

The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”

By WILLIAM S. DODGE*

I. Introduction

The Alien Tort Statute¹ is one of the most widely discussed provisions in modern international law.² Since the Second Circuit’s

* Assistant Professor, University of California, Hastings College of the Law. B.A., Yale College, 1986; J.D., Yale Law School, 1991. I would like to thank David Baderman and Stefan Riesenfeld for commenting on an earlier draft. I am also grateful to Pat Sweeney, who graciously discussed the subject of this Article with me on several occasions.

1. 28 U.S.C. § 1350 (1993) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

2. See, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala*, 22 HARV. INT’L L.J. 53 (1981); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989); William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); David Cole, Jules Lobel & Harold Hongju Koh, *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos*, 12 HASTINGS INT’L & COMP. L. REV. 1 (1988); Anthony D’Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62 (1988); Anthony D’Amato, *Judge Bork’s Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT’L L. 92 (1985) [hereinafter D’Amato, *Judge Bork*]; Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation*, 67 ST. JOHN’S L. REV. 491 (1993); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Harold Hongju Koh, *Civil Remedies For Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT’L L.J. 169 (1987); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1 (1985) [hereinafter Randall, *Federal Jurisdiction Over International Law Claims*]; Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT’L L. & POL. 473 (1986); John M. Rogers, *The Alien Tort Statute and How Individuals “Violate” International Law*, 21 VAND. J. TRANSNAT’L L. 47 (1988); Alfred P. Rubin, *Professor D’Amato’s Concept of American Jurisdiction is Seriously Mistaken*, 79 AM. J. INT’L L. 105 (1985); Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT’L L.J. 1 (1993); Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT’L L. 65 (1995); Beth Stephens, *The Civil Lawsuit as a Remedy for*

landmark decision in *Filartiga v. Peña-Irala*,³ federal courts have developed a sophisticated jurisprudence for international human rights cases brought under the Statute.⁴ Yet the Statute's historical origins are murky. Judge Friendly once remarked that it is a "legal Lohengrin; . . . no one seems to know whence it came."⁵ We know, of course, that the Alien Tort Statute was enacted as the Alien Tort Clause⁶—a provision in Section 9 of the Judiciary Act of 1789, drafted by Oliver Ellsworth.⁷ Because the Clause lacks a "legislative history," however, it is difficult to establish definitively what Ellsworth and the First Congress meant to accomplish with the provision.

In *Filartiga*, the Second Circuit held that the Alien Tort Statute provides federal jurisdiction over acts of torture that occur abroad because torture today violates the law of nations.⁸ Even if the First Congress did not have torture in mind when it passed the Alien Tort Clause, *Filartiga* said, "courts must interpret international law not as it was in 1789, but as it has evolved and exists among nations of the world today."⁹ Moreover, *Filartiga* and its progeny have held that the

International Human Rights Violations Against Women, 5 HASTINGS WOMEN'S L.J. 143 (1994); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995); Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982).

3. 630 F.2d 876 (2d Cir. 1980).

4. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987). I should disclose that I participated on behalf of plaintiffs in the briefing of *Paul v. Avril* when I was a law student.

5. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

6. See Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789). The current version of the provision is most commonly called the "Alien Tort Statute." See, e.g., *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 432 (1989); *Filartiga*, 630 F.2d at 880. But it has also been called the "Alien Tort Claims Act," see, e.g., H.R. REP. NO. 367, 102d Cong., 2d Sess. 3-4 (1991) [hereinafter HOUSE REPORT], reprinted in 4 U.S.C.C.A.N. 84, 86 (1992); *Benjamins v. Brit. Eur. Airways*, 572 F.2d 913, 916 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), and simply the "Alien Tort Act," see, e.g., *Kadic*, 70 F.3d at 236. I will bow to convention and refer to the current version as the "Alien Tort Statute," but will refer to the provision passed by the First Congress as the "Alien Tort Clause" because I believe it more accurately describes what that provision is—a clause in Section 9 of the Judiciary Act of 1789.

7. Ellsworth is generally credited with drafting much of the First Judiciary Act, including Section 9. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 50 (1923).

8. 630 F.2d at 878.

9. *Id.* at 881.

Alien Tort Clause “open[s] the federal courts for adjudication of the rights . . . recognized by international law” without the need for further legislation.¹⁰

Against this prevailing view, Judge Bork has raised the “originalist” banner in an effort to exclude modern human rights suits from the scope of the provision.¹¹ In *Tel-Oren*, Judge Bork made two related arguments. First, he argued that for human rights plaintiffs to bring their claims in federal court they need not just a grant of jurisdiction, which the Alien Tort Clause provides, but also an express cause of action.¹² Recognizing that this requirement would have rendered the Clause a nullity the moment it was passed however, Judge Bork advanced a second argument—that the Clause was meant to apply only to torts that violated the law of nations in 1789, such as piracy and torts against ambassadors, and that it should be limited to those torts exclusively.¹³ In other words, Judge Bork argued that, to carry out the original intent of the Clause, the “law of nations” to which it refers must be frozen in 1789. This would specifically exclude contemporary human rights suits, since “in 1789 there was no concept of international human rights.”¹⁴

Recently, Professor Sweeney has raised an intriguing new argument to support the “originalist” cause.¹⁵ Based on a prodigious amount of historical research on the eighteenth century law governing the capture of enemy vessels at sea known as prize law, Professor Sweeney concludes that the Alien Tort Clause was designed exclusively to provide jurisdiction over a subcategory of prize cases—suits for torts committed during a capture in which the vessel’s status as a “prize” was not at issue; in short, suits for a tort *only*.¹⁶ Like Judge

10. *Id.* at 887; *see also* *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Kadic*, 70 F.3d at 236; *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

11. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 793-823 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

12. *Id.* at 801-08.

13. *Id.* at 810-16.

14. *Id.* at 813.

15. *See Sweeney, supra* note 2.

16. *Id.* at 481-83. Professor Sweeney’s reading has the virtue of explaining why Ellsworth put the word “only” in the text of the Clause. *See id.* at 478-83. For a different explanation, *see infra* notes 220-35 and accompanying text.

Bork's "originalist" arguments, Professor Sweeney's reading of the Clause would exclude contemporary human rights suits.¹⁷

The "originalist" arguments raised by Judge Bork and Professor Sweeney cast doubt on the correctness of the *Filartiga* line of cases. There are two ways to respond to such arguments. The first is to avoid the question by arguing that, even if *Filartiga* misinterpreted the Alien Tort Clause in 1980, Congress has subsequently ratified and even expanded that interpretation.¹⁸ The second is to meet Judge Bork and Professor Sweeney on their own terms and show that their arguments are not truly "originalist" at all.

The thesis of this Article is that *Filartiga* is more consistent with the original understanding of the Alien Tort Clause than the interpretations advanced by Judge Bork and Professor Sweeney. I argue that the original understanding of the Alien Tort Clause is reflected in its text—" [t]hat the district courts shall have . . . cognizance . . . of *all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States"¹⁹—not just those for which there is an express cause of action; not just those that violated the law of nations in 1789; and not just those that arose in the context of a capture at sea. In Part II, I review the historical evidence of the Clause's origin and argue that the Clause was designed to ensure that those who violated the law of nations could be held liable not just criminally but civilly as well.²⁰ I also explain how the Clause was intended to operate within the framework of the common law and the federal system.²¹

17. See Sweeney, *supra* note 2, at 483 ("I do not know of any case in which the clause has been properly applied by a court."). The defendant in *Kadic v. Karadzic* relied unsuccessfully on Professor Sweeney's article in his petition for rehearing. 74 F.3d 377 (2d Cir. 1996) (denying petition for rehearing).

18. In 1992, Congress passed the Torture Victim Protection Act, Pub. L. No. 256, 106 Stat. 73 (1992), which extends section 1350's remedy to U.S. citizens and provides an express cause of action for torture and extrajudicial killing. *Id.* § 2(a). The House Report makes clear that the Act is intended to supplement the Alien Tort Statute, not supersede it. See HOUSE REPORT, *supra* note 6, at 3-4, reprinted in 4 U.S.C.C.A.N. 84, 86 (1992) ("[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.").

19. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (emphasis added). For the current text of the provision, see *supra* note 1. I agree with Professor Sweeney that subsequent stylistic changes have not altered the district courts' jurisdiction. Sweeney, *supra* note 2, at 449-50.

20. See *infra* notes 26-74 and accompanying text.

21. See *infra* notes 75-110 and accompanying text.

Part III responds to each of the arguments raised by the “originalists”: (1) that an express cause of action is needed, which the Clause does not provide; (2) that the Clause should be limited to those torts that violated the law of nations in 1789; and (3) that the Clause should be limited to prize cases. I argue that the first argument is patently antihistorical,²² and that the second is contrary to the Founding Generation’s understanding that the law of nations would evolve.²³ Finally, I contend that the third argument is too selective in its use of history, is contrary to the language of the Alien Tort Clause, would render the Clause largely redundant, and is contradicted by the earliest interpretations of the Clause.²⁴ In short, Judge Bork’s interpretation of the Alien Tort Clause is actually antihistorical, while Professor Sweeney’s interpretation is only deceptively historical. It is *Filartiga*’s interpretation that deserves the mantle of originalism.

II. The Historical Origins of the Clause

As originally enacted, the Alien Tort Clause provided: “That the district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”²⁵ But what was the “law of nations” to which the Clause referred? How was it possible for an individual to violate that law by committing a “tort”? Where did the notion of federal jurisdiction over such torts come from? And how would the Clause operate within the framework of the common law and the federal system?

A. Blackstone and the “Law of Nations”

In the fourth volume of his *Commentaries*, Blackstone has a chapter on “Offences against the Law of Nations.”²⁶ Guided by Blackstone,²⁷ the Founding Generation viewed the law of nations as resting on natural law.²⁸ He explained that “[t]he law of nations is a system

22. See *infra* notes 113-34 and accompanying text.

23. See *infra* notes 135-51 and accompanying text.

24. See *infra* notes 152-219 and accompanying text.

25. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76-77 (1789).

26. 4 WILLIAM BLACKSTONE, COMMENTARIES *66-73.

