No. 03-339

In the

Supreme Court of the United States

♦

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, et al.,

Respondents.

♦

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

♦

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

♦

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QUESTIONS PRESENTED

The Alien Tort Act (ATA), 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 ATA 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.

2. If the ATA provides a cause of action, whether the actions it authorizes are limited to suits for violations of jus cogens norms of international law.

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 ATA.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in a constitutionally grounded government, including adherence to the principles of separation of powers, democratic consent, and limited federal judicial powers. PLF has participated as amicus curiae in a vast assortment of cases heard by this Court over that time and, in so doing, has consistently argued that courts must avoid expanding the language of a legislative act where there is clear potential for a separation of powers problem. *See, e.g.*, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Food*

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[1] **Pursuant to this Court's rule 37.2(a), all parties have consented to the filing of this brief. A stipulation letter evidencing such consent has been lodged with the Clerk of the Court.**

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

and Drug Admin. v. Brown & Williamson Tobacco Corporation, 529 U.S. 120 (2000).

PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case. PLF has formally adopted an objective committing the Foundation to litigation for the purpose of reaffirming that international legal principles may not be judicially applied absent the consent of the political branches of the United States government. Acting on this objective, PLF participated along with Atlantic Legal Foundation as amicus curiae before the Second Circuit Court of Appeals in *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), a case directly raising the issue of the role of customary international law in United States law. *See* Martin S. Kaufman, et al., Brief Amicus Curiae of Pacific Legal Foundation and Atlantic Legal Foundation in Support of Respondents-Appellants *in Beharry v. Ashcroft*, *at* http://www.atlanticlegal.org/ beharry.pdf (June, 2000) (last visited Jan. 16, 2004). Intending to broaden its activity in this area, PLF has since committed to participating as amicus curiae in this important case.

STATEMENT OF THE CASE

The most controversial and far-reaching question raised by the Ninth Circuit's treatment of the Alien Tort Act (ATA) in the present case is what is required to state a violation of the "law of nations" actionable under the ATA. The lower court concluded that an international principle can be part of the "law of nations" and a violation of the principle therefore actionable under the ATA, even if the political branches of the United States government have not consented to such a definition of the "law of nations." Consequently, this case raises a specific issue, and the only issue addressed by amicus, concerning the role of the political branches, and particularly Congress, in

determining what constitutes the "law of nations" for purposes of application in the United States.[2]

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[2] Amicus agrees with Petitioner's arguments that the ATA does not provide a cause of action given the absence of an express grant in the statute. Amicus also believes that such a cause of action should not be implied given the potential for interference with the conduct of foreign affairs delegated to the political branches of government. *See Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-05 (D.C. Cir. 1984) (Bork, J., concurring). These dangers largely depend, however, on the *content* of any

right of action, not just its bare existence. Amicus accordingly believes it appropriate and necessary to direct this Court's attention to that content issue, particularly to the question of whether only legislatively adopted and accepted international principles can be actionable under the ATA.

Respondent Alvarez-Machain was present during the 1985 torture and murder of Drug Enforcement Agency agent Enrique Camanara-Salazar in Mexico. Alvarez-Machain was later indicted for participation in the murder of Camanara-Salazar and a warrant was issued for his arrest. In 1990, agents of the United States abducted Alvarez-Machain in Mexico and returned him to the United States to stand trial. After he was acquitted, Alvarez-Machain returned to Mexico and filed suit against the United States and its agents, seeking damages for his abduction and detention. One of his theories was that defendants were liable for their actions under the ATA and, more specifically, because the abduction and detention violated principles of "international customary law."

On June 3, 2003, an en banc panel of the Ninth Circuit Court of Appeals held that Alvarez-Machain could indeed hold the United States and its agents liable for the tort of arbitrary detention pursuant to a customary international legal principle forbidding such detention. In so doing, the court held that congressional consent to an international legal principle as part of the "law of nations" is not a prerequisite to an ATA suit under that "law." In short, the Ninth Circuit effectively concluded that, if enough other countries besides the United States favor an international principle, federal courts may enforce the principle against the United States under the ATA.

