No. 03-485

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country.

2. Whether an individual arrested in a foreign country may bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for false arrest, notwithstanding the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), because the arrest was planned in the United States.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-121a) is reported at 331 F.3d 604. The panel opinion of the court of appeals (Pet. App. 122a-156a) is reported at 266 F.3d 1045. The district court's orders of March 18, 1999 (Pet. App. 157a-207a) and May 18, 1999 (Pet. App. 208a-211a), and its September 9, 1999, judgment (Pet. App. 212a-247a), as amended on September 23, 1999 (Pet. App. 248a-249a) are unreported.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on June 3, 2003. By order dated August 27, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 1, 2003, and the petition was filed on that date. A petition for a writ of certiorari was granted on December 1, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Section 878 of Title 21, and the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, are set out in the Appendix to this brief, App., *infra*, 1a-7a.

STATEMENT

1. In February of 1985, DEA Special Agent Enrique Camarena-Salazar was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico, where he was tortured for two days to extract information regarding what the DEA knew about the cartel. Camarena-Salazar was then murdered and buried in a park near Guadalajara. See *United States* v. *Zuno-Arce*, 44 F.3d 1420, 1422 (9th Cir.), cert denied, 516 U.S. 945 (1995); *United States* v. *Vasquez-Velasco*, 15 F.3d 833, 843 (9th Cir. 1994). Eyewitnesses placed respondent Humberto Alvarez-Machain, a Mexican citizen, at the house while Camarena-Salazar was being tortured. See *United States* v. *Zuno-Arce*, 25 F. Supp. 2d 1087, 1093 (C.D. Cal. 1998), aff'd, 209 F.3d 1095 (9th Cir. 2000); see Pet. App. 213a. DEA officials believe that respondent, "a medical doctor, participated in the murder by prolonging Agent Camarena's life so that others could further torture and interrogate him." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 657 (1992).

In 1990, a federal grand jury indicted respondent for the torture and murder of Camarena-Salazar in violation of, among other statutes, 18 U.S.C. 1201(a)(5), (c), and the United States District Court for the Central District of California issued a warrant for his arrest. Pet. App. 213a. The DEA attempted to obtain respondent's presence in the United States through informal negotiations with Mexican officials. *Alvarez-Machain*, 504 U.S. at 657 n.2. After those negotiations proved unsuccessful, the DEA approved the use of Mexican nationals to take custody of respondent in Mexico and to transport him to the United States. Several Mexican nationals, acting at the behest of the DEA, then seized respondent from his office in Mexico; within a period of less than 24 hours, they moved him to the United States and into the custody of United States law enforcement officials. Pet. App. 5a.

Respondent moved for dismissal of the indictment against him, arguing that he could not be tried in the United States because his seizure from Mexico was contrary to international law and an extradition treaty between the United States and Mexico. The district court and the Ninth Circuit agreed, ordering that the charges be dismissed and that respondent be returned to Mexico. See *United States* v. *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (per curiam), affirming *United States* v. *Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990). This Court reversed. Respondent's arrest, the Court held, "was not in violation of the Extradition Treaty." *Alvarez-Machain*, 504 U.S. at 670. The Court further held that, even if the arrest violated international law, respondent could be tried nonetheless. *Id.* at 669-670. The case was remanded for trial. However, at the close of the government's case, the district court granted respondent's motion for a judgment of acquittal. Pet. App. 6a.

2. In 1993, after returning to Mexico, respondent brought this civil action asserting various claims—including false arrest and imprisonment—against the United States, several DEA officials, and seven named and unnamed Mexican nationals. Although respondent also brought tort claims asserting abuse and torture, the district court rejected those after trial, finding such accusations "unworthy of belief," "incredible," and "completely contrived," and that respondent had repeatedly "lied during his deposition." Pet. App. 277a-228a, 230a, 231a; see also *id.* at 224a-225a (earlier findings, in criminal case, that respondent's torture claims were "not worthy of belief" and "simply * * * not credible"). Respondent did not appeal those findings, and those claims are therefore no longer at issue in this case. Pet. App. 7a-8a & nn.2-3.

Respondent sought recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which provides that the "United States shall be liable * * * to tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, subject to certain limits and

exceptions, including an exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). Respondent also sought recovery from various individual defendants under 28 U.S.C. 1350. The district court substituted the United States for the individual federal defendants pursuant to 28 U.S.C. 2679. The United States, however, was not substituted for José Francisco Sosa, a Mexican national, for respondent's claims under 28 U.S.C. 1350. Pet. App. 159a & n.2.

a. Following an interlocutory appeal, see *Alvarez-Machain* v. *United States*, 107 F.3d 696 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997), the district court granted the United States' motion for summary judgment. Although the government argued that the action for false arrest and false imprisonment under the FTCA was barred by the foreign country exception in 28 U.S.C. 2680(k), the district court rejected that argument. Pet. App. 177a-181a. The court agreed that the arrest took place in Mexico. *Id.* at 177a. But the court held that respondent had stated a "valid 'headquarters claim' for his seizure because it stemmed from a plan which developed entirely within the United States." Pet. App. 179a; see *id.* at 178a-181a & n.16.

The district court nonetheless concluded that respondent had failed to establish a false arrest claim under California law.[1] California defines false arrest as "an arrest conducted without lawful authority." Pet. App. 184a. Looking to state court decisions and statutes, *id.* at 184a-185a, the district court determined that California law authorizes both peace officers and private citizens to make an arrest whenever

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[1] Under the FTCA, the government's liability is determined according to local law. See 28 U.S.C. 1346(b) (giving courts jurisdiction over certain tort claims "if a private person" would "be liable to the claimant in accordance with the law of the place where the act or omission occurred"). The government has argued that, because the arrest occurred in Mexico, Mexican law should govern—and that, for that reason, the foreign country exception of the FTCA must apply. However, the parties agreed that if, contrary to the position of the United States, Mexican law did not apply, California law would. The district court thus applied California law.

they have "reasonable cause" to believe the person to be arrested has committed a felony. *Id.* at 184a (citing Cal. Penal Code §§ 834, 837). The court concluded that those provisions would "clearly" authorize government agents and private citizens alike to arrest respondent, an indicted criminal suspect. *Id.* at 185a. California law, the court also held, treats police officers acting outside their jurisdiction as private citizens and permits them to conduct citizen's arrests. *Id.* at 184a-185a.

Because the arrest in this case took place in Mexico, the district court also addressed how California law would treat extraterritorial arrests. Pet. App. 185a-190a. The court noted that California law allows a foreign peace officer in fresh pursuit to exercise arrest authority in California. *Id.* at 186a-187a. Similarly, the court explained that California law allows individuals who are not California citizens to conduct citizen's arrests. Thus, "if a peace officer, or any individual, from another state entered California with the requisite probable cause to arrest an individual, then California would presumably not consider that action a false arrest"; instead, it would be treated as a citizen's arrest. *Id.* at 187a. Because the government had probable cause to arrest, the district court concluded that the arrest was not false within the meaning of California law. *Id.* at 189a.

The district court, however, granted summary judgment against one of the Mexican nationals, José Francisco Sosa, holding him liable under 28 U.S.C. 1350. In particular, the court concluded that respondent's transborder arrest and detention violated international law. Pet. App. 194a-199a, 209a-210a. Nonetheless, the court held that respondent was entitled to damages only from the time he was seized in Mexico until he was handed over to law enforcement officials in the United States. Once respondent was handed over to United States officials, the court held, the United States law enforcement authorities made an independent and lawful decision to keep respondent in custody for which Sosa could not be held liable. *Id.* at 233a-241a. After trial (and after

rejecting respondent's claims of mistreatment, see p. 3, *supra*), the court entered judgment for respondent and against Sosa in the amount of $25,000. Pet. App. 244a, 247a.

3. Respondent and Sosa appealed. On September 11, 2001, a panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 122a-156a.

With respect to the FTCA false arrest claim, the panel reversed the judgment in favor of the United States. The panel stated that, "to determine whether a federal officer had lawful authority to carry out an arrest, a California court would first ask whether the arrest was authorized under federal law." Pet. App. 142a. The panel agreed that the criminal statutes under which respondent was indicted expressly apply to acts occurring abroad. See *id.* at 143a. And it agreed that the arrest authority provided to DEA agents under 21 U.S.C. 878—authority to "make arrests without warrant * * * for any felony, cognizable under the laws of the United States," on probable cause—is very broad. Pet. App. 143a.

The panel, however, refused to hold that DEA agents have statutory authority to enforce extraterritorial laws abroad, remarking that "[i]f this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community." Pet. App. 144a. The panel instead "suppose[d] that Congress intended for federal law enforcement officers to obtain lawful authority, which, for example, here might be a Mexican warrant, from the state in which they sought to arrest someone." *Ibid.* Because the DEA did not obtain an arrest warrant from a Mexican court, the panel concluded that respondent's arrest was effected "without lawful authority" and was actionable against the United States as a "false arrest" under the FTCA. *Id.* at 145a.

The panel rejected the district court's conclusion that the arrest was not "false" as a matter of California law. Pet. App. 145a-147a. The court did not dispute that, under California law, an arrest effected outside the scope of an officer's

statutory or jurisdictional authority may be deemed a lawful citizen's arrest. *Id.* at 145a. But the court held that the proper standard for federal law enforcement officers is the law governing arrests pursuant to a warrant. In this case, the court stated, the warrant issued for respondent's arrest "had no effect in Mexico," and its "invalidity * * * for the purposes of [respondent]'s arrest meant that the DEA agents did not act properly under the general common law." *Id.* at 146a; see also *id.* at 147a (arrest improper because court issuing the warrant "had no jurisdiction to issue a warrant for an arrest in Mexico").

The panel also rejected the government's argument that the claim was precluded by the FTCA's exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). See Pet. App. 135a-139a. Because the seizure had been planned and directed in the United States, the court stated, the claim was actionable under the so-called "headquarters" exception. See *id.* at 137a-139a.

Finally, the panel affirmed the judgment in favor of respondent against Sosa under 28 U.S.C. 1350. Pet. App. 125a-133a. The panel first held that the seizure violated "the law of nations" because it infringed respondent's right to "freedom of movement, to remain in his country, and to security in his person." *Id.* at 131a. In the alternative, the court held that the arrest violated the international law prohibition on "arbitrary detention." *Id.* at 131a-133a. A detention is "arbitrary," the court of appeals held, if it is not "pursuant to law." *Id.* at 132a. Because the court concluded that respondent's seizure "occurred pursuant neither to the laws of Mexico nor to the laws of the United States," the court held that it was an "arbitrary" arrest. *Id.* at 130a, 132a-133a.

