of action in Section 1350 is particularly striking when viewed in

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the Court affirmed the dismissal of a complaint brought by a Spanish national who alleged that a member of the United States military had improperly extinguished the emoluments of her government office in Havana, Cuba, during the course of the military's occupation of Cuba under the treaty that ended the Spanish-American War. The complaint asserted jurisdiction under an earlier version of Section 1350. *Id.* at 48. The Court found several "technical difficulties" that supported the dismissal of the action, including that the Secretary of War and Congress itself had ratified the alleged act that served as the basis for the plaintiff's action. *Id.* at 50.

light of the developments in this Court's own case law concerning the proper method for determining whether Congress intended to create a private right of action. In *Sandoval*, the Court emphasized that it had long since abandoned "the understanding of private causes of action that held sway 40 years ago when Title VI [of the Civil Rights Act of 1964]" (the statute at issue in *Sandoval*) was enacted, pointing to its decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), as the dividing line. 532 U.S. at 287. So too, the Court in *Sandoval* rejected the argument that the fact that a statute was enacted at a time when the Court was more willing to supply rights of action that were not anchored in a statute's text calls for a different mode of interpreting the statute. *Id.* at 288.

In any event, the general legal context in which Section 1350 was first enacted is a wholly insufficient basis from which to infer a private right of action that is not remotely supported by the text of the statute. See *Sandoval*, 532 U.S. at 288 ("In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent that it clarifies *text*.") (emphasis added; citation omitted). That is especially true given that, as discussed above, the First Congress—like those that followed it—knew full well how to use rights-creating language when it wanted to create a private right of action for damages. See p. 15, *supra*.

The history of Section 1350 after its original enactment makes inference of a cause of action especially implausible today. As discussed above, no reported decision recognized a cause of action based only on Section 1350 in the decade following its original enactment in 1789, or in the following 190 years. Congress, moreover, twice recodified and revised (in minor ways) Section 1350 in the past century without expressing any indication that it viewed the statute as anything other than a jurisdictional grant. And, then, only in

1980—long after this Court had already "sworn off the habit of venturing beyond Congress's intent" in determining when a statute creates private rights, *Sandoval*, 532 U.S. at 287—did a court discover that Section 1350 supplied a cause of action.

### D. The TVPA Exemplifies The Type Of Rights-Creating Language That Congress Uses When It Creates A Cause Of Action

The stark contrast between the jurisdiction-conferring language of Section 1350 and the rights-creating language of the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), further underscores that the Ninth Circuit was fundamentally mistaken in concluding that Section 1350 itself creates a cause of action.

1. The TVPA, which was signed into law in 1992, creates a cause of action for torture and extrajudicial killing. Section 2 of the Act—entitled "ESTABLISHMENT OF CIVIL ACTION"—provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing shall, in a civil action, be liable for damages" to the individual or, in the case of death, his legal representative. § 2(a), 106 Stat. 73.

Furthermore, the TVPA is limited in important substantive and procedural respects, illustrating the care that Congress took in crafting the cause of action, and the kind of accommodations that Congress adopts when it expressly enacts causes of action that implicate delicate foreign policy concerns. First, Congress carefully defined the acts of "torture" and "extrajudicial killing" that were actionable. § 3, 106 Stat. 73. Second, Congress indicated a respect for foreign judicial systems and an appreciation for the difficulty of litigating claims based on actions overseas by imposing an exhaustion requirement on plaintiffs: "[a] court shall decline

to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." § 2(b), 106 Stat. 73. Third, Congress imposed a 10-year statute of limitations for claims brought under the TVPA. § 2(c), 106 Stat. 73.[5]

2. In at least two key respects, Congress's enactment of the TVPA underscores the error of the Ninth Circuit and other courts of appeals in construing Section 1350 to confer a cause of action. First, the TVPA demonstrates that Congress knows how to create explicit rights of action for a violation of what is defined as the law of nations when it wants to, and that Congress acts with great care in limiting the scope of the action and identifying the actionable violations of the law of nations. The danger of inferring a cause of action out of text that provides for jurisdiction and nothing more is that such text provides no clues as to how Congress would have resolved questions like exhaustion of local remedies if, contrary to fact, Congress had provided for a cause of action. Second, the TVPA is largely superfluous for aliens if Section 1350 is read to supply the type of cause of action inferred by the Ninth Circuit for violations of international law because Section 1350 would already supply a right of action in the Ninth Circuit to recover damages for alleged acts of torture and extrajudicial killing. Moreover, an alien would have little incentive to bring an action *under*

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[5] The bill that became the TVPA was initially introduced in 1986 but was not enacted until 1991. During the course of its consideration of the TVPA, Congress, *inter alia*, narrowed the definition of torture to accommodate concerns expressed by some Members of Congress and added the exhaustion requirement and statute of limitations. See 138 Cong. Rec. 4176 (1992) (statement of Senator Grassley); 137 Cong. Rec. 2670 (1991) (statement of Senator Specter); 137 Cong. Rec. 34,785-34,794 (1991) (statement of Congressman Mazzoli). Thus, the final legislation was the product of careful deliberation and compromise.

*the TVPA* or comply with its exhaustion requirement when he could file under Section 1350 and invoke the unbounded cause of action inferred by the Ninth Circuit.

3. Although it noted the disagreement in the lower courts over whether "section 1350 can be used * * * absent an explicit grant of a cause of action by Congress," the Senate Committee Report stated that the TVPA was not intended to displace Section 1350, and that the cause of action that has been inferred under that provision "should remain intact." S. Rep. No. 249, 102d Cong., 1st Sess. 4-5 (1991) (referring to Judge Bork's concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985)); see also H.R. Rep. No. 367, 102d Cong., 1st Sess., Pt.1, at 4 (1991).

