ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 09-7125, 09-7127, 09-7134, 09-7135

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE VIII, *et al.*,
Plaintiffs-Appellants,

v.

EXXON MOBIL CORPORATION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Case Nos. 01-1357, 07-1022
Hon. Royce C. Lamberth, Chief Judge

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that *amici curiae* Washington Legal Foundation (WLF) Allied Educational Foundation (AEF) are non-profit corporations; they have no parent corporations, and no publicly-held company has a 10% or greater ownership interest.

Pursuant to Circuit Rule 26.1(b), *amici* describe their general nature and purpose as follows. WLF is a public-interest law and policy center that regularly appears in this Court in cases raising public policy issues. AEF is an educational foundation based in New Jersey that on occasion appears in court in cases raising public policy issues.

/s/ Richard A. Samp
Richard A. Samp

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GLOSSARY

AEF	Allied Educational Foundation
ATS	Alien Tort Statute, 28 U.S.C. § 1350
Blackstone	4 Blackstone, *Commentaries on the Laws of England*
Exxon	Exxon Mobil Corp., and its wholly owned subsidiaries
Restatement	Restatement (Third) of Foreign Relations Law of the U.S.
TVPA	Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 *note*
WLF	Washington Legal Foundation

BRIEF OF WASHINGTON LEGAL FOUNDATION, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

WLF is a public interest law and policy center that defends and promotes free enterprise, individual rights, and a limited and accountable government.[1] In particular, WLF has devoted substantial resources over the years to opposing litigation designed to create private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of allegedly customary international law into the domestic law of the United States. *See, e.g., Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, __ U.S. __, 2010 U.S. LEXIS 7652 (Oct. 4, 2010).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici agree with the Supreme Court's view, expressed in *Sosa*, that a decision to create a private right of action is one better left to legislative

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[1] By order dated February 24, 2010, the Court granted WLF's motion for leave to file this brief.

judgment. Congress has given no indication that it has authorized the federal courts to create a private right of action based on violations of customary international law alleged to have occurred in foreign countries. In the absence of any such indication, *amici* oppose efforts to apply the ATS extraterritorially.

STATEMENT OF THE CASE

Appellants are 15 citizens of Indonesia who allege that they were injured based on events that took place during a civil war in the Indonesian province of Aceh. Appellees are Exxon Mobil Corporation and three of its wholly owned subsidiaries (collectively, "Exxon"). Appellants allege that they suffered their injuries at the hands of Indonesian military security personnel, allegedly under the control and direction of Exxon.

Eleven of the Appellants (the "Doe I Appellants") filed suit in 2001, seeking damages under the ATS, the Torture Victim Protection Act (TVPA), and various common law torts. In October 2005, Judge Oberdorfer dismissed the ATS claim for failure to state a cause of action and lack of subject matter jurisdiction. He ruled that: (1) allegations of genocide and crimes against humanity could not be adjudicated because doing so would require the court to evaluate the policies and practices of a foreign state (Indonesia); and (2) with respect to allegations of torture, arbitrary detention, and extrajudicial killing, the

Doe I Appellants had not adequately alleged that Exxon acted under color of law. 393 F.2d 20 (D.D.C. 2005).

Judge Oberdorfer also dismissed the TVPA claim but denied Exxon's motion to dismiss the common law claims as nonjusticiable.[2] He later denied in part Exxon's motion for summary judgment, ruling that the plaintiffs could proceed to trial against two of the four Exxon entities on claims alleging wrongful death, assault and battery, negligent hiring, and negligent supervision. 573 F. Supp. 2d 16 (D.D.C. 2008).

Four of the Appellants (the "Doe VIII Appellants") filed suit in 2007, making similar allegations against Exxon. Their complaint contained only common law tort claims; it did not raise claims under either the ATS or the TVPA.