4. The court of appeals then reheard the case en banc, reaching largely the same result by a six-to-five vote. Pet. App. 1a-121a.

a. The en banc majority agreed with the original panel's conclusion that the DEA lacks authority to effect arrests or otherwise enforce United States law outside the United

States, even where the statute being enforced applies extraterritorially. The majority agreed that this Court's decision in *United States* v. *Bowman*, 260 U.S. 94 (1922), renders the general presumption against extraterritorial application of United States laws inapplicable to "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." Pet. App. 36a (quoting *Bowman*, 260 U.S. at 98). The majority thus had "no doubt that the substantive criminal statutes under which [respondent] was charged apply to acts occurring outside the United States." *Ibid.*

The majority, however, rejected the government's argument that DEA agents have authority to enforce federal statutes outside the United States. Pet. App. 38a. "Congress may have intended the reach of a criminal statute to extend beyond our borders," the court stated, but that does "not mean that Congress also intended to give federal law enforcement officers unlimited authority to violate the territorial sovereignty of any foreign nation to enforce those laws, or to breach international law in doing so." *Ibid.* The court accordingly rejected the government's contention that 21 U.S.C. 878(a)(3), which places no express territorial limits on the DEA's arrest authority, gives DEA agents enforcement authority with the same geographic scope as the laws they are charged with enforcing. Pet. App. 40a-41a. Instead, the court invoked the presumption against extraterritoriality and distinguished *Bowman*: Because the arrest authority provided by Section 878 is a regulation of "executive authority, not criminal conduct," the court declared that the provision cannot "be classified as a criminal statute[] which [is] . . . not logically dependent on [its] locality for the Government's jurisdiction." *Id.* at 41a-42a (quoting *Bowman*, 260 U.S. at 98). The court stated that it was unwilling to assume that Congress had "turned a blind eye to the interests of equal sovereigns and the potential violations of

international law that would inevitably ensue" from the contrary construction. *Id.* at 46a-47a.

The majority stressed that it was not questioning "the powers of the political branches to override the principles of sovereignty in some circumstances, should the need arise." Pet. App. 47a. But the court declared that it would not "impute such an intent where it is not expressed." *Ibid.* Consequently, the majority held that it would not permit extraterritorial enforcement, even of those laws that apply to purely extraterritorial conduct, "absent a clear directive" from Congress. *Id.* at 50a.

While holding respondent's arrest to be "false" precisely because it occurred in Mexico, the court of appeals concluded that the arrest was actionable notwithstanding the FTCA's exclusion of claims "arising in a foreign country." Pet. App. 65a-68a. The claim, the en banc majority held, fell within the "headquarters doctrine" because respondent's seizure was planned and coordinated in the United States. *Id.* at 66a-67a. Agreeing with the reasoning of the original panel opinion, the majority also rejected the claim that the seizure could be deemed a valid citizen's arrest under California law. *Id.* at 70a-72a.

Finally, the en banc court affirmed the judgment against Sosa. Disagreeing with the panel opinion, the majority held that there is no specific, universal, and obligatory rule of international law according individuals a personal right to be free of transborder arrests. Pet. App. 21a-27a. But the en banc majority held that there is a specific, universal, and obligatory rule of international law prohibiting "arbitrary arrest." *Id.* at 28-30a. In this case, the court held that respondent's arrest was "arbitrary" because it was authorized neither by United States nor Mexican law. *Id.* at 33a.[2]

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[2] Sosa filed a separate petition, No. 03-339, challenging the judgment against him under 28 U.S.C. 1350. Certiorari was granted in that case on December 1, 2003, as well, and it has been consolidated with this case.

b. Judge Fisher filed a concurring opinion, joined by Judges Schroeder, Goodwin, Thomas, and Paez. Pet. App. 73a-80a. Judge Fisher, while fully joining the majority opinion, concluded that the DEA agents lacked authority to conduct this arrest because "neither Congress nor the Executive has expressed an intent to allow sub-Cabinet-level law enforcement officials in the DEA to be the final arbiters of" extraterritorial arrest determinations. *Id.* at 73a. Judge Fisher stated that, although "Congress may have intended a criminal statute to reach conduct that occurs beyond our borders, and that United States courts would have jurisdiction over such crimes, [that] does not mean that Congress also intended to give law enforcement officers unlimited authority to enforce the statute by entering a foreign nation, uninvited, to abduct a foreign national, in violation of international law." *Id.* at 79a.

c. Judge O'Scannlain dissented in an opinion joined by Judges Rymer, Tallman, and Kleinfeld. Pet. App. 80a-108a. Judge Gould dissented separately. *Id.* at 108a-121a. Judge O'Scannlain's dissent began:

> We are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world, sometimes with tepid or even non-existent cooperation from foreign nations. With this context in mind, our court today commands that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue our government for money damages. In so doing, and despite its protestations to the contrary, the majority has left the door open for the objects of our international war on terrorism to do the same.

Id. at 80a. The dissenting judges all agreed with the government's position that "the DEA was well within its delegated powers when arresting Alvarez." Pet. App. 103a (O'Scannlain, J., dissenting); *id.* at 120a n.7 (Gould, J. dis-

senting) ("I agree with Judge O'Scannlain's dissenting opinion that federal law authorized the DEA agents' conduct.").

The relevant statutory provisions, Judge O'Scannlain explained, confer on DEA agents the authority to "make arrests . . . *for any felony*, cognizable under the laws of [the] United States" as well as authority to "perform such other law enforcement duties as the Attorney General may designate," without specifying geographic scope. Pet. App. 103a (quoting 21 U.S.C. 878(a)). "Because it is undisputed that Congress has authorized the extraterritorial application of the criminal statutes for which [respondent] was charged, this broad legislative delegation of enforcement powers to the DEA would seemingly sanction the extraterritorial arrests at issue in this case." *Ibid.* "Congress engaged in such a broad delegation of law enforcement authority to the DEA and to the Attorney General in order to allow the Executive branch to have the widest array of enforcement options at its disposal." *Id.* at 104a.

The majority's contrary decision, Judge O'Scannlain observed, leads to the anomalous result of a federal criminal prohibition that no Executive Branch official can enforce:

> [I]f Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which [respondent] was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.

Pet. App. 105a.

Congress thus authorized "arrest, without warrant," when "there is probable cause to suspect violation of an extraterritorially applicable statute," in order to afford "the Executive, which already possesses the general responsibility for deciding both when and whether to arrest and to prose-

cute and how best to conduct the nation's foreign relations, the burden of determining when the national interest requires bypassing diplomatic channels to secure" arrests abroad. *Id.* at 101a. Judge O'Scannlain concluded:

> The decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make. They, unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security.

Id. at 108a.

In a separate dissent, Judge Gould concluded that the case "presents a nonjusticiable political question." Pet. App. 108a. He explained that the decision to order the capture of a foreign national on foreign soil involves delicate foreign policy questions, such as whether "the need to prosecute [respondent] for the torture and murder of an American official justif[ies] the United States's taking actions that might offend Mexico's government." *Id.* at 114a. By engaging that issue, he observed, "the majority transforms the executive branch's foreign policy decisions into occasions for judicial review." *Id.* at 117a. "[I]f the judiciary is to preserve its legitimacy, to show the respect due coordinate branches of government, and to avoid interfering in our nation's foreign relations," he added, "judges must show more restraint than the majority shows today." *Id.* at 120a-121a.

SUMMARY OF ARGUMENT

I. A. The Ninth Circuit's decision in this case holds the United States liable in damages for arresting an indicted torture-murder suspect on probable cause in Mexico because, according to the Ninth Circuit, DEA agents do not have statutory authority to effect arrests outside the United States. That decision cannot be reconciled with the text, history, or purposes of 21 U.S.C. 878, which authorizes DEA

agents to "make arrests without warrant * * * for any felony, cognizable under the laws of the United States." 21 U.S.C. 878(a)(3). That broad language places no geographic limits on the DEA's arrest authority, and the statute's history contradicts any intent to impose such limits.

Congress, moreover, has enacted numerous statutes that apply to conduct that occurs wholly abroad. Thus, many "felon[ies] cognizable under" United States law can be committed outside the United States, and felons committing crimes here may flee the country. As a result, it is neither logical nor appropriate to read Section 878 as limiting the Executive Branch's constitutional authority to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, Cl. 4, by effecting arrests abroad when, in the exercise of that Branch's law enforcement and foreign relations authority, it deems such arrests necessary and prudent. Where Congress has deemed it appropriate to circumscribe the Executive's authority to effect arrests abroad, it has done so explicitly and with careful consideration of the need to preserve the Executive's flexibility. See, *e.g.*, 22 U.S.C. 2291(c)(1). Those limits would be largely superfluous if the DEA and other federal agencies had no legal authority to arrest outside the United States in the first place.

B. The Ninth Circuit erred by engrafting an extra-textual territorial limit on DEA arrest authority based on the presumption against extraterritorial application of United States law. As an initial matter, that presumption cannot be used to defeat Congress's unmistakable intent. In any event, under cases such as *United States* v. *Bowman*, 260 U.S. 94 (1922), and *Maul* v. *United States*, 274 U.S. 501 (1927), the presumption does not apply to Executive Branch authority to enforce federal law. If criminals violating our laws "could escape seizure by departing from or avoiding" the United States, the criminal laws "would be of little practical effect in checking violations, and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." *Maul*, 274 U.S. at 511. Furthermore,

applying the presumption in this context to limit the Executive Branch's options in conducting foreign relations would defeat its purpose of avoiding conflicts with foreign powers. While foreclosing the use of DEA agents to effect arrests abroad, the Ninth Circuit's decision would permit the Executive to seize suspects through the use of military force, an approach that is more likely to generate tension with—and less likely to draw consent from—foreign powers. Extraterritorial arrests without the cooperation of the relevant foreign government, of course, are extremely rare. But Section 878 entrusts determinations regarding the appropriate degree and type of foreign government cooperation to the Executive Branch.