That legislative history is entitled to no weight in discerning the intent of the Congress that first enacted Section 1350 more than 200 years earlier, or of the subsequent Congresses that reenacted that provision without further elaboration. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000) (refusing to look to legislative history from 1986 setting forth "a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier"); *United States* v. *Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring). Moreover, as Judge Randolph recently observed, "the wish expressed in the committee's statement [about Section 1350] is reflected in no language Congress enacted; it does not purport to rest on an interpretation of § 1350; and the statement itself is legislative dictum." *Al Odah* v. *United States*, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (concurring), cert. granted, 124 S. Ct. 534 (Nos. 03-334 and 03-343) (Nov. 10, 2003). In short, the contrast between the terms of Section 1350 and the TVPA says far more about the soundness of the Ninth Circuit's conclusion that *Section 1350* supplies a private right of action

than any statements in the legislative history accompanying the TVPA.[6]

## II. NO CAUSE OF ACTION MAY BE INFERRED FROM CUSTOMARY INTERNATIONAL LAW NORMS THAT HAVE NOT BEEN AFFIRMATIVELY ADOPTED AND MADE ENFORCEABLE BY THE POLITICAL BRANCHES

Just as Section 1350 does not itself create a cause of action, a cause of action is not supplied by the instruments of international law relied on by the Ninth Circuit or, more generally, by some sort of federal-common-law theory. To the extent that the Ninth Circuit inferred a cause of action in this case directly from instruments of customary international law such as U.N. resolutions, or it did so based on a theory that Section 1350 empowered it to infer private rights of action from such instruments, its decision is also fundamentally mistaken.

### A. The U.N. Declarations And Other Sources Of International Law Relied On By The Ninth Circuit Furnish No Basis For Inferring A Private Right Of Action

1. As discussed above, the first principle of this Court's inferred-private-right-of-action cases is that, "[l]ike substan-

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[6] Another example of an Act of Congress that creates a cause of action for a violation of the law of nations is found in 18 U.S.C. 2331, 2333-2334, which was enacted in the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Tit. X, § 1003(a), 106 Stat. 4522. Among other things, that statute, which contains both criminal and civil remedies, provides that "[a]ny national of the United States injured * * * by reason of an act of international terrorism * * * may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains," plus the costs of maintaining the suit. § 1003(a)(4), 106 Stat. 4522 (18 U.S.C. 2333). In addition, the law expressly defines "international terrorism," § 1003(a)(3), 106 Stat. 4521 (18 U.S.C. 2331(1)), thus delineating the acts that may subject a defendant to liability.

tive federal law itself, private rights of action to enforce federal law *must be created by Congress*." *Sandoval*, 532 U.S. at 286 (emphasis added). That principle stems from this Court's recognition "that the federal lawmaking power is vested in the legislative, not the judicial, branch of government." See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981); see *ibid.* ("[F]ederal courts * * * are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers."). Thus, the Court has admonished that, where a "statute that Congress has passed" does not create a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 287.

2. The cause of action inferred by the Ninth Circuit in this case is completely untethered to the requirement of an unambiguous grant of private rights *by Congress*. The Ninth Circuit concluded that any violation of international law is actionable under its construction of Section 1350 as long as, in the court's view, a customary international law norm has "achieved sufficient consensus to merit application by a domestic tribunal." Pet. App. 10a. There not only is no requirement that a plaintiff point to an Act of Congress that is phrased in explicit "'rights-creating' language," *Sandoval*, 532 U.S. at 288, but, under the court's view, there is no requirement to point to an Act of Congress or treaty ratifying the alleged international norm, much less to an Act of Congress or treaty from which it could be inferred that Congress intended to create a private right of action.

What is more, under the Ninth Circuit's view, a court may enforce a customary international law norm in a suit for damages even when, as here, the political branches have affirmatively *declined* to ratify an international norm or stated that it is *not* self-executing. In other words, the Ninth Circuit did not simply assume the role of a common

law court and "[r]aise[] up causes of action where a statute has not created them"—a role that, as this Court recently reiterated, is "*not* for federal tribunals." *Sandoval*, 532 U.S. at 287 (emphasis added) (quoting *Lampf*, *Pleva*, *Prupis* & *Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991)). Rather, the Ninth Circuit assumed the even more astonishing role of inferring causes of action *in spite of* the countervailing expressions of the political branches in specifically declining to ratify or refusing to make self-executing various sources of international law.

The Ninth Circuit apparently viewed Section 1350 as authorizing this extraordinary exercise of judicial lawmaking. But as explained above, Section 1350 is a jurisdictional provision, not a source of substantive rights—or an extraordinary authorization for judicial lawmaking that somehow could trump even clear expressions of the political branches. Absent the Ninth Circuit's mistaken conception of Section 1350, it is clear that the materials cited by the Ninth Circuit do not, and could not, provide a basis for inferring a private cause of action.[7]

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[7] This Court's jurisprudence applying 42 U.S.C. 1983 underscores this point. This Court has held that Section 1983—which, unlike Section 1350, contains rights-creating language—"provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting 'under color of [state law].' " *Gomez* v. *Toledo*, 446 U.S. 635, 638 (1979). In *Gonzaga University* v. *Doe*, *supra*, however, the Court clarified that "[a] court's role in discerning whether personal rights exist in the § 1983 context should * * * not differ from its role in discerning whether personal rights exist in the implied right of action context." 536 U.S. at 285. That is, the Court focuses on the statute allegedly violated and does not accept "anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283. Section 1350 is solely a jurisdictional grant and, therefore, does not supply any cause of action. But it is nonetheless instructive that, even in the Section 1983 context, where a cause of action does exist, a court is not free to infer "actionable" rights in the absence of the unambiguous intent of Congress to confer them.