27. For a comprehensive discussion of Blackstone’s influence on the Founding Generation, see Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

28. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 822 (1989).

of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”²⁹ Thus, as Justice Story would later put it, “every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations.”³⁰ According to Blackstone, “[t]he principal offences against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.”³¹

Blackstone had no doubt that individuals could violate the law of nations. Indeed, each of the “principal offences” he discussed would typically have been committed by individuals.³² He explained that “where the individuals of any state violate this general law [of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained.”³³ In England, this “animadversion” was accomplished mainly by criminal sanctions, which Blackstone discusses at length.³⁴ However, the concept of holding violators civilly liable was also known in England, for he mentions that, by statute, restitution against the transgressor was available for violation of a safe-conduct.³⁵

B. The Continental Congress' Resolution of 1781

In the United States, the Continental Congress became concerned with how to redress individual violations of the law of nations as early as 1781.³⁶ Congress lacked authority to punish such violations itself,³⁷ so it passed a resolution recommending to the States that they “provide expeditious, exemplary and adequate punishment” for viola-

29. 4 BLACKSTONE, *supra* note 26, at *66; *see also* 4 *id.* at *66-67 (“such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree”).

30. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825).

31. 4 BLACKSTONE, *supra* note 26, at *68.

32. *See supra* note 31 and accompanying text.

33. 4 BLACKSTONE, *supra* note 26, at *68.

34. *See* 4 *id.* at *68-73.

35. *See* 4 *id.* at *69 (“the injured stranger should have restitution out of [the violator's] effects”); 4 *id.* at *70 (“the lord chancellor . . . may cause full restitution and amends to be made to the party injured”).

36. *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1136-37 (Library of Congress, 1912).

37. *Casto, supra* note 2, at 490.

tions of the law of nations and treaties to which the United States was a party.³⁸ Specifically, the States were asked to punish: (1) violations of express safe-conducts “granted under the authority of Congress to subjects of a foreign power in time of war”; (2) “acts of hostility against such as are in amity, league or truce with the United States or who are within the same, under a general implied safe conduct”; (3) “infractions of the immunities of ambassadors and other public ministers”; and (4) “infractions of treaties and conventions to which the United States are a party.”³⁹ The first three categories parallel Blackstone’s discussion so closely that there can be little doubt of their origin.⁴⁰ Congress added infractions of treaties to Blackstone’s list but omitted piracy, presumably because Congress itself had authority to appoint courts for the trial of piracies.⁴¹ Congress did not intend its list to be exhaustive⁴² and it further recommended that the States “erect a tribunal in each State, or . . . vest one already existing with power to decide on offences against the law of nations, not contained in the foregoing enumeration.”⁴³

But the resolution did not stop there. The Continental Congress further recommended to the States “to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.”⁴⁴ The resolution thus described two types of civil suits in state court: (1) tort suits brought by the injured party against the tortfeasor, and (2) suits brought by the United States against the tortfeasor to reimburse the United States for compensation paid to the injured party.

The first type of suit envisioned civil liability extending to the full range of law-of-nations violations, not just to the violations of safe-conducts for which English law provided reparations.⁴⁵ As Professor

38. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 1136. For the full text of the 1781 resolution, see *infra* Appendix.

39. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 1136-37.

40. See 4 BLACKSTONE, *supra* note 26, at *68-71.

41. See ARTICLES OF CONFEDERATION, art. 9, § 1, 1 Stat. 4, 6 (“The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas . . .”).

42. The resolution called these four categories “only those offences against the law of nations which are most obvious.” 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 1137.

43. *Id.*

44. *Id.*

45. See *supra* note 35 and accompanying text.

Slaughter has noted, civil liability “was an entirely logical addition” to criminal sanctions.⁴⁶ There were two ways to redress offenses against the law of nations: punishing the wrongdoer and making the injured party whole.⁴⁷ Criminal sanctions were directed at the former; civil damages at the latter. This recommendation for civil suits by the injured party was “the direct precursor of the alien tort provision in the First Judiciary Act.”⁴⁸

The second type of suit envisioned by the 1781 resolution was designed more narrowly to allow reimbursement of the United States in those instances where it had decided to pay the damages itself in order to resolve an international incident quickly.⁴⁹ Because the United States would only be motivated to pay the damages directly when the injury was done by one of its citizens, the resolution referred to injuries done “by a citizen.” The syntax of the resolution makes clear that this requirement applied only to the second type of suit.⁵⁰

It is not certain how many of the States acted on the 1781 resolution. The following year, Connecticut passed “An Act to prevent Infractions of the Laws of Nations,” which criminalized specific violations of the law of nations as well as “any other Infractions or Violations of or Offenses against the known received and established

46. Burley, *supra* note 2, at 477.

47. The principle of punishing the wrongdoer *and* making the victim whole has stood the test of time. The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Commission on Human Rights, 39th Sess., Annex, U.N. Doc. E/CN.4/1984/72 (1984), reprinted in 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985), not only obligates each state party to prosecute or extradite those who engage in torture, *see id.* arts. 4-7, but also to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.” *Id.* art. 14.

48. Burley, *supra* note 2, at 477; *see also* Casto, *supra* note 2, at 490-91; Rosenberg, *supra* note 2, at 1017.

49. The committee report preceding the resolution explained:

That as instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries committed by individuals, and the property of the innocent be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.

21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 1136.

50. Casto, *supra* note 2, at 499 n.179. The distinction between these two types of civil suits is important to rebut any argument that the Alien Tort Clause requires the defendant to be a U.S. citizen. Even if the “by a citizen” language in the 1781 resolution is read to apply to both kinds of suits, the Marbois affair three years later, in which the assailant was an alien, would have made such a limitation seem inadvisable. *See infra* notes 55-64 and accompanying text. And, of course, no such limitation was included in the text of the Alien Tort Clause.

Laws of Civilized Nations.”⁵¹ The Connecticut act also provided a broad tort remedy for injuries “to any foreign Power or to the Subjects thereof” without regard to whether the tort involved a violation of the law of nations.⁵² On the other hand, Edmund Randolph, writing in 1787, complained that “[i]f we examine the constitutions, and laws of the several states, it is immediately discovered, that the law of nations is unprovided with sanctions in many cases, which deeply affect public dignity and public justice,”⁵³ which leads one to think that many States did not follow Connecticut’s example.⁵⁴

C. *The Marbois Affair*

Regardless of how many States acted on the 1781 resolution, an assault on the French Consul General in Philadelphia in 1784 must have added a sense of urgency to the issue.⁵⁵ On May 17, 1784, a French citizen known as the Chevalier De Longchamps threatened Francis Barbe Marbois, the French Consul General, in the French Ambassador’s home.⁵⁶ Two days later, De Longchamps assaulted Marbois on the streets of Philadelphia.⁵⁷ The case attracted wide concern.⁵⁸ The Continental Congress offered a reward so that De Longchamps “may be brought to justice for his said violation of the laws of Nations and of the land”⁵⁹ and, upon being informed of his arrest, Congress “highly approve[d]” Pennsylvania’s actions.⁶⁰ But there was little else that the national government could do. As it was forced to explain to Marbois the following year, its powers were limited by “the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated

51. William R. Casto, *Correspondence*, 83 AM. J. INT’L L. 901, 903 (1989) (quoting 4 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FOR THE YEAR 1782, at 156-57 (L. Labaree ed., 1942)).

52. *See id.*

53. A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 86, 88 (Herbert J. Storing ed., 1981).

54. *See also infra* notes 63-64 and accompanying text.

55. *See* Randall, *Federal Jurisdiction Over International Law Claims*, *supra* note 2, at 24-26; Casto, *supra* note 2, at 491-94.

56. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

57. *Id.*

58. Professor Casto has found frequent discussion of the Marbois affair in the letters of prominent statesmen. Casto, *supra* note 2, at 492 n.143.

59. 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 478-79.

60. 27 *id.* at 503.

to Congress leaving to them only that of advising in many of those cases in which other governments decree."⁶¹

Ultimately, De Longchamps was tried and convicted by the Pennsylvania Supreme Court for a crime against the law of nations, which the court held to be part of Pennsylvania's common law.⁶² In the wake of the Marbois affair, the Continental Congress recommended that the States "pass laws for the exemplary punishment of such persons as may in future by violence or by insult attack the dignity of sovereign powers in the person of their ministers or servants."⁶³ It even went so far as to direct the Secretary for Foreign Affairs, John Jay, to draft "an act to be recommended to the legislatures of the respective states, for punishing the infractions of the laws of nations, and more especially for securing the privileges and immunities of public Ministers from foreign powers."⁶⁴

Four years later, a similar incident arose when a New York City constable entered the house of the Dutch Ambassador Van Berckel and arrested one of his servants.⁶⁵ Secretary Jay complained that "the foederal [sic] Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases."⁶⁶ However, a state court sentenced the unfortunate constable to three months in jail for violating the law of nations.⁶⁷

There is no record of any civil action being filed against De Longchamps or against the constable in the Van Berckel case.⁶⁸ Nevertheless, each had committed what would have been recognized as a tort⁶⁹ and, in so doing, each had violated the law of nations. The Marbois affair, in particular, constituted a well-known case falling squarely within the category of torts in violation of the law of nations recognized by the 1781 resolution.⁷⁰ But no federal remedy was available for Marbois, a situation the First Congress would quickly address.

61. 28 *id.* at 314.

62. *De Longchamps*, 1 U.S. (1 Dall.) at 116.

63. 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 315.

64. 29 *id.* at 655. There is no record of Jay having drafted any such legislation. Casto, *supra* note 2, at 493 n.144.

65. Casto, *supra* note 2, at 494.

66. 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 111.

67. Casto, *supra* note 2, at 494.

68. Burley, *supra* note 2, at 471.

69. See *infra* notes 83-89 and accompanying text.

70. See *supra* notes 36-48 and accompanying text.

D. *The Alien Tort Clause*

The new Constitution gave Congress the authority to do what it could only recommend to the States in 1781. Oliver Ellsworth was a member of the Continental Congress that passed the 1781 resolution and a member of the Connecticut General Assembly that passed the 1782 act.⁷¹ His Judiciary Act enacted all the recommendations of the 1781 resolution.⁷² Sections 9 and 11 gave the federal courts jurisdiction over common-law crimes “cognizable under the authority of the United States,” including crimes in violation of the law of nations.⁷³ The Alien Tort Clause gave the district courts jurisdiction over suits for damages based on the same violations.⁷⁴

To understand how the Alien Tort Clause would provide a remedy for aliens who had been the victims of torts that violated the law of nations, one must understand the provision’s common-law background. To understand why a *federal* remedy was desirable, one must understand how Ellsworth and his contemporaries viewed the state courts’ handling of the law of nations and of aliens’ claims. It is to those subjects that I turn next.

