No. 03-339

IN THE

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides as follows: "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 the ATS, is simply a grant of jurisdiction, or whether, in addition to granting jurisdiction, it provides a cause of action upon which aliens may sue for torts in violation of the law of nations or treaties of the United States, or authorizes federal courts to exercise federal common law-making powers to create federal remedies for such torts.

2. If it is proper to imply or create a cause of action under the ATS, whether those actions should be limited to suits for violations of international legal norms to which the United States has assented.

3. Whether a detention that lasts less than 24 hours, results in no physical harm to the detainee, and is undertaken by a private individual under instructions from senior United States law enforcement officials, constitutes a tort in violation of the law of nations actionable under the ATS.

PARTIES TO THE PROCEEDING

Petitioner José Francisco Sosa is a Mexican national resident in the United States under the federal witness protection program.

Petitioner's co-defendants in the proceedings below included the United States of America; Hector Bellerez, Bill Waters, Pete Gruden, Jack Lawn, and Antonio Garate-Bustamante, all individual employees and agents of the U.S. Drug Enforcement Agency for whom the United States was ultimately substituted as defendant; and five unnamed Mexican nationals in the federal witness protection program. They are all nominal respondents in this matter.

Respondent Humberto Alvarez-Machain is a Mexican national.

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OPINIONS BELOW

The opinion of the *en banc* court of appeals (Pet. App. 1a-108a) is reported at 331 F.3d 604 (9th Cir. 2003). The now-vacated panel opinion of the court of appeals (Pet. App. 109a-139a) is reported at 266 F.3d 1045 (9th Cir. 2001).

The March 18, 1999 (Pet. App. 176a-219a) and May 18, 1999 (Pet. App. 172a-175a) orders and the Sept. 9, 1999 judgment (Pet. App. 140a-171a) of the United States District Court for the Central District of California are unreported.

JURISDICTION

The judgment of the *en banc* court of appeals was entered on June 3, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 10 of the Constitution, which provides that:

> The Congress shall have Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . .

2. Chapter 20, section 9 of An Act to Establish the Judicial Courts of the United States, 1 Stat. 73, 76-77 (1789), now codified as amended at 28 U.S.C. § 1350, which provides that:

> 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.

STATEMENT OF THE CASE

This case presents the fundamentally important question whether a private right of action for violations of evolving international legal norms can be implied under a law that, by its plain terms, simply confers jurisdiction on federal courts. By implying such a cause of action under the so-called Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, or by treating the ATS as an authorization to create federal common law remedies, the Ninth Circuit and several of its sister circuits have launched a misguided legal revolution. Attempting to fashion liability standards without any congressional guidance, they have opened U.S. courts to suits that interfere with political branch management of foreign affairs, that undermine Executive Branch efforts to protect the Nation's security, and that force courts to usurp the constitutional power of the political branches to decide which norms of international law should be binding and enforceable. Because the enacting Congress never intended the mere grant of jurisdiction to give rise to such untoward consequences—and in fact would have rebelled at the very idea—this Court should rule that a cause of action cannot be implied or created under the ATS, and thereby leave it to Congress to decide under what circumstances, if any, a cause of action should be enacted to enforce the law of nations.

STATEMENT OF FACTS

1. In the decision below, the Ninth Circuit, sitting *en banc*, ruled that respondent Humberto Alvarez-Machain, a Mexican national indicted in the United States for allegedly participating in the kidnapping, torture, and murder of a U.S. Drug Enforcement Agency ("DEA") agent, could recover damages under the ATS from petitioner José Francisco Sosa, a Mexican citizen who, at the DEA's request, helped apprehend and transport respondent from Mexico to Texas so that he could be prosecuted.

In February 1985, DEA agent Enrique Camarena-Salazar was kidnapped, tortured, and murdered in Guadalajara, Mexico. Respondent admitted that he was present at the location where those crimes occurred during the time Camarena was being held. In January 1990, a federal grand jury in Los Angeles indicted respondent for participating in the crimes against Camarena, and a warrant was duly issued for his arrest.

In early 1990, the Deputy Administrator of the DEA approved a plan to have Mexican nationals apprehend respondent in Mexico and deliver him to the United States to face trial. Petitioner was one of five or six Mexicans recruited on the DEA's behalf for that effort. Petitioner knew he was acting at the DEA's request and that the DEA would pay the expenses of the operation. The DEA explicitly instructed that respondent was not to be harmed in any way during his arrest and transport to the United States.

On the evening of April 2, 1990, petitioner and others entered respondent's office in Guadalajara, Mexico and took him into their custody. Respondent offered no resistance, and was not mistreated in any way. He was held at a private residence, and then at a motel, until midday on April 3, 1990, when he was taken by taxi to an airport. Respondent was flown in the company of petitioner and others to El Paso, Texas, where he was delivered to federal agents. Less than 24 hours elapsed between the time of his apprehension and his handover in El Paso. At no time during that detention was respondent abused, injured or otherwise harmed.

Respondent moved to dismiss the indictment brought against him by the grand jury in the Central District of California for lack of jurisdiction, citing violations of the extradition treaty between the United States and Mexico. Ultimately, this Court determined that respondent's arrest did not violate that treaty, and that the manner of his arrest did not deprive the trial court of jurisdiction. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669-70 (1992). On remand,

the district court granted respondent's motion for a judgment of acquittal after the United States presented its case. That judgment was accordingly unreviewable.

2. Respondent returned to Mexico, and in 1993 filed this civil action. Relying upon a number of legal theories, he sought damages against both the United States and the DEA agents and Mexican nationals involved in his 1990 arrest and transportation to the United States. The United States was subsequently substituted for all the named individual defendants except petitioner, whom the district court ruled was not a DEA employee.

Respondent's claims against petitioner were advanced under, *inter alia*, the ATS. Following various proceedings and orders limiting respondent's claims against the several defendants, the district court entered summary judgment against petitioner with respect to (i) respondent's arrest and detention, and (ii) his transborder abduction. After a bench trial, the district court rejected respondent's remaining claims for assault and battery and intentional infliction of emotional distress as unsupported by the evidence, limited petitioner's liability for the detention and kidnapping claims to events in Mexico only, and awarded damages of $25,000 on those claims.

3. Petitioner appealed the judgment against him, and a panel of the court of appeals affirmed his liability on the ATS claims.[1] The Ninth Circuit then granted *en banc* review. On June 3, 2003, a deeply divided *en banc* court affirmed in part and reversed in part the judgment against petitioner.

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[1] Respondent also appealed from the substitution of the United States for the DEA agents on his ATS claims; the dismissal of his claims under the Federal Tort Claims Act, 28 U.S.C. § 1346; and the limitation of his damages claim to harm suffered in Mexico. Although the appeals were consolidated in the appellate proceedings below, petitioner here focuses only on the court of appeals' decisions as they affect him.

The court first re-affirmed its prior conclusion, in *Hilao* v. *Estate of Marcos (In re Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467 (9th Cir. 1994), that the ATS provides not only jurisdiction but also a cause of action for tort suits alleging violations of international law. Pet. App. 10a. According to the court, moreover, such claims are not limited to alleged violations of *jus cogens* norms of international law—*i.e.*, those peremptory norms so broadly accepted that no derogation from them is permitted. *Id.* at 12a. Rather, the court held that a plaintiff need only allege violations of "'specific, universal and obligatory'" norms of customary international law. *Id.*

The court then held that, although state-sponsored transborder abduction does not violate international law, arbitrary arrest and detention does. Pet. App. 25a-26a. In deeming respondent's arrest arbitrary, the court concluded that the arrest was not """pursuant to law""" because the warrant did not authorize execution outside the United States. *Id.* at 26a. Although the court acknowledged that federal law authorized DEA agents to effect warrantless arrests on probable cause for suspected felony violations, and that the criminal statutes respondent had been charged with violating applied extraterritorially, the court rejected the government's contention that DEA agents had authority to effect or direct a warrantless arrest in Mexico. The court also concluded that there was no requirement that a detention be prolonged in order to violate customary international law.

The *en banc* court's decision was met with two vigorous dissents. Judge O'Scannlain, writing for himself and three others, explained that "there is simply no basis in our nation's law for this bewildering result, and the implications for our national security are so ominous that I must dissent." Pet. App. 73a. He reasoned that liability could not be imposed under the ATS for violation of any norm to which the United States itself does not subscribe, and that the political branches have never assented to any norm prohibiting transborder

arrests. *Id.* at 80a-87a. "[B]y providing relief to Alvarez on his claim of prolonged arbitrary arrest, our court has in effect restricted the authority of our political branches . . . in a way that finds no basis in our law." *Id.* at 88a. In a separate dissent, Judge Gould objected that the case presented "a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision" to act against a foreign national on foreign soil, with adverse consequences for U.S. foreign relations. *Id.* at 97a.

SUMMARY OF ARGUMENT

I. By its plain terms, the ATS simply confers "original jurisdiction" on federal district courts to hear particular types of actions. It does not purport to create the civil actions to which it extends federal jurisdiction, nor does it contain any of the rights-creating language necessary to justify a finding that Congress intended to create a private right of action. *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). The placement of the ATS in Chapter 85 of the Judicial Code, which consists of a series of similar jurisdiction-vesting provisions, confirms that the statute simply authorizes federal courts to hear causes of action created elsewhere, and is not itself the source of any implied right of action. *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951).