In September 2009, Judge Lamberth granted Exxon's motions to dismiss both suits, ruling that the Appellants – in light of their status as non-resident aliens – lacked prudential standing to proceed with the litigation. Appellants

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[2] Judge Oberdorfer also determined that claims asserted against PT Arun LNG Co., an entity that was 55% owned by Indonesia's state-owned oil and gas company, should be dismissed as nonjusticiable. He held that adjudicating the liability of PT Arun created too great a risk of interfering in Indonesia affairs and thereby interfering with U.S. foreign policy. The Doe I Appellants have not appealed from that ruling.

appeal from that ruling. They also appeal from Judge Oberdorfer's 2005 dismissal of the TVPA claims, as well as his dismissal of the ATS claims alleging extrajudicial killing, torture, and prolonged arbitrary detention.[3]

SUMMARY OF ARGUMENT

The ATS, adopted in 1789, provides that a district court shall have original jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." As Exxon has emphasized in asking the Court to affirm dismissal of this case, "[t]here is a strong presumption, even with respect to an express cause of action, against extending it to encompass conduct in a foreign territory." Exxon Br. 37. In the absence of anything in the language or history of the ATS suggesting that Congress affirmatively desired that the ATS should apply to conduct in a foreign territory, the presumption has not been overcome – and the efforts of Indonesian citizens to apply the ATS to activities that took place in Indonesia should be rejected. Indeed, the history preceding adoption of the ATS as well as the foreign policy concerns of 18th century American leaders strongly supports the view that Congress did *not* intend the ATS to have extraterritorial application.

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[3] In this brief, *amici* urge affirmance of dismissal of the ATS and common law claims. We do not address the TVPA claims.

The exercise of jurisdiction over Appellants' common law claims is similarly inappropriate. All the factors that led Congress to conclude that the ATS should not apply extraterritorially counsel in favor of a conclusion that exercise of jurisdiction over the common law claims is "unreasonable" under § 403 of the Restatement (Third) of Foreign Relations Law of the U.S.

ARGUMENT

I. IN ADOPTING THE ATS, CONGRESS DID NOT SANCTION CAUSES OF ACTION ARISING EXTRATERRITORIALLY

The U.S. Supreme Court held in *Sosa* that while the ATS creates federal court *jurisdiction* to hear tort claims filed by aliens alleging violations of the law of nations, the ATS does not itself create any causes of action. *Sosa*, 542 U.S. at 713-14. Rather, *Sosa* explained, Congress bears principal responsibility for determining what causes of action aliens may file. *Id.* at 727.[4] While *Sosa* held open the possibility that there *may* exist federal common law rights of action over which courts may exercise ATS jurisdiction (in addition to three common law rights of action generally recognized at the time of the ATS's adoption in 1789), the Court held that federal courts should exercise "great caution" in

[4] Congress periodically has exercised that power. For example, the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 *note*, provides a right of action against any "individual" who, under color of foreign law, subjects another individual to "torture" or "extrajudicial killing."

recognizing any such rights. *Id.* at 728. It held that "judicial caution" was particularly warranted before recognizing a right of action based on activities that take place overseas, in light of "the possible consequences of making international rules privately actionable." *Id.* at 727.[5] WLF respectfully submits that the exercise of such caution requires the federal courts to decline to recognize *any* extraterritorial application of ATS claims in the absence of a directive from Congress that they do so. Because the conduct of which Appellants complain took place entirely within Indonesia and had no impact on any American citizens, dismissal of Appellants' ATS claims should be affirmed.

There is no evidence that, in adopting the ATS in 1789, Congress intended thereby to grant federal courts jurisdiction to hear claims arising in foreign countries. Since the early years of the Republic, there has been a strong

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[5] The Court expressed particular concern over extraterritorial application of the ATS when the conduct of a foreign government was at issue:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agents has transgressed those limits. . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, *if at all*, with great caution.

Id. at 727-28 (emphasis added).

presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).[6] The presumption against extraterritoriality was well-established at the time the ATS was adopted. *See The Apollon*, 22 U.S. (9 Wheat) 362, 370 (1824). The 1795 opinion of U.S. Attorney General William Bradford, to which *Sosa* cited approvingly, stated that insofar as "the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States." 1 Op. Att'y Gen. 57, 58 (1795). The Supreme Court has explained, "Foreign conduct is generally the domain of foreign law," and "courts should assume that legislators take account of the legitimate sovereign interests of other nations when they write American law." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007). Earlier this year, the Court held unequivocally:

> The canon or presumption [against extraterritorial application of federal statutes] applies regardless of whether there is a risk of conflict between the American statute and a foreign law. When a statute gives no clear

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[6] The Supreme Court "assume[s] that Congress legislates against the backdrop of the presumption against extraterritoriality." *Id.* Thus, "unless there is the affirmative intention of the Congress clearly expressed" in "the language [of] the relevant Act," the Court presumes that a statute does not apply to actions arising abroad. *Id.*

indication of an extraterritorial application, it has none.