C. The Ninth Circuit not only improperly denied DEA agents statutory authority to effect arrests abroad, but also stripped them of their authority to make citizen's arrests. The longstanding rule is that law enforcement officers acting outside their jurisdiction have the same authority to make arrests as ordinary citizens. By refusing to accord federal agents that authority, the Ninth Circuit disfavored them because they are federal officers and disregarded the Federal Tort Claims Act's directive that the government shall be liable only to the extent that a private person would be liable in like circumstances. 28 U.S.C. 1346(b)(1), 2674.

II. At the same time it denied Executive Branch officials authority to effect arrests abroad, the Ninth Circuit ignored an express limit on its own jurisdiction to entertain claims for money damages challenging such arrests. Under 28 U.S.C. 2860(k), the United States cannot be held liable under the FTCA for "any claim arising in a foreign country." This case not only concerns an arrest abroad, but one that is alleged to be "false" *solely because* it occurred abroad. By holding that the judicially crafted "headquarters doctrine" permits this case to proceed nonetheless, the Ninth Circuit effectively read Section 2680(k)'s foreign country exception out of the statute. Finally, by construing its own adjudicative authority in matters touching on foreign affairs broadly

and the Executive's law enforcement authority in such matters parsimoniously—ignoring an express geographic restriction on judicial authority while engrafting a geographic restriction on Executive authority onto a statute that contains none—the Ninth Circuit inverted traditional separation of powers and statutory construction principles.

ARGUMENT

RESPONDENT'S ARREST IN MEXICO NEITHER VIOLATES FEDERAL LAW NOR IS ACTIONABLE UNDER THE FEDERAL TORT CLAIMS ACT

The Ninth Circuit en banc majority in this case concluded that the United States may be required to pay damages because of the conduct of DEA agents in arresting, in Mexico, a criminal suspect who had been properly indicted by a grand jury on probable cause to believe that he participated in the torture and murder of a federal agent. With considerable understatement, the Ninth Circuit conceded that "a grand jury had already indicted [respondent] and an American arrest warrant had been issued" before respondent's arrest, "giving this case a unique factual twist when compared to traditional false arrest cases." Pet. App. 63a. But the Ninth Circuit nonetheless concluded that respondent's arrest was "false" and thus actionable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, because federal officers charged with enforcing the Nation's laws—including laws that expressly apply to conduct occurring wholly outside the United States—lack authority to effect arrests abroad. At the same time that it held the arrest to be "false" solely because it occurred abroad, the Ninth Circuit held that this suit challenging the arrest was not precluded by the FTCA's exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k).

Those two holdings are not merely difficult to reconcile. They also misconstrue the statutes governing federal arrest authority and inappropriately impede efforts to protect this Nation's security through enforcement of its criminal laws.

Congress granted DEA agents authority to "make arrests without warrant" on probable cause "for *any* felony, cognizable under the laws of the United States" without specifying geographic limits. 21 U.S.C. 878(a)(3) (emphasis added). That language is not naturally read as confined to arrests inside the United States. Congress has enacted numerous criminal prohibitions that apply to conduct taking place wholly abroad. It should not be presumed that Congress, while enacting those provisions and authorizing arrests for "any felony," chose to deny the Nation's law enforcement agencies necessary authority to enforce them. Indeed, where the Legislative Branch has in specific circumstances deemed it appropriate to restrict the Executive's law enforcement authority by barring extraterritorial arrests, it has done so expressly. Those statutory limits would be largely superfluous if DEA and other federal agents did not have legal authority to arrest abroad in the first place.

The Ninth Circuit's contrary holding, under which federal agents lack statutory authority to engage in law enforcement activities outside the United States even *with* the "consent or assistance of the host country," Pet. App. 35a & n.24, threatens the United States' ability to conduct law enforcement operations abroad to combat terrorism and international crime. It provides terrorists and other criminals who hide in countries unwilling or unable to apprehend them using their own officers—including countries that may tacitly approve of involving U.S. law enforcement officers to effect an arrest but will not acknowledge that publicly—a safe harbor despite the fact that their actions are subject to United States laws and harm United States interests. Nothing in the relevant statutes supports that counterintuitive result.

The Constitution assigns to the Executive Branch the duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, Cl. 4, and primary responsibility for foreign relations, U.S. Const. Art. II, § 2; *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) (reiterating "the

generally accepted view that foreign policy [is] the province and responsibility of the Executive") (quoting *Haig* v. *Agee*, 453 U.S. 280, 293-294 (1981)). Given that constitutional allocation of responsibility, it is inappropriate for federal courts lightly to infer congressional intent to intrude on the Executive's traditionally broad discretion in matters relating to law enforcement and foreign relations.

At the same time the Ninth Circuit read the Executive Branch's arrest authority narrowly to impose a geographic restriction found nowhere in the statutory text, that court expansively construed its own authority to adjudicate the legality of conduct abroad despite the FTCA's express exclusion of "any claim arising in a foreign country," 28 U.S.C. 2680(k). In this case, the Ninth Circuit held that the judicially crafted "headquarters exception" gave it authority to pass on the legality of respondent's arrest in Mexico because officials in the United States arranged the arrest, even though no tortious act was committed here. That expansive view of judicial authority effectively nullifies the exception for "any claim arising in a foreign country." It inappropriately intrudes into the Executive's control over foreign affairs. And it would routinely interpose the judiciary into matters of foreign policy where Executive Branch authority is at its apogee.

I. Section 878 Permits DEA Agents To Arrest For Any Felony Cognizable Under U.S. Law Wherever The Executive Deems Enforcement Appropriate

Section 878(a)(3) of Title 21 of the United States Code authorizes any DEA agent to "make arrests without warrant * * * for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony." 21 U.S.C. 878(a)(3). Notwithstanding that authority, the Ninth Circuit held that the United States may be held liable in tort for "false arrest" under the FTCA for the seizure of an indicted torture-murder suspect in Mexico

because, according to that court, DEA agents have "no authority under federal law to execute an extraterritorial arrest" under any circumstances. Pet. App. 70a; see *id.* at 35a n.24.

The FTCA accords "district courts * * * jurisdiction of civil actions on claims against the United States, * * * for personal injury * * * if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," subject to certain exceptions and limits. 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674 (similar). Applying California law to respondent's arrest in Mexico, see pp. 46-47, *infra*, the Ninth Circuit recognized that, where authorized by federal law, the arrest of an indicted suspect on probable cause cannot be a "false arrest" under California tort law. See Pet. App. 69a-70a. But that court erred in holding that DEA agents have no authority to effect extraterritorial arrests. Section 878 by its terms imposes no such geographic limits. Particularly when read in connection with other provisions of federal law, Section 878 unmistakably authorizes arrests abroad wherever and whenever the Executive Branch, consistent with its authority over federal law enforcement and matters of foreign policy, deems them necessary and prudent.

A. Section 878 Grants Federal Officers Authority To Enforce The Law Where And When The Executive Branch Deems Such Enforcement Prudent

1. *Section 878's Text, Purpose, And History Make The Scope Of Enforcement Authority Clear*

Congress has long recognized that criminals have no more respect for national boundaries than they do for the criminal laws. Today more than ever, crime is a transnational phenomenon. With increasing frequency, criminals and criminal organizations can plan and even execute attacks on U.S. interests while operating entirely abroad. For that reason, Congress has enacted criminal statutes that extend to wholly extraterritorial conduct. See, *e.g.*, 18 U.S.C. 1119

(murder of U.S. national in a foreign country); 18 U.S.C. 2332b (foreign terrorist activity); 18 U.S.C. 175 (extraterritorial use of biological weapons); 18 U.S.C. 351, 1751 (crimes committed against high government officials); 18 U.S.C. 1956 (extraterritorial money laundering); 18 U.S.C. 2339B (providing assistance to foreign terrorist organizations); 18 U.S.C. 1116(c) (attacks on diplomats); 18 U.S.C. 1203(b)(1) (hostage taking); 49 U.S.C. 46505 (carrying weapons or explosives aboard aircraft); 50 U.S.C. 424 (extraterritorial jurisdiction over crimes relating to releasing national security information). In this case, for example, respondent was indicted for the kidnapping of a protected United States government employee in violation of 18 U.S.C. 1201(a)(5), (c), a statute that expressly applies to acts outside the United States.

Because United States law often proscribes conduct that may take place entirely abroad and because criminals committing crimes here may seek refuge in foreign countries, the Executive Branch's authority to "take Care that the Laws be faithfully executed" may require the performance of law enforcement activities abroad. See *United States* v. *Yousef*, 327 F.3d 56, 86 (2d Cir.) (It is "beyond doubt * * * [that] Congress has the authority to 'enforce its laws beyond the territorial boundaries of the United States.'") (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)), cert. denied, 124 S. Ct. 353 and 492 (2003). Consistent with that constitutional responsibility, the statutes codifying the arrest powers of federal law enforcement agencies use broad and inclusive language without specifying geographic boundaries. The Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, authorizes a DEA agent to "make arrests without warrant * * * *for any felony, cognizable under the laws of the United States*, if he has probable cause to believe that the person to be arrested has committed or is committing a felony." 21 U.S.C. 878(a)(3) (emphasis added). The statute further authorizes the DEA to "perform such other law enforcement duties as

the Attorney General may designate." 21 U.S.C. 878(a)(5). The FBI's organic statute is phrased similarly. It authorizes the Bureau's agents to "make arrests without warrant for any offense against the United States committed in their presence, *or for any felony cognizable under the laws of the United States* if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U.S.C. 3052 (emphasis added).

Those provisions, which do not include geographic restrictions, are not naturally read to impose territorial limits on the broad arrest authority they grant. To the contrary, Section 878(a)(3) authorizes arrests for "*any* felony, *cognizable under the laws of* the United States"—not arrests of felony suspects "found in the territory of the United States." Many "felon[ies] cognizable under the laws of the United States" arise under statutes that apply extraterritorially and can be committed wholly abroad. The plain text of Section 878 thus clearly authorizes Executive Branch officials to make arrests for felonies committed abroad and for felonies committed here when the suspect has fled the country. In practice, such authority is rarely invoked in the absence of cooperation from the relevant foreign government, and only with due regard for considerations of foreign policy and international practice. But the Ninth Circuit's ruling would proscribe such arrests even with the foreign government's express consent. Pet. App. 35a & n.24.