The strictly jurisdictional nature of the ATS is confirmed by its original placement in Section 9 of the first Judiciary Act. That section consisted of a series of clauses granting the new district courts jurisdiction over particular "causes" or "suits." None of the clauses surrounding the ATS created any new "causes." Indeed, several necessarily assumed that such "causes" would have to be created under separate statutes, and the first Congress promptly created such "causes." There is no basis for concluding that the ATS, alone among the jurisdiction-vesting clauses of Section 9, impliedly created the very "cause of action" to which federal jurisdiction was extended.

Indeed, the history of the first Judiciary Act belies any such conclusion. The jurisdiction of the new federal courts was one of the burning political issues of the day and was debated extensively by members of Congress. Engaged in a divisive battle over the very existence of federal jurisdiction, these members plainly did not intend the basic jurisdictional grants of the first Judiciary Act implicitly to create a cause of action or to authorize federal courts to develop a body of tort remedies for violations of international legal norms.

II. There is also no basis for dispensing with the requirement of a cause of action for ATS suits. Contrary to the claims of some, the founding generation understood the concept of a "cause of action"—*i.e.*, the right to invoke the power of a court to obtain redress. In 1781, the Continental Congress urged the States to create precisely such a right for aliens injured by violations of the law of nations, and Connecticut responded by statutorily authorizing aliens to sue for damages. The first Congress likewise demonstrated its familiarity with the concept of a right to sue, by enacting a series of laws that expressly authorized the filing of various suits to recover damages or penalties. In doing so, it used language markedly different from that found in the ATS.

Nor is it true that the ATS merely extended jurisdiction to hear a category of torts that were already cognizable at common law. The 1781 Resolution and Connecticut statute would have been entirely unnecessary if torts that violate the law of nations were already actionable. In fact, tort law was still in its infancy in the eighteenth century, and it recognized only a handful of private wrongs, such as trespass and nuisance. The then-recognized violations of the law of nations were not torts at all, but public wrongs punished by the public itself through criminal prosecutions.

Finally, the ATS is not a grant of authority to fashion federal common law remedies for torts in violation of the law of nations. Proponents of the first Judiciary Act repeatedly yielded to the demands of those who feared a self-

aggrandizing new judiciary and insisted that it be given limited powers and jurisdiction. It is inconceivable that the authors of this Act would have conferred an unprecedented common law-making power on the federal courts to create causes of action that no state court had ever created. Such an extraordinary grant of power, moreover, was inconsistent with the founding generation's understanding of the role of judges, who did not "make" law at all, as well as with their understanding of the law of nations, which was not the source of independently enforceable rights.

In addition, this Court has made clear that the uniquely federal interest in foreign relations does not authorize plenary law-making by federal courts, but rather compels adoption of federal common law rules that ensure judicial deference to the political branches. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964). By granting Congress authority to define and punish offenses against the law of nations, the Constitution itself demonstrates that the decision to federalize international legal norms must be made by Congress, not the courts. And the first Congress confirmed the lack of judicial authority for such decisions, by declining to vest a "law of nations" lawmaking power in the courts, by modifying international legal norms before incorporating them into U.S. law, and by vesting responsibility for the enforcement of those modified norms with the Executive Branch.

III. The ATS must be read as a mere grant of jurisdiction to avoid the grave separation-of-powers concerns that a contrary interpretation creates. Judicial implication or creation of a cause of action under the ATS interferes with political branch management of foreign affairs, by creating friction and tensions with other nations, and by discouraging investments by U.S. companies in the very countries where the promise of such investment, or the threat of prohibiting it, can be an important diplomatic tool. It also interferes with the President's ability to protect the Nation, by exposing to tort liability foreign agents who help the federal government

apprehend criminals and terrorists on foreign soil. And, the very act of discerning which international legal norms should be binding in U.S. courts usurps the constitutional power and responsibility of the political branches to make such decisions. In the absence of the clearest evidence that Congress intended to authorize tort actions with such adverse effects—and there is none here—implication of a cause of action is constitutionally improper.

IV. If the Court upholds judicial implication or creation of a cause of action, such actions must be limited to suits for violations of international legal norms that the political branches have accepted. Such a limitation minimizes—but does not eliminate—the difficulties of defining a cause of action and the separation-of-power problems inherent in doing so. Here, the United States has never assented to an international legal norm barring extraterritorial arrest.

V. Finally, the Ninth Circuit's determination that respondent's brief detention violated customary international law is incorrect as a matter of law. Respondent's arrest was not arbitrary because Congress has authorized DEA agents to conduct extraterritorial arrests. In all events, separation-of-powers principles bar courts from finding violations of international legal norms where, as here, the political branches have affirmatively refused to accept those norms.

ARGUMENT

I. A CAUSE OF ACTION CANNOT BE IMPLIED UNDER THE ALIEN TORT STATUTE.

Plaintiffs seeking relief in federal court must establish both that their "legal rights have been invaded," and that "a cause of action is available," *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983)—*i.e.*, that "a federal statute provides for a general right to sue for such invasion." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); see also *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979) (a "cause of action"

entitles a litigant to "invoke the power of the court" in order "to enforce the right at issue"). The Ninth Circuit concluded that the ATS is not only a source of subject matter jurisdiction, "but also creates a cause of action for an alleged violation of the laws of nations." Pet. App. 10a. The latter conclusion is inconsistent with the language of the ATS, its placement in the Judicial Code, and this Court's standards for implying causes of action. It is also refuted by the original language and placement of the ATS in the first Judiciary Act, and by the history surrounding the adoption of that Act—all of which confirm that the ATS is a grant of jurisdiction from which a cause of action cannot be implied.

A. The Current Language And Statutory Context Of The Alien Tort Statute Make Clear That It Is Simply A Jurisdiction-Vesting Provision.

The ATS is nothing more than a jurisdiction-vesting provision. It states, in its entirety, that "[t]he district courts shall have original *jurisdiction* of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added). Thus, by its plain terms the ATS does nothing more than confer jurisdiction on federal courts to hear particular types of actions.

The ATS nowhere purports to *create* the civil actions to which it extends federal jurisdiction. Cf. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73, 73 (1992) ("Establishment of civil action" for certain types of violations of international law norms). Indeed, the ATS contains none of the "'rights-creating' language" necessary to justify the conclusion that Congress intended to create a private right of action for money damages. *Alexander* v. *Sandoval*, 532 U.S. at 288. The ATS does not, for example, identify or limit any particular defenses to a putative tort action. Cf. *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33, 40 (1916) (provision barring assumption of risk defense rendered "[t]he inference of a private right of action . . .

irresistible"). Nor does it authorize awards of attorneys fees to prevailing parties. Cf. *Cannon* v. *University of Chic.*, 441 U.S. 677, 699 (1979) (attorneys fee provision "explicitly presumes the availability of private suits to enforce" statutory rights). In fact, while the ATS grants jurisdiction over "any civil action," it does not refer to a civil action "brought to enforce any liability or duty *created*" by the Act—language that was necessary to imply a cause of action even when such remedies were more readily inferred. See *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964) (relying on the foregoing quoted language to imply private right). In light of this Court's repudiation of "*Borak*'s method for discerning . . . causes of action," *Alexander* v. *Sandoval*, 532 U.S. at 287, it is clear that a mere grant of "jurisdiction of any civil action by an alien for a tort" cannot support an implied cause of action.

The absence of any congressional intent to create such a remedy is confirmed by the ATS's current placement in Chapter 85 of the Judicial Code, which is entitled "District Courts; Jurisdiction." As its name suggests, Chapter 85 consists of a series of jurisdiction-vesting provisions that authorize the United States district courts to hear a wide range of issues. Like the ATS, many of these provisions confer jurisdiction over specific types of civil actions brought by particular individuals or entities. See, *e.g.*, 28 U.S.C. § 1345 ("district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States"); *id.* § 1347 ("district courts shall have original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants"). These provisions, however, do not provide the necessary cause of action for the designated claimants. See, *e.g.*, *United States* v. *California*, 655 F.2d 914, 918 (1980) (§ 1345 grants jurisdiction over suits brought by the United States "under any valid cause of action, state or federal").

In short, like the other provisions of Chapter 85 of the Judicial Code that "vest[] jurisdiction in the District Courts, [§ 1350] does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." *Montana-Dakota Utils. Co.*, 341 U.S. at 249. Thus, if a U.S. treaty creates tort liability and authorizes aliens to recover damages for resulting injuries, § 1350 would confer jurisdiction on the district courts to hear such actions.[2] Similarly, if Congress were to create a cause of action for injuries sustained as a result of torts recognized under the law of nations, then § 1350 likewise would empower federal courts to entertain such claims. By its plain terms, however, § 1350 does not create any enforceable rights.

B. The Language And Placement Of The Alien Tort Statute In The Judiciary Act Of 1789 Confirm That It Is Strictly Jurisdictional.

The strictly jurisdictional nature of the ATS is confirmed by its original language and placement in the Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (the "First Judiciary Act"). The ATS appeared in the First Judiciary Act as a single clause in Section 9, which set out the jurisdiction of the newly created federal district courts. Like the other clauses of Section 9, the ATS granted district courts jurisdiction to hear causes of action that Congress created elsewhere.