Morrison v. National Australia Bank, 130 S. Ct. 2869, 2878-79 (2010) (citation omitted). Accordingly, in the absence of affirmative evidence that Congress intended the ATS to apply extraterritorially, it must be presumed that the ATS has no application to the activities in Indonesia of which Appellants complain.

A. No Federal Appeals Court Has Ever Explicitly Held That the ATS Applies Extraterritorially

Amici acknowledge that several federal appeals courts have recognized federal common law rights of action under the ATS in cases in which the underlying conduct occurred in foreign countries. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). However, in none of those cases did the defendants challenge the statute's extraterritorial application, nor did the courts explicitly address the extraterritoriality issue.

Moreover, *dicta* in recent decisions from both the Second and Ninth Circuit expressed serious doubt that the ATS applies to activity in foreign countries. For example, while acknowledging that it was an "open" issue in the Second Circuit whether the ATS applied extraterritorially, that court cited the 1795 opinion of U.S. Attorney General William Bradford as evidence that

Congress did not intend such application:

> [Bradford's] interpretation of the ATS could be read to prohibit any ATS suit seeking compensation for violations of international law committed on foreign soil. In concluding that the Sierra Leone Company could bring suit against the American individuals involved in the French attack on the colony, Attorney General Bradford circumscribes his opinion, appearing to conclude that the Company could *not* bring suit for the actions taken by the Americans in a foreign country, but rather, could sue only for the actions taken by the Americans on the "high seas." *See* 1 Op. Att'y Gen. at 58 ("So far, therefore, as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts. . . . But crimes committed on the high seas are within the jurisdiction of the district and circuit courts of the United States. . . ."). We need not address here the open issue of whether the ATS applies extraterritorially. . . . Were we to take up that issue, . . . we very well could conclude that the ATS does *not* apply extraterritorially, and thus we would dismiss this and the vast majority of recent ATS suits on the ground that the violations of customary international law alleged by plaintiffs "originated or took place in a foreign country." 1 Op. Att'y Gen. At 58.

Kiobel v. Royal Dutch Petroleum Co., __ F.3d __, 2010 U.S. App. LEXIS 19382 at *90-*91n.44 (2d Cir., Sept. 17, 2010).

Similarly, a Ninth Circuit judge last month opined unequivocally that the ATS has no extraterritorial application, citing the Supreme Court's rule that where a statute "gives no clear indication of an extraterritorial application, it has none." *Sarei v. Rio Tinto, PLC*, __ F.3d __, 2010 U.S. App. LEXIS 22001 at *12 (9th Cir., Oct. 26, 2010) (Kleinfeld, J., dissenting from order referring case to mediation) (quoting *Morrison*, 130 S. Ct. at 2878). Judge Kleinfeld stated:

> It is risible to think that the first Congress wrote the Alien Tort Statute intending to enable federal courts to adjudicate claims of war crimes committed abroad. Were it otherwise, a French aristocrat who had escaped the guillotine and fled to Philadelphia could have sued French defendants in our newly organized federal courts, perhaps even Robespierre himself, and obtained an injunction commanding the bloody French revolutionaries to stop immediately. . . . The point of the Alien Tort Statute was to keep us out of international disputes, not to inject us into them.

Id. at *14-*15.[7]

In the few ATS decisions it has issued, this Court has expressed no views regarding the statute's extraterritorial application. Accordingly, the extraterritoriality issue is an open question in the D.C. Circuit, as it is in every other federal appeals court.