That construction of Section 878—under which federal officers cannot effect arrests abroad—implausibly assumes that Congress, while authorizing arrests for "any felony" and enacting criminal prohibitions applicable to conduct taking place solely abroad, chose to deny the Executive Branch authority to enforce those criminal laws. As Judge O'Scannlain observed:

> [I]f Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for

> which [respondent] was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.

Pet. App. 105a (dissenting opinion). Nearly two centuries ago, this Court made a similar point when construing the scope of the national government's constitutional authority:

> To impose * * * the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs.

M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819). There is simply nothing in Section 878 to suggest that Congress sought to impose that sort of impediment here.

To the contrary, Congress was unquestionably aware that, in authorizing arrests for "any felony" cognizable under United States law, it was authorizing arrests abroad. Section 878 was intended to "provide[] the Attorney General with flexibility in the utilization of enforcement personnel *wherever and whenever the need arises*." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 54 (1970) (emphasis added). Congress specifically recognized the international scope of the drug problem the DEA must address. See *id.* at 18 (regulating drugs pursuant to Congress's "foreign commerce power"); *id.* at 78 (discussing extraterritorial aspects of the drug problem); *id.* at 71-72 (enacting provisions governing importation of illegal drugs). And Congress expressed its intent that the "illegal traffic in drugs should be attacked with the full power of the Federal Government." *Id.* at 9.

Indeed, the history of the DEA and its international mission belies the suggestion that the DEA's law enforce-

ment powers are limited to domestic activities. The DEA was established in 1973 as the successor to the Bureau of Narcotics and Dangerous Drugs (BNDD), a division of the Justice Department that was then exercising international responsibilities in the global effort to stem the flow of dangerous drugs into this country. See Message from the President Transmitting Reorganization Plan No. 2 of 1973, H.R. Doc. 69, 93d Cong., 1st Sess. 5-6 (1973) (explaining plan to transform BNDD into the DEA and recognizing the "rapidly developing international activities" of the BNDD); see also DEA History Book <http://www.usdoj.gov/dea/pubs/history/deahistory_01.htm#> (last visited Jan. 20, 2004) (listing foreign drug enforcement offices opened since 1960). The President's reorganization plan was designed to expand that international role—not reduce it—while consolidating the previously fractured drug enforcement responsibilities shared by the Customs and other Departments into a single agency. In explaining the change, the President declared "all-out, global war on the drug menace," H.R. Doc. 69, *supra*, at 3, and explained the advantages of consolidating "worldwide drug law enforcement responsibilities," *id.* at 5-6. The reorganization plan, the President also observed, "could be especially helpful on the international front" and "enhance the effectiveness" of "wide-ranging effort[s] to cut off drug supplies before they ever reach U.S. borders or streets." *Ibid.* Consistent with the reorganization and the announced policies, Congress in 1979 enacted technical amendments to Section 878 to substitute the DEA for the BNDD as the relevant agency, without modifying the agency's mission or goals. See Pub. L. No. 96-132, § 16(b), 93 Stat. 1049; H.R. Rep. No. 628, 96th Cong., 1st Sess. 23 (1979).

Moreover, when Congress enacts statutes of extraterritorial application, it anticipates the possibility of extraterritorial enforcement through arrest. The comments of Senator Specter on the enactment of 18 U.S.C. 2332, which criminalizes certain acts directed against U.S. nationals abroad, are illustrative:

> Yet, if the terrorist is hiding in a country * * * where the government, such as it is, is powerless to aid in his removal, or * * * where the government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial.

131 Cong. Rec. 18,870 (1985).

2. *The Ninth Circuit's Construction Is Inconsistent With Other Statutory Provisions Governing Arrest Authority Abroad*

The Ninth Circuit's view that Section 878 withholds extraterritorial arrest authority is impossible to reconcile with other provisions of law governing the arrest authority of federal officers. In particular, by reading Section 878's broad authorization as an implicit limit on extraterritorial arrests, the Ninth Circuit robbed the explicit (but narrow) statutory restrictions on that authority in the Mansfield Amendment, 22 U.S.C. 2291(c), of any independent meaning. Enacted in 1976 in response to the DEA's then longstanding practice of participating in foreign law enforcement operations, including arrests abroad, the Mansfield Amendment provides that "[n]o officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." 22 U.S.C. 2291(c)(1). The Amendment provides a number of exceptions. It "does not prohibit an officer or employee of the United States, with the approval of the United States chief of mission," such as the U.S. Ambassador, "from being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting an arrest." 22 U.S.C. 2291(c)(2). And it "does not prohibit an officer or employee from taking direct action to protect life or safety" where unanticipated "exigent circumstances arise." 22 U.S.C. 2291(c)(3).

Critically, Congress did not prohibit all arrests abroad. Nor did Congress proscribe the arrest at issue here. This arrest was not effected "directly" by United States officials,

but by foreign nationals. See Pet. App. 139a, 164a n.5, 167a, 216-217a. It was not "part of any foreign police action."[3] And, far from being effected in connection with "narcotics control efforts," it was conducted to bring to justice an individual who had participated in the torture-murder of a federal agent. The fact that Congress expressly proscribed certain foreign arrests by federal officials, but excluded the arrest at issue here from that prohibition, speaks volumes about its intent. See also *United States* v. *Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988) (Congress did not provide "sanctions or penalties by way of relief for persons arrested in contravention of § 2291(c)(1)").

More fundamentally, if Section 878 and other statutes denied federal agents any authority to conduct arrests abroad, the Mansfield Amendment's more narrow prohibition on the "direct effect[uation]" of such arrests "as part of any foreign police action with respect to narcotics control efforts" would be surplusage, and misleading surplusage at that. This Court, of course, is properly "reluctant to adopt a construction making another statutory provision superfluous." *Hohn* v. *United States*, 524 U.S. 236, 249 (1998) (citing *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998)); *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955); cf. *United States* v. *Zacks*, 375 U.S. 59, 67-68

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[3] Although the phrase "as part of [a] foreign police action," if read in isolation, might encompass either (a) a police action in a foreign country by United States officials or (b) a police action by the police of a foreign country, in context it is clear that the latter reading is correct. The Mansfield Amendment applies to "arrest[s]" effected by U.S. officials "in any foreign country as part of [a] foreign police action." Reading the phrase "foreign police action" to mean only that U.S. law enforcement officers are engaging in law enforcement activities abroad would make that phrase surplusage.

(1963) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.").

Furthermore, as would be expected of any limit on an already established and sometimes necessary executive authority, the Mansfield Amendment includes exceptions to account for exigent circumstances, 22 U.S.C. 2291(c)(3), or situations in which the power's exercise is consistent with the diplomatic interests of the United States, 22 U.S.C. 2291(c)(2). The Ninth Circuit's construction of Section 878 is harder still to reconcile with those exceptions, which would make no sense and be wholly inoperative if federal agents (and DEA agents charged with narcotics control efforts in particular) lacked authority to make arrests abroad in the first place. An exception to a limitation (such as the exception for exigent circumstances) is not itself an affirmative authorization, but rather strongly suggests the existence of a broad, affirmative authorization elsewhere in the law (here, in Section 878). Accordingly, while the Ninth Circuit's analysis renders the Mansfield Amendment confusing surplusage, the more natural reading of Section 878 is reinforced by the Amendment.

This Court has explained that federal courts should adopt the "permissible meaning" of a statute "which fits most logically and comfortably into the body of both previously and subsequently enacted law," not necessarily because such an "accommodative meaning" is "what the lawmakers must have had in mind," but because it is the role of the federal courts "to make sense rather than nonsense out of the *corpus juris*." *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991). In this case, the Ninth Circuit needlessly made the law self-contradictory by rejecting the more natural reading of the grant of arrest authority in Section 878, thereby rendering the specific prohibitions and exceptions in the Mansfield Amendment both superfluous and confusing.

To the extent that any doubt regarding Congress's intent could remain, the history of the Mansfield Amendment erases it. That Amendment was adopted primarily in

response to the *DEA's practice*—then accepted as lawful by all—of engaging in narcotics enforcement arrests abroad in combination with foreign police forces. The Amendment's sponsors specifically noted that, as of 1976, there were 365 DEA officials serving abroad, and that many such officials "participat[ed] in raids and other such activities alongside local police officials" because the then-existing law provided "no prohibition on U.S. involvement in local drug raids or other law enforcement actions." 122 Cong. Rec. 2592 (1976) (comments of Sen. Mansfield); see also pp. 21-22, *supra* (actions of predecessor agency); pp. 33-34, *infra* (extraterritorial investigatory authority). Discussing the DEA's opposition to the imposition of a new restriction on its arrest authority, Senator Mansfield represented that the Amendment would be beneficial for DEA agents who "have had nothing to guide them heretofore." *Id.* at 2593; see *ibid.* (compromise legislation was "worked out with the DEA") (comments of Sen. Percy); *id.* at 3635 (objecting to amendment because the "DEA's involvement overseas" has increased "seizures of illicit drugs and arrests of international drug traffickers") (comments of Sen. Hruska). Rather than proscribe DEA agents from effecting any arrests abroad, Congress barred only the category of otherwise lawful arrests thought to be both problematic and unnecessary —those effected "directly" by U.S. agents abroad, as part of a "foreign police action," in connection with "narcotics control efforts."[4]

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[4] As originally proposed, the Mansfield Amendment would have prohibited government personnel from conducting *any* police activities abroad in furtherance of narcotics control. See S. Rep. No. 605, 94th Cong., 2d Sess. 54-55 (1976). Congress's decision to enact a narrower statute—reaching only arrests as part of ongoing foreign police operations—reflects Congress's decision to interfere with Executive discretion only where the foreign nation is already willing to act through its own law enforcement personnel, rendering the involvement of United States officials and the risk of injury or international conflict therefrom unnecessary. See 122 Cong. Rec. at 2591 (comments of Sen. Percy) ("Senator Mansfield's amendment is designed solely to prevent American

Other statutes also plainly envision law enforcement operations by United States agents acting abroad; they too would make little sense if such actions were, in fact, *ultra vires*. For example, Congress has authorized the military to provide equipment and assistance to federal law enforcement officers in a variety of extraterritorial operations, including those designed to effect the "rendition of a suspected terrorist from a foreign country to the United States to stand trial." 10 U.S.C. 374(b)(1)(D). Such authority would serve no purpose if Congress had not conferred extraterritorial law enforcement powers upon federal law enforcement agencies and if, as the Ninth Circuit held, the military were the sole tool available to the Executive to effect extraterritorial arrests.