The Ninth Circuit grounded its finding of an actionable violation of international law on: general provisions of the Universal Declaration of Human Rights, a non-binding resolution of the General Assembly of the United Nations; the American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, to which the Senate refused to give its consent; the ICCPR, a non-self-executing treaty; and language of the *Restatement on Foreign Relations*, a treatise on international law. See Pet. App. 25a-26a & nn.16-18. Significantly, in ratifying the ICCPR (as in ratifying other human rights treaties), the Senate and the Executive Branch expressly agreed that the ICCPR would *not* be self-executing, so that it could not provide individuals with a cause of action in domestic court. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-8071 (1992). Nothing in those provisions remotely supplies a basis for inferring a cause of action.[8]

3. The Ninth Circuit's willingness to rely on customary international law is even more problematic. Customary international law, of course, is not created by Congress. Nor is it even necessarily ratified by the political branches in this

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[8] Other courts of appeals uniformly have recognized that the ICCPR is neither self-executing nor enforceable through jurisdiction-granting provisions such as the habeas corpus statute. See *Flores*, 343 F.3d at 163-164 n.35 (citing cases); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); *United States ex rel. Perez* v. *Warden*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002); *Beazley* v. *Johnson*, 242 F.3d 248, 267-268 (5th Cir.), cert. denied, 534 U.S. 945 (2001); *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam), cert. denied, 514 U.S. 1049 (1995); see also *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). In addition to the ICCPR, the Senate either expressly conditioned its consent on the proposition, or clearly understood, that the International Convention on the Elimination of All Forms of Racial Discrimination, the Torture Convention, and the Genocide Convention would not be self-executing. See 140 Cong. Rec. 14,326 (1994); 136 Cong. Rec. 36,198 (1990); 132 Cong. Rec. 2350 (1986).

country, which may for a number of reasons wish to decline to commit the Nation to the aspirations, objectives, or obligations expressed therein. Moreover, customary international law is fundamentally different from the statutory text on which this Court has fixed the inquiry in determining whether a private right of action exists. As Judge Cabranes recently observed in *Flores*:

> The determination of what offenses violate customary international law * * * is no simple task. Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily identifiable source. All of these characteristics give the body of customary international law a "soft, indeterminate character," Louis Henkin, *International Law: Politics and Values* 29 (1995), that is subject to creative interpretation.

343 F.3d at 154 (footnote omitted); see *id.* at 156-158 (discussing potential sources of customary international law).

The inherently indeterminate nature of customary international law makes it a singularly ill-suited basis for the creation of private rights of action. Nor, even under the Ninth Circuit's view of Section 1350, does the idea of judges searching through unratified treaties and other sources of customary international law documents to discover private rights have anything to recommend it. Indeed, if courts really had such an extraordinary power, then there would be little point in the close scrutiny given to treaties and other international conventions by the Senate and Executive in

determining whether to ratify a treaty or adopt a reservation indicating that a treaty confers no self-executing rights. But the ratification process routinely occurs without apparent recognition that the political branches' judgments could be effectively circumvented by courts applying Section 1350.

Moreover, the Ninth Circuit's asserted power would grant courts carte blanche to create private rights. Not only does the murky nature of customary international law necessitate protracted litigation over the scope and contours of such law, but it means that the determination whether a private right of action exists—under the Ninth Circuit's position—depends on a malleable concept that may vary from one case, or court, to the next. In short, permitting the courts to infer causes of actions from sources of customary international law is likely to lead to uncertainty and unprincipled decision-making—precisely the environment that this Court has sought to eliminate in its recent decisions emphasizing that it has "sworn off the habit of venturing beyond Congress's intent" in deciding when an Act of Congress creates a cause of action. *Sandoval*, 532 U.S. at 287.

4. Nor, especially given this Court's decisions on the role of federal courts since *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), and the text of Article I, § 8, Clause 10 of the Constitution, is there any basis for interpreting Section 1350 as authorizing courts to fashion a federal common law of the law of nations akin to admiralty. Although "[a] narrow exception to the limited lawmaking role of the federal judiciary is found in admiralty," *Northwest Airlines*, 451 U.S. at 95, that role has a textual foundation in the Constitution itself. As the Fourth Circuit recently explained, Article III's reference to "all Cases of admiralty and maritime Jurisdiction" has long been read as authorizing "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, 960 (4th Cir. 2000); see also *United States* v. *Flores*, 289 U.S. 137, 148 (1933) (Section 2 of Article III "has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies"). There is no similar grant of authority in Article III with respect to the law of nations in general. To the contrary, as discussed next, the power to define and legislate offenses against the law of nations is assigned to *Congress* in Article I (§ 8, Cl. 10). See pp. 32-33, *infra*.

Nor, unlike the situation in admiralty, was there a pre-constitutional history of more than 1000 years of specialized courts enforcing international law norms relating to human rights. And nor, again unlike admiralty, is there any robust tradition of federal courts developing and applying the law of nations under Section 1350. In contrast to the volumes of admiralty cases that filled the dockets of the early federal courts, there are, as discussed in Part I.C above, just two reported cases from the founding era in which courts referred to Section 1350 as a potential basis for jurisdiction. Then, from 1795 to 1980, what is now Section 1350 lay fallow. Surely if Congress intended courts to develop an elaborate federal common law—including a cause of action—under Section 1350 for violations of the law of nations, it would have made some comment to that effect when it twice recodified the provision during the past century in the face of such judicial inactivity.

In any event, this Court has admonished that, "[e]ven in admiralty, * * * where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress." 451 U.S. at 96. The Ninth Circuit's decision in this case assumes the authority to infer actionable private rights from sources of customary international law without regard to the "will of Congress." In other words,

even from the perspective of the constitutionally unique harbor of admiralty, the Ninth Circuit's decision is unfounded—indeed, unheard of.