B. The Legislative History Supports the View That Congress Did Not Intend Exterritorial Application of the ATS

The history leading up to adoption of the ATS in 1789 strongly suggests that Congress did not intend the ATS to apply extraterritorially. As *Sosa* recognized, the ATS was adopted in response to a decade-long concern that America's standing within the international community would suffer if it failed to uphold international law by failing to permit aliens a means of seeking redress

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[7] The Ninth Circuit *en banc* panel referred to mediation an ATS case in which the plaintiffs alleged that the defendant corporation aided and abetted the government of Papua New Guinea in the commission of war crimes. The panel said nothing to indicate that it disagreed with Judge Kleinfeld's extraterritoriality analysis.

in American courts for injuries inflicted on them by virtue of violations of the law of nations. *Sosa*, 542 U.S. at 715-19. Those concerns focused on injuries suffered by aliens while living in the United States. *Id.* Nothing in the pre-1789 history provides any support for the proposition that the ATS was intended to apply extraterritorially.

As *Sosa* explained, late 18th-century legal scholars recognized only three offenses by individuals that violated the law of nations: offenses against ambassadors, violations of safe conducts, and piracy. *Sosa*, 542 U.S. at 715 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769) (hereinafter "Blackstone")). It was those offenses that Congress apparently had in mind when it adopted the ATS. *Id.* at 719. Most importantly, Congress apparently was mindful of the need to create an adequate judicial forum when those offenses were committed *within the United States*. *Id.*[8]

Concern about creating an adequate forum for addressing violations of the law of nations arose during the American Revolution, "owing to the distribution

[8] The same Congress that enacted the ATS enacted a statute criminalizing the three offenses – assaults on ambassadors, violations of safe conducts, and piracy – that gave rise to the ATS. 1 Stat. 112, §§ 8, 25 (April 30, 1790). Like the ATS, the criminal statute was silent regarding whether it was to have extraterritorial application. However, although invoked by prosecutors many times, the statute was never invoked in cases involving actions taken within the territory of another nation.

of political power from independence through the period of confederation." *Id.* at 716. As the Court explained:

> The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished." J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893), and in 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary, and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against such as are in amity, . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties to which the United States are a party." 21 *Journals of the Continental Congress* 1136-37 (G. Hunt ed. 1912). The resolution recommended that the States "authorize suits . . . for damages by the party injured, and for compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen." *Id.*, at 1137.

Sosa, 542 U.S. at 716. Quite plainly, the concern focused on misconduct committed by American citizens and others living within this country. The United States could only be said to have "sustained" damages by virtue of "an injury to a foreign power" if the injury occurred domestically; only then could the Nation's international esteem be thought to have suffered by virtue of having failed to prevent the injury to the alien/foreign power from occurring.

1. Offenses Against Ambassadors

Two events in the 1780s – involving assaults on foreign government officials within the United States – heightened the "appreciation of the

Continental Congress's incapacity to deal with" violations of the law of nations. *Id.* The first event, the Marbois Affair of May 1784, was widely recognized as a sign of the weakness of the national government. A "French adventurer, Longchamps, verbally and physically assaulted the Secretary of the French Legion," Mr. Marbois, in Philadelphia. *Id.* "The international community was outraged and demanded that the Congress take action, but the Congress was powerless to deal with the matter. It could do nothing but offer a reward for the apprehension of de Longchamps so that he could be delivered to the state authorities." William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491-92 (1986). The Marbois Affair "was a national sensation that attracted the concern of virtually every public figure in America. The Continental Congress's impotence when confronted with violations of the law of nations had been clearly established." *Id.* at 492-93. It was discussed on numerous occasions at the Constitutional Convention in 1787 and led to inclusion of Art. I, § 8, cl. 10 (granting Congress the power to "define and punish . . . Offences against the Law of Nations") and Art. III, § 2 (granting federal courts jurisdiction over "Cases affecting Ambassadors [and] other public Ministers and Consuls").

A similarly notorious incident occurred in 1787 during the ratification

process following the convention. A local New York City constable entered the house of the Dutch ambassador and arrested one of his servants. This "affront" to diplomatic immunity "outraged" the ambassador, who protested to national government officials; but "[a]s in the Marbois Affair, the national government was powerless to act." Casto, at 494. The only sanction came at the hands of state courts in New York, which deemed the constable's conduct a violation of the law of nations, actionable under New York's common law. *Id.* at 494 n.153. Thus, when Congress adopted the ATS in 1789 in order to create federal court jurisdiction over the three torts thought actionable as violations of the law of nations, the two best-known examples of torts made actionable thereby (Marbois and the Dutch ambassador) both involved conduct that had taken place within the United States.