As originally enacted, the ATS gave district courts "*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." *Id.* § 9, 1 Stat. at 77, App. 1a-2a (emphasis added). The term "cognizance" was used by

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[2] Although 28 U.S.C. § 1331 would also confer jurisdiction over such claims today, that was not true prior to 1875, when Congress passed the first statute creating "arising under" jurisdiction.

eighteenth century American lawyers as a synonym for "jurisdiction." Alexander Hamilton and James Wilson, a framer and later a Justice of this Court, used the terms interchangeably in their writings. See, *e.g.*, *The Federalist No. 81*, at 485-88 (A. Hamilton) (C. Rossiter ed., 1961); James Wilson, *Lectures on Law*, *in* 2 *The Works of James Wilson* 457 (R. McCloskey ed., 1967). And the terms were likewise used as synonyms by members of the House during debate on the Act itself.[3]

Significantly, the surrounding clauses of Section 9 were all purely jursidictional in nature. The first clause gave the new district courts exclusive "cognizance of all crimes and offences that shall be cognizable under the authority of the United States." First Judiciary Act, ch. 20, § 9, 1 Stat. at 76-77, App. 1a-2a. The second clause conferred "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." *Id.* The third clause conferred "exclusive original cognizance of all seizures on land" and on certain waters "made, and of all suits for penalties and forfeitures incurred, under the laws of the United States." *Id.* The fifth clause conferred concurrent "cognizance . . . of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars." *Id.* Finally, the sixth clause conferred "jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls." *Id.*

These surrounding clauses did not create the "causes" or "suits" to which jurisdiction was extended, nor did they authorize individuals to bring such "causes" or "suits." To the contrary, several necessarily contemplated that Congress

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[3] *See, e.g.*, 1 Annals of Cong. 828 (J. Gales ed., 1789) (some "deem it expedient that [the district court] should be entrusted with a more enlarged *jurisdiction*; and should, in addition to admiralty causes, take *cognizance* of all causes of seizure on land, all breaches of impost laws, of offenses committed on the high seas, and causes in which foreigners . . . are parties") (emphasis added).

would create the "causes" elsewhere. The third clause, for example, conferred exclusive jurisdiction "of all *suits for penalties and forfeitures incurred, under the laws of the United States*." *Id.* (emphasis added). Both before and after passage of the first Judiciary Act, Congress enacted separate laws authorizing suits to recover penalties and forfeitures.[4] Cf. *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 415 (1865) (because the Judiciary Act was passed before there were any federal criminal statutes, the clause in § 11 of that Act "giving the Circuit Courts concurrent jurisdiction in all cases of crime cognizable in the District Courts, must, of necessity, have had reference to such statutes as should thereafter define offences to be punished in the District Courts").

The jurisdictional grants of Section 9, therefore, did not impliedly create causes of action, but instead authoritzed federal courts to hear those "causes" that Congress created elsewhere. Read in context, the fourth clause (*i.e.*, the ATS) must likewise be understood as a grant of jurisdiction that does not itself create any "causes" or authorize the filing of "suits." See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'"). Indeed, there is no basis for assuming that the ATS, alone among the jurisdiction-granting

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[4] *See, e.g.*, An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandise imported into the United States, ch. 5, § 29, 1 Stat. 29, 45 (1789) (providing that customs collectors who failed to post rates, fees and duties would forfeit $100 "to be recovered with costs, in any court having cognizance thereof, to the use of the informer"); An Act providing for the enumeration of the Inhabitants of the United States, ch. 2, § 3, 1 Stat. 101, 102 (1790) (providing for penalties for failure to file census returns, "which forfeitures shall be recoverable . . . by action of debt, information or indictment; the one half thereof to . . . the informer; [except] where the prosecution shall be first instituted on behalf of the United States").

clauses of Section 9, impliedly created the very cause of action to which federal jurisdiction was extended.

This understanding of the ATS is confirmed by the fact that, as of 1789, the United States had already entered into treaties that authorized aliens to sue for tort damages. For example, an "Indemnity" article in a 1778 treaty with France provided that:

> all the commanders of the ships of His Most Christian Majesty and of the said United States, and all their subjects and inhabitants, shall be forbid doing *any injury or damage* to the other side; and if they act to the contrary, they shall be punished, and shall moreover *be bound to make satisfaction for all matter of damage, and the interest thereof, by reparation*, under the pain and obligation of their person and goods.

Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., art. XV, 1 Malloy 468, 474 (emphases added). Other treaties contained the same or similar language.[5] Thus aliens could sue U.S. citizens for damages and interest arising out of privateering-related injuries. The drafters of the ATS therefore had reason to understand that the jurisdiction they were creating would extend to treaty-based causes of action that the United States had already created elsewhere. That fact further undermines any claim that the drafters believed that the provision itself created such causes of action.

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[5] *See*, *e.g.*, Treaty of Amity and Commerce, July 9, 1785, U.S.-Prussia, art. XV, 8 Bevans 78, 83 (persons "who shall molest or injure in any manner whatever the people, vessels, or effects of the other party, shall be responsible in their persons and property for damages and interest, sufficient security for which shall be given by all commanders of private armed vessels before they are commissioned").

C. The History Of The Judiciary Act Of 1789 Confirms That Congress Did Not Intend The Alien Tort Statute To Create A Cause Of Action.

The purely jurisdictional nature of the ATS is confirmed by the history of the Judiciary Act itself. The first Congress was undertaking the truly unprecedented task of creating a new federal judicial system that had to be "put into operation . . . before the new Government could function at all." Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 57 (1923). The jurisdiction of these new courts was not merely one of a number of details that the House and Senate had to iron out. The scope of federal jurisdiction was the central issue to be resolved in fashioning a federal judiciary—indeed, it was one of the burning political issues of the day. Grappling with fundamental and divisive questions concerning the very purpose and role of the federal judicial department under the new constitutional system, it is inconceivable that the first Congress even considered whether to create, let alone actually conferred, a new federal right of redress for aliens injured by torts that violated the law of nations or U.S. treaties.

Oliver Ellsworth is recognized as the principal author of the bill that a special Senate committee reported out after two months of work. *Id.* at 59-60. During the committee's work on the bill,

> a contest had been waged between those men who wanted to confine the Federal judicial power within narrow limits and leave to the State Courts the chief part of original jurisdiction, and those men who wished to vest the Federal Courts the full judicial power which the Constitution granted—namely, that it should "extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority."

Id. at 62 (quoting U.S. Const. art. III, § 2, cl. 1). The former faction prevailed, and language in early drafts that would have granted the federal courts cognizance over "'all cases of federal jurisdiction'" was deleted from the Bill as reported. *Id.*[6]

Not content with this victory, anti-federalists opened the debate in the full Senate in June 1789 by raising the fundamental issue "whether there should be any District Courts of the United States at all." *Id.* at 65. When, "[a]fter long debate," the Senate voted to establish such courts, the anti-federalists immediately moved to limit the jurisdiction of both district and circuit courts to admiralty or maritime causes. *Id.* at 66-67. As Professor Warren explained, "[t]his was the crucial contest in the enactment of the Judiciary Act." *Id.* at 67. Although the anti-federalists lost, *id.* at 68, this was not the last time they would contest the issue.

Having beaten back this drastic limitation, the federalists obtained a few modest expansions of the district courts' jurisdiction. The Senate granted district courts exclusive jurisdiction over suits against consuls, or vice-consuls (except for certain criminal offenses) and added what became the third clause of § 9, which conferred exclusive jurisdiction for "'all seizures on land'" and on certain waters, "'made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.'" *Id.* at 74-75. No changes, however, were made in the clause that became the ATS.

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[6] There are no records of the debates in the Senate Committee or the Senate itself. Later historians have noted that Professor Warren based his account of the amendments that the full Senate made to the committee bill by comparing the final Senate version to the committee's handwritten version, rather than to the "slightly different" printed committee bill that the Senate actually used in the debates. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 496 n.158 (1986). Petitioner has not relied on any portion of Warren's recitation of events that might have been affected by his mistaken comparison.

In addition to modifying the jurisdiction of the circuit courts and this Court, *id.* at 78-80, 93-94, the Senate engaged in a heated debate over whether federal courts should possess any equity jurisdiction. *Id.* at 96-100. This debate reflected, in part, a strong reluctance to give federal courts powers that state courts lacked. *Id.* at 96. The issue was resolved by limiting federal equity powers to those that "then existed" at common law. *Id.* at 97.

These fights over federal court jurisdiction were not arcane matters of concern only to lawyers and judges. To the contrary, the initial Senate bill "was widely reported in the newspapers," and "the people at large were keenly following" its progress. *Id.* at 63-64. Indeed, newspaper editors expressed passionate views on such seemingly minor issues as the bill's failure to include assignments of real estate in a provision that prevented parties from creating circuit court diversity jurisdiction through assignments of "choses in action." *Id.* at 80 n.73 (citing *Centinel Revived*, Indep. Gazetteer (Phil.), Aug. 27 & Sept. 9, 1789).