SUMMARY OF ARGUMENT

Unlike the "law of the United States," which is made by Congress and can be ascertained by examining the United States Code, there is no clear source or meaning for the "law of nations." *See* 2 Joseph Story, *Commentaries on the Constitution* § 1163 (2d ed. 1851) "[O]ffenses against the law of nations . . . cannot with any accuracy be completely ascertained, and defined in any public code, recognized by the common consent of nations."). Yet, if the ATA is to have

content and force, the "law of nations" must be defined by someone. Both by explicit command and structural imperative, the Constitution compels the conclusion that only Congress should have this power. Indeed, to avoid a construction of the statute that raises troubling constitutional issues, the Court should conclude that the "law[s] of nations" actionable under the ATA are those international principles which have been defined or recognized as part of the "law of nations" by the Congress or that have been otherwise adopted as judicially applicable law by the Congress through constitutional process.

ARGUMENT

I

APPLICATION OF INTERNATIONAL PRINCIPLES WITHOUT CONGRESSIONAL ACQUIESCENCE RAISES SERIOUS SEPARATION OF POWERS CONCERNS

The Ninth Circuit's fundamental conclusion is that federal courts may identify international rules as the "law of nations" applicable in the United States under the ATA, even in the absence of congressional recognition of a principle as part of the "law of nations" or the law of the United States. *See Alvarez-Mechain v. United States*, 331 F.3d 604, 620 n.15 (9th Cir. 2003); *id.* at 650 (O'Scannlain, J., dissenting); *id.* at 664 (Gould, J., dissenting). But this conclusion is not consistent with the language of the Constitution and the separation of powers principles upon which it is structured.

The Constitution grants only Congress the power to "define" offenses "against the law of nations." U.S. Const. art. I, § 8, cl. 10. More generally, it establishes a government of separated powers, with lawmaking powers vested in Congress, executive powers in the President, and judicial powers—the power to interpret and enforce the law—in the federal courts.

See U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1. This structure, and the Constitution, are imperiled when the judiciary treads upon a power expressly delegated to another branch or otherwise exceeds the proper scope of its authority. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (recognizing an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere"). The lower court's conclusion that no congressional authorization is necessary for federal courts to apply a rule as the "law of nations" conflicts with these separation of powers standards.

A. The Lower Court's Decision Usurps Congress' Exclusive Power to Define the "Law of Nations"

The framers of the Constitution, many of whom were part of the Congress that passed ATA, anticipated that the fledgling United States would respect the "law of nations," which at that time consisted (at most) of "the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states." Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 821-22 (1989). But they well-understood that the "law of nations" was vague, could not be positively grounded in any source, and therefore subject to conflicting interpretations. *See* 2 Joseph Story, *Commentaries on the Constitution* § 1163 ("[O]ffenses against the law of nations . . . cannot with any accuracy be completely ascertained, and defined in any public code, recognized by the common consent of nations."); Committee of Detail, *The Records of the Federal Convention of 1787*, at 157 (Max Farrand ed., Yale Univ. Press 1966) (1911) (Madison's notes) (stating

that the "law of nations is too vague and deficient to be a rule").

To reconcile the desire to respect the law of nations with the need to determine first what that law is, the constitutional framers granted *to Congress* the power "[t]o define and punish . . . offenses against the law of nations." U.S. Const. art. I, § 8, cl. 10. *See* Charles D. Siegal, *Deference and Its Dangers*: *Congress*' *Power to* '*Define . . . Offenses Against the Law of Nations*,' 21 Vand. J. Transnat'l L. 865, 874 (1988). Indeed, during the constitutional debates, it was decided that the term "define" should be added to the original draft of the Offenses Clause, which only referred to a congressional right to "punish." *See id.* at 875. Though the intent was probably not to allow Congress to *declare* the law of nations, the addition seems to have been meant to allow Congress to resolve and clarify ambiguities before proposed international principles became incorporated into United States law. *Id.* at 874 ("[T]he framers wanted to put Congress in a position to deal with uncertainties as to what the offenses were. There is some evidence that the framers believed [power under] the clause was not restricted to the 'offenses against the law of nations' recognized in 1789."). Indeed, the power to "define" "offenses against the law of nations" necessarily implies a power to define the "law of nations" itself, for one cannot identify a legal violation until the law is itself known, as the lower court's decision in this case aptly illustrates.