1. *The Clause’s Relationship to the Common Law*

It is important to understand the relationship between the Alien Tort Clause and the common law because that relationship explains how an alien might bring suit for a tort in violation of the law of na-

71. Casto, *supra* note 2, at 495 n.155 (noting Ellsworth’s membership in the Continental Congress); Casto, *supra* note 51, at 902-03 (noting Ellsworth’s membership in the Connecticut General Assembly).

72. Burley, *supra* note 2, at 477.

73. See Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (district court jurisdiction over minor crimes—*i.e.* “where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted”); *id.* § 11, 1 Stat. 73, 78-79 (circuit court jurisdiction concurrently with the district courts over minor crimes and exclusively over all others). Charles Warren has shown that Congress intended this jurisdiction to include common-law crimes, including those against the law of nations, and that Congress struck from the draft bill provisions that would have limited this jurisdiction to statutory crimes. See Warren, *supra* note 7, at 73, 77.

74. See Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (“the district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States”). Suits by the United States for reimbursement of damages paid on behalf of one of its citizens, see *supra* note 49-50 and accompanying text, could be brought in district court if the amount in controversy were \$100 or more, Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77, and in circuit court if the amount in controversy were \$500 or more, *id.* § 11, 1 Stat. 73, 78.

tions in the absence of an express cause of action.⁷⁵ Blackstone had observed that “the law of nations . . . is . . . adopted in it’s [sic] full extent by the common law, and is held to be a part of the law of the land,”⁷⁶ and American writers “generally asserted that the law of nations was part of the law of the new American states and their national government.”⁷⁷

At the time, violations of the law of nations were widely recognized as common-law crimes. For his assault on Marbois, De Longchamps was indicted and convicted of a common-law offense against the law of nations, which the Pennsylvania Supreme Court declared, “in its full extent, is a part of the law of this State.”⁷⁸ The prosecutions of Americans for neutrality violations during the 1790s were likewise by indictment at common law.⁷⁹ Torts were the civil counterparts of crimes,⁸⁰ and the Alien Tort Clause recognized tort liability over the full range of offenses against the law of nations. That “torts in violation of the law of nations” were intended to reach at least as far as “crimes in violation of the law of nations” is apparent from the Alien Tort Clause’s origin in the resolution of 1781, which would have made them coextensive.⁸¹ Moreover, the Clause expressly extended jurisdiction to “*all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”⁸² The important point is that in 1789 neither crimes nor torts in violation of the law of nations required positive legislation to be actionable; both were cognizable *at common law*.

Although “tort law was not a highly developed field” in the late eighteenth century,⁸³ Blackstone listed as “torts” many of the same common-law actions we would recognize today: “actions for trespasses, nuisances [sic], assaults, defamatory words, and the like.”⁸⁴ It is apparent that a tort action would frequently lie where a person committed a violation of the law of nations. Violations of safe-con-

75. For a fuller refutation of Judge Bork’s argument that an alien must have an express cause of action to bring suit under the Clause, see *infra* notes 113-34 and accompanying text.

76. 4 BLACKSTONE, *supra* note 26, at *67.

77. Jay, *supra* note 28, at 825.

78. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (1784).

79. See Jay, *supra* note 28, at 842-45; Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1042-53 (1985).

80. Burley, *supra* note 2, at 479.

81. See *supra* notes 44-48 and accompanying text.

82. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

83. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 261 (1973).

84. 3 BLACKSTONE, *supra* note 26, at *117.

ducts would typically involve assaults. Violations of the rights of ambassadors could involve assault, as in the Marbois affair,⁸⁵ or trespass and false imprisonment, as in the invasion of Ambassador Van Berckel's home.⁸⁶ Acts of piracy could involve assault, trespass, and false imprisonment.⁸⁷ Violations of treaties could implicate a variety of torts, but it is apparent that assaults in violation of U.S. neutrality could violate a treaty.⁸⁸ Finally, as Professor Sweeney demonstrates, actions for trespass and false imprisonment might lie in cases of wrongful capture at sea.⁸⁹

In the 1790s, federal jurisdiction over common-law crimes became caught up in partisan disputes between Federalists and Republicans over the powers of the central government.⁹⁰ Ultimately, the federal courts lost their authority over such crimes in *United States v. Hudson*.⁹¹ Not so with common-law torts in violation of the law of nations. Professor Jay has observed that "[f]or a considerable period in early American judicial history, the federal courts were free to develop a common law for civil cases . . . without provoking serious objections of the sort raised in *Hudson*."⁹²

In 1795, after the controversies concerning common-law crimes had begun, Attorney General William Bradford was asked to opine on the actions that might be taken against American citizens who had aided the French in attacking the British colony of Sierra Leone in violation of a treaty promising U.S. neutrality.⁹³ Ignoring the possibility of an indictment at common law, Bradford expressed some doubt

85. See *supra* notes 55-64 and accompanying text.

86. See *supra* notes 65-67 and accompanying text.

87. Although not listed in the 1781 resolution because the Articles of Confederation already provided for it, see *supra* note 41, piracy was considered one of the principle offenses against the law of nations, see 4 BLACKSTONE, *supra* note 26, at *68, *71-73, and there is little doubt that it fell within the Alien Tort Clause. See generally Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1925) (discussing piracy as an offense under the law of nations and under municipal law).

88. See *infra* notes 93-95 and accompanying text. Several treaties of the United States also had provisions guaranteeing safe-conducts to aliens, Randall, *Federal Jurisdiction Over International Law Claims*, *supra* note 2, at 47 n.220 (listing provisions), and providing immunities to ambassadors. *Id.* at 48 n.222 (listing provisions).

89. See Sweeney, *supra* note 2, at 465-75; see also *Le Caux v. Eden*, 99 Eng. Rep. 375 (K.B. 1781) (actions for trespass and false imprisonment).

90. See Jay, *supra* note 79, at 1039-1111.

91. 11 U.S. (7 Cranch) 32 (1812).

92. Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1276 (1985).

93. See 1 Op. Att'y Gen. 57 (1795). Bradford was Attorney General of Pennsylvania during the Marbois affair. See 1 U.S. (1 Dall.) 46 (1780) (notice of appointment). Assisted by James Wilson, Bradford had prosecuted *De Longchamps*. See *Respublica v. De*

as to whether the offenders could be criminally prosecuted in a U.S. court “in consequence of the terms in which the ‘Act in addition to the act for the punishment of certain crimes against the United States’ is expressed.”⁹⁴ He continued:

But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.⁹⁵

In short, the Founding Generation understood that the law of nations was part of American common law and that a tort violating that law would be cognizable at common law just as any other tort would be. The Alien Tort Clause simply provided federal jurisdiction over these common-law torts, giving aliens who could allege not just a tort but a tort in violation of the law of nations the option of bringing suit in federal, rather than state, court.

2. *The Clause's Relationship to State Courts*

If the law of nations was part of the common law, and if torts in violation of the law of nations were common-law torts, then such torts should have been cognizable in the courts of the several States. Yet the 1781 resolution and Edmund Randolph's observations six years later⁹⁶ display a fear that this was not always the case. The Alien Tort Clause appears to have been passed partly to ensure that aliens could sue for torts in violation of the law of nations regardless of the vagar-

Longchamps, 1 U.S. (1 Dall.) 111, 113 (1784); *see also* Casto, *supra* note 2, at 503 n.201 (noting Bradford's participation in the Marbois affair).

94. 1 Op. Att'y Gen., *supra* note 93, at 59. The Act to which Bradford referred made it a “high misdemeanor” for any “citizen of the United States . . . within the territory or jurisdiction of the same” to accept a foreign commission, enlist in a foreign army, serve on a foreign privateer, and so on. An Act in addition to the act for punishment of certain crimes against the United States, ch. 50, §§ 1-2, 1 Stat. 381, 381-83 (1794) (emphasis added) (repealed 1818).

95. 1 Op. Att'y Gen., *supra* note 93, at 59 (emphasis in original). That the tort occurred outside the United States posed no obstacle to a civil suit. It had been established by Lord Mansfield's opinion in *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1030-31 (K.B. 1774), that tort actions were “transitory” and the injured party could bring suit wherever the tortfeasor was found. *See McKenna v. Fisk*, 42 U.S. (1 How.) 241, 248 (1843) (dating doctrine of “transitory torts” to *Mostyn*); *Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. 1786) (Ellsworth, J.) (“right of action [for a tort] against an administrator is transitory, and the action may be brought wherever he is found”); *see also* Randall, *Federal Jurisdiction Over International Law Claims*, *supra* note 2, at 61-62 (discussing transitory torts); Casto, *supra* note 2, at 503-04 (discussing transitory torts).

96. *See supra* notes 36-54 and accompanying text.

ies of state law. But at least two other factors likely motivated the First Congress to provide a federal forum for alien tort suits: a desire for uniformity in the interpretation of the law of nations,⁹⁷ and a fear that state courts would be hostile to alien claims.⁹⁸

Writing in *The Federalist*, John Jay expressed the Founding Generation's desire for a uniform interpretation of the law of nations:

Under the national government, treaties . . . as well as the laws of nations, will always be expounded in one sense . . . whereas adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.⁹⁹

Of course, the Alien Tort Clause would not guarantee uniformity in the interpretation of the law of nations because it only gave alien plaintiffs the *option* of bringing their tort claims in federal court. Assuming that state law permitted, aliens could still bring such claims in state court.¹⁰⁰ But the Clause made sure that aliens would have the opportunity to have their claims adjudicated under a law of nations that was, at least in theory, "expounded in one sense" by the federal judiciary.¹⁰¹

Fear that state courts would be hostile to alien claims also likely motivated the First Congress to pass the Alien Tort Clause. As James Madison put it famously while defending the Constitution's grant of alienage jurisdiction: "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."¹⁰² Alexander

97. See *infra* notes 99-101 and accompanying text.

98. See *infra* notes 102-05 and accompanying text.

99. THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961).

100. District court jurisdiction under the Alien Tort Clause was "concurrent with the courts of the several States, or the circuit courts, as the case may be." Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789). The concurrent circuit court jurisdiction refers to alienage jurisdiction, where the amount in controversy was \$500 or more. See *id.* § 11, 1 Stat. 73, 78; Burley, *supra* note 2, at 479.

101. As it turned out, the Judiciary Act did not produce a federal judiciary particularly well adapted to ensure the uniformity of federal law because of significant gaps in the Supreme Court's appellate jurisdiction. See William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role,"* 100 YALE L.J. 1013, 1017 n.19 (1991).

102. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (J. Elliot ed., 2d ed. 1881).

Hamilton made the same point more neutrally in *The Federalist*, when he wrote:

As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.¹⁰³

The difficulty that British creditors had collecting their debts following the peace in 1783 gave Madison and Hamilton good reason to fear the hostility of state courts toward alien claims,¹⁰⁴ and there was little reason to think that this hostility toward foreign claims would be any less pronounced in tort actions.¹⁰⁵

Without the Alien Tort Clause, aliens like Marbois or the British victims of the attack on Sierra Leone would have been forced to bring their civil suits in state court, unless they could meet the narrow requirements for alienage jurisdiction.¹⁰⁶ Even if state law permitted such suits, state courts might prove hostile to them¹⁰⁷ and, in any event, would not speak with “one voice” regarding the law of nations.¹⁰⁸ In the end, Congress preferred to assure other nations that “individuals who have been injured . . . have a remedy by a *civil* suit in

103. THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

104. See Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1440-53; see also William R. Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101, 1111-13 (1985); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 6-8 (1996); *Dunlop v. Ball*, 6 U.S. (2 Cranch) 180 (1804) (“Until the act of 1793, from the obstacles interposed by juries, and the proceedings of some courts of Virginia, a general opinion prevailed among the inhabitants of the state of Virginia, and among juries, that a British debt could not be recovered.”). For further discussion of the British debt problem and its relationship to the word “only” in the Alien Tort Clause, see *infra* notes 220-28 and accompanying text.

105. See Casto, *supra* note 104, at 1114 (quoting a speech by William Paterson during the debate on the Judiciary Act) (“One would assume that those ‘local Prejudices’ that alienage and diversity jurisdiction were designed to remedy would be particularly virulent in tort actions.”).

106. Marbois would not have been able to rely on the alienage grant because his assailant De Longchamps was also an alien. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809). Moreover, as Professor Casto has pointed out, the \$500 amount-in-controversy requirement would have excluded virtually all tort suits at the time. Casto, *supra* note 2, at 497 & n.168.

107. See *supra* notes 102-05 and accompanying text.

108. See *supra* notes 99-101 and accompanying text. Cf. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

the courts of the United States”¹⁰⁹ than to explain that the “nature of a federal union” left Congress the role “of advising in many of those cases in which other governments decree.”¹¹⁰

Thus, the original intent of the Alien Tort Clause was to provide the broad civil remedy for violations of the law of nations that the Continental Congress had sought since 1781. The Alien Tort Clause accomplished this purpose by giving the district courts jurisdiction over a category of tort actions—those that violated the law of nations or a treaty of the United States—that were already cognizable at common law. Moreover, by providing a *federal* remedy for such torts, the First Congress could protect against the vagaries of state law, the hostility of state courts, and differences in their interpretations of the law of nations, sparing the new nation the sort of embarrassment that had attended the Marbois affair.

III. The “Originalists” Objections

Judge Bork and Professor Sweeney both fly the “originalist” banner. Both argue that the First Congress’ understanding of the Alien Tort Clause is the key to its correct interpretation.¹¹¹ Together, they raise three principal arguments against the broad interpretation of the Clause adopted by *Filartiga* and its progeny:¹¹² (1) that an express cause of action is needed, which the Clause does not provide; (2) that the Clause should be limited to those torts that violated the law of nations in 1789; and (3) that the Clause should be limited to prize cases.

In this Part, I show that history contradicts each of these arguments. Judge Bork’s argument for requiring an express cause of action is patently antihistorical. The very notion of an express cause of action did not appear until 1848—nearly sixty years after Congress passed the Alien Tort Clause. In 1789, it was understood that the

109. 1 Op. Att’y Gen., *supra* note 93, at 59 (emphasis in original); *see supra* notes 93-95 and accompanying text.

110. 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 314; *see supra* notes 55-61 and accompanying text.

111. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 816 (D.C. Cir. 1984) (Bork, J., concurring) (“Congress’ understanding of the ‘law of nations’ in 1789 is relevant to a consideration of whether Congress, by enacting section 1350, intended to open the federal courts to the vindication of the violation of any right recognized by international law.”); Sweeney, *supra* note 2, at 477 (“we cannot understand what the clause means so long as we do not know what the word ‘tort’ meant in the law of nations and treaties of the United States back [in 1789]”).

112. *See supra* notes 8-10 and accompanying text.

common law provided the right to sue for a tort in violation of the law of nations, just as it provided the right to sue for any other kind of tort. Judge Bork's other argument—that the Clause should be limited to those torts that violated the law of nations in 1789—has a more “originalist” ring, but it also is out of tune with the Founding Generation's views. Not only did the members of the First Congress understand that the law of nations had evolved, they expected that evolution to continue—indeed, they specifically provided for it. Professor Sweeney's error lies in a somewhat different direction. He focuses intently on some parts of the Alien Tort Clause's text and history, but completely ignores others. Professor Sweeney's suggested connection between the Clause and prize cases is intriguing, but it runs counter to the historical evidence of the Clause's purpose recounted in Part II. I argue, moreover, that his interpretation cannot be correct because it is at odds with the plain meaning of the text, renders the Clause largely redundant, and is contradicted by the earliest interpretations of the Clause. In the end, Professor Sweeney's argument turns out to be only deceptively historical.

A. *Requiring an Express Cause of Action*

In *Tel-Oren*, Judge Bork took the position that, notwithstanding section 1350's grant of jurisdiction, “it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.”¹¹³ He spent much of the rest of his opinion arguing that no such cause of action existed for human rights violations.¹¹⁴

Although Judge Bork professes allegiance to the original understanding of the Alien Tort Clause,¹¹⁵ his express cause of action re-

113. *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring).

114. *See id.* at 808-19. In response to Judge Bork's opinion, Congress passed the Torture Victim Protection Act. Pub. L. No. 256, 106 Stat. 73 (1992); *see* HOUSE REPORT, *supra* note 6, at 3-4, *reprinted in* 4 U.S.C.C.A.N. 84, 86 (1992) (noting that the Act was passed to provide “an unambiguous and modern basis for a cause of action” in light of Judge Bork's opinion in *Tel-Oren*). The House Report states that “claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.” HOUSE REPORT, *supra* note 6, at 4, *reprinted in* 4 U.S.C.C.A.N. 84, 86 (1992). Thus, it is plain that Congress does not agree with Judge Bork that an express cause of action is required to bring suit under the Alien Tort Statute or that the Alien Tort Statute should be limited to those torts that violated the law of nations in 1789. *See infra* notes 135-51 and accompanying text.

115. *See supra* note 111.

quirement would have mystified the First Congress. According to the Supreme Court, "cause of action" became a legal term of art only in 1848 when the New York Code of Procedure abolished the distinction between law and equity "and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.'"¹¹⁶ Judge Bork's application to a 1789 provision of a requirement that did not even exist for nearly sixty more years is a strange argument for an originalist.¹¹⁷

As we have seen, Ellsworth and the First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be.¹¹⁸ In *Tel-Oren*, the plaintiffs argued that common law provided them with a cause of action,¹¹⁹ but Judge Bork dismissed this argument with more antihistorical reasoning. Plaintiffs' argument, he wrote, "reflects a confusion of two distinct meanings of 'common law.'"¹²⁰ On the one hand, there was common law like that of contracts and torts, "whose origins can be traced to the medieval English legal system."¹²¹ On the other hand, there was "federal common law," which "has been used 'to refer generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command.'"¹²² Judge Bork continued:

To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts. It is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief.¹²³

Yet this reasoning too would have mystified the First Congress. The notion of a specialized "federal common law" distinct from traditional common law is a post-*Erie* phenomenon.¹²⁴ Today, interna-

116. *Davis v. Passman*, 442 U.S. 228, 237 (1979) (quoting 1848 N.Y. Laws, ch. 379, § 120(2)).

117. See D'Amato, *Judge Bork*, *supra* note 2, at 95 ("This rather late arrival of the term upon the legal scene raises at least a question when it is applied to interpret the alien tort statute (28 U.S.C. § 1350), originally passed as part of the Judiciary Act of 1789.")

118. See *supra* notes 75-95 and accompanying text.

119. See *Tel-Oren*, 726 F.2d at 810 (Bork, J., concurring).

120. *Id.* at 811.

121. *Id.*

122. *Id.* (quoting PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 770 (2d ed. 1973)).

123. *Id.*

124. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-22 (1964).

tional law is classified as federal common law,¹²⁵ but in 1789 “‘federal common law’ was not a meaningful term.”¹²⁶ The Founding Generation did distinguish between local common law, which might vary from State to State, and general common law, which did not,¹²⁷ but general common law was not thought of as distinctively federal, and it was binding on the States as well as the federal government.¹²⁸ As Professor Henkin has put it, “[e]arly in our history, the question whether international law was state law or federal law was not an issue: it was ‘the common law.’”¹²⁹ It was not the plaintiffs in *Tel-Oren* who were confused about the relationship between the common law and the Alien Tort Clause, but rather Judge Bork.¹³⁰

The First Congress expected “torts in violation of the law of nations” to be actionable at common law in the same way as other torts.¹³¹ Indeed, Judge Bork is forced to admit as much—at least with respect to violations of safe-conducts, infringement of the rights of ambassadors, and piracy.¹³² Otherwise, his interpretation would have rendered the Alien Tort Clause a nullity when it was passed,¹³³ since Congress provided no express cause of action in 1789.¹³⁴ But if torts like piracy that violated the law of nations in 1789 were actionable without an express cause of action, why is an express cause of action required for torts like torture that violate the law of nations today? Here, Judge Bork must fall back on a different, and more historical sounding, argument: that the First Congress only intended to allow alien tort suits for those violations of the law of nations that existed when the Judiciary Act was passed—that the law of nations should be frozen in 1789.

125. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559-60 (1984).

126. Jay, *supra* note 92, at 1270.

127. *Id.* at 1263-64.

128. *Id.* at 1274-75; see, e.g., *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (1784) (“[the law of nations], in its full extent, is a part of the law of this State”).

129. Henkin, *supra* note 125, at 1557.

130. The simplest way to translate the Alien Tort Clause into modern terms is to hold, as federal courts have repeatedly done, that section 1350 provides both a cause of action and jurisdiction. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

131. See *supra* notes 75-95 and accompanying text.

132. *Tel-Oren*, 726 F.2d at 813-14 & n.22 (Bork, J., concurring).