B. The Presumption Against Extraterritoriality Does Not Support The Ninth Circuit's Decision

The Ninth Circuit nowhere disputed that the text of Section 878 accords DEA agents broad arrest authority without specifying geographic limits. That court, however, imposed a geographic restriction itself by invoking the presumption against extraterritorial application of United States laws. Pet. App. 41a-42a; see *EEOC* v. *Arabian Am. Oil. Co.*, 499 U.S. 244, 248 (1991) (*Aramco*). That was error. As an initial matter, the presumption against extraterritorial application

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involvement where it is unnecessary to our own domestic drug law enforcement programs and where friction with foreign governments is likely to result."); H.R. Rep. No. 1144, 94th Cong., 2d Sess. 54-55 (1976) (noting that the provision was intended "to avoid involvement by U.S. personnel in foreign police operations where violence or the use of force could reasonably be anticipated" and that U.S. ambassadors were to monitor narcotics control activities abroad to ensure "that U.S. personnel do not become involved in sensitive, internal law enforcement operations which could adversely affect U.S. relations with that country"); see also *United States* v. *Green*, 671 F.2d 46, 53 n.9 (1st Cir.) ("[T]he legislative history of the provision makes it clear that it was only intended to 'insure that U.S. personnel do not become involved in sensitive, internal law enforcement operations which could adversely affect U.S. relations with that country.'"), cert. denied, 457 U.S. 1135 (1982).

is just that—a presumption—a "canon of construction * * * whereby *unexpressed* congressional intent may be ascertained." *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)) (emphasis added). It is not a license to defeat Congress's clearly expressed will. See *Foley Bros.*, 336 U.S. at 285 (presumption that "legislation * * * is meant to apply only within the territorial jurisdiction of the United States" may be invoked "*unless* a contrary intent appears") (emphasis added). In this case, Section 878's text, history, and purpose confirm that Congress did not confine the authority of DEA agents to arrest for "any felony cognizable under the laws of the United States" to felons who are found in the United States. To the contrary, because many "felon[ies] cognizable under the laws of the United States" can be committed wholly abroad, and because Congress established explicit limits on the DEA's extraterritorial arrest authority in other statutes, Congress's provision of authority to arrest for "any felony" authorizes extraterritorial arrests with sufficient clarity to overcome any contrary presumption. That is particularly true in light of DEA's "worldwide drug enforcement responsibilities." H.R. Doc. 69, *supra*, at 5-6; see p. 22, *supra*.

In any event, the presumption against extraterritoriality does not apply to statutes, such as Section 878, which are designed to accord the Executive Branch authority to address criminal conduct with an international dimension. Nor does invoking the presumption in such cases serve its underlying purpose of avoiding conflicts with foreign powers. Indeed, by employing the presumption to restrict the discretion of the Executive Branch in matters of foreign policy, the Ninth Circuit's decision denies that Branch necessary flexibility and remits it to options—such as the use of the Nation's *armed forces*—which are less likely to invite foreign government consent and more likely to provoke international strife.

1. *The Presumption Against Extraterritoriality Is Not Applicable To Statutes Granting Authority To Enforce The Nation's Criminal Laws*

Unlike the Ninth Circuit's nearly reflexive application of the presumption against extraterritorial application of United States law, this Court's cases carefully distinguish between those situations where the presumption is likely to reflect Congress's intent and those situations where it is not. For example, over 80 years ago, this Court held that the presumption is inapplicable to criminal statutes that do not logically depend on locality for their operation. See *United States* v. *Bowman*, 260 U.S. 94, 98 (1922) (explaining that the general presumption against extraterritorial application does not apply to those "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction"); see also *Yousef*, 327 F.3d at 87-88. The enforcement of such a criminal statute abroad reflects the judgment of two different branches of government—the Legislature's determination to regulate conduct affecting critical United States interests regardless of the conduct's locality, and the Executive's judgment that extraterritorial enforcement action is warranted in particular cases.

For similar reasons, this Court has likewise declined to apply the presumption against extraterritoriality to statutes that grant the Executive Branch authority to enforce the law. See, *e.g.*, *Maul* v. *United States*, 274 U.S. 501 (1927) (relying on *Bowman* to construe ambiguous statute to permit extraterritorial seizures on the high seas). That approach makes sense. The government's interest in enforcing federal law and bringing criminals to justice does not, as a logical matter, end at the Nation's borders. Nor does it terminate merely because the suspect flees or remains abroad. To the contrary, Congress has made the international scope of the United States' law enforcement interests apparent by its frequent decision to extend its criminal laws (including the ones respondent was charged with violating) to conduct committed wholly abroad. Given the scope of the United

States' criminal laws and the government's interest in apprehending those who violate our laws but seek refuge abroad, it is not logical to read the enforcement authority of the Executive Branch as terminating at the border.

Although acknowledging *Bowman*'s applicability to *substantive* criminal prohibitions, the court of appeals refused to apply *Bowman* in this case because "Section 878(a) regulates executive authority, not criminal conduct." Pet. App. 41a-42a. But the fact that Section 878 grants discretionary law enforcement authority to the Executive Branch—the Branch of government responsible for the conduct of this Nation's foreign relations—merely underscores the inapplicability of the presumption against extraterritoriality, for Congress reasonably relies on the Executive Branch to exercise its discretionary powers consistent with foreign policy considerations. In cases involving a private party's efforts to apply an ambiguous statute abroad, the presumption against extraterritoriality avoids unintended interference with the political Branches' conduct of foreign policy. When it is the Executive itself seeking to enforce a federal statute abroad, those concerns are inapplicable. See pp. 35-40, *infra*. Particularly in this area, it is not appropriate for the judiciary to restrict the Executive's exercise of its sound discretion based on statutory silence.

In any event, the Ninth Circuit's refusal to apply *Bowman* to statutes granting the Executive Branch seizure authority is inconsistent with this Court's decision in *Maul* v. *United States*, *supra*, which addressed the authority of revenue cutters—customs enforcement vessels—to arrest suspected violators on the high seas. By longstanding tradition, revenue cutters had been assigned to particular "districts" in United States territorial waters, 274 U.S. at 509-510, and Congress had reflected that practice by authorizing revenue cutter officers to make certain seizures "as well without as within their respective districts," *id.* at 510. The Court agreed that the statutory language was ambiguous and might be read as authorizing seizures only "within other cus-

todial districts" and thus to exclude extraterritorial seizures in "the sea outside customs districts." *Id.* at 510-511. But the Court rejected that construction, holding that Congress had granted extraterritorial arrest authority. If vessels "violating the revenue laws * * * could escape seizure by departing from or avoiding waters within customs districts," the Court explained, "the liability * * * would be of little practical effect in checking violations; and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." *Id.* at 511. Citing *Bowman*—and not the presumption against extraterritoriality—the Court thus upheld extraterritorial seizure authority. *Ibid.* Justice Brandeis (joined by Justice Holmes) similarly observed: "If the officers of revenue cutters were without authority to seize American merchant vessels found violating our laws on the high seas beyond the twelve-mile limit, or to seize such vessels found there which are known theretofore to have violated our laws without or within those limits," then "many offenses against our laws might, to that extent, be committed with impunity." 274 U.S. at 520 (Brandeis, J., concurring).

The same reasoning applies here (particularly given that the DEA inherited responsibilities previously held by the Customs Department). By engrafting a territorial limit onto the DEA's statutory arrest authority, the Ninth Circuit implausibly presumed that Congress meant to extend the reach of substantive criminal law outside the United States, while denying the Executive Branch authority to enforce those laws abroad. The decision thus would appear to foreclose federal law enforcement agents encountering Bin Laden in Afghanistan before the September 11, 2001, attacks, for example, from seizing him, even with that foreign nation's express or tacit consent. It likewise would preclude federal agents from seizing individuals who have committed other serious crimes here only to flee abroad. See, *e.g.*, *Kasi* v. *Angelone*, 300 F.3d 487 (4th Cir.), cert. denied, 537 U.S. 1025 (2002) (FBI arrest of fugitive in

Pakistan who killed two CIA agents in Langley, Virginia, when seeking to assassinate the Director of the CIA).[5] If criminals could thus "escape seizure by departing from or avoiding" the territory of the United States, this Nation's criminal laws (including those that apply to conduct committed wholly abroad) "would be of little practical effect * * * , and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." *Maul*, 274 U.S. at 511. Certainly such limits on Executive enforcement authority are not "to be lightly assumed," *id.* at 525 (Brandeis, J., concurring), particularly in view of the Executive Branch's constitutional obligation to "take Care that the Laws be faithfully executed" and its primacy in matters of international relations.

The error in the Ninth Circuit's interpretive methodology is particularly apparent in the context of *investigative* authority. Just as Congress has granted the DEA and the FBI arrest authority without specifying geographic limits, it has granted those agencies parallel criminal investigatory authority as directed by the Attorney General without specifying geographic limits. See 21 U.S.C. 878(a)(5) (DEA agents may "perform such other law enforcement duties as the Attorney General may designate"); 28 U.S.C. 533(1), (3) (Attorney General may appoint agents to "detect and prosecute crimes against the United States" and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State"). Despite the absence of express authority to investi-

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[5] Mir Aimal Kasi opened fire with an AK-47 on a line of cars waiting to enter CIA headquarters in Langley, Virginia; he killed two agents and wounded three others. Kasi then fled and successfully avoided capture by hiding in Afghanistan. After he was indicted in the United States in 1993, FBI agents located and seized Kasi while he was making a brief stop in Pakistan and transported him to the United States, where he was tried and convicted. Under the Ninth Circuit's decision, however, that arrest may well have been unlawful, whether or not Pakistan consented, protested, or cooperated actively or tacitly in the capture.

gate such crimes abroad, no one has ever sensibly thought that Congress meant to foreclose federal investigations in foreign countries.