The federal courts have no similar constitutional authority. Although the framers initially considered giving the courts broad and express authority to

adjudicate cases "arising under" the law of nations, this idea did not prevail. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. at 830. General power to define offenses against the law of nations can be found *only* in the enumeration of Congress' powers. Since it is established that powers delegated to one branch of government should be considered exclusive, and not imparted to another branch through its "aggregate powers," the power to define offenses against the law of nations should be considered a unique prerogative of Congress. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (legislative power granted to Congress was an exclusive grant, which power could not also be found in executive branch through its aggregate powers). Courts encroach upon this prerogative when they independently enforce a principle as a violation of law of the nations. *See* Jason Jarvis, *Constitutional Constraints on the International Law-Making Power of the Federal Courts*, 13 J. Transnat'l L. & Pol'y 251, 252 (2003) ("compliance with the Constitution mandates the federal courts' complete withdrawal from the determination or enforcement of non-statutory customary international law"). This is exactly what occurred in this case: the Ninth Circuit defined and punished "arbitrary detention" as a violation of the "law of nations," actionable under the ATA, even though Congress has not reached the same conclusion.

B. The Lower Court's Decision Assumes Lawmaking Powers That Properly Reside in Congress

The judiciary runs afoul of separation of powers principles when it engages in the functional equivalent

of lawmaking, as well as when it usurps a power delegated to another branch of government. In a series of cases ending in the seminal decision of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court wrestled with the question of whether courts improperly legislate when they apply rules grounded in a free-floating general common law, "a transcendental body of law outside of any particular State," *Erie*, 304 U.S. at 79, rather than an act of a sovereign authority. During the Nineteenth Century, this Court repeatedly held that courts were within their proper powers when they resorted to this general law. *See, e.g.*, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). But, after almost a century of sustained criticism, the Court reversed course in *Erie*.

Erie declared that "there is no general federal common law." *Erie*, 304 U.S. at 79. Instead, "law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Id.* This conclusion followed from the conviction that an "unconstitutional course" was set out by "the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves the federal courts free to interpret general law for themselves." *Erie*, 304 U.S. at 91 (Reed, J., dissenting). Continued application of general common law principles not grounded in any federal or state legislative authority amounted to an '"*unconstitutional assumption of powers* by the Courts of the United States.'" *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (emphasis added).

As recognized in *Erie*, the constitutional infirmity arising from application of a "general law" unlinked to

a legislative act rested not only in federalism, as is commonly understood, but also in the separation of powers doctrine. *See* Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 Harv. L. Rev. 1785, 1793 (1997). Thus, *Erie* made clear that even if the federal *government* had power to make law binding on the states, the federal *courts* had no independent authority to do so. *Erie*, 304 U.S. at 78. *Erie* therefore ended the judicial practice of making decisions of federal law that were not grounded in the Constitution or a congressional act. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) ("[A] federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress."); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1261-62 (1996) ("[A]n essential premise of the Court's decision in Erie . . . appears to be that unilateral lawmaking by federal courts in this context violates the Constitution's separation of powers.").

Judicial decisionmaking under the "law of nations" is no different than decisionmaking under the general common law doctrine renounced in *Erie*. Indeed, the "law of nations" has historically been considered part of that same doctrine. *See Oliver Am. Trading Co. v. United States of Mexico*, 264 U.S. 440, 442-43 (1924); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517-21 (1984). *Swift v. Tyson*, the decision expressly overruled by *Erie*, applied a general "law merchant" which was understood to be linked to the "law of nations."

Logically, *Erie* halted federal judicial development and application of rules arising under the "law of nations," but untethered to any legislative act. Though *Erie* generally directed courts to look to state legislative acts, in the absence of positive federal guidance, this does not throw the "law of nations" into state hands because here, there *is* an exclusive federal guide: it is Congress through its powers under the Offenses Clause. Consequently, *Erie* prevents courts from applying modern customary international principles absent congressional consent. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 852-53 (1997) (after *Erie*, a federal court cannot apply customary international law "in the absence of some domestic authorization to do so, as it could under the [nullified] regime of general common law").

Some of the Court's early decisions may appear inconsistent with the notion that courts can only apply the "law of nations" after Congress has clarified the scope of that law in the United States. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). But these decisions predate *Erie*, and there is no persuasive reason for concluding that their broad understanding of a judicial right to apply the "law of nations" survived *Erie*. The argument that the "law of nations" is a uniquely federal area that should not be subject to the control of the states fails as a ground for expansive judicial power; the particular concern is indeed federal, but, again, it is one that has already been delegated by the Constitution to *Congress through the Offenses Clause*, not to federal courts.