After the Senate passed the bill, the House postponed debate on it in order to consider the proposed amendments to the Constitution, many of which also related to the judiciary. *Id.* at 111. Anti-federalists in the House twice moved, unsuccesfully, for consideration of a constitutional amendment that would have confined lower federal courts to admiralty jurisdiction. *Id.* at 119-20. When the House finally took up the Judiciary bill, the anti-federalists opened the debate by again seeking to restrict the lower federal courts to admiralty jurisdiction. See 1 Annals of Cong. 813 (J. Gales ed., 1789). That motion was debated extensively for two days before it was defeated. *Id.* at 826-66.

During this debate, Members not only referred to the district court's "jurisdiction" or "cognizance" countless times, they also distinguished between statutes that grant jurisdiction and those that create new "causes." In a speech that was reprinted in the newspapers, Fisher Ames asked rhetorically

"who shall try a crime against the law of the United States, *or a new created action*." *Id.* at 838 (emphasis added).[7] He then gave, as an example of such a "new created action," an "action . . . *brought on a statute*, declaring a forfeiture equal to the whole of the goods against him whoever shall unlade without a permit," *id.* at 839 (emphasis added)—precisely the type of statutory cause of action contemplated by the third clause of Section 9. See *supra* at 14. Representative Vining likewise justified the necessity of federal courts by referring to the new causes of action that Congress would create: "from your amazingly increasing system of Government," he argued, "causes must necessarily multiply in a proportionably extensive ratio; these causes must be tried somewhere." 1 Annals of Cong. at 853. No one, however, referred to the ATS as one of the "new created action[s]" that the district courts had jurisdiction to decide.

Finally, during Senate debate on the House-passed constitutional amendments, the anti-federalists in the Senate made one last run at their cherished goal of a federal judiciary confined to admiralty cases. They moved for an amendment limiting federal court jurisdiction to such cases. Warren, *supra*, at 127. Once again, they lost. *Id.*

In sum, the jurisdiction of the district courts was one of the most hotly contested political issues of the day. It was debated repeatedly and extensively by Senators and Representatives who understood the difference between jurisdiction and the causes of action to which federal jurisdiction could extend. It is clear that the contestants in this struggle over fundamental first principles were concerned with the first principles themselves—the existence and scope of the *jurisdiction of the new federal courts*—and were not concerned with creating any of the "causes" to which that jurisdiction would extend. Indeed, as discussed in greater

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[7] In a letter, Ames identified this speech as one reprinted in the newspapers. *See* Warren, *supra*, at 123 n.166.

detail below, they soon turned their attention to that subject, and used markedly different language than that found in the ATS to create these new "causes." See *infra* at 23.

Read in its historical context, the fourth clause of Section 9 of the first Judiciary Act, like the clauses surrounding it, can only be understood as a grant of jurisdiction to hear "causes" created elsewhere. As one scholar has concluded, the ATS "is purely jurisdictional, and the first Congress undoubtedly understood this to be the case. . . . Any suggestion that the statute creates a federal statutory cause of action is simply frivolous." Casto, *supra*, at 479-80 (footnote omitted).

II. AN ACTION FOR A TORT IN VIOLATION OF THE LAW OF NATIONS CANNOT BE BROUGHT IN THE ABSENCE OF A CAUSE OF ACTION.

In the face of this evidence, proponents of ATS claims have attempted to dispense with the requirement of a cause of action altogether. They argue that the concept of a cause of action was not invented until 1848, and that it is therefore "antihistorical" to require evidence of a congressional intent to confer one. See William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 Hastings Int'l & Comp. L. Rev. 221, 237-39 (1996). Second, they claim that the first Congress simply provided federal jurisdiction to hear "a category of tort actions—those that violated the law of nations or a treaty of the United States—that were already cognizable at common law." *Id.* at 237. Third, they claim that the ATS empowers federal judges to implement the law of nations by fashioning appropriate domestic federal common law remedies. Casto, *supra*, at 480. All of these claims are wrong.

A. The First Congress Was Familiar With The Requirement Of A Cause Of Action.

Proponents of ATS claims have argued that the concept of a "cause of action" did not exist until 1848, when New York abolished the distinction between law and equity and required

complaints to include "'"[a] statement of the facts constituting the cause of action."'" Dodge, *supra*, at 239 (alteration in original) (quoting *Passman*, 442 U.S. at 237). From this, they reason that any requirement that aliens demonstrate that they possess a cause of action to bring an ATS claim is "patently antihistorical." *Id.* at 237. In fact, this claim is itself historically mistaken.

The first Congress plainly understood the concept of authorizing suits to enforce rights. As this Court has explained, the phrase "cause of action" can refer *either* to "the alleged invasion of recognized legal rights upon which a litigant bases his claim for relief," *Passman*, 442 U.S. at 237 (internal quotation marks omitted)—terminology first introduced in 1848, *id.—or* to the distinct concept of an authorization to "invoke the power of the court" to "enforce the right at issue." *Id.* at 240 n.18. The founding generation of American lawyers plainly understood the latter concept, and had in fact grappled with it in connection with torts in violation of the law of nations.

At least as early as 1781, the Continental Congress was concerned with the lack of availability of redress for violations of the law of nations. In that year, a committee of Congress reported that "the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations," and that foreign powers could refuse to accept U.S. disavowals of transgressions of that law by a U.S. citizen "if regular and adequate punishment shall not have been provided against the transgressor." 21 Journals of the Continental Congress 1774-1789, at 1136 (G. Hunt ed., 1912) (1781) ("Journals"). Because such transgressions could, if unpunished, provide an excuse for war, the Continental Congress adopted a resolution in 1781 calling on the state legislatures "to provide expeditious, exemplary and adequate punishment" for "violation of safe conducts or passports," "the commission of acts of hostility against such as are in amity, league or truce with the United States,"

"infractions of the immunities of ambassadors and other public ministers," and "infractions of treaties and conventions to which the United States are a party." *Id.* at 1136-37, App. 3a.[8] Significantly, the 1781 Resolution went on to recommend that the state legislatures "*authorise suits to be instituted for damages* by the party injured." *Id.* at 1137, App. 4a (emphasis added).

The only State that appears to have responded to this call, see Dodge, *supra*, at 228-29, was Connecticut. In addition to criminalizing certain conduct, Connecticut adopted a broad tort remedy for aliens (among others) that provided that:

> if any Injury shall be offered and done by any Person or Persons whatsoever, to any foreign Power, or to the Subjects thereof, either in their Persons or Property, by Means whereof any Damage shall or may in any Wise arise, happen or accrue, either to any such foreign Power, to the said United States, to this State, or to any particular Person; the Person or Persons offering or doing any such Injury, *shall be liable to pay and answer all such Damages* as shall be occasioned thereby.

Acts and Laws of the State of Connecticut, in America 83 (1784), App. 6a (emphasis added).

Thus, both the 1781 Resolution and the Connecticut statute flatly refute any claim that the founding generation "would have [been] mystified" by the concept of an authorization to sue to enforce rights. Dodge, *supra*, at 239. Indeed, these two measures reflect a clear appreciation for the necessity of an authorization to seek redress for torts that violated the law of nations. Moreover, Oliver Ellsworth, the principal author of the Judiciary Act of 1789, was a member of the Continental Congress that passed the 1781 Resolution, and

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[8] These infractions tracked Blackstone's list of the "principal offences against the law of nations . . . : 1. Violations of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 William Blackstone, *Commentaries* *68.

the Connecticut General Assembly that responded expressly by authorizing tort claims brought by aliens, *id.* at 228-29, and Ellsworth had served as a judge of the Connecticut Superior Court. Julius Goebel, Jr., *History of the Supreme Court: Antecedents and Beginning to 1801*, at 459 (1971).

The first Congress also demonstrated that it understood the difference between the jurisdiction of courts to hear cases, and the authorization necessary for individuals to bring suits. Fisher Ames' example, during the debate on the Judiciary Act, of "an action . . . *brought on a statute*" to recover a statutory forfeiture, 1 Annals of Cong. at 839 (emphasis added), closely tracked language that the first Congress often used to authorize individuals to enforce rights under federal statutes. Thus, for example, An Act for the Encouragement of Learning created a remedy for copyright damages "to be recovered by a *special action on the case founded upon this act*, in any court having cognizance thereof." Ch. 15, § 6, 1 Stat. 124, 125-26 (1790) (emphasis added). This same act provided for forfeitures against copyright infringers, and authorized authors to "sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered by action of debt." *Id.* § 2, 1 Stat. at 125. Similarly, the first patent act provided that infringers "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*." An Act to Promote the Progress of Useful Arts, ch. 7, § 4, 1 Stat. 109, 111 (1790) (emphasis added). And a merchant marine act provided that seaman who jumped ship "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." An Act for the Government and Regulation of Seaman in the Merchants Service, ch. 29, § 5, 1 Stat. 131, 133 (1790). Numerous other statutes passed by the first Congress authorized "informers" to sue to recover a portion of statutory penalties. See note 4, *supra*.

There is thus ample evidence that the drafters of the ATS understood the concept of a cause of action, and the difference between that concept and the concept of jurisdiction. In drafting the jurisdictional provisions of the Judiciary Act, including the ATS, they did not intend to create new "causes." Rather, they anticipated that other statutes would authorize suits to enforce various rights, and they in fact adopted numerous such statutes themselves.