### B. Judicial Inference Of A Private Right Directly From Sources Of Customary International Law Is Fundamentally Inconsistent With The Constitution's Separation Of Powers

The Ninth Circuit's conclusion that a court may recognize private rights of action based on customary international law norms directly contravenes settled separation-of-powers principles.

1. As this Court has long recognized, the Constitution commits "the entire control of international relations" to the political branches. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893); see, *e.g.*, U.S. Const. Art. I, § 8, Cls. 3, 10, 11, 12, 13; Art. II, § 2; see also *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."). It is the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" to decide the "important complicated, delicate and manifold problems" of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936); see also *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386 (2003) ("Nor is there any question generally that there is executive authority to decide what [foreign] policy should be."). In light of the Constitution's textual commitment of the responsibility for international affairs to the political branches, this Court traditionally has cautioned against the exercise of judicial authority that would interfere with that responsibility. Indeed, the Court has acknowledged that foreign policy is "of a kind for which the Judiciary has neither aptitude, facilities nor responsi-

bility." *Chicago & So. Air Lines, Inc.* v. *Waterman S.S Corp.*, 333 U.S. 103, 111 (1948).

2. The Constitution makes explicit which Branch has the authority to "define and punish * * * Offenses against the Law of Nations"—Congress. Art. I, § 8, Cl. 10. The original draft of the Constitution merely gave Congress the authority to punish, and not to define, offenses against the law of nations. During the debate on the Constitution, James Madison and Edmond Randolph "moved to insert, 'define &' before 'punish.'" 2 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed., 1911). In so moving, Madison emphasized the need for "uniformity" and "stability in the law" in this area, and proposed that the solution was "to vest the power proposed by the term 'define' in the Natl. legislature." *Ibid.* When the Constitution reached the committee on style, Gouverneur Morris supported a similar revision, emphasizing that "[t]he word *define* is proper when applied to *offences* in this case; the law of (nations) being often too vague and deficient to be a rule." *Id.* at 615.

More than 50 years later, Justice Story recounted the Framers' wisdom in granting that power to Congress. He observed that "[o]ffences against the law of nations are quite * * * important, and cannot with any accuracy be said to be completely ascertained, and defined in any public code, recognised by the common consent of nations." *Commentaries on the Constitution of the United States* § 565, at 407 (Ronald D. Rotunda & John E. Nowak eds. 1987). He added that, "as to offences against the law of nations, there is a peculiar fitness in giving to congress the power to define, as well as to punish," and "there is not the slightest reason to doubt, that this consideration had very great weight with the convention, in producing the phraseology of the clause." *Ibid.*

As Judge Randolph recently observed in recounting the same constitutional history, the "define and punish" clause "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*, 321 F.3d at 1147 (concurring). Furthermore, the First Congress did not hesitate to exercise that authority. A year after it passed the original version of Section 1350, it codified as part of the first criminal code the three classic offenses against the law of nations identified by Blackstone—piracy, violating the right of safe conduct, and assaults on ambassadors. See An Act for the Punishment of Certain Crimes Against the United States, Ch. ___, 1 Stat. 113-115, 117-118; see also 4 William Blackstone, *Commentaries* *67-*68 ("The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy."). More recently, Congress exercised that same authority in carefully defining the "torture" and "extrajudicial killing" that it expressly made actionable under the TVPA. See S. Rep. No. 249, *supra*, at 5-6 (listing Art. I, § 8, Cl. 10 as one of the constitutional bases for the TVPA).[9]

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[9] Congress has more frequently exercised this authority in the context of defining criminal offenses against the law of nations than in defining privately actionable offenses in the civil context. But the considerations that led the Framers to vest in Congress the authority "to define" the offenses against the law of nations—namely, the indeterminate nature of the law of nations and the need for clarity and uniformity in defining such law—apply to the definition of offenses against the law of nations that may be actionable in a private suit for damages in the United States. Indeed, as explained in Part II.C below, such damages actions may directly interfere with foreign policy objectives and thus squarely implicate the concerns that led the Framers to vest this important power in the Legislature.

Significantly, when Congress focuses its attention on enacting laws that punish or redress violations of the law of nations, it frequently defines the offense or cause of action with precision that is not typically found in customary international law norms. For example, the definitions that Congress adopted in the TVPA—after years of consideration—for "torture" and "extrajudicial killing" are more precise than statements found in provisions of customary international law and track the definitions adopted by the Senate's understanding of the requirements of the Torture Convention (Convention Against Torture And Other Cruel Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985)), which the Senate adopted as a condition to the Senate's consent to that treaty. Similarly, in the Genocide Convention Implementation Act of 1987, Congress made genocide a federal criminal offense. 18 U.S.C. 1091-1092. In doing so, however, it explicitly defined the offense, 18 U.S.C. 1091(a), and carefully limited it by specifying, *inter alia*, that it applies only to acts committed within the United States or by United States nationals, 18 U.S.C. 1091(d), and that it does not "creat[e] any substantive or procedural right enforceable by law by any party in any proceeding," 18 U.S.C. 1092.