Therefore, any doubt as to how *Erie* applies to early decisions relying on a legislatively ungrounded "law of nations" should be resolved here in favor of *Erie*'s unmitigated renunciation of those decisions. *See, e.g.*, Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 Va. J. Int'l L. 365, 393-463 (2002) (reviewing arguments for allowing application of the "law of nations" as common law after *Erie* and concluding that such a position is inconsistent with *Erie* and in violation of constitutional principles). After *Erie*, the "law of nations" can be applied in court only after congressional action. Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 Mich. J. Int'l L. 450, 463 (1989) ("[M]odern decisions by United States courts based on principles of customary international law derived their authority from the United States body politic."). The alternate course, finding an unspoken exception in *Erie* for continued independent judicial development of the "law of nations," would "run counter to constitutional limits on the role of federal courts." *Tel-Oren*, 726 F.2d at 812.

II

TO AVOID SEPARATION OF POWERS PROBLEMS, THE COURT SHOULD REQUIRE CONGRESSIONAL CONSENT BEFORE AN INTERNATIONAL PRINCIPLE BECOMES ACTIONABLE IN THE UNITED STATES AS "THE LAW OF NATIONS"

The Ninth Circuit's assumption of judicial power to define the "law of nations" under the ATA is inextricably linked to its conclusion that such "law" can be ascertained from the principles in international human rights treaties and declarations. *See Alvarez-*

Machain, 331 F.3d at 617-18. In several ways, this approach exacerbates the basic separation of powers problems identified above, *see infra* Part I, and reinforces the conclusion that congressional consent is a necessary condition for judicial application of the "law of nations."

First, independent judicial authority to define the "law of nations" opens the door for courts to assert increased control over policy questions better left in Congress' hands. Modern international human rights instruments purport to govern vast areas of national social and economic policy; indeed, scholars have already identified the following as potential customary international principles: the right to food,[3] the right to equal education,[4] rights to a healthy environment,[5] a

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[3] Anthony P. Kearns, Note, *The Right to Food Exists Via Customary International Law*, 22 Suffolk Transnat'l L. Rev. 223 (1998).

[4] Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 Harv. BlackLetter L.J. 37 (1994).

[5] *See, e.g.*, John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 Colum. J. Envtl. L. 283 (2000); Karyn I. Wendelowski, Comment, *A Matter of Trust: Federal Environmental Responsibilities to Native Americans Under Customary International Law*, 20 Am. Indian L. Rev. 423 (1995-96); Brian R. Popiel, Comment, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. Envtl. Aff. L. Rev. 447 (1995).

state obligation to use "precision munitions,"[6] inviolability of aboriginal territory,[7] "cultural property" rights[8] and sexual orientation rights.[9] While these may be goals worthy of pursuit, the manner

and extent to which they are enforced in the United States is for the American people to determine through their congressional representatives, not the courts.

So far, Congress has resolutely refused to allow international human rights treaties and the policies they favor to supplant or supplement United States law in any way. *See* David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DePaul L. Rev. 1183, 1206 (1993) (reservations attached to international treaties out of "a desire not to effectuate changes to domestic law"); *International Covenant on Civil and Political Rights (ICCPR), Senate Comm. on Foreign Relations Report*, S. Rep. No. 102-23, at 14 (1992) (reservations to ICCPR preserving differences

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[6] Stuart Walters Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 Naval L. Rev. 115 (2000).

[7] Julie Cassidy, *The Enforcement of Aboriginal Rights in Customary International Law*, 4 Ind. Int'l & Comp. L. Rev. 59 (1993).

[8] David A. Meyer, Note, *The 1954 Hague Cultural Property Convention and Its Emergence Into Customary International Law*, 11 B.U. Int'l L.J. 349 (1993).

[9] James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 Hastings Int'l & Comp. L. Rev. 1, 119 (1994).

between United States law and the requirements of the ICCPR were designed to ensure that "changes in U.S. law in these areas will occur *through the normal legislative process*") (emphasis added).

But, the Ninth Circuit's recognition of an independent judicial power to define the "law of nations" allows courts to enforce international treaty policies and principles, under the ATA, even when they lack congressional support. This not only renders superfluous the Senate's right to consent *or* reject far-reaching treaties, it also provides the judiciary with a powerful mechanism for tinkering with American policy. Just as the Ninth Circuit used its assumed power to define the "law of nations" to pass judgment on United States policy regarding extraterritorial arrest, a future court might use the same technique to influence United States' environmental or immigration policy. *See, e.g.*, *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002) (customary international principle against arbitrary detention required federal immigration statute to provide an additional hearing to an alien set to be deported, even in face of conflicting plain language of statute), *rev'd on other grounds*, *sub nom. Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 144 (2d Cir. 2003) (under the ATA, plaintiffs allege violation of customary international law rights to "sustainable development" and "health").