B. Torts "In Violation Of The Law Of Nations" Were Not Cognizable At Common Law In 1789.

Alternatively, proponents of ATS claims contend that the first Congress did not need to create a cause of action for torts in violation of the law of nations or U.S. treaties because such torts were "already cognizable at common law." Dodge, *supra*, at 237. It is this claim—and not the requirement of a cause of action—that is "patently antihistorical." There were no recognized torts "in violation of the law of nations" at the end of the eighteenth century, which is why the Continental Congress repeatedly urged the States to create such causes.

Although it is natural to read the term "tort" in the ATS in light of modern legal meanings and practice, it is mistake to do so. "The lack of a recognizable system of tort is one of the major differences between liability law before 1800 and after about 1850." Kermit L. Hall et al., *American Legal History* 178 (1991). "Not a single treatise on the law of torts was published before 1850," Lawrence M. Friedman, *A History of American Law* 299 (2d ed. 1985), and "[t]he term 'tort' appears only once in the index of Blackstone's *Commentaries on the Laws of England*." Hall, *supra*, at 178. Blackstone devoted little attention to torts "because the substance of the common law of wrongs *was almost nonexistent before the mid-nineteenth century*." *Id.* (emphasis added). See also Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 835 (1989) (in the 1780s, "the judicial enforcement of rights was confined to

claims fitting under common-law categories dealing with property and contract").

To the extent it did exist, tort law in the 1780s did not include cognizable actions for violations of the law of nations or treaties. Blackstone lists only actions for "trespasses, nuisances, assaults, defamatory words, and the like," as recognized tort actions. 3 William Blackstone, *Commentaries* *117. In his brief discussion of torts, he nowhere mentions violations of safe-conducts, infringement of the privileges of ambassadors, or piracy—all of which he grouped under the entirely separate heading of "Offences against the Law of Nations." 4 Blackstone, *supra*, at *68; see also Casto, *supra*, at 491 (acknowledging that Blackstone did not treat violations of the law of nations as "being a civil tort"). Unlike torts, which were "private wrongs," "offences" against the law of nations were public wrongs, which could justify the initiation of war by the injured state, unless the government of the transgressors "animadvert[ed] upon them with a becoming severity, that the peace of the world may be maintained." 4 Blackstone, *supra*, at *68; see also *id.* at *67 (explaining that England "animadverted on" such wrongs through its "municipal" criminal laws).

Thus, violations of the law of nations were not private wrongs redressable through private tort actions, but public wrongs, to be punished by the public itself to avoid the public calamity of war. The common law of the 1780s did not authorize individuals injured by such public wrongs to invoke the power of the courts to obtain redress for such injuries, which is precisely why the Continental Congress passed a resolution urging the States to enact statutes authorizing such suits. Indeed, if torts in violation of the law of nations were already cognizable at common law, there would have been no need for Congress to have passed its 1781 Resolution.

The necessity of such authorization is confirmed by the two incidents that most scholars identify as the impetus behind the ATS. The first occurred in Philadelphia in 1784, when a

French citizen, de Longchamps, threatened and then assaulted the French Consul General, Marbois. Casto, *supra*, at 491-92. After the French and other foreign representatives protested, Congress offered a reward for de Longchamps' capture, but was otherwise powerless to act. *Id.* Congress once again passed a resolution "strongly recommend[ing] to the legislatures of the respective States to pass laws for the exemplary punishment of such persons," 28 Journals, at 315 (J. Fitzpatrick ed., 1933) (1785), and asked John Jay to draft appropriate legislation, 29 Journals, at 655. Although it was at great pains to assure France of this country's respect for the law of nations, 28 Journals, at 314-15, Congress nowhere suggested that any form of civil redress was available through the state courts. Nor is there any record that Marbois ever filed a civil action. Dodge, *supra*, at 230. Similarly, there is no record of any civil action being instituted by the Dutch Ambassador when, four years later, a New York City constable entered his house and arrested one his servants. *Id.* Rather, in both cases, the law of nations was vindicated through criminal, *i.e.*, public, prosecutions of these public offenses. Casto, *supra*, at 494.

In short, as the 1781 Resolution makes clear, there were no cognizable common law tort actions for violations of the law of nations in the 1780s. Thus, unlike the grant of diversity jurisdiction, the ATS cannot be understood as extending federal jurisdiction to well-known common law causes of action that authorized private individuals to invoke the remedial powers of the courts. Rather, the ATS conferred federal jurisdiction over a species of actions that required additional legislative acts (*i.e.*, statutes or treaty ratifications) authorizing individuals to seek redress in the courts.

C. The Alien Tort Statute Does Not Authorize Creation Of A Federal Common Law Remedy For Torts In Violation Of The Law Of Nations.

Finally, ATS proponents have argued that the Act's grant of jurisdiction is, in effect, a grant of authority to federal courts

to exercise their power to make federal common law to provide remedies for torts in violation of the law of nations. Quoting this Court's statement in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction," the Second Circuit construed the ATS as authorizing federal courts to provide redress for "rights already recognized by international law." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). See also Casto, *supra*, at 480 (ATS creates "a federal forum in which federal judges are given power to implement the law of nations by fashioning appropriate domestic federal remedies"). This theory suffers from a number of fatal flaws.

1. Construing the Alien Tort Statute as an Authorization to Create Federal Common Law Is Inconsistent With the Intent and Understandings of the Enacting Congress.

As petitioner has shown, the first Congress simply intended the ATS to vest jurisdiction in the federal courts. That intent alone precludes a finding that the ATS can serve as a grant of federal common law-making power: "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). Nor is this the only evidence that the first Congress did not intend the ATS to serve as a font of judicial law-making power.

First, as petititoner has shown, the first Congress plainly understood the concept of a cause of action, and the principal author of the ATS, Oliver Ellsworth, knew that there was no recognized authorization to sue for torts in violation of the law of nations. Under these circumstances, it is inconceivable that the drafters of the ATS intended—without uttering a single word on the subject—to confer a common law-making power on the new federal courts to create causes of action that no state courts had created. An intent to confer such an

unprecedented judicial law-making power is rendered particularly implausible in view of the fact that, within months of enacting the Judiciary Act, the first Congress employed its Article I powers to create a number of express causes of action. See *supra* at 23.

Second, and perhaps even more telling, the proponents of the first Judiciary Act repeatedly sought to placate the concerns of anti-federalists, who feared an oppressive and self-aggrandizing federal judiciary. The Act was thus "a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given *the minimum powers* and jurisdiction." Warren, *supra*, at 53 (emphasis added). Indeed, in the case of equity jurisdiction, the Senate flatly refused to give federal courts broader powers than state courts had ever exercised. See *supra* at 18. It is simply inconceivable, therefore, that the first Congress would have sought to confer an unprecedented law-making power on the federal courts—let alone that they would grant a power to make *federal* common law in a provision conferring concurrent jurisdiction on *state* courts. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938) (diversity statute does not authorize creation of federal common law).

Deriving an authorization to create federal common law from the ATS is also inconsistent with basic assumptions the founding generation had about the role of judges. Eighteenth century judges were not understood to "make" common law within the meaning of *Erie*. Instead, they "found" or "discovered" a general common law that was thought to have an independent existence as part of natural law. See generally Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, at 7 (1977). It is thus anachronistic to suppose that the first Congress could have viewed the ATS as a post-*Erie*-style grant of authority to create federal common law remedies for torts in violation of the law of nations.

In addition, as petitioner has shown, the "law of nations" was not the source of any *enforceable* tort remedies in 1789. Even today, international law does not "create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws," *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring); see also *United States* v. *Diekelman*, 92 U.S. (2 Otto.) 520, 524 (1875) (an individual injured by foreign conduct "must seek redress through his own government," which may prosecute the claim "as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war"). To the extent the law of nations was "part of our law," therefore, it served as a body of rules to which courts resorted to resolve *otherwise authorized actions*. See *The Paquete Habana*, 175 U.S. at 700 (international law "must be ascertained and administered by the courts . . . as often as questions of right depending upon it *are duly presented* for their determination") (emphasis added); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 422-23 (1964) (international law "establishes substantive principles for determining whether one country has wronged another" and is applied "as a part of our own *in appropriate circumstances*") (emphasis added).[9] While members of the first Congress

[9] "Questions of right" that depended upon the "law of nations" were most often "duly presented" in maritime actions. *See Federalist No. 80*, at 478 (Alexander Hamilton). Despite being categorized as a branch of the "law of nations," however, admiralty law was understood by "sophisticated eighteenth century lawyers," as it is today, to be a form of domestic law. *See* Casto, *supra*, at 475 n.45; *see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 1-5, at 15 (3d ed. 2001) ("maritime law . . . became English national law" during the eighteenth century). Well before the 1780s, moreover, there were a host of recognized maritime causes of action. *See id.* Thus, members of the first Congress would not have understood the "law of nations" to *create*

might have expected these rules to evolve over time, they would not have understood the statute to empower federal judges to enforce "rights" derived from rules that did not then—and still do not today—give rise to enforceable rights.