2. Violations of Safe Conducts

There is also no evidence that Congress contemplated extraterritorial application of the second tort covered by the ATS, violations of safe conducts. As explained by the Sixth Circuit, a "safe conduct" is defined as "[a] privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specific purpose. . . . Blackstone makes it clear that a violation of safe conducts occurs when an alien's privilege

to pass safely through the host nation is infringed and the alien consequently suffers injury to their 'person or property.'" *Taveras v. Taveraz*, 477 F.3d 767, 773 (6th Cir. 2007) (quoting 4 Blackstone, *Commentaries on the Law of England*, at 68-69). No 18th century legal commentator suggested that nations should be concerned about protecting the rights of aliens who were traveling through *other* nations. Rather, it was understood that a nation should be concerned with protecting the rights of aliens who had been granted a safe conduct while traveling through *that nation*.[9]

Blackstone explained that violations of safe conducts "are breaches of the public faith, without the preservation of which there can be no intercourse between one nation and another." Blackstone, at 68-69. If a nation was to avoid war with the nation whose citizen's travel was interrupted, it was required to punish the individual responsible for the interruption. *Id.* Accordingly, new nations like the United States, in order to preserve peace, had a particular interest in ensuring that redress was provided to those foreigners whose safe conducts were violated while traveling in the United States. Conversely, such nations would have had little interest in providing a judicial forum to, for example, a

[9] Also understood to be protected were aliens passing through overseas territories, in those areas in which the nation "had a military presence." *Taveras*, 477 F.3d at 773.

Spaniard who claimed that his safe conduct had been violated while he traveled through England. Interpreting the ATS to provide jurisdiction in federal court over such a cause of action would likely lead to conflict with England, the precise opposite from the intended purpose of providing redress for violations of safe conducts.

3. Piracy

The third tort covered by the ATS in 1789, piracy, quite clearly encompassed conduct that occurred outside the territorial jurisdiction of the United States. But while the federal courts exercised jurisdiction over piracy on the high seas, that jurisdiction did *not* include acts of piracy occurring within the jurisdiction of foreign nations.

Indeed, piracy was viewed in the 18th century as a unique offense precisely because it so often occurred outside the sovereign territory of *any* nation. Unless nations were willing to exercise jurisdiction over acts of piracy occurring outside their territory, many such acts would go unpunished. Thus, by general agreement of legal commentators, *all* nations were both entitled and obligated to punish piracy on the high seas. *See, e.g. United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163 n.8 (1820) ("[A]s pirates are the enemies of the human race, piracy is justly regarded as a crime against the universal laws of society,

and is everywhere punished with death. . . . [E]very nation has a right to pursue, and exterminate them, without a declaration of war.") (quoting Azuni, part 2, c. 5, art. 3, Mr. Johnson's translation); *United States v. Klintock,* 18 U.S. (5 Wheat.) 144, 152 (1820) (those engaging in robbery/plunder on the high seas "are proper objects for the penal codes of all nations," unless they are acting "under the acknowledged authority of a foreign State.").

Importantly, not only was the 1790 piracy statute never invoked to cover alleged acts of piracy within the territory of a foreign nation, the Supreme Court interpreted that statute as not even applying to attacks on foreign ships by American citizens, where the attacking ship on which the Americans served was sailing under the authority of a foreign nation. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-34 (1818). It is difficult to believe that the same Congress that adopted an anti-piracy statute of such limited scope nonetheless adopted an ATS statute for the purpose of extending the common law so as to regulate conduct within foreign nations.

C. Blackstone Did Not Believe That the Law of Nations Permitted Tort Actions Arising from Extraterritorial Activities

Sosa confirms that the 1789 Congress looked to Blackstone for guidance regarding the circumstances under which individuals could file tort actions for

violations of the law of nations. As noted above, Blackstone asserted that the law of nations recognized causes of action for violations of safe conducts, infringement of the rights of ambassadors, and piracy. In support of his assertion, Blackstone noted that English statutes proscribed all three of those offenses. Blackstone at 68 (the three offenses were "animadverted on as such by the municipal law of England"). Importantly, those English statutes did not apply extraterritorially – they applied only to conduct that occurred in the British realms or on the high seas. Given Blackstone's belief that those statutes were the embodiment of the law of nations, he most certainly did not believe that the law of nations authorized English courts to hear tort actions arising in foreign countries. Accordingly, there is no reason to believe that the 1789 Congress, when it adopted a statute intended to create jurisdiction for the tort actions described by Blackstone, sought to authorize tort actions vastly greater in scope than the ones contemplated by Blackstone.