133. *Id.* at 779 (Edwards, J., concurring); D’Amato, *Judge Bork*, *supra* note 2, at 100.

134. See *supra* notes 116-17 and accompanying text.

B. Freezing the Law of Nations

Judge Bork conceded in *Tel-Oren* that “[t]he substantive rules of international law may evolve.”¹³⁵ But that did not mean, in his view, that torts in violation of the new rules would be actionable without further congressional action, specifically an express cause of action.¹³⁶ Judge Bork assumes that the First Congress intended to limit the torts that were actionable under the Alien Tort Clause to violation of safe-conducts, infringement of ambassadors’ rights, piracy and those (presumably few) others that can be shown to have violated the law of nations in 1789.¹³⁷ That assumption, I argue, is demonstrably incorrect.

The Founding Generation recognized that the law of nations had evolved over time. In 1793, Thomas Jefferson wrote that the rights of neutral traders were governed by the law of nations: “I mean the principles of that law as they have been *liberalized in latter times* by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of every civilized Nation.”¹³⁸ Justice Wilson, writing three years later in *Ware v. Hylton*,¹³⁹ observed that “[w]hen the United States declared their independence, they were bound to receive the law of nations, *in its modern state of purity and refinement*.”¹⁴⁰

The Founding Generation expected this process of “refinement” to continue.¹⁴¹ Obviously, the United States would continue to conclude treaties with foreign powers, and it would be absurd to suggest that the First Congress intended to limit the Alien Tort Clause only to violations of those treaties that existed in 1789. So too with the law of nations. The Constitution expressly provided for its development by conferring on Congress the authority to “define and punish . . . Of-

135. *Tel-Oren*, 726 F.2d at 816 (Bork, J., concurring).

136. *See id.* As noted above, Congress has provided such a cause of action in response to Judge Bork’s opinion. *See supra* note 114.

137. *See Tel-Oren*, 726 F.2d at 815-16 (Bork, J., concurring).

138. Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793) (emphasis added), *quoted in* Jay, *supra* note 28, at 846.

139. 3 U.S. (3 Dall.) 199 (1796).

140. *Id.* at 281 (emphasis added).

141. Justice Story’s famous observation in *United States v. La Jeune Eugene*, that “[i]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations,” seems to reflect the Founding Generation’s view. 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825).

fenses against the Law of Nations.”¹⁴² The First Congress exercised this power almost immediately, providing statutory punishments for piracy,¹⁴³ violations of safe-conducts,¹⁴⁴ and assaults on ambassadors.¹⁴⁵

The Founding Generation also expected the law of nations to evolve through decisions by common-law courts as cases were brought before them. The Continental Congress recognized this when it recommended “to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on offences against the law of nations, *not contained in the foregoing enumeration . . .*”¹⁴⁶ Courts were thought to be capable of expounding the law of nations because that law was based on principles of natural law.¹⁴⁷ As Justice Story explained in *United States v. La Jeune Eugenie*, “every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations.”¹⁴⁸

What makes the late eighteenth century view of the law of nations different from our own is the characterization of its evolution. The First Congress would have viewed the elaboration of the law of nations by common-law courts as the “discovery” of a pre-existing natural law.¹⁴⁹ The First Congress would have viewed its own legislation defining offenses against the law of nations as “declaratory” of

142. U.S. CONST. art. I, § 8, cl. 10.

143. See An Act for the Punishment of certain Crimes against the United States, ch. 9, § 8, 1 Stat. 112, 113-114 (1790).

144. See *id.* § 28, 1 Stat. 112, 118.

145. See *id.* For a discussion of the Offenses Clause’s history, see Charles D. Siegal, *Deference and Its Dangers: Congress’ Power to “Define . . . Offenses Against the Law of Nations,”* 21 VAND. J. TRANSNAT’L L. 865, 874-79 (1988).

146. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 1137 (emphasis added). For further discussion of the 1781 resolution and its relationship to the Alien Tort Clause, see *supra* notes 36-48 and accompanying text.

147. See *supra* notes 28-30 and accompanying text.

148. 26 F. Cas. at 846; see also 4 BLACKSTONE, *supra* note 26, at *66 (“The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”); 4 *id.* at *66-67 (“such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree”).

149. See Jay, *supra* note 28, at 833 (referring to “the prepositivist understanding that judges merely discovered law (a point of view especially important with regard to the law of nations in that it was formed from international sources)”). In this, the law of nations did not differ from the common law. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 7 (1977) (“common law rules were discovered, statutes were made”).

the same pre-existing law.¹⁵⁰ But this difference in characterization makes its conception of the law of nations no less dynamic than our own. Thus, there is little reason to think that the First Congress expected or intended that the Alien Tort Clause would be confined to those torts that violated the law of nations in 1789. Had he so desired, Ellsworth could easily have specified a limited number of torts to which the Clause would extend. He did not. Instead he wrote that the district courts should have cognizance "of *all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States,"¹⁵¹ and he did so with the knowledge that the law of nations had evolved and would continue to do so.

C. *Limiting the Clause to Prize Cases*

In contrast to Judge Bork's arguments, Professor Sweeney's thesis is firmly grounded in history. It therefore not only requires but deserves a more detailed response. As a good "originalist," Professor Sweeney begins with the text of the Alien Tort Clause: "That the district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."¹⁵² Professor Sweeney is troubled by the word "only," and he sets out to find a historical explanation for that word.¹⁵³ His solution is to read the Alien Tort Clause against the background of prize law.¹⁵⁴ During wartime, the law of prize allowed government ships and privateers to capture and condemn enemy ships as well as enemy goods carried on neutral ships.¹⁵⁵ In cases of wrong-

150. See Jay, *supra* note 28, at 827 (quoting a grand jury charge by William Paterson) ("Consistent with the English tradition, American legislation in an area subject to the law of nations was said to be 'declaratory of the law of nations.'"); see also 4 BLACKSTONE, *supra* note 26, at *67 ("those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of it's [sic] decisions, are not to be considered as introductive of a new rule, but merely as declaratory of the old fundamental constitutions of the kingdom").

151. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

152. *Id.*, 1 Stat. 73, 76-77.

153. See Sweeney, *supra* note 2, at 446 ("I never could see why granting jurisdiction over a 'tort' should be read as implying a grant of jurisdiction over something other than a tort, thus creating a need to exclude the possibility.").

154. Professor Sweeney is not the first to suggest the relevance of prize cases in understanding the Clause. See Rosenberg, *supra* note 2, at 1016-17. In *Argentine Republic v. Amerada Hess Shipping Corp.*, the Supreme Court expressed some doubt about the connection between the Clause and prize cases, noting that the "Alien Tort Statute makes no mention of prize jurisdiction." 488 U.S. 428, 436-37 (1989).

155. See Sweeney, *supra* note 2, at 447.

ful capture or where the captor had injured persons or property aboard the captured vessel, the law of prize also permitted reparations against the captor.¹⁵⁶ Professor Sweeney recognizes that where the legality of the capture as prize was at issue the district courts would have exclusive jurisdiction in admiralty,¹⁵⁷ but he suggests that the Alien Tort Clause was designed to deal with those cases in which "the legality of the capture was not in issue, and the suit was 'only' for the reparation in damages of a wrong related to a capture."¹⁵⁸

Intriguing as it is, there are several problems with Professor Sweeney's thesis, which ultimately show that his interpretation is only deceptively historical. First, his use of history is too selective. In focusing narrowly on prize cases, Professor Sweeney ignores the substantial historical evidence that the Alien Tort Clause was intended to serve the broader purpose of providing civil liability for all tortious violations of the law of nations.¹⁵⁹ Second, the disproportionate weight Professor Sweeney places on prize cases in order to explain the word "only" requires distortion of other parts of the text. Thus, Professor Sweeney reads "tort" to mean "'wrongs' under the law of prize;"¹⁶⁰ I read it to mean "tort." He reads "all causes" to mean causes "related to a capture, but not involving the legality of the capture as prize;"¹⁶¹ I read it to mean "all causes." Third, Professor Sweeney's thesis renders the Alien Tort Clause largely redundant. The district courts already had jurisdiction in admiralty over maritime torts, and the Clause would have served no useful purpose if it were limited to granting jurisdiction over those same cases a second time.¹⁶² And finally, the earliest efforts to interpret and apply the Alien Tort Clause contradict his thesis.¹⁶³ Three of these points require further discussion: the meaning of the word "tort"; the district courts' jurisdiction over maritime torts; and the early efforts to interpret the Clause. This section ends by considering why Ellsworth might have inserted the word "only," which so troubles Professor Sweeney.¹⁶⁴

156. See *id.* at 447, 467-75.

157. Sweeney, *supra* note 2, at 482; see also *id.* at 457-58 (discussing *Le Caux v. Eden*, 99 Eng. Rep. 375 (K.B. 1781), and *Lindo v. Rodney*, 99 Eng. Rep. 385 (K.B. 1782)).

158. *Id.* at 482.

159. See *supra* notes 25-110 and accompanying text.

160. Sweeney, *supra* note 2, at 475.

161. *Id.* at 481; see also *id.* at 482. Professor Sweeney adds that these cases involved "an odd situation not likely to recur in the future." *Id.* at 483.

162. See *infra* notes 175-201 and accompanying text.

163. See *infra* notes 202-19 and accompanying text.

164. See *infra* notes 220-35 and accompanying text.

1. *The Meaning of the Word "Tort"*

Professor Sweeney's reading of "tort" as referring exclusively to "wrongs" under the law of prize¹⁶⁵ is at odds with the common understanding of that word, not just today but in 1789 as well. As I have already noted, Blackstone listed as "torts" many of the same common-law actions we would recognize today: "actions for trespasses, nuisances [sic], assaults, defamatory words, and the like."¹⁶⁶ Professor Sweeney concedes that "in the law of prize . . . the word 'tort' was seldom used."¹⁶⁷ To show that "torts" could refer to wrongs under the law of prize, he relies on a note on prize practice in which Justice Story uses the word in that manner.¹⁶⁸ But this shows only that "tort" *could* refer to wrongs under the law of prize, not that it was *limited* to those wrongs.¹⁶⁹ Justice Story's use of the word in *De Lovio v. Boit*,¹⁷⁰ his seminal decision on the scope of federal admiralty jurisdiction, clearly shows that Story thought of "tort" as having a broader meaning than wrongs under the law of prize. For example, in examining the effect of English statutes limiting admiralty jurisdiction, he explained that:

[C]onsistently with these statutes, the admiralty may still exercise jurisdiction, 1. Over *torts* and injuries upon the high seas and in ports within the ebb and flow of the tide, and in great streams below the first bridges; 2. Over all maritime contracts arising at home or abroad; 3. Over *matters of prize and its incidents*.¹⁷¹

165. Sweeney, *supra* note 2, at 475.

166. 3 BLACKSTONE, *supra* note 26, at *117; *see also supra* notes 83-89 and accompanying text.