Moreover, an assumed judicial power to define the law of nations by reference to international treaty principles clearly gives foreign nations, even those that are outwardly hostile to the United States, a powerful mechanism for creating United States law. *See*

Richard A. Falk, *The Role of Domestic Courts in the International Legal Order* 72 (1964) (assumption of international relations powers "principally entrusted by the Constitution to the Congress or the Executive" converts courts into "agent[s] of the international order"). International human rights agreements, and the potential customary international principles which they advance are, after all, created by nations which "are neither representative of the American political community nor responsive to it." Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 721 (1986). This is vividly illustrated by noting that the following nations have adopted the ICCPR, the instrument on which the Ninth Circuit heavily relies in this case to find a "law of nations" principle barring arbitrary arrest:

Iraq (pre-liberation)

Iran

North Korea

Afghanistan (pre-liberation)

Syria

Libya

Sudan

Somalia

Haiti

Colombia

See Signatures to United Nations Covenant on Civil and Political Rights,

http://www.hrweb.org/legal/cprsigs.html (last visited Jan. 16, 2004).

While it may not be intrinsically objectionable for principles favored by these and other nations to influence the direction of United States law, *see* Sandra Day O'Connor, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law: Keynote Address*, 96 Am. Soc'y Int'l L. Proc. 348, 352 (2002) ("[A]cting in accord with international norms may increase the chances for broader alliances."), it is undoubtedly objectionable when this occurs through a judicial process that is largely immune from, and unaccountable to, the will of the majority of Americans. *See* James Madison, *Notes on Debates of the Convention of 1787*, Aug. 17, 1787, *at* http://www.yale.edu/lawweb/avalon /debates/817.htm (last visited Jan. 16, 2004) ("stating that 'no foreign law should be a standard farther than is *expressly adopted*'").

To preserve Congress' right to determine whether foreign principles will become part of United States law, and to avoid judicial encroachments on Congress' policy making role, as well as on its power to define offenses against the law of nations, congressional acquiescence[10]

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[10] It is not necessary to identify all the congressional actions that might constitute consent to, or recognition of, a principle as part of the "law of nations," for purposes of allowing judicial application of the principle under the ATA. However, it is worth noting that a prior congressional consent requirement may be satisfied, as a practical matter, if the ATA is held to permit suits for some *jus cogens* norms, such as torture or piracy, or for some norms of the "law of nations" as understood *at the time ATA was enacted*, since a case can be made that congressional acts or the Constitution already recognize these limited norms as part of

United States law. *See, e.g.*, *Tel-Oren*, 726 F.2d at 813-14 (Congress may have meant ATA to allow suits for violations of rights of Ambassadors, safe-conduct, and for piracy, since these were well-understood at that time to implicate the law of nations and were specifically addressed in early federal statutes); Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 Chi. J. Int'l L. 421, 424 (2000) (discussing Congress' creation of a cause of action for torture and extrajudicial killing by 1991 enactment of the Torture Victim Protection Act). But the important point is not that some specific and narrow class of widely respected international norms are actionable, it is that some norms are actionable because they *enjoy the support of the American people through the actions of their representatives*. *See, e.g.*, Young, *Sorting out the Debate*, 42 Va. J. Int'l L. at 448 (noting that in ATA cases applying *jus cogens* norms, there appears to be "a domestic law filtering mechanism that determines which international norms are 'in' and which are 'out' for domestic purposes—an inquiry reminiscent of the . . . position that customary law may be applied only with some sort of

should be required before federal courts may apply and interpret an international principle as "the law of nations" in the United States, under the ATA or otherwise. *See* Trimble, *A Revisionist View of International Law*, 33 UCLA L. Rev. at 716 ("courts should never apply customary international law except pursuant to political branch direction").

As Justice Holmes explained a decade before *Erie*:

> [W]e must realize that however ancient may be the traditions of [international] maritime law, however diverse the sources from which it has been drawn, it *derives its whole and only power in this country from its having been accepted and adopted by the United States* . . . . When a case is to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.

The Western Maid, 257 U.S. 419, 432 (1922) (emphasis added).

By following the path set out long ago in *Western Maid*, the Court will reaffirm the constitutional promise

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domestic authorization").

to "integrate the dispersed powers into a workable government. . . . [to] enjoin[] upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed.

DATED: January, 2004.

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