Finally, treating the ATS as a grant of federal common law-making power results in a jurisdictional anomaly that the enacting Congress could never have intended. Some have argued that, where a plaintiff states a claim for a tort in violation of the law of nations, federal jurisdiction is available under § 1331, because the plaintiff's action "'arises under' § 1350 and, therefore, under a law of the United States, as required by § 1331." *Tel-Oren*, 726 F.2d at 779 n.4 (Edwards, J., concurring). But the ATS is indisputably a grant of jurisdiction. Such an "arising under" theory implausibly strips the ATA of its clear jurisdictional role and treats it as a mere predicate for federal question jurisdiction that Congress did not create until nearly a century later.

2. The Founding Generation's Desire to Ensure Adherence to the Law of Nations Does Not Render the Alien Tort Statute a Source of Federal Common Law-Making Power.

Although the first Congress clearly did not intend the ATS to serve as a source of judicial common law-making power, this Court has indicated that federal courts may formulate federal common law in the absence of congressional intent where "'necessary to protect uniquely federal interests,'" such as "our relations with foreign nations." *Texas Indus., Inc.*, 451 U.S. at 640-41 (quoting *Sabbatino*, 376 U.S. at 426). *Sabbatino* itself, however, held that the uniquely federal interests that arise in disputes implicating foreign relations justify a federal common law rule of judicial *restraint and deference to the political branches*. The founding generation's concern with ensuring national adherence to the

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maritime causes of action, but rather to serve as a body of domestic rules for resolving such actions.

law of nations confirms that decisions about when international norms should be enforceable in U.S. courts should be left to the national political branches.

In *Sabbatino*, this Court ruled that, as a matter of federal common law, the act of state doctrine bars federal and state courts from examining the validity of a taking of property by a foreign government within its own territory, "even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428. In adopting this rule, the Court cited the separation-of-powers underpinnings of the doctrine, and repeatedly stressed the constitutional responsibility, and far greater competence, of the political branches in the field of foreign affairs.[10] Thus, "*Sabbatino*'s federal common law analysis was designed to shield courts from involvement in foreign affairs. It was not an endorsement of a free-wheeling coordinate lawmaking power for federal courts in the foreign affairs field." Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 861 (1997) (footnote omitted).

Although there are numerous statements from the constitutional convention and ratification debates in which proponents of the new constitution stressed the need for federal court *jurisdiction* over cases involving the law of nations, the founding generation's desire to ensure national conformity with the law of nations confirms that the ATS is not a source of "a free-wheeling coordinate law-making power for federal courts." *Id.* The Framers empowered Congress, not the courts, to "define and punish Piracies and Felonies committed on the high Seas, and Offences against

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[10] *See*, *e.g.*, *Sabbatino*, 376 U.S. at 423 (act of state doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals"); *id.* at 427-28 (the doctrine reflects "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs").

the Law of Nations." U.S. Const. art. I, § 8, cl. 10. This provision "strongly implies that the choice to federalize or not federalize is left to Congress—not the federal courts." Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 Va. J. Int'l L. 365, 431 (2002).

That implication hardens into conviction in light of the actions of the first Congress. As noted above, the first Congress did not grant federal courts exclusive jurisdiction over claims falling within the ATS's jurisdictional grant. Nor did it adopt the 1781 Resolution's proposal "to erect a tribunal in each State, or to vest one already existing with power to decide on offenses against the law of nations, not contained in the [Resolution's] enumeration [of such offenses]." 21 Journals at 1137, App. 4a. Instead, the first Congress exercised its power under the Define and Punish Clause to "animadvert on" the three then-recognized offenses against the law of nations. An Act for the Punishment of certain Crimes against the United States, ch. 9, §§ 8-9, 25-28, 1 Stat. 112, 113-14, 117-18 (1790) ("First Crimes Act"). In doing so, moreover, it created an exception to the immunities of ambassadors, which, in England, nullified all legal process against an ambassador or "his domestic or domestic servant[s]." 4 Blackstone, *supra*, at *70. The first Congress, by contrast, provided that the immunity of any "domestic or domestic servant" of an ambassador did not extend to any "citizen or inhabitant of the United States, who shall have contracted debts prior to his entering into the service of any ambassador or other public minister, which debts shall be still due and unpaid." First Crimes Act, ch. 9, § 27, 1 Stat. at 118.

Through its actions, therefore, the first Congress asserted political branch primacy over the law of nations. It declined to vest a "law of nations" lawmaking power in the courts (as the Continental Congress had proposed) or even to grant federal courts exclusive jurisdiction over cases involving the law of nations. It expressly incorporated international norms into U.S. law, but only after *modifying* those norms. And it

vested responsibility for enforcing those modified norms in the executive branch.

Moreover, as one scholar has explained, "a sizeable portion of early pronouncements about the application of the law of nations to American law must be understood as having been advanced to augment *the executive's* assertion of power over foreign affairs." Jay, *supra*, at 844 (emphasis added). Most notably, in the decade following passage of the Judiciary Act, members of the Washington Administration, aided by a number of federalist judges, argued that the law of nations provided the basis (in the absence of any statute) for prosecuting violations of the neutrality treaty with Britain—a legal position that "significantly augumented executive power."[11] *Id.* at 846. Indeed, "[f]rom the very first years of the country, the law of nations often has served more as a source of executive power." *Id.* at 848.

In short, the early actions of Congress and the executive branch confirm that it is the political branches that have primacy with respect to the law of nations. In light of that history, the ATS cannot plausibly be understood as a source of an affirmative *judicial* law-making power. Rather, consistent with *Sabbatino*'s teachings, this early history demonstrates that the federal courts should leave to the political departments—and, in particular, to Congress—decisions about whether and under what circumstances aliens can invoke the power of federal courts to seek redress for torts that violate international norms. As petitioner demonstrates next, any judicial arrogation of that power raises serious separation-of-powers concerns.

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[11] This Court ended this practice in *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812).

III. IMPLYING OR CREATING A CAUSE OF ACTION UNDER THE ALIEN TORT STATUTE RAISES GRAVE SEPARATION-OF-POWER CONCERNS.

If there were any doubt about the impropriety of implying or creating a cause of action under the ATS, those doubts must be resolved in favor of a purely jurisdictional reading of the ATS in order to avoid the serious separation-of-powers problems that a contrary interpretation creates. First, judicial implication or creation of a cause of action interferes with the political branches' conduct of foreign affairs. Second, as this case illustrates, a judicially implied or created cause of action interferes with political branch efforts to promote and protect the Nation's security. Finally, in attempting to give content to a judicially implied cause of action, lower courts have usurped the power and responsibility of the political branches to decide which norms of international law should be binding.

A. Judicial Implication Or Creation Of A Cause Of Action Interferes With The Conduct Of Foreign Affairs By The Political Branches.

"The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). See also *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386 (2003). Judicial implication or creation of a cause of action under the ATS can cause—and in fact has caused—international frictions and tensions that complicate and interfere with political branch management of U.S. foreign relations. In the absence of evidence that Congress intended to authorize judicial actions with such untoward consequences—and there is none here—judicial implication of a cause of action under the ATS is inconsistent with the Constitution's allocation of responsibility for management of the Nation's foreign affairs.

In two recent ATS cases, senior officials of foreign governments expressed concern and even anger about the very existence of the suits. See, *e.g.*, Letter from Soemadi D.M. Brotodiningrat, Ambassador of Indonesia to the United States, to Richard Armitage, Deputy Secretary, U.S. Department of State (July 15, 2002), *filed in Doe I* v. *ExxonMobil Corp.*, No. 01cv1357 (D.D.C. document filed Aug. 1, 2002); South African President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation (Apr. 15, 2003), *available at* http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html. Indeed, the President of South Africa stated that his nation considered it "completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation." *Id.*[12] These reactions, in turn, complicate diplomatic efforts, forcing the Executive Branch to promote foreign policy goals by opposing such lawsuits and thereby face the wrath of public opinion, or to stay silent and damage our Nation's position with foreign nations. Cf. *Sabbatino*, 376 U.S. at 436 (executive branch will often "wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically").

Indeed, in some instances such suits can affirmatively impair pursuit of U.S. foreign policy goals. The State Department's Legal Adviser advised a court that adjudication

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[12] These cases are not aberrational in this regard. Many ATS suits are likely to upset foreign governments. *See* Tom Carter, *Outside Investors Face "Slave Labor" Suit*, Wash. Times, Apr. 9, 2001 (noting plans to sue the Cuban government for constructing a system of "slave labor"); *Bao Ge* v. *Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000) (dismissing lawsuits over China's alleged slave labor), *aff'd*, 35 Fed. Appx. 1 (D.C. Cir. 2002) (unpublished per curiam decision).

of one ATS case would "risk a potentially serious adverse impact on significant interests of the United States." Letter of William H. Taft, IV, Legal Adviser, Department of State, to Hon. Louis F. Oberdorfer 1 (July 29, 2002) *filed in Doe I* v. *ExxonMobil Corp.*, No. 01cv1357 (D.D.C. document filed Aug. 1, 2002). Explaining that "the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty," the Legal Adviser opined that adjudication of the suit "could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform." *Id.* at 2-3.