To the contrary, federal agents are regularly called upon to conduct investigations abroad, since many federal crimes are planned or committed (and felons may seek refuge) outside this country. See, *e.g.*, FBI, *Byte Out of History: Solving a Complex Case of International Terrorism* (last modified Dec. 19, 2003) <http://www.fbi.gov/page2/dec03/panam121903.htm> (discussing FBI investigative work in Scotland to prosecute suspects in the bombing of Pan Am Flight 103); FBI, *Partnering Against Global Threats: FBI Director Discusses Common Issues in Mideast and Europe* (last modified Nov. 10, 2003) <http://www.fbi.gov/page2/nov03/rsm111003.htm> (discussing FBI Director Mueller's meeting with FBI agents stationed in Iraq for "investigative purposes"); see also *Authority of the Federal Bureau of Investigation to Override International Law in Extra-territorial Law Enforcement Activities*, 13 Op. Off. Legal Counsel 163 (1989), available in 1989 WL 595835. The FBI, moreover, has long played a role in international intelligence gathering as well as espionage investigations. See, *e.g.*, Exec. Order 12,333, 46 Fed. Reg. 59,941 (1981); Intelligence Authorization Act, Fiscal Year 1990, Pub. L. No. 101-193, § 603, 103 Stat. 1710 (directing that the FBI, subject to the Attorney General's authority, "shall supervise the conduct of all investigations of violations of" U.S. "espionage laws * * * by persons employed by or assigned to United States diplomatic missions abroad"). The DEA currently has approximately 400 agents stationed overseas and 80 offices in 58 different countries. See <http//www.usdoj.gov/dea/agency/domestic.htm> (last visited Jan. 23, 2004). And Congress has long been aware of those international law enforcement activities. See pp. 21-22, 25-26, *supra* (extra-territorial activities of DEA and predecessor departments). The Ninth Circuit's decision to infer a prohibition on extra-territorial law enforcement activity from perceived statu-

tory silence is thus inconsistent with logic and experience alike.

2. *Applying The Presumption Against Extraterritoriality Undermines Its Purposes And Inverts The Constitution's Allocation Of Responsibilities Among The Branches*

The presumption against extraterritorial application of United States law is founded on the "commonsense notion that Congress generally legislates with domestic concerns in mind," *Smith* v. *United States*, 507 U.S. 197, 204 n.5 (1993), and the need to avoid "unintended clashes between our laws and those of other nations," *Aramco*, 499 U.S. at 248. The presumption thus ensures that courts do not misconstrue federal statutes to regulate private primary conduct outside this country where that conduct is principally a concern for a foreign power. It ensures, moreover, that courts do not inappropriately interpose themselves and private lawsuits into sensitive international matters which are the province of the political branches and for which the judiciary has little competence. See *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial," as they involve "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."). See generally U.S. Br. in No. 03-339, *Sosa* v. *Alvarez Machain*, at 31-46; p. 38 & note 7, *infra*.

In *Aramco*, for example, the Court applied the presumption to hold that Title VII's anti-discrimination rules, and the associated private cause of action created thereby, do not apply abroad. Noting that Title VII did not distinguish between United States companies and foreign companies employing United States citizens abroad, the Court found itself unwilling, absent "clearer evidence of congressional intent," to infer that Congress had established "a policy which

would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." 499 U.S. at 255. Similarly, in *Foley Brothers* v. *Filardo*, 336 U.S. 281, the Court declined to give extraterritorial effect to a federal law requiring employers to pay overtime for work in excess of an eight-hour day. Because the statute and the associated cause of action were motivated by "concern with domestic labor conditions," the Court saw no reason to apply them to Iranian and Iraqi workers in their home countries where the labor conditions "were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation." 336 U.S. at 286. "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." *Ibid.*

Those same considerations weigh *against* applying the presumption here. First, in creating the DEA, Congress sought to establish an agency to fulfill the Executive's enforcement duties with respect to federal laws that expressly apply abroad and to criminals found within this country and without. Indeed, in creating the DEA from the BNDD and other agencies, the Executive and Congress recognized the unique challenges to federal law enforcement in dealing with narcotics. Chief among the distinguishing characteristics is that many illegal narcotics have their sole or primary source abroad, and that an effective drug enforcement policy therefore must attack both domestic demand and foreign supply. See pp. 21-22, 25-26, *supra.* And when Congress restricted the DEA's international arrest authority, it did so expressly and only in limited circumstances. See pp. 23-24, 26 & note 4, *supra.* Consequently, the supposition that Congress must have legislated solely with domestic circumstances in mind has no application here. Cf. *Bowman*, 260 U.S. at 98; *Maul*, 274 U.S. at 510-511.

Nor does the interest of avoiding unintended conflict with foreign powers justify a narrow construction of Section 878.

That interest looms large with respect to statutes that directly regulate private primary conduct without benefit of the Executive's exercise of enforcement discretion, or that create private causes of action that might interpose the judiciary into sensitive foreign relations matters. But it has no application to grants of enforcement authority to the Executive Branch, the Branch the Constitution charges with conducting the Nation's foreign affairs. Indeed, it is precisely because the Executive Branch has both expertise in and constitutional responsibility for the conduct of foreign relations that Congress is presumed to rely on that Branch's sound discretion to carry out its functions with such considerations in mind. *Egan*, 484 U.S. at 529-530 (reiterating "the generally accepted view that foreign policy [is] the province and responsibility of the Executive") (quoting *Haig*, 453 U.S. at 293-294). Congress should not be presumed to wish to hinder the Executive Branch's ability to make case-specific judgments about the tools or proper degree of formal or informal foreign cooperation that is appropriate in apprehending a criminal suspect. Instead, the more sensible view is that Congress both granted the Executive broad authority to determine where and when to enforce federal law, and relied on that Branch to ensure the authority is exercised after taking into account foreign policy and international practices.

Far from reducing the likelihood of conflict with foreign powers, the Ninth Circuit's effort to restrict the Executive Branch's authority in such matters increases the potential for strife. While the Ninth Circuit would bar the DEA from engaging in law enforcement activities such as seizing criminal suspects abroad, it did not dispute the government's ability to use the Nation's *armed forces* to do the same. Pet. App. 4a; *id.* at 80a-81a n.1 (O'Scannlain, J., dissenting); *id.* at 118a (Gould, J., dissenting). The Ninth Circuit nowhere explained why the interest in preventing international conflict would favor the use of military force rather than ordinary law enforcement officers to effect such arrests. Nor could it.

By eliminating one option otherwise available to the Executive Branch, namely the use of law enforcement agencies in their law enforcement capacity, the Ninth Circuit favored the use of another mechanism—the military—that is less likely to be acceptable to foreign countries and more likely to create international strife.[6]

The Ninth Circuit's reliance on the general presumption that Congress does not intend to violate international law, Pet. App. 46a-47a (citing *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)), or invade the sovereignty of foreign nations, *id.* at 38a-39a, is misplaced for the same reasons. Most extraterritorial arrests are conducted with the foreign nation's consent and thus violate neither international law nor national sovereignty. Yet the Ninth Circuit construed Section 878 to deny the power to conduct a transborder arrest even with such consent. Pet. App. 35a n.24. The presumption against extraterritoriality, moreover, has no application to statutes like Section 878 that do no more than grant the Executive Branch discretionary enforcement authority (rather than regulating private primary conduct directly). The presumption with respect to such statutes is that they preserve the Executive's traditional discretion in matters of law enforcement and foreign policy, leaving it to that Branch—in the exercise of its foreign relations authority—to take into consideration foreign

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[6] The Ninth Circuit's decision also threatens to embroil courts adjudicating false arrest claims like this one in difficult distinctions among military, national security, and law enforcement activities, or require them to determine to which agency a particular arrest must be charged, matters for which the judiciary is ill-suited. For example, the Ninth Circuit did not dispute that the Executive Branch has inherent authority to employ domestic law enforcement agents for national security functions abroad. But it offered no judicially manageable standards for determining when a federal agent is serving a "national security" function or an ordinary law enforcement interest. See Pet. App. 81a n.1 (O'Scannlain, J., dissenting); *id.* at 117a n.5 (Gould, J., dissenting). There is thus reason for concern that "the line the majority trie[d] to draw in limiting its decision is more illusory than real." *Id.* at 117a n.5 (Gould, J., dissenting).

policy and international law concerns. See *United States* v. *Corey*, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000).

The Ninth Circuit's decision, moreover, undermines the ability of the Executive to avoid conflict through informal negotiated arrangements with foreign nations. In some circumstances, foreign governments may wish to cooperate with the United States—and rid themselves of criminals within their borders in the process—but be unwilling or unable to effect the arrests themselves. They may also wish to avoid acknowledging their cooperation publicly. The Ninth Circuit's decision hampers the United States' ability to accommodate those concerns by quietly negotiating for the use of U.S. law enforcement agents rather than a military incursion to effect such arrests. It is hard to imagine that Congress intended thus to hamstring the Executive Branch in its exercise of law enforcement and foreign relations powers.[7]

Of course, extraterritorial enforcement efforts undertaken without overt consent from foreign governments are extremely uncommon. The norm is to seek and obtain extradi-

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[7] The panel's vacated September 11, 2001, ruling read the arrest authority to extend abroad, but to require the consent of the foreign country where the arrest takes place. Pet. App. 144a. The en banc majority's opinion, however, held as a matter of statutory construction that federal officials entirely lack extraterritorial arrest power, and adopted a rule that the grant of such arrest power must be expressed by Congress. Pet. App. 35a n.24. But even the textually implausible view of the now-vacated panel opinion—that the statute grants the DEA authority to conduct arrests abroad conditioned on foreign consent—places courts in the middle of potentially sensitive matters of foreign relations. Whether a foreign nation consented, protested, or cooperated actively or tacitly in the capture of criminals is not a proper matter for judicial inquiry. See Pet. App. 99a-101a (O'Scannlain, J., dissenting). If another country has objections to the law enforcement efforts of the United States abroad, that is a matter for diplomatic resolution. See p. 39, & note 8, *infra*. The courts, moreover, are also ill-equipped to determine in any particular case the often politically charged question whether the arrest is permitted by international law, such as whether a U.N. Security Council Resolution authorizes it or whether it is justified as self-defense.

tion or other cooperation from the foreign nation. Because extraterritorial arrests risk violating the territorial sovereignty of a foreign power, they may become the subject of international protest that must be handled as a matter of State-to-State relations. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669 (1992).[8] As this case demonstrates, there is sometimes a significant diplomatic price to be paid for exercising extraterritorial law enforcement power. See Pet. App. 25a n.14 (discussing diplomatic consequences). Nonetheless, sometimes foreign governments give consent only confidentially; sometimes the foreign state may have no functioning government with which the United States can negotiate; and sometimes the United States will not have an extradition treaty, or exceptions to the Treaty it does have will apply. Consequently, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches" rather than the courts to make. Pet. App. 108a (O'Scannlain, J., dissenting); see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (restriction on searches abroad "must be imposed by the political branches though diplomatic understanding, treaty, or legislation"); *Alvarez-Machain*, 504 U.S. at 669 & n.16 (even if Alvarez-Machain's apprehension had been "in violation of general international law principles," there is a sizable "advantage [to] the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to unilateral action by the courts of one nation").