When interpreting the ATS, it is important to bear in mind 18th- century understandings regarding the common law and the law of nations. Common law was not then viewed (as it is now) as a set of rules created by judges based on the cumulative wisdom gained through centuries-long experience dealing with recurring factual situations. Rather, "the accepted conception was of the

common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" *Sosa* at 725 (quoting *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes. J., dissenting)). Like other 18th-century English legal scholars, Blackstone viewed "the law of nations" as an aspect of the common law; he did not view it as a restatement of the rules already widely accepted by the governments of Europe but rather as a "system of rules, deducible by natural reason." Blackstone at 67. Thus, when Blackstone declared that there existed three offenses against the law of nations that could be charged against individuals, he meant thereby that, in his view, the existence of a prohibition against those offenses could be deduced from the principle "that different nations ought in times of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests." *Id.*

Because Blackstone viewed the law of nations as an aspect of the common law, in his view it had already been adopted in England "in its full extent by the common law." *Id.* When Blackstone asserted that his three law-of-nations offenses had been "animadverted on as such by the municipal laws of England," *id*. at 68, he meant thereby that English statutes gave official recognition to

offenses that, even prior to adoption of the statutes, were subject to sanction under the common law. Accordingly, to gain insight into whether Blackstone believed that the law of nations required England to apply its laws extraterritorially, it is helpful to look at the scope of the "municipal laws of England" that Blackstone believed were an accurate reflection of the common law. Tellingly, none of those statute had extraterritorial application.

Violations of Safe Conducts. To support his assertion that violations of safe conducts were offenses against the law of nations, Blackstone cited a series of 15th century statutes culminating in a 1452 statute, 31 Hen. VI c. 4, that "remain[ed] in full force" at the time that Blackstone wrote. Blackstone at 69-70. The 1452 statute stated:

> [I]f any of the king's subjects attempt or offend, upon the sea, or in any port within the king's obeysance, against any stranger in amity, league, or truce, or under safe conduct; and especially by attaching his person, or spoiling, or robbing him of his goods; the lord chancellor, with any justice of either the king's bench or common pleas, may cause full restitution and amends to be made to the party injured.

31 Hen. VI c. 4 (quoted in Thomas Walter Williams, LAW DICTIONARY (Gale and Fenner, London, 1816)).

By its plain terms, the 1452 statute did not apply extraterritorially. Rather, it applied only to conduct occurring on the high seas or "in any port within the

king's obeysance." Moreover, it did not attempt to regulate the conduct of foreign citizens; rather, only British subjects could be sued in tort.

Offenses Against Ambassadors. To support his assertion that offenses against ambassadors were offenses against the law of nations, Blackstone stated that Parliament adopted a statute in 1708 to "more effectively enforce the law of nations" with respect to ambassadors. Blackstone at 70 (citing 7 Ann. c. 12). The statute, known as the English Diplomatic Privilege Act of 1708, remained in force until the 20th century. Section 3 of the Act granted immunity from civil process to "any ambassador or other publick minister of any foreign prince or state authorized or received as such by her Majesty [or] her heirs or successors." Section 4 of the Act declared that violations of Section 3 "shall be deemed violat[ions] of the law of nations" and that violators "shall suffer such pains (penalties and corporal punishment)" as the courts "shall judge to fit to be imposed and inflicted."[10] The Act quite clearly was not intended to have extraterritorial effect; it did not apply to offenses against just any ambassador but rather only those foreign ambassadors or public ministers who were "authorized or received as such" in England by the Queen.

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[10] Sections 3 and 4 of the Act are quoted in *United States v. Enger*, 472 F. Supp. 490, 538 n.8 & n.9 (D.N.J. 1978).