167. Sweeney, *supra* note 2, at 475.

168. *See id.* at 475-76 (quoting Henry Wheaton, *Additional Notes on the Principles and Practice in Prize Causes*, 15 U.S. (2 Wheat.) (app.) 5 (1817)). For Professor Sweeney's explanation of Justice Story's claim to authorship, *see id.* at 464-65.

169. *See also* Kadic v. Karadžić, 74 F.3d 377, 378 (2d Cir. 1996) (denying petition for rehearing) ("Even if the tort of wrongfully boarding in time of war a ship suspected of aiding the enemy was the tort that prompted the 1st Congress to create federal court jurisdiction for aliens suffering damages in violation of the law of nations or a treaty of the United States, it does not follow that the statute should be confined to this tort.").

170. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

171. *Id.* at 426 (emphases added); *see also id.* at 419 ("at a very early period, the admiralty had cognizance of all questions of prize; of torts and offences . . . upon the high seas; of maritime contracts and navigation . . ."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816) (Story, J.) ("the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contract, and offences, in which the principles of the law and comity of nations often form an essential inquiry").

Justice Story's enumeration shows that he viewed "torts" as encompassing not only those injuries that might arise during captures, but all injuries occurring at sea. In other cases, Story used the word to refer to torts on land.¹⁷²

Ultimately, Professor Sweeney's claim that Ellsworth used "tort" to refer only to wrongs under the law of prize must rest on his assertion that there were no torts in violation of the law of nations and no torts in violation of United States treaties except in the prize context.¹⁷³ But that assertion is mistaken, as the discussion in Part II has shown. The First Congress envisioned torts in violation of the law of nations beyond the limited context of prize and specifically designed the Alien Tort Clause to provide a federal forum for these suits.¹⁷⁴

2. *Jurisdiction Over Maritime Torts*

Under Professor Sweeney's reading, the category of cases with which the Alien Tort Clause was designed to deal is narrow indeed. Under English law, the admiralty court had prize jurisdiction "not only of the question, 'prize or not prize,' but all of its consequences."¹⁷⁵ Moreover, admiralty's prize jurisdiction was exclusive of the common-law courts.¹⁷⁶ Tort actions for trespass or false imprisonment were thought to be "consequences" of the prize question because the argument that a ship had lawfully been taken as prize was a complete defense to these torts.¹⁷⁷ Even if the suit were only for tort damages because the illegality of the capture had been previously determined, English law held that the suit belonged exclusively to the admiralty's prize jurisdiction.¹⁷⁸ Thus, most tort suits related to a cap-

172. See, e.g., *Whittemore v. Cutter*, 29 F. Cas. 1120, 1123 (C.C.D. Mass. 1813) (No. 17,600); *Meecker v. Wilson*, 16 F. Cas. 1311, 1312 (C.C.D. Mass. 1813) (No. 9392).

173. See Sweeney, *supra* note 2, at 476.

174. See *supra* notes 25-110 and accompanying text.

175. *Le Caux v. Eden*, 99 Eng. Rep. 375, 379 (K.B. 1781) (Buller, J.).

176. See *id.*; *Lindo v. Rodney*, 99 Eng. Rep. 385, 386 (K.B. 1782) (Mansfield, J.) ("the Courts of Westminster-Hall never have attempted to take cognizance of the question, 'prize or not prize'"); 3 BLACKSTONE, *supra* note 26, at *108 ("In case of prizes . . . the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations.").

177. See *Le Caux*, 99 Eng. Rep. at 384 ("if the ship be a lawful prize, it is not a false imprisonment").

178. See *id.* ("The question of 'prize or not prize,' must still arise, notwithstanding the acquittal in the Admiralty, though it is true that the sentence in that Court is conclusive on the question.").

ture would already have fallen within the exclusive prize jurisdiction of the federal district courts.¹⁷⁹

The case Professor Sweeney has in mind as an example of a tort suit related to a capture in which the legality of the capture was not in issue is *Talbot v. The Commanders and Owners of Three Brigs*.¹⁸⁰ But even here, it seems to me, a correct application of prize law would have put the case within the exclusive prize jurisdiction that the Judiciary Act ultimately vested in the federal district courts. In *Talbot*, the High Court of Errors and Appeals of Pennsylvania tried to find a way around the rule that prize jurisdiction covered not just “the question ‘prize or not prize,’ but all of its consequences,”¹⁸¹ by supposing that it was unnecessary to determine whether either Talbot’s original capture of the *Betsey* or the three brigs’ subsequent capture of the *Betsey* from Talbot was a capture as prize.¹⁸² However, the commanders and owners of the three brigs were entitled to argue and did argue, as a defense to Talbot’s claim, that their capture was a lawful capture as prize.¹⁸³ In concluding that the three brigs’ taking of the *Betsey* “was not a real but a pretended capture, as prize,”¹⁸⁴ the Pennsylvania court did not avoid the question “prize or not prize”—it decided that question. Under *Le Caux*, therefore, the case fell within the prize jurisdiction. Moreover, there was no question that Talbot’s original taking of the *Betsey* was a capture as prize, and both the Pennsylvania court and Professor Sweeney appear to concede that this fact would place the case within the prize jurisdiction if *Le Caux* had been followed.¹⁸⁵

Nevertheless, it is possible to imagine tort suits related to a capture that would not fall within the exclusive prize jurisdiction of the

179. Although Section 9 of the Judiciary Act does not mention prize jurisdiction, there is no doubt that it was included in the grant of admiralty and maritime jurisdiction. See *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 16 (1794); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 557-58 (1818); see also William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 145 (1993) (“There is no express reference to cases of capture [in the Judiciary Act], but [Ellsworth] undoubtedly viewed these proceedings as the epitome of cases described by the Act’s reference to ‘civil causes of admiralty and maritime jurisdiction.’”).

180. 1 U.S. (1 Dall.) 95 (1784). For Professor Sweeney’s discussion of the *Talbot* case, see Sweeney, *supra* note 2, at 468-69, 478-81.

181. *Le Caux*, 99 Eng. Rep. at 379; see *supra* notes 175-78 and accompanying text.

182. See *Talbot*, 1 U.S. (1 Dall.) at 103-07.

183. See *id.* at 103.

184. *Id.* at 104.

185. See *id.* at 104-06 (noting and rejecting English decisions); Sweeney, *supra* note 2, at 481 (“the Court [in *Talbot*] bluntly declared that even if the English courts would call the case one of capture ‘as prize,’ it would not follow their decision”).

federal district courts. First, there might be suits not involving trespass or false imprisonment but solely for mistreatment.¹⁸⁶ Second, there might be suits related to captures not during time of war, for captures as prize could only occur during war.¹⁸⁷ The problem with Professor Sweeney's argument is that these cases would still have fallen within the district courts' admiralty and maritime jurisdiction on the "instance side,"¹⁸⁸ which makes one wonder what purpose the Alien Tort Clause was supposed to serve if limited as Professor Sweeney contends.

To understand this point, some further background on the scope of federal admiralty jurisdiction is necessary. Under the second clause of Section 9, district courts had:

[E]xclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.¹⁸⁹

Justice Story examined the scope of this jurisdiction at length in *De Lovio v. Boit*¹⁹⁰ and concluded "without the slightest hesitation" that it "comprehends all maritime contracts, torts, and injuries."¹⁹¹ In-

186. See *Le Caux v. Eden*, 99 Eng. Rep. 375, 379 (K.B. 1781) (Willes, J.) ("I will not say there may not be cases where this [common-law] Court would have a concurrent jurisdiction; if, for instance, personal ill-treatment should be used, not the necessary effect of the capture.")

187. See *Lindo v. Rodney*, 99 Eng. Rep. 385, 386 (K.B. 1782) (Mansfield, J.) ("A thing being done upon the high sea, don't [sic] exclude the jurisdiction of the Courts of Common Law. For, seizing, stopping, or taking, a ship, upon the high sea, not as prize, an action will lie; but for taking, as prize, no action will lie.")

188. As Professor Sweeney explains, "[t]he court of admiralty in England was divided into two sides: the 'instance side' and the 'prize side.'" Sweeney, *supra* note 2, at 460. Cases that did not fall on the "prize side" but were still within the admiralty court's jurisdiction were considered to fall on the "instance side." See *id.*; accord *Talbot*, 1 U.S. (1 Dall.) at 98 ("It is acknowledged by the counsel for the appellants, that if this is not a cause of prize, the Court of Admiralty might take cognizance as an Instance Court . . .").

189. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789).

190. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

191. *Id.* at 444. Justice Story found that in England "the jurisdiction of the admiralty . . . extended to all maritime contracts . . . and to all torts, injuries, and offences, on the high seas, and in ports, and havens, as far as the ebb and flow of the tide." *Id.* at 441. Turning to the United States, he found the broad scope of admiralty jurisdiction confirmed by the Constitution's phrase "admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 3 (emphasis added); see *De Lovio*, 7 F. Cas. at 442-43. Justice Story reasoned that the word "maritime" was added to "remove every latent doubt" about the scope of the admiralty

deed, one need look no further than *Talbot* for confirmation that suits for damages related to a capture in which the legality of the capture was (supposedly¹⁹²) not at issue were within the admiralty jurisdiction.¹⁹³

Of course, despite the reference to the district courts' admiralty and maritime jurisdiction being "exclusive," it was not considered to be so in all cases. Specifically, the "saving to suitors" clause reserved to common-law courts, both federal and state, concurrent jurisdiction over those suits they had traditionally heard at common law.¹⁹⁴ Those suits appear to have included torts arising on the high seas, with the exception of those within the prize jurisdiction. In *De Lovio*, Justice Story concluded that "the courts of common law, by a silent and steady march, have gradually extended the limits of their own authority, until they have usurped or acquired concurrent jurisdiction over all causes, except of prize, within the cognizance of the admiralty."¹⁹⁵

jurisdiction and to give the federal courts jurisdiction over "all maritime cases." *Id.* at 443. "Upon any other construction," he wrote, "the word 'maritime' would be mere tautology." *Id.*

Professor Casto has recently offered a different explanation of the word "maritime," arguing that it confirmed the federal courts' jurisdiction over revenue cases, which in England were tried in the Exchequer. *See* Casto, *supra* note 179, at 133 n.57. However, even Professor Casto does not question that the grant of admiralty and maritime jurisdiction to the federal courts included private contract and tort claims. *See id.* at 153 ("The Founding Generation clearly understood that admiralty courts frequently adjudicated private maritime claims.").