Nor do statements in pre-*Erie* decisions of this Court, concerning the interrelationship between international law and the law of this country, support the Ninth Circuit's radically different view of the role of the courts in these same types of matters in suits brought under Section 1350. In *The Paquete Habana*, 175 U.S. 677 (1900), this Court observed that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their deter-

mination." *Id.* at 700.[10] See also, *e.g.*, *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820) (piracy action). But *The Paquete Habana* Court's observation does not address the question of when questions of international law are, in fact, "duly presented." The Ninth Circuit's conception that Section 1350 duly presents questions of international law by making any violation of customary international law actionable is profoundly flawed and would routinely generate the potential for judicial pronouncements at odds with the policies of the political branches on matters of foreign policy, which courts seek to avoid.[11]

Equally important, the statement quoted above from *The Paquete Habana* was immediately followed by language indicating that a court may properly look to international law norms only where there is "no controlling executive or legislative act." 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. So too, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category. And U.N. General Assembly resolutions are not binding on member nations,

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[10] *The Paquete Habana* involved an appeal from an order condemning two fishing vessels and their cargoes as prizes of war, *i.e.*, a classic type of proceeding within the "admiralty and maritime jurisdiction" of the federal courts. 175 U.S. at 680. After examining sources of customary international law, the Court concluded that fishing vessels generally "are exempt from capture as prize of war," and thus held that the vessels' capture was without cause. *Id.* at 708, 714.

[11] The precise status of *The Paquete Habana*'s statement after *Erie* is a subject of considerable debate. See *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (summarizing debate). But however that debate is ultimately resolved, nothing in the decision supports either the Ninth Circuit's interpretation of Section 1350 as something other than a jurisdictional grant or the practice of inferring private causes of action directly from customary international law.

and require further action by the member states before they can create any enforceable rights. In short, the decision below effectively undermines the critical role of the political branches in determining the extent to which international law has "controlling" effect in this country.[12]

3. The Constitution also establishes special procedures for the consideration and ratification—by the political branches—of treaties. See U.S. Const. Art. II, § 2, Cl. 2. As this Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and 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) (Marshall, C. J.). Moreover, even when a treaty is self-executing, it does not typically confer a private right of action; rather, it means only that it is "regarded in courts of justice as equivalent to an act of the legislature." *Ibid.*

The constitutionally prescribed process for ratifying treaties ensures that the political branches scrutinize the United States' international obligations or declarations before committing to them. Since World War II, numerous international human rights treaties have been proposed and assented to by other nations. The political branches of the United States Government have declined to ratify several of these treaties, such as American Convention on Human Rights, that were relied on by the Ninth Circuit in this case. Pet. App. 26a & n.17. Even when they have chosen to ratify

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[12] That does not mean that international law can play no role in adjudicating disputes that are otherwise properly pending in federal court pursuant to an Act of Congress that creates a cause of action. When such an issue is "duly presented," a court may properly consult international law. But such reference to international law is a fundamentally different endeavor than inferring a cause of action in the first instance based solely on a court's assessment of customary principles of international law. The former is a judicial task. The latter is one that the Constitution unambiguously vests in the political branches.

such instruments, the President and the Senate have frequently conditioned ratification on express reservations, understandings, or declarations that, *inter alia*, specify that the treaties are not self-executing under domestic law and, therefore, do not create privately enforceable rights. For example, as noted above, when the Senate consented to the Torture Convention in 1990, it did so only after attaching a number of conditions to its ratification, including those specifying that the substantive provisions of the Convention were "not self-executing." See S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 30-31 (1990). Similarly, in ratifying the ICCPR, the Senate and the Executive stated that the ICCPR is not self-executing. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-8071 (1992). The political branches took those actions without any apparent understanding—let alone recognition—that Section 1350 could be read as a basis for overriding those carefully considered judgments. That omission reflects the true nature of Section 1350 as a jurisdictional grant, rather than a massive oversight on the part of the political branches.

The Senate and the President do not always specify their reasons for stating that international conventions do not give rise to privately enforceable rights. However, myriad factors are properly considered by the political branches in deciding whether to express such reservations or conditions on the United States' ratification of an international agreement. They include the possibility of embarrassment to allies in actions filed in our courts, the potential for friction with other nations that the United States is seeking to influence through diplomatic means, and the negative consequences for the United States and its officials if they were subjected to reciprocal suits in foreign courts. The Ninth Circuit's decision provides the courts with an ill-defined power to override those policy judgments, even though the

courts have no responsibility or capability to judge the impact that their actions may have on other foreign policy objectives.

The political branches could reasonably conclude, for example, that injuries to United States citizens abroad should be resolved through diplomatic channels, in which executive branch officials can seek redress consistent with broader foreign policy objectives, rather than through litigation. The Ninth Circuit approach creates the same potential for friction through suits filed by aliens in United States courts. Indeed, the Ninth Circuit would provide aliens vastly superior rights to sue for damages for alleged violations of the law of nations than are available to United States citizens—in the United States' own courts. See *Al Odah*, 321 F.3d at 1146 (Randolph, J, concurring). But if the executive branch can limit the litigation rights of citizens to promote foreign policy objectives, it would seem to follow *a fortiori* that the rights of aliens in our courts can be limited, unless and until the political branches authorize a particular cause of action.

4. The role that the Ninth Circuit assumed for the courts in applying Section 1350 in this case is fundamentally incompatible with the constitutional commitment of those powers to the political branches. The Ninth Circuit's position transforms Section 1350 into a roving license for the Federal Judiciary to define the offenses against the law of nations that are actionable in this country in a manner that is *not* anchored in the positive enactments of the political branches of the United States Government—and, indeed, as the Ninth Circuit's decision in this case demonstrates (see Pet. App. 25a-26a), may actually *contradict* those enactments. The Ninth Circuit's decision accordingly transgresses fundamental and textually committed separation-of-powers principles.

To permit Article III courts, in the absence of a governing Act of Congress, to discover private rights of action in the vagaries of customary international law also is anti-democratic, just as it would be to permit Article III courts to raise up causes of action from sources of domestic law when Congress has not conferred them. See *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring). By contrast, the political branches are directly accountable to the people for foreign policy decisions made on their watch. Moreover, as John Jay explained in *The Federalist No. 64* in discussing the treaty power, one of the reasons that the Constitution vests that power in the Executive and the Senate, *i.e.*, in the political branches, is that electors are likely to choose the President and Senators "who best understand our national interests," "who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence." See also Pet. App. 96a (O'Scannlain, J., dissenting) (political branches, unlike courts, "may be held accountable for any whirlwind that they, and the nation, may reap because of their actions").