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[8] There are a variety of negotiated State-to-State remedies for a State-sponsored transborder arrest when such a remedy is deemed necessary and appropriate. See Restatement (Third) of Foreign Relations Law, § 432 & cmt. c (1986); see also S.C. Res. 138, U.N. SCOR, 15th Year, Resolutions and Decisions of the Security Council 1960, at 4 (1965) (U.N. Doc. S/4349). It would hardly serve concerns for minimizing diplomatic tensions to allow individuals to bring an FTCA action and air the same issues that the State-to-State diplomatic remedies were designed to resolve.

As this Court has explained, "[s]ome who violate our laws may live outside our borders in a regime quite different from that which obtains in this country." *Verdugo-Urquidez*, 494 U.S. at 275. The Executive Branch must have the ability to respond to "[s]ituations threatening to important American interests that may arise half-way around the globe." *Ibid.* It must have the flexibility to respond with the tools that best balance foreign policy and law enforcement objectives. A proper reading of Section 878 accords the Executive Branch those tools. The Ninth Circuit's armed-forces-or-nothing approach does not.[9]

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[9] The concurring judges suggested that respondent's extraterritorial arrest was unlawful because it was not authorized by the President or the Attorney General. See Pet. App. 73a-80a (Fischer, J., concurring). The majority, however, held that the DEA lacks statutory authority to arrest outside the United States without regard to such high-level authorization. Section 878, moreover, nowhere conditions the exercise of the broad arrest authority it grants on personal authorization by the President, the Attorney General, or some other official "above the paygrade of those who approved" of respondent's arrest here, see Pet. App. 74a, and the concurrence's attempt to engraft that condition onto Section 878 is textually implausible. Congress knows how to require the personal authorization of a high ranking official, and can do so with great specificity. See, *e.g.*, Foreign Intelligence Surveillance Act, 50 U.S.C. 1802(a); Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), 18 U.S.C. 2516(1); *United States* v. *Giordano*, 416 U.S. 505, 508 (1974). Absent such specific direction, courts are ill-positioned to decide whether the officials authorizing an action like respondent's arrest—such as the Deputy Director of the DEA, the number two person in the DEA and a presidential appointee—are of insufficient "paygrade." Of course, the Executive Branch has established procedures and policies to ensure that extraterritorial arrests that would violate international law are conducted only with the approval of officials of appropriate rank and responsibility. But those policies and procedures exist as a matter of internal, Executive Branch governance. Their breach would be a serious matter, and cause for the Executive Branch to discipline an offending employee. They do not, however, establish a judicially enforceable private right to freedom from extraterritorial arrest absent use of the specified procedures.

C. The Ninth Circuit's Decision Improperly Denies Federal Officers Authority To Effect Citizen's Arrests

After stripping federal officers of their statutory authority to make arrests for "any felony" based on a territorial limit not found in statutory text, the Ninth Circuit then compounded its error by stripping federal officers of the authority to make citizen's arrests when acting outside their jurisdiction. Pet. App. 70a-72a. The court of appeals did not dispute the nearly universal principle that law enforcement officers are treated "like private citizens" when they "make arrests outside their jurisdiction." Pet. App. 184a-185a (citing *People* v. *Monson*, 105 Cal. Rptr. 92, 95 (Ct. App. 1972); *People* v. *Califano*, 85 Cal. Rptr. 292, 298 (Ct. App. 1970)); see *id.* at 70a & n.44.[10] For that reason, the district court held that the arrest of respondent on probable cause, even if exercised without federal statutory authority, was a permissible citizen's arrest. See Pet. App. 183a-191a; see Pet. App. 187a ("[I]f a peace officer, or any individual, from another state entered California with the requisite probable cause to arrest an individual, then California would presumably not consider that action a false arrest."). Because the government is only liable under the FTCA "as a private individual under like circumstances," 28 U.S.C. 1346(b)(1), see 28

[10] See *People* v. *Marino*, 400 N.E.2d 491, 496-497 (Ill. App. Ct. 1980) (collecting cases); *Commonwealth* v. *Harris*, 415 N.E.2d 216, 220 (Mass. App. Ct.) (collecting cases), review denied, 441 N.E.2d 1042 (Mass. 1981); see also *United States* v. *Sealed Juvenile 1*, 255 F.3d 213, 217-218 (5th Cir. 2001) (explaining that a wide range of law enforcement officers have power to effect citizens' arrests and noting that the contrary result would be "counter-intuitive" and lead to "absurd results"); *United States* v. *Layne*, 6 F.3d 396, 398-399 (6th Cir. 1993), cert. denied, 511 U.S. 1006 (1994) (finding an arrest by a law enforcement officer valid under Tennessee's citizen's arrest statute); *Ward* v. *United States*, 316 F.2d 113, 117 (9th Cir.) (similar result for postal inspector under California law), cert. denied, 375 U.S. 862 (1963).

U.S.C. 2674, the government cannot be held liable for false arrest where private persons would not.

Departing from that approach, the Ninth Circuit majority created a special federal rule that denies federal law enforcement officers, and only federal law enforcement officers, the authority to make citizen's arrests. Invoking its earlier decision in *Arnsberg* v. *United States*, 757 F.2d 971 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986), the court of appeals held that the "the law of citizen arrest cannot * * * be used to extend" arrest authority "beyond its territorial limits." Pet. App. 71a. The Ninth Circuit thus held that, even though an ordinary citizen acting without special law enforcement authority in the jurisdiction would not violate California law by arresting respondent on probable cause, even outside the citizen's home State, see *id.* at 70a n.44, 187a, federal officers acting in locations where they similarly have no special statutory arrest authority are deemed to commit a tort for effecting the identical arrest, *id.* at 71a-72a.

That result has no basis in law. There is no principled reason for denying federal law enforcement officers acting outside their statutory jurisdiction the ability to make citizen's arrests simply because they are federal officers. The contrary rule openly discriminates against federal officers because they are federal officers. And it conflicts with the express statutory directive that the United States is liable only to the extent a private person would be liable under like circumstances. See 28 U.S.C. 1346(b)(1), 2674. A private person who has no special law enforcement powers may effect a citizen's arrests on probable cause. The same rule must apply to federal officers who allegedly lack special law enforcement powers because they are operating outside their jurisdictional authority.

II. The FTCA Exception For Claims Arising In A Foreign Country Bars Respondent's Lawsuit

While denying a federal law enforcement agency the authority to enforce federal law abroad based on statutory silence, the Ninth Circuit accorded itself authority under the FTCA to pass on the propriety of foreign arrests notwithstanding that statute's express exception for "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). Because the "foreign country" exclusion is a limit on "the scope of the United States' waiver of sovereign immunity," it must be construed strictly in favor of the United States. See *Smith* v. *United States*, 507 U.S. 197, 201, 203-204 (1993); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (waivers of sovereign immunity must be "construed strictly in favor of the sovereign"). That exception bars respondent's false arrest claim here.

A. The So-Called "Headquarters Doctrine" Does Not Excuse Courts From Applying The FTCA's Express Exception For Claims Arising In Foreign Countries

The Ninth Circuit did not dispute that respondent's arrest took place in a foreign country. In fact, the *only* reason that court found the arrest of respondent—an indicted suspect—on probable cause to be "false" and thus tortious was that it took place in Mexico. See Pet. App. 70a (holding the arrest to be false because the "DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court"). The court, moreover, agreed that liability was only appropriate for the actions that took place abroad—that damages were available only for the brief interval beginning with respondent's seizure in Mexico and ending with respondent's delivery into the United States. *Id.* at 60a-64a. Accordingly, the claim in this case unquestionably arose in a foreign country, and Section 2680(k) denies federal courts authority to entertain it.

To avoid that result, the Ninth Circuit invoked the so-called "headquarters doctrine" developed by several courts

of appeals (see Pet. 27 n.11) based on this Court's decision in *Richards* v. *United States*, 369 U.S. 1 (1962). *Richards*, however, did not construe the scope of the foreign country exception or the meaning of the phrase "arising in a foreign country." Nor did it purport to create a free-standing, extra-statutory "headquarters doctrine." Instead, *Richards* addressed "where the act or omission occurred," 28 U.S.C. 1346(b), for purposes of determining which State's tort law to apply. In *Richards* itself, the negligence (the substandard repair of an airplane) took place in Oklahoma but the injury (the resulting crash) occurred in Missouri. See 369 U.S. at 2-3. The Court held that the relevant "act or omission occurred" in the State where the negligence "took place," even if the injury was sustained in another State. *Id.* at 8, 10. *Richards* had no reason to address Section 2680(k) and it certainly does nothing to support the extraordinary proposition that Section 2680(k)'s exception for claims "arising in a foreign country" is inapplicable where the allegedly tortious conduct occurs abroad, where damages accrue only while that conduct continues abroad, and where the only reason the conduct is tortious is that it occurred abroad. The Ninth Circuit's contrary holding effectively excises the foreign country exception from the FTCA.

Richards and its focus on where the tortious activity occurred, moreover, provide no support for the Ninth Circuit's attempt to make a tort committed abroad actionable under a "headquarters exception" whenever there is involvement by officials inside the United States. Torts may often involve planning, authorization, or support from officials in multiple jurisdictions. But the tortious conduct itself—the particular conduct that makes the matter actionable—generally will occur exclusively or predominantly in one place. *Richards* involved a search for the jurisdiction where the critical act of negligence was committed. The Ninth Circuit's variant of the headquarters doctrine renders the FTCA's foreign country exception inapplicable whenever some authorization, support, or

planning took place in the United States. As explained herein, it thus does not represent an effort to determine where the claim arose, but is an expedient to avoid the foreign country exception whenever some involvement of officials in the United States is shown.