192. *See supra* notes 180-85 and accompanying text.

193. *See Talbot*, 1 U.S. (1 Dall.) at 98-99 (rejecting the argument that common-law courts had exclusive jurisdiction and upholding the jurisdiction of the admiralty court); *see also* Sweeney, *supra* note 2, at 481 (*Talbot* "affirmed the jurisdiction of the Admiralty Court as an instance court over a proceeding brought 'only' for the reparation in damages of a wrong related to a capture, but not involving the legality of the capture as prize.").

Blackstone also stated that the admiralty courts "have jurisdiction and power to try and determine all maritime causes" including "such injuries, which, though they are in their nature of common law cognizance . . . [are] committed on the high seas. . . ." 3 BLACKSTONE, *supra* note 26, at *106. He appears to have thought that where the common-law courts had jurisdiction, they would exclude admiralty. *See 3 id.* at *106-08. But that position, even as a matter of English law, was soundly refuted by Justice Story. *See De Lovio*, 7 F. Cas. at 429-31.

194. *See Garcia y Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 188 (1870); *accord* *American Dredging Co. v. Miller*, 114 S. Ct. 981, 984 (1994) ("Federal-court jurisdiction over [admiralty and maritime] cases . . . has never been entirely exclusive.").

195. *De Lovio*, 7 F. Cas. at 426. Justice Story was critical of the common law's usurpation, commenting that "it is difficult to perceive" on "what principles of the ancient common law this extension of jurisdiction can be supported." *Id.* The Pennsylvania court in *Talbot* was similarly critical of common-law jurisdiction over torts on the high seas, calling them "not properly cognizable at common law." 1 U.S. (1 Dall.) at 99.

To summarize, it seems that the class of cases Professor Sweeney has in mind fell within the admiralty and maritime jurisdiction of the district courts and that the state courts enjoyed concurrent jurisdiction over those cases by virtue of the "saving to suitors" clause. The question, then, is what the Alien Tort Clause was supposed to accomplish if it were limited as Professor Sweeney argues. One could argue that it might have permitted an alien to sue either in admiralty or in law, but it is difficult to see why Ellsworth and the First Congress would have thought this necessary or desirable. Suits in admiralty were generally viewed as more convenient because all the parties could be joined in one action.¹⁹⁶

The right to a jury trial was preserved in suits at common law, but why an alien tort plaintiff would want his case heard by a jury of Americans is hard to fathom.¹⁹⁷ During the First Congress' work on the Judiciary Act, none other than Oliver Ellsworth defended alienage jurisdiction to one of his colleagues on the ground that "[j]uries were too apt to be biased against [foreigners], in favor of their own citizens & acquaintances."¹⁹⁸ Thomas Jefferson likewise thought that "[i]n disputes between a foreigner and a native, a trial by jury may be im-

196. See *Talbot*, 1 U.S. (1 Dall.) at 99 ("In the present case, the owners, masters and sailors of the three brigs could not be jointly sued at common law. If they could not, what a multiplicity of actions must be brought? Supposing the owners, commander and men of the *Argo* could join in a suit at common law, one of them might destroy the action by a release. The vessels are not liable in the same manner at common law, as they are in a Court of Admiralty."); see also *DeLovio*, 7 F. Cas. at 437 ("it is more convenient for seamen to sue in the admiralty, because they may all join in one suit").

197. See Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) ("And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."); see also U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

Professor Holt has argued that the Constitutional Convention, fearing the prejudice of juries against creditors in particular, conspired to limit the jury right. See Holt, *supra* note 104, at 1468-69. He points to the absence in the original Constitution of a jury right in civil cases, see U.S. CONST. art. III, § 2 ("The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."), and to the Supreme Court's appellate jurisdiction "both as to Law and Fact," U.S. CONST. art. III, § 2, which might have been used to retry cases in which a biased jury was suspected. Holt, *supra* note 104, at 1468-69. That such efforts were ultimately limited by the Judiciary Act and the Seventh Amendment does not diminish the fact that some of the Framers were deeply suspicious that juries would not act impartially in at least some cases.

198. Letter from William Smith to Edward Rutledge (Aug. 9-16, 1789) (referring to conversation with Ellsworth), quoted in Holt, *supra* note 104, at 1484.

proper.”¹⁹⁹ He suggested that, if such cases were not excepted from the jury right, aliens should at least be given “the medietas linguae in civil as well as criminal cases.”²⁰⁰ The unattractiveness of a jury option to alien tort plaintiffs is confirmed by the fact that none of the aliens who invoked the Clause during the 1790s used it to obtain a jury trial, preferring to bring their suits as libelants in admiralty.²⁰¹ In short, Professor Sweeney’s reading of the Alien Tort Clause as limited to cases in which the district courts already had admiralty jurisdiction renders the Clause largely redundant.

3. *Early Interpretations of the Clause*

If Professor Sweeney’s interpretation of the Alien Tort Clause were correct, one would expect to find that it had been espoused by some early interpreter. At the very least, one would expect that early interpretations of the Clause would not be inconsistent with his interpretation. As it turns out, however, neither is true. Although the Alien Tort Clause was rarely used during the early part of our history,²⁰² two district courts and one Attorney General attempted to interpret the Clause in the 1790s. Each of these early interpretations contradicts Professor Sweeney’s restrictive reading of the Clause.

199. Letter from Thomas Jefferson to James Madison (July 31, 1788), reprinted in 13 THE PAPERS OF THOMAS JEFFERSON 442 (Julian P. Boyd ed., 1956).

200. *Id.* The jury *de medietate linguae* was a jury composed one half of aliens, which English law had long provided in cases where an alien was a party. See Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 771, 785 (1994) (citing 27 Edw. 3, st. 2, ch. 8 (1353) (Eng.) and 28 Edw. 3, ch. 13, § 2 (1354) (Eng.)). Blackstone observed that juries *de medietate linguae* were designed to provide a “more impartial trial.” 3 BLACKSTONE, *supra* note 26, at *360. However, despite indications of American jurors’ hostility to aliens’ claims, see *supra* notes 104-05 and accompanying text, the right to a jury *de medietate linguae* was guaranteed by neither the Constitution nor federal statute. Cf. *United States v. Cartacho*, 25 F. Cas. 312 (C.C.D. Va. 1823) (No. 14,733) (exercising discretion to grant a jury *de medietate linguae* to an alien accused of piracy). For a thorough discussion of state law on juries *de medietate linguae*, see Lewis H. LaRue, *A Jury of One’s Peers*, 33 WASH. & LEE L. REV. 841, 850-62 (1976).

201. See *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); see also *infra* notes 203-16 and accompanying text (discussing *Moxon* and *Bolchos*). The decisions in *Moxon* and *Bolchos*, in which jurisdiction was asserted under both the admiralty clause and the Alien Tort Clause, suggest that the Clause extends to tort suits that would already be within the district courts’ admiralty jurisdiction. In critiquing Professor Sweeney’s argument, I do not mean to suggest that torts falling within the admiralty and maritime jurisdiction were excluded from the scope of the Alien Tort Clause. My point is simply that the Clause would have served little purpose if limited to cases that were already within the admiralty jurisdiction.

202. See Randall, *Federal Jurisdiction Over International Law Claims*, *supra* note 2, at 4-5 n.15 (listing cases asserting jurisdiction under the Clause prior to *Filartiga*).

Jurisdiction under the Alien Tort Clause was asserted in two early cases as a supplement to the district courts' admiralty and maritime jurisdiction. In *Moxon v. The Fanny*,²⁰³ a French privateer captured a British ship within the territorial waters of the United States, which was neutral. The owners sought restitution of the ship and its cargo as well as damages for detention of the ship.²⁰⁴ They argued that the district court had cognizance of the case under its "admiralty and maritime jurisdiction" and because the court was "particularly by law vested with authority where an alien sues for a tort only in violation of the laws of nations, &c.—and this is a case falling under that description."²⁰⁵

The district court dismissed the suit on what we would call political question grounds²⁰⁶ but it did state in dictum that the suit could not be maintained under the Alien Tort Clause.²⁰⁷ Because the suit sought restitution of the ship and its cargo in addition to damages, the court reasoned, "it cannot be called a suit for a tort only."²⁰⁸ *Moxon's* interpretation of the word "only" was different from Professor Sweeney's. According to the district court, whether a suit was one for a "tort only" did not turn on whether the legality of the capture was at issue—indeed, the district court held that the legality of the capture was at issue in *Moxon*.²⁰⁹ Rather, the district court thought the case was not one for "tort only" because of the remedy that was sought, and specifically because the remedy sought was not simply damages but also restitution.²¹⁰

The second early case interpreting the Alien Tort Clause was *Bolchos v. Darrel*,²¹¹ in which a French privateer captured as prize a Spanish vessel carrying slaves mortgaged to a Spanish citizen by a British citizen. Once in port, the slaves were seized and sold by the mortgagee's agent, and the privateer brought suit against the agent

203. 17 F. Cas. 942 (D. Pa. 1793) (No. 9895).

204. *Id.* at 943.

205. *Id.*

206. Whether it was lawful to take a prize within the territorial waters of a neutral state depended on whether the neutral state would allow it. *See id.* at 946. Whether it should be allowed in this case was a question the court felt it ought to leave to the political branches. *See id.* at 947.

207. *See id.* at 947-48.

208. *Id.* at 948.

209. *See id.* at 947 ("it is impossible to enquire into the question of trespass, without involving that of prize or no prize"). The court's ruling on this point is consistent with *Le Caux v. Eden*, 99 Eng. Rep. 375 (K.B. 1781). *See supra* note 177 and accompanying text.

210. *See* 17 F. Cas. at 948.