Although the political branches cannot control the development of customary international law, they can seek to influence the development of that law through diplomatic and military measures, formal pronouncements, negotiation of international agreements, and the announcement of reservations or conditions to the ratification of such agreements, or to general standards of international law that may be asserted by other nations. Both the President and the Congress are held directly accountable through the political processes for the treaties that they ratify and the legislation that they enact, such as the TVPA, defining or providing for the private enforcement of specific offenses against the law of nations. By contrast, as Judge Randolph recently observed, "[t]o have federal courts discover [customary international law] among the writings of those considered

experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al Odah*, 321 F.3d at 1148 (concurring).

### C. The Litigation Under Section 1350 That Has Proliferated In The Federal Courts In The Past Two Decades Underscores The Gravity Of Those Separation-Of-Powers Problems

In more practical terms, the Section 1350-driven litigation that has spread in the federal courts since *Filartiga* illustrates the manner—and extent—to which permitting courts to recognize private rights of action based on their own assessment of customary international law is incompatible with the textual commitment of the control over international relations to the political branches. Indeed, the majority below itself acknowledged that "international human rights litigation under [Section 1350] inevitably raises issues implicating foreign relations," Pet. App. 18a, and that this case itself "raises difficult and politically sensitive issues connected to our foreign relations," *id.* at 14a n.7; see also *id.* at 3a (This litigation "implicates our country's relations with Mexico."). The state of affairs in the wake of *Filartiga* demonstrates the magnitude of the error in construing Section 1350 (or U.N. declarations) as creating a cause of action for damages for violating judicially-defined standards of international law.

1. In numerous cases, the assertion of claims under Section 1350 in the aftermath of *Filartiga* has directly embroiled United States courts in difficult and politically sensitive disputes that, in many instances, are confined to foreign nations. *Filartiga* itself involved a suit brought by Paraguayans alleging torture by Paraguayan officials in Paraguay. Since then, suits under Section 1350 have called on the federal courts to entertain suits based on an alleged terrorist attack by the Palestine Liberation Organization on

a bus in Israel, *Tel-Oren*, 726 F.2d at 775; Argentina's destruction of an oil tanker during the Falklands War, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); genocide and war crimes in connection with the conflict in Bosnia, *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); environmental pollution by a U.S. mining company in Peru, *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); and war crimes by the Japanese against Japanese and Korean comfort women during World War II, *Hwang Geum Joo* v. *Japan*, 332 F.3d 679, 687 (D.C. Cir. 2003).[13] Although

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[13] See also, *e.g.*, *Bano* v. *Union Carbide*, 273 F.3d 120, 127-130 (2d Cir. 2001) (suit by victims of an accident at a chemical plant in India against the U.S. owner of the plant; Section 1350 claims barred by Indian judicial settlement orders); *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 447-449 (2d Cir. 2001) (suit by Canadian citizens and their Egyptian corporation against Delaware corporations alleging that the defendants purchased property unlawfully seized from the plaintiffs by the Egyptian government because the individual plaintiffs were Jewish; Section 1350 claim rejected because the complaint did not allege violations of the law of nations by the defendant corporations); *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-108 (2d Cir. 2000) (suit by Nigerian citizens against two foreign companies alleging that the companies participated in human rights abuses against the Nigerians; case remanded for further consideration of forum non conveniens motion), cert. denied, 532 U.S. 941 (2001); *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 164-169 (5th Cir. 1999) (suit by Indonesian citizens against Indonesian corporations for environmental abuses, human rights violations, and genocide; Section 1350 claim rejected because allegations did not rise to the level of violations of the law of nations); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (class action by Philippine citizens against former President Marcos and his family; Section 1350 claims allowed to proceed), cert. denied, 513 U.S. 1126 (1995); *Koohi* v. *United States*, 976 F.2d 1328, 1333 n.4 (9th Cir. 1992) (suit by families of those onboard a civilian aircraft erroneously shot down by a U.S. warship; Section 1350 claims dismissed because it does not waive sovereign immunity), cert. denied, 508 U.S. 960 (1993); *Goldstar (Panama) S.A.* v. *United States*, 967 F.2d 965, 967-969 (4th Cir. 1992) (suit for damages stemming from looting, allegedly caused

many actions under Section 1350 are dismissed prior to trial on various grounds, such as foreign sovereign immunity, the mere filing of such litigation can raise serious international relations issues and difficulties for the governments of the foreign countries or officials involved in such suits, as well as the United States Government. The State Department has received numerous protests about these actions from foreign governments.

Some suits are filed against corporations or individuals who allegedly aided and abetted the unlawful acts of foreign governments. In those cases, the legality of the alleged conduct of a foreign government may be adjudicated even though that government is not represented in the litigation. In other cases, the suit is filed directly against a foreign government or its officials with little prospect of recovering (or enforcing) any judgment in light of sovereign immunity principles. A primary motivation for filing such suits appears to be simply to obtain a public judicial forum in the United States to air international human rights grievances to the world.