More fundamentally, the Ninth Circuit's approach departs from Section's 2680(k)'s text, which asks where the claim arose, not where it was planned or authorized. Tort claims simply do not "arise" in every location where steps toward commission were undertaken. Instead, the claims generally arise where the tort is completed—*e.g.*, where the conduct that fell below the relevant standard of care or duty took place. In intentional tort cases like this one, the tort generally "occurs" where the prohibited act is committed. See Restatement (Second) Conflict of Laws § 145 cmts. c, f, e (1971). For example, had the arrest at issue here been planned in California and executed in Arizona, there could be no doubt that the FTCA would look to Arizona as the place where the "wrongful act" occurred. See *Landry* v. *A-Able Bonding, Inc.*, 75 F.3d 200, 205 n.7 (5th Cir. 1996) (applying Texas law to claim of false imprisonment that took place in Texas pursuant to an arrest warrant issued in Louisiana). In this case, respondent's false arrest claim arose in Mexico. The arrest is alleged to be "false" and thus actionable only because it took place in Mexico. A critical element of the claim—the "nonconsensual, intentional confinement of a person," *Scofield* v. *Critical Air Med. Inc.*, 52 Cal. Rptr. 2d 915, 920 (Ct. App. 1996)—occurred in Mexico, and ceased to be actionable once respondent crossed the border into the United States. And none of the elements of the tort of false arrest occurred in the United States. Mexico thus was not merely the site of the injury. It was the location where the allegedly wrongful "act * * * occurred" and the place where the claim "arose" within the meaning of the FTCA. The invocation of a judicially crafted "headquarters doctrine" does not alter that reality.

B. The Ninth Circuit's Application Of The Headquarters Doctrine Contravenes The Purposes Of The Foreign Country Exception

The "headquarters" theory relied upon by the Ninth Circuit is also at odds with the purposes of the foreign country exception in the FTCA. This Court has explained that the foreign country exception must be viewed together with 28 U.S.C. 1346, which "waives the sovereign immunity of the United States for certain torts committed by federal employees 'under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred*.'" *Smith*, 507 U.S. at 201 (quoting 28 U.S.C. 1346(b)). "By the exclusion of claims 'arising in any foreign country,' the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States." *United States* v. *Spelar*, 338 U.S. 217, 219 (1949). The foreign country exception was enacted because Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Id.* at 220-221. The exception, moreover, helps prevent unnecessary judicial entanglement in sensitive matters of foreign relations.

Recognizing that applying Mexican law to determine the legality of respondent's arrest would be inconsistent with *Spelar*, the court of appeals and district court went through legal gymnastics to apply California rather than Mexican law. See Pet. App. 190a (noting the "artificial" nature of the resulting inquiry). That is just another example of how the headquarters doctrine has become an artifice to circumvent the FTCA's foreign country exception rather than a device for determining where the claim "arose" for jurisdictional purposes. It is hard to see how it makes any sense to apply California law to determine whether the United States is liable for the arrest of a Mexican citizen, by other Mexican nationals, inside Mexico. In general, foreign tort law is applicable where the intentional act occurred abroad. See *Curley* v. *AMR Corp.*, 153 F.3d 5, 12-15 (2d Cir. 1998)

(applying New York choice-of-law rules); *Hamilton* v. *Accu-Tek*, 47 F. Supp. 2d 330, 340 (E.D.N.Y. 1999); *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 195-196 (D. Mass. 1995); *Roxas* v. *Marcos*, 969 P.2d 1209, 1235 n.16 (Hawaii 1998). As noted above, if the arrest took place in Arizona rather than Mexico, it would be clear that Arizona rather than California law applies. The statutory choice-of-law precepts do not change merely because their proper application demonstrates that the lawsuit is statutorily precluded.[11]

Nor does purporting to apply California legal standards sidestep the imposition of liability based on foreign law. If Sosa and the arrest team had been Mexican law enforcement officers authorized by Mexican law to effect respondent's arrest and hand him over to United States authorities, their conduct would not have been tortious. Instead, it would have been lawful by virtue of their status under Mexican law. See Pet. App. 34a n.23 (noting that other suspects were seized by foreign agents with local authority). The Ninth Circuit thus did not deem the arrest in this case to be "false" because it violated some California or constitutional standard for arrests, such as the requirement of probable cause. It deemed the arrest to be false because it was effected without legal authority, whether Californian, United States, or Mexican. See Pet. App. 70a; see *id.* at 33a-50a (arrest unauthorized by law). Because Mexican law could provide that authority just as clearly as any other source (even through the law of citizen's arrest), this is precisely the sort of case Congress sought to exclude under 28 U.S.C. 2680(k)—one in which liability depends on "the laws of a foreign power" and the legal status of the arresting individuals under those laws.

Finally, the court of appeals' expansive application of the "headquarters doctrine" (and of its jurisdiction under the 28

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[11] Nor can international law provide the substantive tort law required by Section 1346(b). See *Goldstar (Panama) S.A.* v. *United States*, 967 F.2d 965, 970 (4th Cir. 1992); cf. *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994).

U.S.C. 1350 at issue in *Sosa* v. *Alvarez-Machain*, No. 03-339), places that court squarely where federal courts do not belong—in the realm of international politics, adjudicating the propriety of Executive conduct abroad. In this case, for example, the Ninth Circuit is attempting to address in a judicial forum issues of national sovereignty that the political branches of the United States and Mexico addressed by diplomacy long ago. The decision, moreover, drags the federal judiciary into review of foreign policy issues for which "the Judiciary has neither aptitude, facilities nor responsibility and which ha[ve] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines*, 333 U.S. at 111.

C. The Ninth Circuit's Decision Inverts The Constitution's Allocation Of Powers Among The Branches And Threatens To Embroil Courts In Foreign Relations Matters

The Ninth Circuit's willingness to arrogate for itself the constitutional role of the Executive Branch, far from being an isolated mistake, pervades its decision. When determining the *judiciary's* authority under the waiver of sovereign immunity in the FTCA, the Ninth Circuit construed the FTCA broadly to permit adjudication of the validity of an extraterritorial arrest, notwithstanding an express exception in 28 U.S.C. 2680(k) for claims arising abroad, and notwithstanding the rule that waivers of sovereign immunity are narrowly construed in favor of the sovereign. When determining whether the *judiciary* should impose liability under the FTCA for that foreign arrest, the Ninth Circuit applied state law broadly, holding an arrest in Mexico to be tortious through an extraterritorial application of the law of the State of California. And when deciding the scope of the *judiciary's* authority to recognize new causes of action under 28 U.S.C. 1350 at issue in *Sosa* v. *Alvarez-Machain*, No. 03-339, the Ninth Circuit gave that statute a broad construction too, holding that it permits courts to adjudicate, under

international law, disputes between foreign nationals arising out of events that took place abroad. See U.S. Br. As Respondent Supporting Petitioner at 48-49, No. 03-339 (arguing that Section 1350 merely provides jurisdiction and should not apply to disputes arising abroad).

But when passing on the scope of *Executive Branch* authority to conduct arrests abroad under a statute that contains no express geographic limit, the Ninth Circuit invoked the presumption against extraterritorial application to deny the Executive Branch that authority—even though the laws the Executive is charged with enforcing by their terms apply to conduct taking place abroad, and even though other federal statutes expressly contemplate extraterritorial arrests. Moreover, when passing on the authority of *Executive Branch* officers to make citizen's arrests outside their territorial jurisdiction, the Ninth Circuit denied them such authority because they are federal officers.

The Ninth Circuit's highly selective application of the presumption against extraterritoriality is exactly backwards. In matters touching on foreign relations and law enforcement—whether, where, when, and how to enforce federal law—Executive authority is at its apogee and judicial expertise at its nadir. See *Chicago & S. Air Lines*, 333 U.S. at 111; *Egan*, 484 U.S. at 529-530 ("[F]oreign policy [is] the province and responsibility of the Executive") (quoting *Haig*, 453 U.S. at 293-294); *Haig*, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). It is precisely to avoid judicial or private actions that would trench on the Executive's authority to conduct foreign relations that Acts of Congress are presumed not to have extraterritorial effect. See pp. 34-40, *supra*. No less than the Constitution, federal statutes that on their face *grant* the Executive Branch authority should not be construed to disrupt the ability of that Branch "to respond to foreign situations involving our national interest," *Verdugo-Urquidez*, 494 U.S. at 274, or to "take Care that the Laws be

faithfully executed," U.S. Const. Art. II, § 3, Cl. 4. Because the Ninth Circuit's decision ignores those principles and inverts the traditional allocation of responsibilities among the Branches—arrogating to the judiciary the authority to pass upon the propriety of Executive conduct abroad while denying the Executive its traditional authority in matters of law enforcement and foreign relations—its judgment cannot stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 878 of Title 21 of the U.S. Code provides, in relevant part, as follows:

§ 878. Powers of enforcement personnel

(a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may—

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate * * *.

2. Section 3052 of Title 18 of the U.S. Code provides as follows:

§ 3052. Powers of Federal Bureau of Investigation

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United

States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

3. The Mansfield Amendment, Pub. L. No. 94-329, § 504(b), 90 Stat. 764 (1976), codified as 22 U.S.C. 2291(c), provides in relevant part:

§ 2291. Policy, general authorities, coordination, foreign police actions, definitions, and other provisions

* * * * *

(c) Participation in foreign police actions

(1) Prohibition on effecting an arrest

No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law.

(2) Participation in arrest actions

Paragraph (1) does not prohibit an officer or employee of the United States, with the approval of the United States chief of mission, from being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting an arrest.

(3) Exception for exigent, threatening circumstances

Paragraph (1) does not prohibit an officer or employee from taking direct action to protect life or safety if exigent circumstances arise which are unanticipated and which pose an immediate threat to United States officers or employees, officers or employees of a foreign government, or members of the public.

(4) Exception for maritime law enforcement

With the agreement of a foreign country, paragraph (1) does not apply with respect to maritime law enforcement operations in the territorial sea or archipelagic waters of that country.

(5) Interrogations

No officer or employee of the United States may interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the written consent of such person.

(6) Exception for status of forces arrangements

This subsection does not apply to the activities of the United States Armed Forces in carrying out their responsibilities under applicable Status of Forces arrangements.

4. The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, provides in relevant part:

§ 1346. United States as defendant.

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

* * * * *

§ 2674. Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of

occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * * * *

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the

possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection,

"investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.