ATS litigation can also undermine the ability of the political branches to use economic leverage to advance foreign policy goals. The President can use the ability to permit or prohibit U.S. investment abroad to induce cooperation from repressive or hostile regimes. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375-76 (2000). Recently, however, plaintiffs have begun to use the ATS to seek to hold multinational corporations liable for state-sponsored human rights abuses that occur in countries where those corporations operate. See, *e.g.*, *Ntsebeza* v. *Citigroup Inc.*, 1:02cv4712 (S.D.N.Y. filed June 19, 2002) (claims against corporations doing business in South Africa during apartheid era). U.S. businesses operating overseas thus face new, and undefined liability based on evolving norms of international law—liability risks that can chill or curtail U.S. investment in the very countries where the promise of such investment, or the threat of prohibiting it, can be a powerful diplomatic tool. See generally Brief for the National Foreign Trade Council, et al., as *Amici Curiae* in Support of Petitioner at 5-19.

In *Sabbatino*, this Court concluded that the risk that judicial decisions could be perceived as an "affront to another state," or could "seriously interfere with" diplomatic efforts, including "economic and political sanctions," 376 U.S. at

431-32, justified a refusal to adjudicate recognized state law causes of action. These same concerns mandate adoption of a strong presumption that courts should not imply (or create) a cause of action that can complicate or interfere with the conduct of U.S. foreign policy absent the clearest evidence that Congress intended to authorize such actions. Indeed, such a presumption is a natural corollary to the "long-standing" presumption against extra-territorial application of federal law, *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), *superseded by statute on other grounds*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994)—a presumption that prevents "unintended clashes between our laws and those of other nations which could result in international discord." *Id*.

It is clear that the first Congress never intended to authorize tort actions with the potential for such adverse effects on the conduct of U.S. foreign policy. It is inconceivable, for example, that the first Congress ever envisioned U.S. state and federal courts passing factual, moral and legal judgments on events that occurred within the borders of another nation (as in this case), or that involved exercises of foreign governmental authority (as in *Bao Ge* v. *Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000)). The impetus for the ATS was incidents that occurred on U.S. soil. See *supra* at 25-26. More fundamentally, when the ATS was passed, America was "a weak power with an unproven government, operating in a world in which warfare was a common form of dispute resolution and a principal element of the international aspirations motivating many nations." Jay, *supra*, at 821. The founding generation repeatedly sought to *avoid* offending other countries—by urging States to punish violations of the law of nations, apologizing for the inability of the Continental Congress to do so, criminalizing such violations shortly after ratification of the Constitution, and invoking the law of nations to punish neutrality violations in the 1790s.[13] In light

[13] This desire to placate other nations also explains a 1795 Attorney General opinion that suggested that British citizens injured by U.S.

this history, there can be no doubt that the first Congress did not intend to authorize tort actions that would *cause* complaints and expressions of outrage from ambassadors and presidents of foreign nations. Judicial implication of a cause of action is thus constitutionally improper.

B. Judicial Implication Or Creation Of A Cause Of Action Interferes With The Executive's Efforts To Protect National Security.

As this case makes clear, judicial implication or creation of a cause of action under the ATS can also interfere with national security efforts. In the absence of a clear congressional intent to authorize actions that can cause such interference—and there is none here—judicial implication of such a cause of action is constitutionally improper.

The United States has explained that imposing liability on aliens who assist the federal government in its efforts to apprehend indicted murderers and other criminals on foreign soil inescapably impairs the government's anti-terrorism efforts. See Brief for the United States as *Amicus Curiae* at 3, 22, *John Doe I* v. *Unocal Corp.*, Nos. 00-56603, 00-56628 (9th Cir. filed May 8, 2003) (*en banc*), Pet. App. 228a-229a, 242a-243a (citing panel decision below). The assistance of foreign agents operating on foreign soil is vital to the Nation's efforts to fight both international terrorism and international

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participants in a French raid on a British colony "have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations." 1 Op. Att'y Gen. 57, 59 (1795). At a time when the Washington Administration was stretching the common law past the breaking point to prosecute conduct that did not violate federal law (but could be deemed a breach of neutrality by Britain), *see United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812), it is not surprising that the Attorney General would overstate the ATS's scope. *See* Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 Am. J. Int'l L. 62, 67 (1988) (noting "[t]he imperative security interests"—*i.e.*, avoiding war with Britain and France—"that animated . . . Attorney General Bradford['s]" opinion).

crime. For example, the United States might request that a Middle East ally detain a suspected terrorist for questioning. Under the decision below, however, the U.S. officials who convey the request, the foreign officials who execute it, and any cooperating individuals who participate in a brief detention, expose themselves to the burdens of defending their actions in distant U.S. courts and to liability for money damages.

These risks are starkly illustrated by this very case. Acting at the direction of senior DEA officials who had obtained a valid indictment against respondent and a valid warrant for his arrest, petitioner was ultimately held liable based on a highly technical interpretation of the statutory authority of DEA agents to engage in extraterritorial enforcement activities. This holding can only deter other would-be assistants in the wars on terrorism and international crime.

This Court has recognized that decisions affecting national security

> should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion.

Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). In light of the Constitution's allocation of national security responsibilities, there should be a strong presumption that, in the absence of compellingly clear evidence to the contrary, Congress does not intend courts to imply causes of action that can undermine the executive's national security efforts. And, once again, there is no evidence that, in enacting the ATS, Congress intended to authorize judicial actions that could cause such interference. To the contrary, as petitioner has shown, the founding generation repeatedly sought to ensure compliance with the

law of nations in order to protect the Nation from wars of reprisal. Those efforts belie any attempt to imply a cause of action under the ATS that can undermine national security efforts.

C. Judicial Implication Of A Cause Of Action Has Led Courts To Usurp The Responsibility Of The Political Branches To Decide Whether And When International Norms Should Be Binding.

Because the ATS does not create a cause of action, it sets forth none of the necessary elements for a claim, including any liability standard. As a result, lower courts have embarked on the quixotic task of attempting to identify which international law norms are sufficiently binding to create tort liability. The Second Circuit, which inaugurated this practice, has recently lamented its myriad pitfalls:

> [T]he 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 . . . 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.

Flores v. *Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003) (citation, footnote and internal quotation marks omitted).

The inherent unmanageability of this task is sufficient, by itself, to confirm that the first Congress did not intend federal courts to imply or create a cause of action under the ATS. In addition, the necessity of establishing liability standards in the absence of congressional guidance has given rise to a far more significant problem: usurpation of the constitutional powers and responsibilities of the political branches to decide which international norms are binding in the United States.

In concluding that arbitrary arrest and detention is a violation of customary international law, the Ninth Circuit relied in this case on, among other things, the American Convention on Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, and the Universal Declaration of Human Rights. Pet. App. at 25a-26a & n.17. The Senate, however, has *refused to ratify* the American Convention on Human Rights. The United States is not a party to either the European Convention or the African Charter. And, while the Senate has ratified the ICCPR, the Senate and the Executive Branch have expressly agreed that this treaty is not self-executing and may not be relied upon by individuals in domestic court proceedings. See S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992); 138 Cong. Rec. S4781, S4783-84 (daily ed. Apr. 2, 1992). The Universal Declaration of Human Rights, in turn, is not a treaty at all, but a *non-binding* United Nations resolution that the United States approved on the express understanding that it was *not* a "statement of law or of legal obligation[s]." 1 *Digest of International Law* § 2, at 53 (M. Whiteman ed., 1963) (quoting statement of Eleanor Roosevelt) (internal quotation marks omitted).

The Constitution prescribes very specific procedures, including a super-majority voting requirement, before a treaty becomes binding law under the Supremacy Clause. U.S. Const. art. II, § 2, cl. 2. Those procedures, of course, include no role for the courts. By purporting to derive "specific, universal and obligatory" norms from unratified treaties, treaties ratified subject to qualifications, and non-binding U.N. resolutions, the court below circumvented these constitutionally prescribed steps, cf. *INS* v. *Chadha*, 462 U.S. 919, 956-58 (1983) (requiring adherence to constitutionally specified steps for enacting federal legislation), and improperly usurped the prerogative of the political branches

to decide whether certain norms of international law should be binding and enforceable in U.S. courts. *Miller* v. *French*, 530 U.S. 327, 341 (2000) (the "Constitution prohibits one branch from encroaching on the central prerogatives of another"). Although Congress can expressly incorporate international law into federal law, and has occasionally done so, see *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 157 (1820) (statute prohibited piracy "'as defined by the law of nations'"), respect for separation-of-powers principles compels courts to refrain from purporting to derive enforceable norms from non-binding documents absent a congressional directive to do so. See, *e.g.*, *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring) (practice of having federal courts "discover" binding legal norms "among the writings of those considered experts in international law and in treaties that the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers"), *cert. granted*, 124 S.Ct. 534 (2003). And, as petitioner has shown, no such directive can be found in the ATS. See *supra* at 27-33.

This practice, moreover, gives rise to a second separation-of-powers violation. Because customary international law is derived from the consensus of nations, the political branches have a role to play in shaping that consensus. Thus, "[w]hen articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, . . . but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns." *Sabbatino*, 376 U.S. at 432-33. Indeed, from the very outset, "the United States endeavored to influence the development of the law of nations by asserting diplomatic positions that at times were in opposition to established international law." Jay, *supra*, at 846. See also *Brown* v. *United States*, 12 U.S. (8 Cranch.) 110, 128 (1814) (Marshall, C.J.) (noting that the usages of other nations "is a guide which the sovereign

follows or abandons at his will"). By purporting to derive binding norms from international legal standards that the political branches have not incorporated into U.S. law, federal courts impermissibly interfere with the ability of the political branches to influence and shape those very norms.