Section 1350 litigation may implicate and inflame international tensions or disagreements over highly sensitive matters in several different respects. First, courts may be required to resolve factual disputes over the responsibility for alleged human rights abuses, a task complicated by the

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by the lack of U.S. police protection in the wake of the U.S. invasion of Panama; Section 1350 claim rejected because Section 1350 does not waive sovereign immunity); *Saltany* v. *Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (per curiam) (suit by Libyan citizens for damages caused by the 1986 U.S. air strikes on Libya; claims summarily dismissed); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-208 (D.C. Cir. 1985) (Scalia, J.) (suit by Nicaraguan citizens and residents, among others, against U.S. officials and alleged paramilitary trainers for tortious injuries caused by the Contras; Section 1350 claim rejected on the grounds that Section 1350 does not reach private, non-state conduct, and that even if it applied to state conduct, a suit was precluded by sovereign immunity).

fact that most Section 1350 actions involve events that allegedly occurred in foreign countries. Second, the entry of judgment (or even dismissal of actions) may create the impression to the citizens of other nations—who are not familiar with the American constitutional system or Section 1350—that the United States Government has taken sides in an internal dispute, even where the Executive Branch has not spoken directly on a question. Third, and perhaps most fundamentally, in resolving such disputes, federal courts have construed and made pronouncements on the consensus that has developed with respect to particular international agreements or the scope and application of those agreements.

Each of these scenarios may frustrate if not displace the efforts of the political branches to address international events or foreign policy issues by speaking with *one* voice, and to define the scope of international rights or obligations through legislation, treaties, or less formal agreements. Indeed, Judge Gould believed that the potential for interfere with matters assigned to the political branches that is created by the Ninth Circuit's application of Section 1350 is so great as to trigger the political question doctrine. See Pet. App. 97a-108a (dissenting).

2. The potentially disruptive effects of Section 1350 litigation on the foreign policy interests of the United States and the actions of other countries is exemplified by the pending Section 1350 action in *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (Jud. Pan. Mult. Lit. 2002), which was brought on behalf of alleged victims of apartheid. The Government of South Africa, at the highest levels, has informed the United States Government, as well as the federal court overseeing this action (see Pet. 18; U.S. Pet. Br. 25-26 n.9), that the litigation threatens to disrupt and contradict the laws, policies, and domestic processes that South Africa has developed—with the popular backing of its

people—for dealing with the aftermath of apartheid as an institution. The current Government of South Africa has taken extensive steps to promote reconciliation and redress for the injustices of apartheid, and support for those efforts is a cornerstone of the United States' foreign policy with respect to South Africa.

The State Department has determined that, to the extent that the pending apartheid litigation impedes South Africa's domestic efforts to promote both reconciliation and equitable economic growth, the litigation will undermine the United States foreign policy objectives of promoting both foreign investment in South Africa and redress for the wrongs of apartheid. Several foreign governments, including the governments of the United Kingdom and Canada, have approached the United States Government through diplomatic channels to express their concerns about suits in which their banks, corporations, and other entities have been named as defendants. The State Department has received similar complaints from foreign governments in other recent Section 1350 cases.

In other situations, the prospect of costly litigation under Section 1350 and potential liability in United States courts for operating in a country whose government implements oppressive policies—policies that the United States Government is seeking to change through diplomatic channels or political sanctions—may discourage U.S. and foreign corporations from investing in precisely the areas of the world where economic development may have the most positive impact on economic and political conditions. Economic measures, such as promoting investment or the threat of sanctions, are an important tool that the Executive uses in conducting the Nation's foreign policy. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375-376 (2000) (recounting the manner in which the political branches

have sought "to exercise economic leverage against [the military government of] Burma").[14]

3. Furthermore, as conceived by courts such as the Ninth Circuit, Section 1350 is not limited to suits against rogues and outlaws. It may be invoked by aliens as a means of obtaining judicial review of the Executive's efforts to enforce this Nation's criminal laws with the assistance of other nations, as in this case, or the Executive's conduct of military operations in which foreign allies may be involved, including the current war on terrorism. For example, the next-friend petitioners in *Al Odah* v. *United States*, *supra*, included a claim under Section 1350 alleging that the military's detention of aliens at the U.S. Naval Base at Guantanamo Bay, Cuba, violated the law of nations and treaties entered into by the United States, including the Geneva Convention. Although, as Judge Randolph explained in his concurring opinion in *Al Odah*, 321 F.3d at 1149-1150, the United States and its officials are immune from suit under Section 1350, Section 1350 may still be asserted against foreign governments or officials who assist the United States military in its ongoing operations around the world.[15]

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[14] Burma (Myanmar) is a prime example of a country in which the United States Government is actively seeking through diplomatic channels, congressional measures, and economic sanctions to promote positive political and economic change. See Pet. App. 229a & n.1. One U.S. corporation that was involved in the construction of a pipeline in Burma is currently the subject of a Section 1350 action pending in the Ninth Circuit. See *Doe* I v. *Unocal Corp.*, Nos. 00-56603 & 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003), vacated and reh'g granted (argued June 11, 2003). The *Unocal* case illustrates that the expansive interpretation of Section 1350 adopted by courts such as the Ninth Circuit may also subject U.S. companies to Section 1350 litigation if they invest or engage in foreign projects.

[15] Another example is *Doe* v. *ExxonMobil Corp.*, No. 01CV1357 (D.D.C. 2002). That case involves an action brought under Section 1350 challenging alleged human rights abuses by military and police forces of

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A decade after Section 1350's predecessor was enacted by the First Congress, then-Representative John Marshall observed that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 6 Annals of Cong. 613 (1800), quoted in *Curtiss-Wright Export Corp.*, 299 U.S. at 319. The revolutionary role assumed by federal courts since *Filartiga* to serve as arbiters of the types of wide-ranging international disputes discussed above—typically involving, as here, events arising in foreign lands—was not within the comprehension of those who heard Marshall's remarks that day.

### III. NO CAUSE OF ACTION MAY BE INFERRED FROM SECTION 1350 BASED ON THE ALLEGED CONDUCT OF ALIENS IN FOREIGN COUNTRIES

The cause of action described and applied by the Ninth Circuit in this case is improper in another fundamental respect. Like the other courts of appeals that have concluded that Section 1350 itself creates a cause of action, the Ninth Circuit has concluded that it reaches a tort committed against an alien *anywhere* in the world. That understanding, too, is seriously mistaken.