Piracy. To support his assertion that piracy was an offense against the law of nations, Blackstone cited a series of piracy statutes, including 11 Will. c. 7, the Piracy Act of 1698. Blackstone at 72. Section VII of the Act provided:

> If any of his Majesties . . . Subjects . . . shall commit any Piracy or Robbery or any Act of Hostility against other His Majesties Subjects upon the Sea under Colour of any Commission from any Forreigne Prince or Pretence of Authority from any person whatsoever such Offender and Offenders and every of them shall be deemed adjudged and taken to be Pirates Felons and Robbers.

Blackstone himself went on to define piracy as follows: "The offense of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there." *Id*. at 72 (citing 1 Hawk. P.C. 100). In other words, since piracy by definition was limited to acts committed upon the high seas, Blackstone could not have believed that the law of nations provided a right of action for attacks by "pirates" in a foreign country (for example, an attack on a ship sitting in a foreign port).

In sum, Blackstone's understanding of the law of nations provides strong support for the conclusion that Congress did not intend the ATS to apply extraterritorially. There is no reason to believe that Congress, in adopting the ATS, intended thereby to authorize the federal courts to entertain common law

suits based on actions within a foreign country, if the legal scholar to whom Congress looked for guidance regarding the meaning of the law of nations (Blackstone) did not believe that the law of nations authorized such suits.

D. Courts Have Consistently Construed Federal Law in a Manner Designed to Prevent Conflict with Foreign Nations

When this Nation was in its infancy, federal officials did all they could to avoid conflict with the numerous more-powerful European countries. As noted above, a principal purpose of the ATS was to ensure that foreign ambassadors had recourse to federal courts for any offenses committed against them in this country, thereby ensuring that the ambassadors' home countries would not hold the United States responsible for the offenses. It is inconceivable that the same Congress that adopted the ATS for the purpose of avoiding conflict would simultaneously invite conflict by mandating extraterritorial application of the ATS. As Judge Kleinfeld so colorfully explained, conflict with 18th century France would have been inevitable if French royalists could have sued French revolutionaries in U.S. courts under the ATS based on claims that the latter's indiscriminate use of the guillotine in Paris violated the law of nations. *Sarei*, 2010 U.S. App. LEXIS 22001 at *14-*15.

The guiding principle of U.S. foreign policy during the George Washing-

ton Administration – when the ATS was adopted – was to remain neutral in the ongoing wars between France and England. Most famously, Washington's April 22, 1793 Proclamation of Neutrality declared an official policy of neutrality in the European wars. It declared that any U.S. citizen who "shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against" any European powers, or by shipping contraband to any of the warring nations, would not be protected by the U.S. government; and that any Americans who violated the law of nations with respect to the warring powers would be subject to criminal prosecution.

Supreme Court maritime decisions from that era repeatedly interpreted federal law in a manner that ensured the least possible conflict with foreign powers. *See, e.g. United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795) (rejecting the claims of a Philadelphia merchant that a French ship violated the law of nations by capturing his ship and taking it to France for prize adjudication); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795) (upholding the claim of a Dutch citizen that an American citizen had unlawfully captured (and claimed as a prize) the Dutchman's ship, even though the American claimed to have been commissioned by France, which was at war with the Netherlands). Many legal commentators have viewed the *Peters* and *Talbot* decisions as evidence that the

Supreme Court went to great lengths in its early years to interpret federal law in a manner that would avoid conflict with foreign countries. *See, e.g.*, Anthony J. Bellia Jr. and Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 59-60 (2009) ("[i]n the years immediately following ratification, the Supreme Court (or individual Justices) described how judicial failure to apply certain principles of the law of nations in a given case would disrespect the perfect rights of another nation."). *See also The Apollon*, 22 U.S. at 370 (holding that even though a French ship had passed through U.S. waters on its way to Spanish Florida, American officials acted wrongfully in seizing the ship while in Spanish Florida, and stating, "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.").

Recent decisions construing the ATS have continued to counsel against interpreting the statute in a manner that would lead to conflict with foreign countries. *See* Note 5, *supra* (quoting *Sosa*'s urging of "great caution" when federal courts consider recognizing causes of action that "raise risks of adverse foreign policy consequences."). Any foreign nation will take umbrage at U.S. courts adopting "rules that would go so far as to claim a limit on the power of foreign governments over their own citizens." *Sosa*, 542 U.S. at 727. But even when the conduct of a foreign government is not directly at issue in an ATS suit,

such governments can be expected to resent efforts by a U.S. court to judge the actions of their citizens within their own country.