211. 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).

claiming that the proceeds of the sale belonged to him.²¹² The district court held that the suit belonged to its “jurisdiction in the admiralty.”²¹³ It continued:

Besides, as the 9th section of the judiciary act . . . gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point [of jurisdiction].²¹⁴

Ultimately, the court ruled in favor of the French privateer because a treaty between the United States and France made neutral property found on prizes the property of the captor.²¹⁵ As in *Moxon*, the court did not view the Alien Tort Clause as Professor Sweeney does. *Bolchos* was a suit in which the privateer claimed rights that *depended* on the ship being a lawful prize—not one in which the ship’s status as prize was not in issue.²¹⁶

Attorney General Bradford’s 1795 opinion also contradicts Professor Sweeney’s restrictive reading.²¹⁷ Asked to determine what actions might be taken against American citizens who had helped the French plunder Sierra Leone, Bradford replied that the company or individuals who had been injured could bring a civil suit in federal court, “jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.”²¹⁸ Yet this incident involved no capture at sea.²¹⁹

212. *Id.* at 810.

213. *Id.*

214. *Id.*

215. *Id.* at 811.

216. The same district judge also mentioned the Alien Tort Clause in *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.S.C. 1794) (No. 7216), *aff’d sub nom.* *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795), but appears to have relied chiefly on his prize jurisdiction. *See id.* at 359.

217. *See* 1 Op. Att’y Gen., *supra* note 93. For further discussion of Bradford’s opinion, *see supra* notes 93-95 and accompanying text.

218. 1 Op. Att’y Gen., *supra* note 93, at 59. There is no record that the incident in Sierra Leone actually led to a suit under the Clause. Randall, *Federal Jurisdiction Over International Law Claims*, *supra* note 2, at 41 n.185.

219. Professor Casto notes one other early Attorney General’s opinion relying on the statute in connection with the rights of ambassadors. *See* Casto, *supra* note 2, at 504 n.203 (discussing 1 Op. Att’y Gen. 141 (1804)). The opinion makes no explicit mention of the statute, but Professor Casto interprets a reference to the ambassador prosecuting “an indictment in district court,” 1 Op. Att’y Gen. 141, 147 (1804), as necessarily relying on the statute because an ambassador could not prosecute a criminal suit. *See* Casto, *supra* note 2, at 504 n.208.

4. *The Word "Only"*

I have argued that the best interpretation of the Alien Tort Clause is one that looks at all the historical evidence and gives proper weight to the word "all" in the Clause's text. Professor Sweeney's interpretation might be more plausible if it alone could explain why Ellsworth put the word "only" after "tort,"²²⁰ but there are other explanations. Professors Randall and Casto have suggested that the phrase "tort only" should be read in conjunction with the \$500 amount-in-controversy requirement for diversity and alienage jurisdiction as part of an effort to keep suits by British creditors out of federal court.²²¹ Despite the promise of Article 4 of the Definitive Treaty of Peace between Great Britain and the United States "that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted,"²²² and despite the fact that concern about state courts' hostility toward creditors' claims helped motivate the creation of federal courts in the first place,²²³ the First Congress ultimately bowed to political pressure and decided to leave British creditors to the mercy of state courts.²²⁴ According to Randall and Casto, the word "only" made sure that these creditors could not sneak into federal court through the Alien Tort Clause.²²⁵ It is worth noting that the broader language of the 1781 resolution, referring to "suits . . . for damages by the party injured,"²²⁶ might have opened the door to contractual as well as tort claims.

Professor Sweeney is not satisfied with this explanation because he thinks the word "tort" could have done that job just as well by itself.²²⁷ In light of the strong opposition, particularly in the southern

220. It was the word "only" that sent Professor Sweeney on his quest in the first place. See *supra* note 153 and accompanying text.

221. See Randall, *Federal Jurisdiction Over International Law Claims*, *supra* note 2, at 28-31; Casto *supra* note 2, at 507-08.

222. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80, reprinted in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 151, 154 (Hunter Miller ed., 1931).

223. Holt, *supra* note 104, at 1458; see also *supra* notes 102-05 and accompanying text.

224. See Holt, *supra* note 104, at 1487-88.

225. See Randall, *Federal Jurisdiction Over International Law Claims*, *supra* note 2, at 28-31; Casto *supra* note 2, at 507-08.

226. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 1137.

227. Sweeney, *supra* note 2, at 446 ("The bonding of the word 'only' to the word 'tort' always struck me as peculiar and intended to do more than merely exclude actions not in tort. I never could see why granting jurisdiction over a 'tort' should be read as implying a

States, to permitting British creditors to sue in federal court,²²⁸ Ellsworth's use of the word "only" seems a reasonable precaution. But "only" may have been designed to serve an additional purpose as well. The district court in *Moxon v. The Fanny*²²⁹ interpreted the word "only" as being about remedies.²³⁰ For some kinds of torts, one had a choice of remedies. As the circuit court explained in *Bullard v. Bell*, "[i]f a person unlawfully converts and sells the property of another, it is properly a tort; yet the injured party may waive the tort, and bring assumpsit for the proceeds."²³¹ The word "only" might have served to limit an alien who wished to bring such a suit in district court to tort damages. Or, as in *Moxon*, the word "only" might have limited an alien to damages and excluded the possibility of obtaining restitution of the property itself.²³² These distinctions regarding the available remedy would not have made much difference in suits to recover the debts with which Article 4 was concerned, but they might have assumed some importance in light of Articles 5 and 6, which provided that British Subjects should be free to seek "Restitution" of property confiscated from them²³³ and "[t]hat there shall be no future Confiscations made . . . against any Person or Persons for or by Reason of the Part, which he or they may have taken in the present War."²³⁴ Thus, the word "only" may be explained not just as a confirmation of "tort" but as a limitation on the remedy that British Subjects might seek in confiscation cases.²³⁵

grant of jurisdiction over something other than a tort, thus creating a need to exclude the possibility.").

228. See Holt, *supra* note 104, at 1466-78.

229. 17 F. Cas. 942 (D. Pa. 1793) (No. 9895).

230. See *supra* notes 208-10 and accompanying text.

231. 4 F. Cas. 624, 639 (C.C.D.N.H. 1817) (No. 2121).

232. See *supra* notes 208-10 and accompanying text.

233. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art. 5, § Stat. 80, reprinted in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 151, 154 (Hunter Miller ed., 1931). Of course, the Treaty says "Restitution," and *Moxon's* interpretation would specifically have excluded the possibility of restitution under the Alien Tort Clause, limiting the plaintiff to damages. See *supra* note 210 and accompanying text. But perhaps damages in lieu of restitution would have been sufficient to satisfy Article 5 of the Treaty.

234. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art. 6, § Stat. 80, reprinted in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 151, 155 (Hunter Miller ed., 1931).

235. Professor Slaughter acknowledges the possible connection between the confiscation cases and the wording of the Alien Tort Clause, but finds no historical support for it. See Burley, *supra* note 2, at 468 n.36. However, she fails to provide any explanation of the word "only" that would satisfy Professor Sweeney. See *supra* note 227 and accompanying text.

To explain why Ellsworth wrote “only,” Professor Sweeney ignores the word “all” and forces upon “tort” a limited meaning at odds with its common understanding.²³⁶ He reads the Clause in a way that did not occur to any early interpreter²³⁷ and in a way that makes it practically redundant.²³⁸ And finally, he ignores the overwhelming evidence that the First Congress had a broad understanding of “torts in violation of the law of nations” and enacted the Alien Tort Clause to provide a civil remedy against any who would violate that law.²³⁹ But none of this is necessary to provide a satisfactory explanation for the word “only.”

IV. Conclusion

One may well decide that Congress' recent endorsement of *Filartiga*²⁴⁰ renders the “originalist” arguments of Judge Bork and Professor Sweeney moot. But that is to avoid the more difficult question of whether *Filartiga* was correct when it was decided. The purpose of this Article has been to show that *Filartiga*'s interpretation of the Alien Tort Clause as a dynamic provision that provides a federal remedy for all torts in violation of the law of nations is more consistent with its original intent than the interpretations advanced by Judge Bork and Professor Sweeney. Judge Bork's interpretation is actually antihistorical, limiting the Clause in ways that the First Congress would never have dreamed of.²⁴¹ Professor Sweeney's is deceptively historical, focusing on some parts of the Clause's text and history but ignoring others.²⁴² In the end, the history of the Alien Tort Clause²⁴³ confirms that the First Congress meant just what it said—“[t]hat the district courts shall have . . . cognizance . . . of *all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”²⁴⁴

236. See *supra* notes 165-72 and accompanying text.

237. See *supra* notes 202-19 and accompanying text.

238. See *supra* notes 175-201 and accompanying text.

239. See *supra* notes 25-110 and accompanying text.

240. See *supra* notes 18 and 114.

241. See *supra* notes 113-51 and accompanying text.

242. See *supra* notes 152-219 and accompanying text.

243. See *supra* notes 25-110 and accompanying text.

244. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (emphasis added).

APPENDIX

Continental Congress' Resolution of November 23, 1781

On a report of a committee, consisting of Mr. [Edmund] Randolph, Mr. [James] Duane, Mr. [John] Witherspoon, appointed to prepare a recommendation to the states to enact laws for punishing infractions of the laws of nations:

The committee, to whom was referred the motion for a recommendation to the several legislatures to enact punishments against violators of the law of nations, report:

That the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations:

That a prince, to whom it may be hereafter necessary to disavow any transgression of that law by a citizen of the United States, will receive such disavowal with reluctance and suspicion, if regular and adequate punishment shall not have been provided against the transgressor:

That as instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries committed by individuals, and the property of the innocent be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.

Resolved, That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment:

First. For the violation of safe conducts or passports, expressly granted under the authority of Congress to the subjects of a foreign power in time of war:

Secondly. For the commission of acts of hostility against such as are in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct:

Thirdly. For the infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States in Congress assembled, by animadverting on violence offered to their persons, houses, [carriages and property, under the limitations allowed by the usages of nations; and on disturbance given to the free exercise of their religion: by annulling all writs and processes, at any time sued forth against an ambassador, or other public minister, or against their goods and chattels, or against their domestic servants, whereby his person may be arrested: and,

Fourthly. For infractions of treaties and conventions to which the United States are a party.

The preceding being only those offences against the law of nations which are most obvious, and public faith and safety requiring that punishment should be co-extensive with such crimes:

Resolved, That it be farther recommended to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on offenses against the law of nations, not contained in the foregoing enumeration, under convenient restrictions.

Resolved, That it be farther recommended to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.]†

† The editor reports that the resolution is in the writing of Edmund Randolph and that the part appearing in brackets is in the writing of George Bond. See 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1137 n.1 (Library of Congress, 1912).