1. The longstanding presumption is that, unless an expression to the contrary is found within a federal statute, or absent certain contexts where special considerations exist,

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the Government of Indonesia. In July 2002, the State Department submitted a letter to the court in that case (see Pet. App. 251a-252a), advising the court of the "potentially serious adverse impact [of that litigation] on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism" in Indonesia, a country that has served as "a focal point for U.S. initiatives in the ongoing war against Al Qaida and other dangerous terrorist organizations." *Id.* at 251a-252a (Letter of William H. Taft, IV, Legal Adviser, to Hon. Louis F. Oberdorfer (July 29, 2002)).

see, *e.g.*, *United States* v. *Bowman*, 260 U.S. 94 (1922), the statute is presumed to regulate private conduct only within the territory of the United States, or, in limited circumstances, on the high seas. See *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949); see also *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (general statutory language should not be construed to apply to conduct of foreign nationals outside the United States).

That presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). And the newly formed federal courts were, if anything, particularly sensitive to avoiding such clashes. As Justice Story observed in *United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (No. 15,551):

> No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

See also *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 630-631 (1818) (federal piracy statute should not be read to apply to foreign nationals on a foreign ship); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (presumption

against extraterritorial application "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility").

If the Ninth Circuit had insisted on the existence of an Act of Congress that conferred a private right of action, it could then have applied the presumption against extraterritoriality to that statute. To the extent that such a statute included language overcoming the presumption, it might have provided specific direction to minimize the potential for friction in such extraterritorial application, such as the exhaustion provision of the TVPA. See p. 21, *supra*. But instead, the Ninth Circuit inferred a cause of action from the jurisdiction-conferring terms of Section 1350 and thus essentially bypassed the presumption against extraterritoriality.

2. Nothing in Section 1350, or in its contemporary history, suggests that Congress contemplated that suits would be brought based on conduct against aliens in foreign lands. To the contrary, the only reported cases in which courts even adverted to Section 1350's predecessor soon after its enactment involved events that took place in this country's territory—*i.e.*, the capture of a foreign ship in United States territorial waters and seizure of slaves on a ship at a United States port. See Part I.B, *supra*.

More generally, the founding generation, in particular, exhibited little enthusiasm for inserting itself into the internal affairs of *other* countries. See 35 *The Writings of George Washington from the Original Manuscript Sources 1745-1799* (John C. Fitzpatrick, ed. 1940), Letter of George Washington to James Monroe (Aug. 25, 1796) ("[N]o Nation had a right to intermeddle in the internal concerns of another.") (available at http://memory.loc.gov/ammem/gwhtml/gwhome.html). The evidence suggests, moreover, that "those who drafted the Constitution and the Judiciary

Act of 1789 wanted to open federal courts to aliens for the purpose of *avoiding*, not provoking, conflicts with other nations." *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring); see *The Federalist No. 3* (John Jay) ("It is of high importance to the *peace* of America that she observe the law of nations * * * and * * * it appears evident, that this will be more perfectly and punctually done by one national Government.") (emphasis added). By authorizing actions under Section 1350 challenging alleged abuses against aliens by foreign actors in foreign lands, courts have transformed Section 1350 into an instrument for generating international discord and inter-meddling in the affairs of other countries.

3. In this case, the Ninth Circuit recognized a cause of action under Section 1350 for the arrest of a Mexican national by Mexican civilians in Mexico. Although it is true that Alvarez-Machain was arrested at the behest of United States law enforcement officials, that does not alter the extraterritorial nature of the arrest. Indeed, it is precisely the extraterritorial nature of the arrest that rendered it actionably "false" and "arbitrary" in violation of international law in the Ninth Circuit's view.[16] Moreover, the

[16] For the reasons explained in the Brief for the United States in No. 03-485, the extraterritorial arrest at issue was authorized by federal law and was, therefore, in no way arbitrary or in violation of the law of nations. The Ninth Circuit would not have had to reach that question in determining whether Sosa had stated an actionable claim under Section 1350, if it had recognized at the outset that Section 1350 is purely a jurisdictional grant, and that federal courts may not infer private rights from the law of nations, whatever its precise scope. In addition, in view of the separation-of-powers problems and practical concerns created by the interpretation of Section 1350 by the Ninth Circuit and other courts of appeals in the wake of *Filartiga*, the United States believes it is important for this Court to correct the threshold errors made by the Ninth Circuit in analyzing Alavarez-Machain's Section 1350 claim. In any event, because of the Ninth Circuit's erroneous interpretation of federal law, even if every mistaken antecedent step in the Ninth Circuit's application of Section 1350 were indulged, the decision would still need to be reversed.

claim held actionable by the Ninth Circuit was directed solely at a Mexican national, and with respect to events occurring in Mexico. The extraterritorial nature of the events at issue in this case only heightens the separation-of-powers concerns discussed above, and it provides an additional reason for the Court to hold that the Ninth Circuit erred in affirming the judgment against Sosa based on Alaverez-Machain's Section 1350 claim.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

STUART E. SCHIFFER
*Acting Assistant Attorney General*

PAUL D. CLEMENT
EDWIN S. KNEEDLER
*Deputy Solicitors General*

GREGORY G. KATSAS
*Deputy Assistant Attorney General*

GREGORY G. GARRE
*Assistant to the Solicitor General*

DOUGLAS N. LETTER
BARBARA L. HERWIG
ROBERT M. LOEB
*Attorneys*

WILLIAM H. TAFT IV
*Legal Adviser*
*Department of State*

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