Indeed, this case illustrates the risk of such interference. Balancing the harms to our foreign relations against national law enforcement needs and interests, the Executive Branch chose to authorize the abduction of a Mexican citizen from Mexico rather than seek extradition pursuant to treaty. By condemning this action as a violation of binding international law, the Ninth Circuit interfered with the Executive Branch's ability to develop a consensus that such conduct does not violate customary international legal norms. This interference underscores, once again, the impropriety of judicial implication or creation of a cause of action in the absence of the clearest evidence that Congress meant to authorize suits under the ATS. Cf. *Sabbatino*, 376 U.S. at 432 (judicial refusal to entertain recognized cause of action justified by the "serious and far-reaching consequences [that] would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary").

D. Congress Has Not Ratified Judicial Implication Or Creation Of A Cause Of Action Under The Alien Tort Statute.

Faced with overwhelming evidence that the first Congress did not intend to create any cause of action under the ATS—let alone one capable of interfering with the ability of the political branches to manage foreign affairs, protect national security, and shape international norms—ATS proponents and lower courts have argued that Congress ratified judicial implication of a cause of action under the ATS by enacting the Torture Victim Protection Act ("TVPA") in 1992. The TVPA creates an express cause of action for aliens as well as U.S. citizens to seek redress for a discrete set of torts that

violate international law—*i.e.*, extra-judicial killings and torture. Pub. L. No. 102-256, § 2, 106 Stat. at 73. The accompanying House Report stated that the TVPA "would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under . . . section 1350," cited *Filartiga* with approval, and stated that the ATS "should not be replaced." H.R. Rep. No. 102-367, at 3 (1991). Reliance on these statements, however, is misplaced. Indeed, the TVPA undermines the reasoning of *Filartiga* and the courts that have followed its lead.

First, it is the intent of the *enacting* Congress, not the views expressed in a report by a subsequent Congress, that controls the scope and meaning of the ATS. See *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) (dismissing views expressed in 1984 committee report concerning the meaning of 1974 enactment). Second, the actions of the 102nd Congress undermine, rather than support, implication of an ATS cause of action. If the ATS already granted aliens the right to sue for *all* tortious violations of binding international legal norms, then Congress did not need to create an express cause of action for aliens that covers a very narrow category of such violations. The TVPA authorizes damages awards only against those individuals "who, under actual or apparent authority, or color of law, of any foreign nation," subject another to "extrajudicial killing" or "torture," Pub. L. No. 102-256, § 2, 106 Stat. at 73. Congress, in turn, provided detailed definitions for the latter term. *Id.* § 3, 106 Stat. at 73-74. The clear inference to be drawn from this action is that aliens do not have a cause of action to sue for other alleged violations of international law, such as a detention of less than 24 hours that results in no physical injury and is carried out under "actual or apparent authority" of this country, not a foreign nation.

Indeed, in addition to providing a detailed liability standard, the TVPA also sets forth an exhaustion requirement and a statute of limitations. *Id.* § 2(b)-(c), 106 Stat. at 73. The

TVPA is thus precisely the type of subsequently enacted cause of action that the first Congress anticipated when it granted the new district courts concurrent "cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations." The TVPA also provides the clear authorization needed to eliminate the separation-of-powers concerns that would otherwise arise from suits in which U.S. courts passed legal, moral and factual judgment on conduct that occurs within the borders of other nations and that involves exercises of foreign governmental authority. The TVPA thus highlights the impropriety of implying a cause of action to enforce international legal norms where, as here, there is no evidence that the enacting Congress intended to authorize such actions.

IV. IF A CAUSE OF ACTION IS IMPLIED UNDER THE ALIEN TORT STATUTE, IT SHOULD EXTEND ONLY TO THOSE NORMS TO WHICH THE UNITED STATES HAS ASSENTED.

Should the Court conclude, despite all of the foregoing, that it is proper to imply a cause of action, or derive federal common law-making power, from the ATS's jurisdictional grant, the Court must undertake the difficult task of defining the scope and content of that action. See generally Brief for the National Association of Manufacturers as *Amicus Curiae* in Support of Reversal at 17-21. Indeed, delimiting the range of actionable torts that violate the law of nations is crucial, as plaintiffs have demonstrated creativity in the range of putative offenses they would bring within the statute's ambit.[14] Petitioner submits that any such cause of action must be limited to suits for violations of international legal norms that the political branches of the United States have accepted.

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[14] *See, e.g., Flores*, 343 F.3d at 145 (claims for violations of "'right to life' [and] 'right to health'" from intranational pollution); *Aguinda* v. *Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (environmental claims); *Zapata* v. *Quinn*, 707 F.2d 691 (2d Cir. 1983) (claim for loss of money from distribution system of state lottery).

Such a limitation minimizes—though it does not eliminate—the difficulties of defining an implied cause of action and the separation-of-power problems inherent in doing so.

As noted above, the Second Circuit has candidly acknowledged that binding norms of customary international law cannot be found in "any single, definitive, readily identifiable source," but instead must be divined from the custom and practices of governments as shown in "myriad decisions made in numerous and varied international and domestic arenas," using evidence that is "widely dispersed and generally unfamiliar to lawyers and judges." *Flores*, 343 F.3d at 154. If, however, a judicially implied or created cause of action under the ATS is limited to those norms to which the United States subscribes, courts will only be forced to decide whether an alleged norm has actually achieved the status of customary international law if the United States has assented to it. If the United States has not done so, that is the end of the inquiry.

The United States generally makes its assent known through treaties, executive agreements, and federal laws that are readily identifiable. In addition, certain international norms, known as *jus cogens* norms, govern matters of such universal concern, and their violation is so universally condemned, that U.S. assent might be inferred. Thus, for example, U.S. assent to *jus cogens* norms such as prohibitions on genocide, crimes against humanity and slavery, see Ian Brownlie, *Principles of Public International Law* 489 (6th ed. 2003), might be inferred from the United States' role in the Nuremburg trials and from the Civil War-era amendments to the Constitution.

Limiting a judicially implied cause of action to suits seeking to enforce norms to which the United States has assented eliminates a number, though certainly not all, of the separation-of-powers problems noted above. Most significantly, courts enforcing such norms will not usurp the role of the political branches to shape and influence the

development of international norms, or to determine which norms should be binding. Such a limitation should also reduce judicial interference with the ability of the political branches to manage foreign relations and protect national security. If, for example, Congress and the President had assented to an international norm that prohibits governmental abduction of aliens on foreign soil, judicial enforcement of that norm under an implied cause of action would not interfere with national security efforts, inasmuch as the political branches already would have prevented the Executive Branch from employing such a tool to protect the Nation. Cf. Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1981) ("[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination"). See also *The Paquete Habana*, 175 U.S. at 712 (construing presidential proclamations to have bound the United States to maintain a naval blockade of Cuba in accordance with the law of nations).

Under such a limitation, respondent's claim necessarily fails. As noted above, in finding that petitioner had violated a customary international legal norm that did not rise to the level of a *jus cogens* violation, the Ninth Circuit relied on two treaties to which the United States is not a party, another treaty that the Senate has refused to ratify, and a non-binding U.N. resolution that the United States approved on the understanding that it did not create any legal norms. See *supra* at 41. Although the Ninth Circuit did rely on one treaty that the United States has ratifed, the United States did so on the condition that the treaty's norms would not be enforceable in U.S. courts. *Id.* That condition necessarily forecloses reliance on a judicially implied cause of action to enforce the norms of that treaty.

V. PETITIONER DID NOT VIOLATE CUSTOMARY INTERNATIONAL LAW.

Even if, *arguendo*, a cause of action can properly be inferred or created under the ATS for torts in violation of the

law of nations, no such violation occurred here. Respondent's detention, which lasted less than 24 hours, resulted in no physical harm to him, and was undertaken on a case-specific basis by a private citizen following instructions from U.S. law enforcement officials, offends no rule of customary international law.

The Ninth Circuit found that petitioner violated a rule of customary international law that prohibits arbitrary detention of any duration. As the United States has shown, U.S. Br. at 17-40, respondent's detention was not "arbitrary" at all, but was instead statutorily authorized. That showing, which petitioner incorporates by reference here, is dispositive.

In addition, separation-of-powers principles preclude the Ninth Circuit's determination that respondent's limited detention violated customary international law. Even if the Court concludes that the ATS authorizes courts to derive enforceable legal norms from customary international law, those norms cannot be based, as they were here, on treaties that the United States has refused to ratify, or that it has ratified subject to the express reservation that the treaty shall not create rights enforceable in U.S. courts. Thus, the Ninth Circuit not only purported to decide an issue that, under the Constitution, the political branches are assigned responsibility to decide (*i.e.*, which international legal norms should be binding as a matter of U.S. law), the lower court chose to *contradict* a decision that the political branches had already made. Because courts plainly have no authority to override such political branch judgments, the Ninth Circuit's holding that petitioner violated a binding norm of international law was constitutionally impermissible.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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