More than 25 years ago, Judge Robert Bork warned that an expansive reading of the ATS risked provoking conflict with other nations, contrary to the intent of the drafters of the ATS:

> What little relevant historical evidence background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking conflict with other nations. *The Federalist* No. 80 (A. Hamilton). A broad reading of section 1350 runs directly contrary to that desire.

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring). He observed that interpreting the ATS in a manner that permits federal courts "to sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens" would raise unprecedented "prospects of judicial interference with foreign affairs." *Id*. at 813.

More recently, the Second Circuit has observed that the ATS:

> [W]as rooted in the ancient concept of international law and was intended to provide a remedy for violations of customary international law that "threaten[ ] serious consequences in international affairs." [*Sosa*, 542 U.S.] at 715. Unilaterally recognizing new norms of customary international law – that is, norms that have not been universally accepted by the rest of the civilized world – would potentially create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute was enacted to promote.

Kiobel, 2010 U.S. LEXIS 19382, at *83.

Amici respectfully submit that interpreting the ATS as having no extraterritorial application is consistent not only with the history and text of the statute, but also with the manner that courts have construed all federal laws with significant foreign policy ramifications – both in the era immediately after adoption of the ATS and throughout the remainder of American history.

II. SIMILAR POLICY CONSIDERATIONS COUNSEL AGAINST DISTRICT OF COLUMBIA COURTS AUTHORIZING CITIZENS OF INDONESIA TO ASSERT COMMON LAW CLAIMS REGARDING EVENTS IN INDONESIA

In addition to seeking relief under the ATS and TVPA, Appellants assert common law claims against Exxon – for wrongful death, assault and battery, negligent hiring, and negligent supervision. For many of the same reasons that the exercise of ATS jurisdiction is inappropriate in this case, *amici* respectfully submit that exercise of jurisdiction over the common law claims is also inappropriate.

This case involves claims by citizens of Indonesia who have absolutely no connection with the United States. They seek to recover damages based on events that occurred solely in Indonesia. Their sole basis for asserting jurisdiction is that one defendant, Exxon Mobil Corp., is incorporated in the U.S.

and that another defendant, ExxonMobil Oil Indonesia, Inc., allegedly has minimum contacts with the U.S. Under the facts of this case, that thin jurisdictional thread is insufficient under District of Columbia common law to warrant the exercise of jurisdiction.

Section 403 of the Restatement (Third) of Foreign Relations Law of the United States ("Restatement") provides that, even when the minimum prerequisites for the exercise of jurisdiction are otherwise met, a court should decline to exercise jurisdiction when doing so would be "unreasonable." A determination of unreasonableness should be based on an evaluation of "all relevant factors," including, where appropriate:

> (a) the link of the activity to the territory of the regulating state, *i.e.,* the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Restatement, § 403(2).

Amici submit that, based on the factors set forth in § 403(2), it would be "unreasonable" for courts in the District of Columbia to exercise jurisdiction over the common law claim being asserted by Appellants. The District has virtually no interest in the adjudication of Appellants' claims, and Appellants have no "justified expectations" that their claims would be heard here. As explained at length in the prior discussion of the ATS, for a District of Columbia Court to "sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens" would raise unprecedented "prospects of judicial interference with foreign affairs." *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring). Nor is the exercise of such jurisdiction "consistent with the traditions of the international system" (§ 403(f)); *amici* are unaware of similar common-law lawsuits being filed outside of the U.S. If U.S. courts are to

be empowered to exercise jurisdiction over tort claims so fraught with foreign policy difficulties, it is much more "reasonable" for the authority for such suits to come from Congress rather than from the States.

The principle that an exercise of jurisdiction is "unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law as well." Restatement § 403, comment a. *Amici* respectfully submit that the exercise of jurisdiction over Appellants' common law claims is unreasonable and thus unlawful under District of Columbia law.

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al*. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,990, not including the Circuit Rule 26.1 disclosure statement, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2010, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp