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A Tort Only
in Violation of the Law of Nations

By Joseph Modeste Sweeney*

I. INTRODUCTION

Like most people I know, I wish to adhere as much as possible to the prevailing beliefs of the society in which I live, and as a member of the legal profession, I find it as a general rule more comfortable to abide by the beliefs it endorses rather than to depart from them. Of course, I am free at any time to depart from them on grounds which appear good and sufficient to me, but the transgression will, in most cases, have the aura of sin; and sin, as everybody knows, calls for expiation. I will admit that if I were still young and on the threshold of a career, the prospect of penitence might deter me from assuming the risk. Fortunately, the risk is no more than a minor consideration now that I have reached what is called in France, with commendable civility, "le troisième âge."1

A. The Question

It so happens I belong to a circle of law teachers who make it their business to study the international legal system and keep abreast of its currents. Within this somewhat esoteric and relatively small community, a collective belief has taken hold of late concerning an odd question: the role of the word "only" when it is bonded to the

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Michael Bollman was my student assistant when I started to think about this article at Tulane University. He was an indefatigable researcher and a valued collaborator when I began to perceive where the investigation was leading. I owe him many thanks for his help.

I owe many thanks as well to Linda Weir, of the library at Hastings College of the Law. She never tired of my innumerable requests to borrow esoteric books on the law of nations of the eighteenth and nineteenth centuries, and was always most diligent and gracious in helping me use the resources of Hastings' own library.

1. The first age of man is youth. The second age of man is maturity. Then comes the third age of man.
word "tort," as it is in the fourth clause of Section 9 of the Judiciary Act of 1789. The clause granted jurisdiction to the federal district courts over "a tort only in violation of the law of nations or a treaty of the United States." The collective belief in the circle to which I belong is that the bonding of the word "only" to the word "tort" had no effect on the jurisdiction of the federal district courts, except perhaps to emphasize the exclusion of actions not in tort.

The belief was planted by the federal Court of Appeals for the Second Circuit in the celebrated case of Filartiga v. Pena-Irala decided in 1980. By then the clause was integrated into the United States Code and the basic issue was whether the word "tort" in the clause covered a wrong in violation of the international law of human rights committed in Paraguay by a national of Paraguay against a national of Paraguay. The court ruled it did and hence federal jurisdiction obtained. In interpreting the grant of jurisdiction to the federal courts, the court did not consider whether the jurisdiction it based on the word "tort" was affected by the word "only." The court obviously believed the addition of the word "only" was irrelevant. The members of the circle to which I belong quickly and uncritically subscribed to the belief, at least so far as I can tell from their writings, for I have not seen any which challenge it.

B. The Answer

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 grant of jurisdiction over something other than a tort, thus creating a need to exclude the possibility. I suspected that the draftsman had in mind a purpose which responded to historical conditions no doubt familiar to the members of the Congress of 1789, but not even remotely understood by us today. For this reason, I engaged in a search of the law of nations and treaties of the United States in effect before 1789 and for some years thereafter. By the grace of a happy chance, I eventually came upon what I believe to

2. 1 Stat. 73, 77 (1789) (later codified as 28 U.S.C. § 1350 (1982)). For the full text of Section 9, see infra Appendix.
3. This is the position of Kenneth C. Randall in Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. Int'l L. & Pol. 1, 28 (1985).
4. 630 F.2d 876 (2d Cir. 1980).
be the proper explanation for the bonding of the word “only” to the word “tort.”

Unfortunately, the explanation is not as simple as I wished it were. It runs as follows:

1. When the United States was at war, its war vessels, public and private, had the right under the branch of the law of nations known as the law of prize, to capture on the high seas enemy merchant vessels and enemy cargoes in order to have them condemned as lawful prize in the courts of prize of the United States.

   In the exercise of the right of capture, these war vessels had the right of visiting and searching on the high seas all neutral merchant vessels in order to verify the neutrality of vessel and cargo and of subjecting them to capture if invested with an enemy character.

   However, under treaties concluded with foreign nations before 1789, United States war vessels could visit, search, and capture on the high seas the neutral merchant vessels of these nations only to the extent permitted by the treaties.

2. In the exercise of the right of visitation and search under the law of prize or under applicable treaties, commanders and crews of the war vessels of the United States were forbidden to do injury to person or property aboard the intercepted vessels.

   An alien who was the victim of such an injury had the right to sue the commander for reparation of the tort in the courts of prize created by the several states during the War of the Revolution to exercise jurisdiction over all matters of capture.

   In 1789, the federal courts, sitting as prize courts, were vested with exclusive jurisdiction, as against the state courts, to decide the legality of a capture as prize and any issue incidental to the capture, such as a claim for reparation of a tort committed by the captors.

3. If the legality of the capture was not in issue and the case was one in which an alien sued for a “tort only,” the jurisdiction of the federal courts was merely concurrent with the jurisdiction of the state courts under the fourth clause in Section 9 of the Judiciary Act of 1789.

   I shall now turn to proving my case, even if it may prove that the word “tort” in the clause could not mean what the court in Filariga said it meant, and hence could not provide a valid basis of jurisdiction for its decision.
II. THE "TORT ONLY" CLAUSE

A. The Original Text

The clause has a very presentable parentage. It was written in the draft of the Act by Oliver Ellsworth, an able lawyer from Connecticut. At the time he wrote, the Constitution had just gone into effect, the new Congress had just convened, and he was the leader of the Senate committee appointed to prepare a bill for organizing the judicial system of the infant nation. Eventually, he was to become Chief Justice of the Supreme Court of the country, but his claim to posterity's fame stems principally from being the main draftsman of the bill. As Madison put it: "It may be taken for certain, I believe, that the bill organizing the Judicial Department originated in his draft and that it was not materially changed in its passage into law."

In his handwritten draft for Section 9 of the Act, Ellsworth delimited the cognizance, or jurisdiction as we would say today, of the federal district courts. In the third clause of his draft for the section (then numbered 10), he wrote:

[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where a foreigner sues for a tort only in violation of the law of nations or a treaty of the United States. (emphasis added).

The third clause in his draft became the fourth clause in Section 9 of the Act. But the clause remained unchanged, with one exception: in the Act, the term "an alien" was used instead of the term "a foreigner."

6. "It . . . appears . . . that the original Draft Bill is in several different handwritings. . . . Sections 10 [Section 9 of the Act] to 23 are, in all probability in the handwriting of Oliver Ellsworth." Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49, 50 (1923-1924).

7. While there are several biographies of Ellsworth, the most complete and careful one appears to be William Garrott Brown, The Life of Oliver Ellsworth (1905). It is the one I rely on here.

8. Warren, supra note 6, at 60 n.27 (citing letter from James Madison to Joseph Ward (Feb. 27, 1836)).

9. Bill to Establish the Judiciary (National Archives and Records Administration, Center for Legislative Archives, Record Group 46, Records of the U.S. Senate (SEN 1A-B1)).
B. The Changes in the Text

In the course of time which followed, Congress undertook on three occasions to make changes in the text of the clause, presumably on the assumption they would improve it.

The first changes took place when the clause became Section 563 (Sixteenth) in the Revised Statutes of 1873. There, the text was shorn of the reference to the concurrent jurisdiction of the courts of the several states and the federal circuit courts. The phrase “all causes where an alien sues” was made to read “all suits brought by any alien,” single quotation marks were placed around the word “only,” and a comma was placed after the word “nations.” It read as follows:

[The district courts shall have jurisdiction] of all suits brought by any alien for a tort ‘only’ in violation of the law of nations, or a treaty of the United States.

The next changes took place when the clause became Section 24 (Seventeenth) of the Act of March 3, 1911, which codified, revised, and amended the laws relating to the judiciary. There the text of 1873 was modified by removing the single quotation marks around the word “only,” placing a comma after it, rendering the term “law of nations” into the plural “laws of nations,” and taking out the comma after the word “nations.” It read as follows:

[The district courts shall have jurisdiction] of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

The last changes took place in 1948 when the clause became Section 1350 of Title 28 of the United States Code. There, the text of 1911 was amended by returning the term “laws of nations” to the singular number, returning the term “any alien” to “an alien” as in the text of the Act in 1789, inserting the word “committed” before the words “in violation of,” and substituting the words “any civil action” for the term “all suits.” Thus the clause now reads:

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. 12

11. 36 Stat. 1087, 1093 (1911).
C. The Current Text

The changes in the text of the clause, whether useful or pointless, did not affect the jurisdiction originally granted by the clause to the federal district courts. In 1789, the clause gave those courts the right to exercise their power over a limited class of causes—those where an alien sued for a tort only in violation of the law of nations or a treaty of the United States. As can readily be seen by comparing the original text of the clause with the text of Section 1350, the class of causes was not narrowed, enlarged or otherwise modified by the changes in the text since 1789. The class of causes over which the federal district courts now have jurisdiction under Section 1350 thus remains precisely the class of causes over which those courts were given jurisdiction by the clause in 1789.

Moreover, the concurrent jurisdiction of the courts of the several states over the same class of causes was not affected by the changes in the text of the clause. The courts of the several states did not receive their jurisdiction from the clause; it belonged to them already as courts of newly sovereign states. The clause merely acknowledged that the jurisdiction of the federal district courts over this class of causes would be concurrent with the existing jurisdiction of the courts of the several states. The courts of the several states would have lost their jurisdiction if the changes in the text of the clause had given the federal district courts exclusive jurisdiction over this class of causes. But they did not.

D. The Causes in the Class

The question then is what were the causes over which the federal district courts and the courts of the several states were to exercise concurrent jurisdiction?

Had Ellsworth specified the wrongs for which a foreigner would be able to sue in American courts, the causes over which the courts were given jurisdiction would be precisely identified. They would be the causes arising from the commission of those wrongs. But he did not so specify. Succinct to a fault, as he often was, he presumed that everyone in the new Congress would know what were the wrongs for which a foreigner would be able to sue in American courts. Hence, he deemed it sufficient to say the causes would be those where a foreigner sued for a “tort.” Indeed, he went further and bonded to the

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word "tort" the word "only" without explanation of any sort, this time on the presumption that everyone in the new Congress would know why he did.

Thus we must find out what Ellsworth meant by the word "tort," and then we must find out why Ellsworth bonded to it the word "only."

III. THE MEANING OF THE WORD "TORT"

The word "tort," as used by Ellsworth in the clause, referred to wrongs under the law of prize.

In order to establish this proposition, I shall need first to provide some general information about the law of prize. Its peculiar features, especially its granting of private causes of action for the reparation of the torts it prohibited, can be understood only in the context of the system as a whole.

A. Historical Note

1. Maritime Capture

The capture of enemy merchant vessels as prize played an important role in the War of the Revolution. According to one source, 530 British vessels were captured during the first year of the war.14 According to another source, 733 British vessels were captured between May 1776 and early 1778.15 In both accounts, the context indicates that the vessels were merchant vessels. According to a publication of the United States Naval Academy, 2,980 British vessels were captured during the war,16 but the figure includes some vessels of war in addition to merchant vessels. A reasonable extrapolation suggests that the total number of captured merchant vessels must have been at least 2,500.

The statistic is quite startling, especially when compared to the 2,452 Allied merchant vessels sunk by German submarines during the Battle of the Atlantic in World War II.17 The extraordinary feature of the statistic, however, is that the captures were made mainly by pri-

16. Faculty of the United States Naval Academy, American Sea Power Since 1775, at 8 (Allan Westcott ed., 1947).
vate vessels of war, or "privateers," rather than the United States public vessels of war. Over the course of the war, there were probably more than 2,000 American privateers in operation,\textsuperscript{18} while the number of government war vessels diminished from thirty-one in 1776 to seven in 1782.\textsuperscript{19}

2. \textit{American Privateers}

A historian of American privateers defines the term thus: "The privateer, as understood at the outbreak of the war for American independence, was a ship armed and fitted out at private expense for the purpose of preying on the enemy's commerce to the profit of her owners, and bearing . . . a letter of marque, authorizing her to do so, from the Government."\textsuperscript{20} He goes on to say, "The owners, of course, had the lion's share [of the profits], though a considerable portion was divided among the officers and crew as an . . . incentive to securing prizes."\textsuperscript{21} While the Continental Congress had begun to build a navy in the autumn of 1775,\textsuperscript{22} it opened the way to privateering on March 21, 1776 by resolving "[t]hat the inhabitants of these colonies be permitted to fit out armed vessels to cruize on the enemies of these United Colonies."\textsuperscript{23} Thereupon, privateering became part of the American culture.

"Every seaport . . . had its quota of privateers scouring the seas . . . ."\textsuperscript{24} "Merchants in every port joined in this grand adventure, which filled their pockets in a patriotic cause."\textsuperscript{25} "They came forth from New England in an endless stream . . . . [In 1776] New England, in fact, had begun to live on privateering; in Salem it was the principal business of the town. Even outside of New England, men like Washington and Morris engaged in it."\textsuperscript{26} "The records of the Council of Maryland show that [its privateers were so active] . . . [the prizes they] captured and sent into the Chesapeake realized over $1,000,000. [One finds] . . . in the list of owners of these vessels and their commanders

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\textsuperscript{18} FACULTY OF THE UNITED STATES NAVAL ACADEMY, supra note 16, at 7.
\textsuperscript{19} EDGAR STANTON MACLAY, A HISTORY OF AMERICAN PRIVATEERS 113 (Burt Franklin ed., 1968) (1899).
\textsuperscript{20} Id. at 7.
\textsuperscript{21} Id.
\textsuperscript{22} STARK, supra note 15, at 119.
\textsuperscript{24} MACLAY, supra note 19, at 69.
\textsuperscript{25} FACULTY OF THE UNITED STATES NAVAL ACADEMY, supra note 16, at 7.
\textsuperscript{26} STARK, supra note 15, at 123.
\end{flushleft}
some of the very best people in the State, . . . .”27 According to a contemporary account of the exploits of Silas Talbot, the famous commander of a privateer: “The country people came down from a considerable distance, only to see Captain Talbot and his prizes and to count the shot marks about the Argo.”28

3. The Law of Nations

Before the Revolution, cases of capture as prize were decided, subject to appeal, by the vice-admiralty courts established in all the colonies29 and functioning in time of war as prize courts. The law applied to captures by the vice-admiralty courts was the English law of prize, that is to say the law of nations governing the right of capture, as understood and received in England and applied in the courts of Great Britain. In Thirty Hogsheads of Sugar v. Boyle,30 decided in 1815, Chief Justice Marshall adopted as a rule of decision in the case a rule of prize law that had been established in the British courts. He explained why: “The United States having, at one time, formed a component part of the British empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances . . . .”31 (emphasis in original).

B. The Law of Prize

1. Enemy Merchant Vessels

The condemnation of an enemy merchant vessel in a court of prize would usually take place as a matter of course. It was identified by the national flag it flew. The flag was conclusive of its enemy character.32 Hence this character, the legal basis for the capture, could not be denied in the prize court. Moreover, the master and members of the crew were deemed to possess the national character of their vessel and hence to be enemy aliens.33 As such, they had no standing to assert any right in a court of prize.34 In short, there was no case for litigation between captor and captured, and since there was no case to

27. SCHARF, supra note 14, at 64.
28. MACLAY, supra note 19, at 106.
30. 13 U.S. (9 Cranch) 191 (1815).
31. Id. at 198.
32. 3 ROBERT PHILLMORE, COMMENTARIES UPON INTERNATIONAL LAW 606 (1857).
33. Id. at 603-04.
34. Id. at 582. But they were not in general disabled to be a witness. Id. at 601-02.
decide, there was no case to report in a reporter system, if there was one.

2. Neutral Merchant Vessels

A different legal situation existed when belligerents interfered with neutral merchant vessels by exercising the right of visitation and search, and captured vessel and cargo on the ground that they were invested with an enemy character. Whether the capture was justified became a matter for litigation in the court of prize between captor and captured and possibly a case for reporting, if a reporter system was in effect.

The practical importance of this aspect of the right of capture is evidenced by the disproportionate amount of space accorded to it by text writers when dealing with maritime capture at large. Indeed, statements by them which appear on their face to be made about the right of capture in general will often be found on close examination to apply only to the capture of neutral vessels or cargoes.

3. The Silesian Loan Report

During the War of Austrian Succession (1740-1748), English privateers exercised the right of visitation and search to capture the cargoes carried aboard eighteen Prussian merchant vessels and thirty-three Prussian cargoes carried aboard merchant vessels of other powers. At the time of the captures, Prussia and these other powers were neutrals as to Great Britain. In both cases the captors suspected the cargoes really belonged to enemies of England. The English court of prize restored the cargoes whenever bona fide Prussian ownership could be established.

Frederic II (the Great) objected to the captures, asserting that the goods of an enemy could not be taken aboard a neutral vessel. By way of reprisal, he withheld the payment to English merchants of interest on a loan secured by mortgages on properties in the Duchies of Silesia. In the diplomatic correspondence which eventually followed after the war, Frederic submitted in justification of his action a document in French entitled Exposition des Motifs. George II requested from his law officers a report on its validity. One of those composing the report was Mr. Murray, solicitor-general, who later became Lord Mansfield. It was submitted on January 18, 1753. The report began

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35. The full title of the report is as follows: Report of the Law Officers As to the Action of Frederic II in Withholding Payment of Interest on the Silesian Loan in Reprisal
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with a statement of the law of nations applicable to the dispute. I set forth below the most significant parts of the statement.

a. The Right of Capture

"When two powers are at war, they have a right to make prizes of ships, goods, and effects of each other upon the high seas."36 "[W]hatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken, provided he observed his neutrality."37

The "goods of an enemy on board the ship of a friend may be taken," and "contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war is a departure from neutrality."38

"[B]y the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy."39 "[B]ut particular treaties have enjoined a less degree of search, on the faith of producing solemn passports, and formal evidence of property duly attested."40

b. The Judicial Proceeding

"By the maritime law of nations universally and immemorially received, there is an established method of determination whether the capture be, or be not, lawful prize."41

"Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard" and "condemnation thereupon as prize in a court of Admiralty, judging by the law of nations and treaties."42 "The proper and

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37. Id.
38. Id.
39. Id. at 354.
40. Id.
41. Id. at 350.
42. Id.
regular court for these condemnations is the court of that state to whom the captor belongs."

"If the sentence of the court of Admiralty is thought to be erroneous, there is in every maritime country a superior court of review, . . . ."44 "This superior court judges by the same rule which governs the court of Admiralty, viz. the law of nations, and the treaties subsisting with that neutral power whose subject is a party before [the court]."45

c. Condemnation or Restitution

"The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz. the papers on board, and the examination on oath of the master and principal officers; . . . ."46 "If there do not appear from thence ground to condemn as enemy's property, or contraband goods going to the enemy, there must be an acquital; . . . ."47

"[In case of acquittal and restitution] . . . the law of nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken and other circumstances of the case, costs to be paid, or not to be received, by the claimant . . . ."48

However, "if a seizure is made without probable cause, the captor is adjudged to pay costs and damages; for which purpose all privateers are obliged to give security for their good behaviour; and this is referred to and expressly stipulated by many treaties."49

d. The Source of Prize Law

According to the Exposition des Motifs, British ministers had admitted that the prize cases in issue had been decided by the "laws of England." In context, the Exposition was charging that the British courts had applied "the domestic or municipal laws of England" rather than the law of nations.50

To this charge, the Report answered: "They must have been misunderstood; for the law of England says, that all captures at sea, as

43. Id. at 351.
44. Id. at 352.
45. Id.
46. Id. at 351.
47. Id.
48. Id.
49. Id. at 352.
50. Id. at 369.
prize, in time of war, must be judged of in a court of Admiralty ac-
cording to the law of nations and particular treaties, where there are
any.” "There never existed a case where a court, judging according to
the laws of England only, ever took cognizance of a prize."$51 This
statement in the Report was to find strong confirmation in two deci-
sions of the King's Bench rendered when Lord Mansfield was on the
court.

i. Le Caux v. Eden$52

In Le Caux v. Eden, decided in 1781, the defendant was the com-
mander of a British privateer who, in October 1778, stopped a
merchant vessel from Jersey. After examining the papers and docu-
ments concerning her ownership and cargo, he seized her as prize and
caus[ed] the plaintiff and others to be removed from their vessel and
kept on board the privateer until her arrival in England. There John
Fiott, presumably the owner of the merchant vessel, claimed her with
all the merchandise laden at the time she was captured. The Court of
Admiralty restored the vessel and cargo to the claimant and con-
demned the captor in costs and damages. The plaintiff then brought
against the captor an action at common law for assault and false
imprisonment.

All the judges agreed that the plaintiff had no cause of action. In
his opinion, Justice Buller examined at some length the question
whether an action at common law could be maintained for imprison-
ment resulting from a capture as prize. He pointed out there was no
case "in which it has ever been held, that such an action would
lie,"$53 and then stated:

But the case does not rest on negative usage only; for there are
a current of authorities, from the time of Queen Elizabeth, to the
present time, all of which agree, that the Admiralty has jurisdiction,
not only of the question, 'prize or not prize,' but of all its conse-
quences: and many of them agree, that the Admiralty has the sole
and exclusive jurisdiction, and that the Courts of Common Law
have no jurisdiction at all of such questions.$54

To explain why this was so, Justice Buller quoted from an older case:
"The true reason why the jurisdiction is appropriated to the Admi-
ralty, is, that prizes are acquisitions jure belli, and jus belli is to be

51. Id.
53. Id. at 379.
54. Id.
determined by the law of nations, and not the particular municipal law of any country.”

According to the reporter, “Lord Mansfield did not go into the argument at large, but adhered to the opinion he had so repeatedly and peremptorily given at Nisi Prius; and probably thought it more decent to leave the discussion of it to the other judges.” In any case, Lord Mansfield declared his assent to everything Justice Buller had said.

ii. *Lindo v. Rodney*

In *Lindo v. Rodney*, decided in 1782, Lord Mansfield delivered the single opinion issued in the case, the other judges being in agreement. Yet it is reported only as a long footnote to the opinion in *Le Caux v. Eden*. The reporter decided to include it there, instead of reporting it the following year, because of its connection with the subject of *Le Caux* and its thorough exposition of the “foundation and nature of prize jurisdiction in the court of Admiralty.”

In the course of this exposition, Lord Mansfield said, “The end of a Prize Court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly, . . . if, upon the most summary examination, there don’t appear a sufficient ground; to condemn finally, if the goods really are prize, . . .” He then went on to say: “These views cannot be answered in any Court of Westminster-Hall, and therefore, the Courts of Westminster-Hall never have attempted to take cognizance of the question, ‘prize or not prize;’ . . . .”

**C. Courts of Prize**

1. **Before 1789**

Until the Constitution went into effect in 1789, prize jurisdiction was exercised by the courts of the several states pursuant to the recommendation of the Continental Congress in its Resolution of November 25, 1775. The Resolution provided: “That it be, and is hereby recommended to the several Legislatures in the United Colonies, as

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55. *Id.* at 382.
56. *Id.* at 378.
57. *Id.* at 385.
59. *Id.* at 385 n.1.
60. *Id.* at 386.
61. *Id.*
soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made . . .

Whereupon the colonies, except Massachusetts whose action had preceded that of Congress, created admiralty courts and gave them, or existing courts, jurisdiction over captures.

a. Hopkinson's Reports

During the colonial period, "the demand for decisional literature was met chiefly by importing reports from English courts." Hence, prior to independence very few local decisions were reported and published. The practice carried over into the early years of independence. As a result, no reports were published of the decisions made in matters of prize by the courts of admiralty of the several states during the War of the Revolution, except for those of Hopkinson.

Francis Hopkinson, the admiralty judge of the State of Pennsylvania, published in 1789 a volume of six of his judgments. Some claim it was the first volume of reports to be published in America, but whether it was so is a subject of academic debate. In 1792, he published a three volume collection of Miscellaneous Essays and Occasional Writings; the third volume consisted of forty-nine of his judgments and was entitled Judgments in Admiralty Court of Pennsylvania, 1779-1788. Thirty of them involved matters of prize.

b. Cases on Appeal

The Resolution of November 25, 1775 provided: "That in all cases an appeal shall be allowed to the Congress, or such person, or persons as they shall appoint for the trial of appeals, . . ." At first, the appeals were referred to special committees whose members were styled "Commissioners." Later, the appeals were referred to a Standing Committee. Finally, they were referred to a permanent

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65. Id. at 39.
66. Id. at 40.
68. 3 Journals of the Continental Congress 1774-1789, supra note 23, at 374.
69. Carson, supra note 63, at 50.
70. Id. at 51.
body created on January 15, 1780 and entitled "The Court of Appeals in Cases of Capture." 71

The special committees, the Standing Committee, and the Court of Appeals together decided 118 cases. 72 "So far as appears [from the records] . . . no written reports in the nature of opinions were made by the committees." 73 "The Court of Appeals filed only eight opinions, all of which are reported in 2 Dallas 1-42, . . . " 74 Dallas reported them under the heading "Federal Court of Appeals."

2. After 1789

By Article III of the Constitution, the admiralty jurisdiction of the state courts was delegated to the federal courts. 75 Accordingly, the second clause in Section 9 of the Judiciary Act provided that the federal district courts would have exclusive original jurisdiction over all civil causes of admiralty. 76 The question then came up whether the delegation to the federal courts of the admiralty jurisdiction of the state courts included prize jurisdiction.

a. Prize Jurisdiction

The argument against federal prize jurisdiction was advanced in Jennings v. Carson, 77 decided by the federal district court for Pennsylvania in 1792. The case arose from the capture by an American privateer in 1778 of the merchant vessel of a national of Holland. The argument ran as follows. The court of admiralty in England was divided into two sides: the "instance side" and the "prize side." The instance side had jurisdiction over the ordinary subjects of admiralty, while the prize side had jurisdiction over captures in time of war. The same division existed in the colonial courts of admiralty. The state courts of admiralty which had been created to replace the colonial courts of admiralty had inherited the division. Hence, when the admiralty jurisdiction of the state courts was delegated to the federal courts, the district courts received only the jurisdiction on the instance side, not the jurisdiction on the prize side.

72. Carson, supra note 63, at 61.
73. J.C. Bancroft Davis, Federal Courts Prior to the Adoption of the Constitution, 131 U.S.(app.) xix, xxxiv (1889).
74. Id. at xxxv.
76. 1 Stat. 73, 77 (1789).
77. 13 F. Cas. 540 (D. Pa. 1792) (No. 7,281).
The judge who decided the case had been register of the colonial court of admiralty of Pennsylvania before the Revolution. He rejected the argument, stating the division did not exist in the admiralty courts of the colonies and hence "if the powers of an admiralty... court are delegated by congress to this court, those of a prize court are mixed in the mass of authority with which it is invested..." The Supreme Court closed the issue in 1794 by declaring in Glass v. The Sloop Betsey that "every District Court in the United States, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court."

3. The War of 1812

The capture of British vessels by American privateers played an important role in the War of 1812, just as it did in the War of the Revolution. The navy of the United States consisted of twenty-two vessels, twelve of which were lost during the hostilities. But there were 515 privateers in operation according to one source, 516 according to another, and 526 according to a third. Their prizes numbered at least 1,341. A brochure handed to tourists on the waterfront of Baltimore claims that 126 privateers from the city accounted for 556 of the British vessels captured or destroyed in the war. The name of Jean Laffite is well remembered in New Orleans, but it is for his participation in the battle for the city rather than for his deeds, or misdeeds, as the leader of a fleet of privateers operating under letters of marque issued by the Republic of Cartagena.

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78. Id. at 541 n.3.
79. Id. at 542.
80. 3 U.S. (3 Dall.) 6 (1794).
81. Id. at 16. The case should be read with caution. As the Supreme Court made clear in the case of L'Invincible, 14 U.S. (1 Wheat.) 238 (1816), the ruling that the federal district court had prize jurisdiction did not mean that it should exercise that jurisdiction. In the Glass case, the capture of the prize was made by a French captor. The right to exercise jurisdiction to condemn as prize belonged exclusively to the prize courts of the captor's nation, not to the federal district court.
82. 2 A.T. Mahan, Sea Power in Its Relations to the War of 1812, at 242, 244 (1919).
83. Stark, supra note 15, at 135.
84. Mahan, supra note 82, at 242.
85. Maclay, supra note 19, at 506.
86. See Stark, supra note 15, at 135 (setting the number at 1,341); McAlay, supra note 19, at 506 (setting it at 1,345); Mahan, supra note 82, at 242 (setting it at 1,344).
88. The Republic of Cartagena is now part of Colombia. According to the journal of Jean Laffite, he had on hand at the time of his troubles with Governor Claiborne (1813-14).
a. Privateering Abolished

The War of 1812 was the last war of the United States in which privateering played a role. It was abolished by the Declaration of Paris of April 16, 1856: "La course est et demeure abolie." The Declaration received the adherence of the principal states of the world, but not of the United States. Nevertheless, the United States virtually abandoned the practice thereafter.

b. Supreme Court Decisions

The War of 1812 resulted in extensive prize litigation in the federal courts. As the superior court of review, the Supreme Court made remarkable contributions to the international law of prize. Colombos, a well known English scholar, noted the fact, stating: "[T]he influence of the Supreme Court . . . has been very important, and the judgments delivered by two of its most distinguished members, Mr. Justice Story and Chief Justice Marshall, rank amongst the greatest pronouncements on the law of prize."

D. Writings on Prize

1. The Letter to John Jay

Great Britain declared war on France in February of 1793. In the course of the war, controversies arose with the United States involving, among other things, the exercise by Great Britain of its right of visiting and searching American merchant vessels on the high seas. In April of 1794, John Jay, then Chief Justice of the United States, went to London on a mission to settle the conflicting claims of the parties. They agreed to submit their claims to arbitration in the treaty of November 19, 1794, commonly known as the Jay treaty.

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90. MAcLAY, supra note 19, at xxiii.
93. The mission, the treaty, and the arbitration are reported at great length in 4 INTERNATIONAL ADJUDICATIONS 3 (John Bassett Moore ed., 1931). Information on the mission of John Jay begins at 24.
In the discharge of his mission, John Jay retained as counsel for the United States Dr. John Nicholl and Sir William Scott (later Lord Stowell), who became famous as judge of the High Court of Admiralty. They prepared at Jay's request a statement of the law in prize causes and delivered it by letter dated September 10, 1794. After the introductory paragraph, it read: "The general principles of proceeding [in prize causes] cannot, in our judgment, be stated more correctly or succinctly, than we find them laid down in the following extract from a report made to His late Majesty, in the year 1753, ...."

The report to which the statement referred was, of course, the Silesian Loan Report, and the extract included in the statement was the exposition of the law of prize contained in that report. The letter given John Jay was then reproduced in scholarly writings of the nineteenth century on the law of prize, such as those of Wheaton, Story, Phillimore, and Upton. In this manner, the exposition of the law of prize, born in 1753 from a political dispute, eventually became part of the learned literature on the subject.

2. The Notes of Wheaton

Henry Wheaton was the reporter for the cases decided by the Supreme Court from 1816 through 1827. Thereafter he had a long and successful career in the diplomatic service. In that career, he acquired fame for his writings on international law, some of which he originally wrote and published in French.

Before becoming the reporter for Supreme Court decisions, he published (besides his translation of the French Civil Code of 1804) a three hundred page treatise on the law of prize entitled *A Digest of the Law of Maritime Captures and Prizes*. While reporter for Supreme Court decisions, he wrote extensively on diverse legal topics and published these writings in appendices to eight of the twelve volumes of

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94. Id. at 30, 31.
95. Id. at 43-48.
98. It was published in 1815.
his reports. His industry in so doing led Daniel Webster to say, "No reporter in modern times has inserted so much and so valuable matter of his own." Note II in the Appendix to the first volume of his reports was "On the Practice in Prize Causes." Note I in the Appendix to the second volume of his reports contained "Additional Notes on the Principles and Practice in Prize Causes." Together, they formed a ninety-two page treatise on the subject.

3. Judge Story's Claim

In 1854, Frederic Thomas Pratt published in London a volume entitled Notes on the Principles and Practice of Prize Courts by the Late Judge Story. The publication contained first the Letter to John Jay and then the "Notes on the Practice of Prize Courts" published by Wheaton in the appendices to the first and the second volumes of his Supreme Court reports.

Pratt asserted that Wheaton's Notes had been written by Justice Story. He put in as evidence a document published in The Life and Letters of Joseph Story by His Son, William W. Story. The document, described by the son as an "entry in one of the memorandum-books of my father," read in part:

June 12th, 1819. It is not my desire to be known as the author of any of the notes in Mr. Wheaton's Reports. Lest, however, the fact should transpire, and it should be supposed that he is under obligations to me for notes which are his own, I think it best to put down those notes which I have written. I made it an express condition, that the notes furnished by me should pass as his own, and I know full well, that there is nothing in any of them which he could not have prepared with a very little exertion of his own diligence and learning.

The document went on to list the Notes involved and included those published by Wheaton on prize causes in the appendices to the first and the second volumes of his reports. The son wrote that the deaths of his father and Wheaton had "removed any personal reason for the
concealment of the authorship of these notes." He explained that he was making the document public because it showed "the lavish generosity with which . . . [his father] imparted all that he knew, . . . ."

E. Reparation for Wrongful Capture

In cases of wrongful capture, the prize court would order restitution of the merchant vessel and allow the captured to claim damages against the commander of the private or public vessel of war. The damages could be substantial. In *Le Caux v. Eden*, the judge of the admiralty ordered the register of the court to make a report on the amount of costs and damages to be paid by the captor. The report included allowances for the following: the passage of passengers; the sailors' wages from the time of capture to their arrival in Jersey; their expenses in the intermediate time; the master's expenses; sundry ship's materials that were missing; repairs to the ship; loss of part of the cargo, damage to the rest, and diminution in the value of the produce by the loss of market; demurrage; interest on two bills of exchange; insurance on the ship, and the remaining part of the cargo, from England to Jersey; commission on the valuation of the ship and cargo; and expenses for the assistance of two merchants in making the report.

1. Private Vessels of War

The law of prize required the commander of a privateer to give security for the payment of the damages he might be ordered to pay for a wrongful capture. The Continental Congress was aware of the rule. It authorized privateering on March 23, 1776. On April 3, 1776, it approved the form of a letter of marque and reprisal for private armed vessels. The form required the commander of a private war vessel to deliver a penalty bond, with sureties, before he could receive the letter of marque and reprisal. The bond guaranteed reparation, within the stated amount, of damages sustained as a result of the misconduct of the commander or the crew.

106. *Id.*
107. *Id.* at 284.
The owners of a privateer were jointly liable with their commander for the damages. Judge Hopkinson so ruled in the case of *Gibbs v. The Two Friends.* His ruling was upheld on appeal. The owners, however, were liable to the extent of the actual loss and injury even if the damages exceeded the amount of the bond given by their commander.

2. *Public Vessels of War*

In the case of the *Acteon,* an American merchant vessel was sailing under an English license to take a cargo to Spain, where Great Britain was at war with France. On its return to the United States, it was stopped on the high seas by a public vessel of war of Great Britain. The captain of the British war vessel, suspicious of the license and for other reasons, destroyed the American vessel by setting it afire. In the court of prize, the captain did not object to paying restitution for the destroyed vessel. However, he argued that damages should not be awarded unless he was found guilty of wilful misconduct. Sir W. Scott held the captain liable for the payment of damages, even though the captain had not acted from any corrupt or malicious motive. Sir W. Scott indicated he had no doubt the captain would be indemnified by the government.

On the other hand, the commanders and crews of public vessels of war shared in the profits of their captures. In its ordinance of January 6, 1776, the Continental Congress regulated in great detail the shares of prizes to be allocated to commanders, captains, lieutenants, petty officers, gunners, surgeons and others, including cooks, who formed the company of government war vessels.

**F. Reparation for Personal Wrongs**

Under the law of prize, neutral merchant vessels were forbidden to offer resistance to visitation and search by the war vessels of belligerents. They became lawful prize of war if they did. If, on the basis of visitation and search, the commander decided the neutral merchant vessel or its cargo had an enemy character, capture fol-

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111. *Francis Hopkinson, Judgments in Admiralty Court in Pennsylvania 1779-1788,* at 95 (1781).
112. *Id.* at 98.
115. Wheaton, *supra* note 110, at 105-06.
The commander would put aboard the captured vessel a qualified prize-master and a sufficient crew to navigate her to a convenient port. The persons aboard the captured vessel, although not prisoners of war, became captives on either their own vessel or the vessel of the captors, until they were released in the port of adjudication.

Thus the captives and their captured vessel were under the complete control of the capturing commander and his crew from the moment they were ordered to stop for visitation and search to the moment they reached port. If, during this period, they suffered injury from the commander, his crew, or his prize-master, they were entitled to sue the commander for reparation of the injury. If, during this period, property on the vessel or the vessel itself was damaged, taken, or destroyed as a result of the conduct of the commander, his crew, or his prize-master, the owners of the property were entitled to sue the commander for reparation of the loss. The owners of a privateer were jointly liable with their commander for reparation of the injury or loss.

I set forth below cases on point and other relevant material.

1. English Cases

a. The St. Juan Baptista and La Purissima Conception

Two Spanish merchant vessels were charged by an English privateer with resistance to visitation and search. They had sailed in ignorance of the war in which Great Britain had become involved with another nation. Hence, they did not know the privateer was a belligerent vessel of war entitled to exercise the right of visitation and search. The prize court decreed restitution of the vessels and allowed damages for two months detention.

The captured claimed improper conduct by the captors, alleging "the Spanish crew, to the number of twenty-two persons, were put in irons." The court said the misconduct appeared to have proceeded from an improper notion of security, rather than from an intention to inflict pain or personal indignity. Accordingly, it gave the claimants compensation in the amount of one hundred pounds.

The captured also claimed embezzlement of some articles. The court ordered a report on the value of the articles. When it became

117. Upton, supra note 96, at 394.
118. Id. at 439, 441-42.
120. 5 C. Rob. at 40, 165 Eng. Rep. at 689.
121. This sequel appears as a footnote on the first page of the report of The Die Fire Damer, 5 C. Rob. 357, 165 Eng. Rep. 804 (Adm. 1805).
available, Great Britain and Spain had come to war. Thus the Spanish owners had become enemies of Great Britain and as such had no longer a "persona standi" to claim in a British court compensation for the embezzlement. But the court said the money would be made available to the government, and the government could then give the Spanish owners a license to take the money out of the country.

b. The Die Fire Damer

The commander of a British privateer put aboard a neutral vessel a prize-master who, according to the master of the neutral vessel, was guilty of great cruelty and misbehaviour to the captured crew. The captured crew prayed for a decree of pecuniary compensation against the owners of the privateer.

Sir W. Scott stated: "Owners are... answerable for the proper conduct of the persons to whose care they entrust the conduct of their privateer. They ought not to put their vessel into the hands of a person capable of being guilty of such outrageous behaviour, as is imputed to the prize master in this instance, ..." He went on to remark that he dealt "very scanty justice, by condemning them in the sum of one hundred guineas, to be divided amongst the crew of the neutral vessel." He also added, "It is stated, that the privateer which made this capture has since been lost. If that had not been the case, I should certainly have directed measures to be taken for the forfeiture of her letter of marque."

2. Hopkinson's Reports

a. Silas Talbot v. The Owners of the Brigs Achilles, Patty, and Hibernia

Being on a cruise on the sloop Argo in September 1779, Silas Talbot discovered and captured after a two hour engagement the brig Betsey, a British letter of marque. Talbot put aboard a prize-master and eleven of his crew, with written orders to take her to New London for condemnation. Soon after, the brigs Achilles, Patty, and Hibernia, which were American privateers, came up under British colors (a common and proper ruse of war at the time). Taking them for ene-

122. Id.
125. Id.
126. Hopkinson, supra note 111, at 132.
mies, Talbot left his prize. The brigs then boarded and made prize of the Betsey, took out the prize-master and the other men from the Argo, put their own people on board, and ordered her for Philadelphia. But on her way she was captured by a British cruiser, carried into New York, and thus lost to all parties. The three brigs went on their voyages, taking the Argo’s men with them. They left the men in Spain and other remote regions.

Talbot filed a libel against the owners of the three brigs. After hearing the testimony, Judge Hopkinson stated that the act of the three brigs was one “of such unjustifiable violence and wrong... [he was] clear in deciding in favour of the libellant.” He ascertained the value of the Betsey and gave judgment in that amount against the owners of the three brigs. An appeal by the owners to the Court of Appeals in Cases of Capture was rejected.


On June 12, 1776, the Continental Congress appointed a committee to prepare a model for treaties to be proposed to foreign powers. A model treaty, to be proposed to France, was adopted by the Congress on September 17, 1776.

In cases where one of the parties became a belligerent and the other was neutral, the model treaty greatly lessened, as between the parties, the need for the right of visitation and search. It did this by adopting, in Article 26, the principle that free ships would make free goods. In other words, enemy goods aboard neutral merchant vessels would not be subject to capture. As a result, visitation and search became pointless so far as concerned neutral vessels sailing from enemy ports. However, it remained useful to discover contraband of war aboard neutral vessels sailing to enemy ports. Articles 15 and 16 of the model treaty regulated the manner in which the right of visitation and search would be exercised against neutral merchant ves-

127. Id. at 137.
128. The information is provided in a note at the end of the report. The note does not say on what ground the appeal was made, but it must have been on the ground that the Admiralty Court of Judge Hopkinson lacked jurisdiction over the case. Then the Court of Appeals held that it itself lacked jurisdiction over the case because the suit was between citizens for damages only. Whether it was lacking jurisdiction, or not, is discussed infra in Section IV.C.
129. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, supra note 23, at 433.
130. Id. at 768.
131. Id. at 775.
sels sailing to an enemy port. Article 18 of the model treaty dealt with the wrongs which the commanders and crews of vessels of war might commit while exercising the right of visitation and search against such neutral vessels.

The terminology of the article is archaic because its text is drawn from Article 28 of the Treaty of Commerce and Navigation concluded between France and Great Britain at Utrecht on April 11, 1713 in French and Latin. I have compared the English text of Article 18 to the French text of Article 28, and there can be no doubt about the source.

The Article first states its purpose: "[T]hat more effectual Care may be taken, for the Security of the Subjects, and Inhabitants of both parties, that they suffer no Injury by the Men of War or Privateers of the other Party." The Article next states a prohibition: "[A]ll the Commanders of the Ships of the most Christian King, and of the said United States and all their Subjects and Inhabitants shall be forbid, doing any Injury, or Damage to the other Side." The Article then states the consequences for the violation of the prohibition: "[I]f they act to the contrary, they shall be punished, and shall moreover be bound to make Satisfaction for all matter of Damage, and the Interest thereof, by Reparation, under the Penalty and Obligation of their Persons and Goods."

Article 18 of the model treaty became Article 17 in the Treaty of Amity and Commerce concluded with France on February 6, 1778. With slight modifications, it became Article 13 in the Treaty of Amity and Commerce concluded with the Netherlands on October 8, 1782, and Article 15 in the Treaty of Amity and Commerce concluded with Sweden on April 3, 1783. In shorter and less archaic language, it was incorporated into Article 15 of the Treaty of Amity and Commerce concluded with Prussia on September 10, 1785: "[A]ll persons belonging to any Vessel of war public or private who shall molest or injure in any manner whatsoever the people, Vessels or effects of the other party shall be responsible in their persons & property for damages & interest . . . ."
4. Federal Cases

a. The Lively

An American privateer captured the schooner *Lively*, an American merchant vessel, as prize. The commander of the privateer had received information that the vessel intended to trade with the enemy and thought her conduct indicated such an intention. Trading with the enemy invested a merchant vessel with an enemy character. It was an offense against the law of prize long before the American Revolution. It subjected vessel and cargo to condemnation as prize of war.\(^{140}\)

The owners of the vessel and cargo filed a libel for restitution. The district court ordered vessel and cargo restored to the owners and appointed commissioners to assess the damages. To the damages awarded the owners, the court then added a sum of one hundred dollars for the personal indignities and abuse inflicted upon the owner of the vessel, who was aboard at the time of capture.

Circuit Justice Story said there could be no doubt of the jurisdiction of the court “to punish every indignity offered to those who, by the fortunes of war, fall into the possession” of American vessels of war.\(^{141}\) He stated the court would not tolerate “personal indignities, or unnecessary modes of restraint” towards neutrals or citizens of the country.\(^{142}\) He further stated the court would never hesitate to give exemplary damages for undeserved suffering or malicious injury. Nevertheless, the court denied the award for indignities and abuse in this case because the behavior of the owner of the *Lively* had been improper and provocative.

b. Dias v. The Revenge and Bustamento v. Same\(^{143}\)

The American privateer the *Revenge* chased, under British colors, the Portuguese brig *Triomphe de Mars* and brought her to. An officer from the privateer boarded the brig, put a pistol to the breast of the master and declared him a prisoner. Thereupon the officer ordered the trunks to be opened, took all the money he could find, and carried it with some other property back to the privateer. The brig was allowed to proceed and arrived safely in New York.

\(^{139}\) 15 F. Cas. 631 (C.C.D. Mass. 1812) (No. 8,403).
\(^{140}\) The *Tulip*, 24 F. Cas. 307, 314 (C.C.D. Pa. 1813) (No. 14,234).
\(^{141}\) The Lively, 15 F. Cas. at 636.
\(^{142}\) *Id*.
\(^{143}\) 7 F. Cas. 637 (C.C.D. Pa. 1814) (No. 3,877).
The same privateer, again under British colors, chased the Iris, a Spanish merchant vessel, and fired broadsides into her as she lay to—a violation of the law of prize (chasing under false colors was lawful, but not firing). The master and crew of the Iris were manacled. Eight hundred dollars in silver, eight boxes containing three thousand silver dollars, and other articles, were taken to the privateer. The Iris was allowed to continue on her voyage, but was later reboarded by the Revenge and ordered to Cadiz.

The commander and crew of the Revenge were indicted for piratical acts, but were acquitted by the jury. The owners of the Portuguese and the Spanish vessels filed libels against the owners of the privateer for reparation of the acts of piracy they had suffered. The district court dismissed the libels.

Circuit Justice Washington said the owner of a privateer was liable for the wrongful conduct of its commander so long as the commander was executing the business for which he was employed. He stated that on this principle, an owner “is liable for... embezzlement of the property taken as prize by the officers and crew; and for ill-treatment unnecessarily inflicted upon the persons of the prize-crew.” But, if the commander “turns his back upon the business intrusted to him, and sanctioned by his commission, and commits acts of piracy, ... [such acts] cannot, upon any principle ... be visited upon his owners.” Accordingly, the court affirmed the decree of the district court.

c. The Amiable Nancy

The Amiable Nancy was a neutral schooner from Haiti. She was boarded by an American privateer. The crew of the privateer plundered the property aboard the schooner, and beat and otherwise ill-treated her master and crew. Those participating in the offenses were eventually tried and convicted by a naval court martial.

The master of the schooner, the supercargo, the mate, and one mariner, filed a libel against the owners of the privateer for the plundered property and the personal injuries. In argument, the owners in effect conceded that the libellants were entitled to “an indemnity for

144. Id. at 640.
145. Id. at 641.
the property taken, and to a reasonable remuneration for personal injuries."\textsuperscript{147}

The district court directed its clerk to assess, with the help of two merchants, the amounts to be paid for the plundered property. When the assessment was made, the court decreed payment in the amounts assessed. The court further decreed that there be paid for personal injuries five hundred dollars to the supercargo, one hundred to the master, one hundred to the mate, and fifty to the mariner.

Neither the amounts awarded for the plundered property, nor those awarded for personal injuries, were in issue when the case went on appeal to the circuit court; and later the Supreme Court. The appeals involved the compensation awarded the owner of the schooner and cargo. He had joined in the libel for the damages he had suffered as a consequence of the illegal boarding. The privateer had taken her papers. Because she did not have any papers, she had been captured by a British vessel of war and condemned in a British court of prize. The cargo had then been sold at a loss in order to redeem the schooner after her condemnation and to pay for the expenses incurred during her detention.

Justice Story considered the case one of "gross and wonton outrage."\textsuperscript{148} "Under such circumstances," he said, "the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them."\textsuperscript{149} He further stated: "[I]f this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct."\textsuperscript{150} But, he concluded that the owners, while bound to pay for the actual loss or injury, were not bound to the extent of vindictive damages.

d. Del Col v. Arnold\textsuperscript{151}

This case, decided by the Supreme Court in 1796, involved the capture of an American merchant vessel by a French privateer. Under the law of prize, jurisdiction in such a case belonged exclusively to the courts of France. Apparently the point was not raised nor considered at the time. However, in 1816 the Supreme Court ruled that

\textsuperscript{147} The Amiable Nancy, 1 F. Cas. at 768.
\textsuperscript{148} The Amiable Nancy, 16 U.S. (3 Wheat.) at 558.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} 3 U.S. (3 Dall.) 333 (1796).
jurisdiction in that type of case belonged exclusively to the courts of the capturing nation and was prompted to say of *Del Col*: “To say the least of that case, it certainly requires an apology.”152

In *Del Col*, the Court made two formal statements about the law of prize whose validity was not affected by the 1816 ruling on jurisdiction. The first statement was that “the right of seizing and bringing in a vessel for further examination, does not authorize, or excuse, any spoliation, or damage, done to the property; ... the captors proceed at their peril, and are liable for all the consequent injury and loss.”153 The second statement was that “the owners of the privateer are responsible for the conduct of their agents, the officers and crew, to all the world; ... the measure of such responsibility is the full value of the property injured or destroyed.”154

e. The Anna Maria155

The *Anna Maria* was an American schooner. Because she appeared to be heading toward enemy territory and thus intending to trade with the enemy, she was chased by the American privateer *Nonsuch* under English colors. The men from the privateer who boarded her did so in the disguise of British officers and conducted a long and abusive search which failed to produce any incriminating evidence.

The commander of the privateer did not capture the schooner as prize. He took her papers instead of entrusting them to a prize-master, and took out her whole crew and put them and the master in irons. He then left her in the possession of one of his officers and two men. They went to St. Jago del Cuba for supplies, and when they attempted to bring her out of port, she was run aground and injured. She was sold, with her cargo, and the proceeds were deposited with the American consul for whoever was entitled to them.

The owners of the *Anna Maria* and her cargo filed a libel against the owners of the *Nonsuch* for reparation of the injury they had sustained. The district court dismissed the libel and the circuit court affirmed the dismissal. The Supreme Court reversed.

Chief Justice Marshall first examined the facts pertaining to the voyage of the *Anna Maria* and found she really was heading for a neutral port. He then turned to the right of visitation and search. He

153. 3 U.S. (3 Dall.) at 334.
154. Id. at 335.
stated it was "a belligerent right, which cannot be drawn into ques-
tion." "But," he said, "this search ought to have been conducted with
as much regard to the rights and safety of the vessel detained as was
consistent with a thorough examination of her character and voy-
age." He went on to say, "Stripped of her crew and of her papers,
left in the possession of an officer and two men, without orders
whither to proceed, she was exposed to dangers; for the [resulting
loss] . . . those who placed her in this situation must be responsible."157

Justice Marshall concluded: "[T]he justice of the court requires
that compensation should be made for the injury which the libellants
have sustained." The circuit court was directed to appoint commis-
sioners to ascertain the amount of damages based on the prime value
of the vessel and the prime cost of the cargo.

G. Epilogue

1. The Meaning of "Tort"

I set out to find the meaning of the word "tort" as used by Ells-
worth in the third clause of his draft for Section 9 of the Judiciary Act
of 1789. Ellsworth did not use the word "tort" with the meaning it has
in the common law of torts. He used the word "tort" as a synonym for
the word "wrong." He used it to identify "wrongs" under the law of
prize.

Why did Ellsworth write "tort" rather than the word "wrong"? As Dean Prosser put it in his classic treatise on the law of torts, "'Tort'
is found in the French language, and was at one time in common use
in English, as a general synonym for 'wrong.'" It gradually ac-
tained a technical meaning in the common law of torts. Not so in the
law of prize. There the word "tort" was seldom used. Indeed it does
not appear in any of the treaty provisions, nor in any of the cases, that
I reviewed in the preceding pages. But it was used occasionally, and
when it was, it was with its old meaning as a word interchangeable
with "wrong." No better proof of this can be advanced than the fol-
owing passage from the second Note on prize causes written by
Wheaton (Story) in 1817.

"[T]he prize court will not only entertain suits for restitution, and
damages in cases of wrongful capture, and award damages therefor;

156. Id. at 332.
157. Id. at 334.
158. Id. at 335.
159. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 3 (1941).
but it will also allow damages for all personal *torts*, and that upon a
proper case laid before the court as a mere incident to the posses-
sion of the principal cause. And in such a case it will not confine
itself to the actual wrongdoer; but will . . . decree damages against
the owners of the offending privateer. And where the captured
crew have been grossly ill treated, the court will award a liberal re-
compense.¹⁶⁰ (emphasis added).

In 1789, Ellsworth used “tort” with exactly the same meaning as
Wheaton (Story) did in 1817.

Why did Ellsworth write tort “in violation of the law of nations or
a treaty of the United States” instead of being more specific and writ-
ing tort “in violation of the law of prize or a treaty of the United
States dealing with prize”? In the days of Ellsworth, there was no
need to be so specific.

Only the law of nations pertaining to the law of prize ever
granted private causes of actions to the nationals of one country for
the reparation of wrongs in violation of the law of nations committed
by the nationals of another country. When Ellsworth wrote in the
clause that a foreigner could sue in American courts, state or federal,
for a tort in violation of the law of nations, he could mean nothing but
the wrongs committed by American captors in violation of the law of
prize. He could assume that his colleagues in the new Congress would
know what these wrongs were because the law of prize, at least in its
essentials, had deeply penetrated the legal and political culture of the
time.

The same reasoning applies, of course, to the treaties of the
United States dealing with prize. I am not aware of any United States
treaties, other than those dealing with prize, which grant to aliens a
private cause of action for the reparation of wrongs committed by
Americans in violation of the treaties. When Ellsworth wrote in the
clause that a foreigner could sue for a tort in violation of a treaty of
the United States, he could only mean the wrongs committed by
American captors in violation of the prize provisions in the four trea-
ties of Amity and Commerce in effect in 1789. He properly could as-
sume that his colleagues in the new Congress would be familiar with
the prize provisions in the four treaties.

¹⁶⁰. Wheaton, *supra* note 102, at 5.
2. The Mistake in Filartiga

In Filartiga, the court mistakenly assumed that the word "tort" in the clause had the meaning it has in the common law of torts. A characteristic of a common law tort is that it gives its victim a transitory cause of action triable anywhere in the world. Hence the court assumed that in the law of nations and treaties of the United States in effect in 1789 there were torts giving the victims transitory causes of action triable anywhere in the world. In my search of the law of nations and treaties of the United States in effect before and after 1789, I could not find a scintilla of evidence of the existence of any such torts. Such torts did not exist.

There is an unfortunate but endemic tendency in legal discourse to assume that a word which appears in two different legal contexts has the same meaning in both. Even so, it is surprising that the court should have made this mistake in Filartiga.

The language of the clause is clear. The tort it contemplates is a tort under the law of nations or a treaty of the United States. This language does not create a problem of interpretation. It presents us with a problem only because of our ignorance today of what was familiar to those who voted the clause into law in 1789: 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 then. The obvious solution is to do the necessary research and find out what it meant in 1789. Researching the law of nations in effect in 1789 might be difficult, not so researching the treaties of the United States in effect in 1789.

The texts of treaties of the United States in effect in 1789 are in the second volume of a series available in any law library.161 Fifteen treaties had been concluded by 1789.162 The first in the book is the Treaty of Amity and Commerce concluded with France in 1778.163 Within a few pages, anyone looking at the text even cursorily would come to a stop at Article 17. The Article, as we know, forbids American commanders of men of war and privateers from doing "injury or damage" to Frenchmen and makes the American commanders liable to reparation if they do.164 Anyone reading this text would immedi-

161. 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, supra note 135.
162. See id. at ix.
163. Id. at 3.
164. Id. at 16.
ately realize that the word "tort" in the clause had nothing to do with transitory causes of action at common law.

3. The Disregard of Treaties

Why the court in Filartiga, and other courts relying on the tort clause for their jurisdiction such as the federal Court of Appeals for the Ninth Circuit in the case of Trajano v. Marcos,165 failed even to look at the treaties of the United States in order to find out what the word "tort" meant in 1789, is a question I cannot answer.

IV. THE REASON FOR THE WORD "ONLY"

A. Talbot's Case on Appeal

Earlier in these pages, I summarized the case of Silas Talbot against the owners of the three American brigs which had taken his prize, the Betsey. The owners appealed the decision of the Admiralty Court of Pennsylvania, awarding him the full value of the prize, to the Court of Appeals in Cases of Capture. The court rejected the appeal. The owners then removed the case to the High Court of Errors and Appeals of Pennsylvania. There they argued that the Admiralty Court did not have jurisdiction to hear the case brought by Talbot because "in cases of damages to be assessed or recovered to make satisfaction for a wrong or trespass to person or property, the prosecutions ought to be in Courts of Common Law."166

Talbot raised a different issue before the High Court. The law of Pennsylvania gave the High Court jurisdiction over appeals from the Admiralty Court. But Talbot contended that the High Court did not have jurisdiction to hear the appeal in the case because it was a case of prize, and all appeals of prize cases belonged exclusively to the Court of Appeals in Cases of Capture. His argument came at a time when Pennsylvania was engaged in a bitter controversy with the other states

165. In Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992), the Ninth Circuit Court of Appeals upheld jurisdiction over the estate of former Philippine President Ferdinand Marcos and his daughter Imee Marcos-Manotoc for the torture and death of Archimedes Trajano. Although the plaintiff and defendants were all Philippine nationals, and the torts occurred in the Philippines, the court found jurisdiction under the tort clause. Although the court admitted that "there is no direct evidence of what the First Congress intended to accomplish," id. at 498, the court followed Filartiga and assumed that the Statute was enacted "to provide a federal forum for transitory torts." Id. at 503.

166. Talbot v. The Commanders and Owners of Three Briggs, 1 U.S. (1 Dall.) 95, 97 (1784).
A Tort Only in Violation of the Law of Nations

for its refusal to give effect to the decision of the predecessor of the Court of Appeals in the case of the Active.

B. The Affair of the Active

The conflict over the affair of the Active, which first took place between Pennsylvania and the confederation, and later between Pennsylvania and the federal government, is well known. Hence, it is unnecessary to explain the affair here in detail. In any case, it would take too long to do so. I shall make only a short statement of it, in the hope the statement will be sufficient to make the point it is meant to make.

The affair began in 1778 when the Active became prize to a vessel of war of the State of Pennsylvania and other claimants. The controversy in the Admiralty Court of Pennsylvania was between the claimants over their respective share of the prize. The court awarded half of the prize to the State of Pennsylvania and the commander of the vessel of war and its crew, and the rest to the other claimants. Four of the other claimants appealed the award to the Standing Committee of the Continental Congress. On December 15, 1778, the Committee reversed the decision of the Admiralty Court and awarded the whole prize to those four claimants.167

The judge of the Admiralty Court refused to abide by the decision of the Committee. He ordered the marshall to sell the Active and her cargo and bring the proceeds to his court.168 Benedict Arnold, the military commander of Philadelphia, warned the Committee of the order issued by the judge of the Admiralty Court.169 The Committee issued an injunction to the marshall commanding him to hold the money subject to its order. But the marshall disregarded the injunction and paid the money over to the admiralty judge who, in conformity with his decision, deposited half of the proceeds in the treasury of the State of Pennsylvania.170

At that point the Committee announced it would not proceed further in the affair, nor hear any other appeal, until its authority was settled. It referred the matter to Congress. The Congress issued, over the objections of Pennsylvania, a resolution strongly supporting theStanding Committee, stressing the need to ensure uniform application

169. Id. at 19.
170. Id. at 20.
of the law of nations in all cases of capture, and emphasizing the
supreme power of Congress to do so through a committee of its own
members.\textsuperscript{172}

The resolution had no effect. Thereafter, the Congress twice ap-
pointed a committee to confer over the deadlock with a committee of
the Pennsylvania legislature, but nothing came from it.\textsuperscript{173} Finally, af-
ter much litigation, in 1809 the Supreme Court of the United States
ruled in \textit{United States v. Peters}\textsuperscript{174} that the Standing Committee had
properly exercised its power to reverse the judgment of the Admiralty
Court of Pennsylvania and hence had extinguished any interest the
State of Pennsylvania could claim in the \textit{Active} and her cargo.

\textbf{C. The Talbot Decision on Appeal}

The High Court of Errors and Appeals of Pennsylvania decided
on January 15, 1785, that it, and not the Court of Appeals in Cases of
Capture, had jurisdiction over the appeal. There are echoes of the
affair of the \textit{Active} in its opinion.

Early in the opinion, the Court went out of its way to stress that,
except for the powers conceded to the confederation, Pennsylvania
was still a sovereign state: “This State has all the powers of Independent
Sovereignty by the Declaration of Independence on the 4th of
July, 1776, except what were resigned by the subsequent confedera-
tion dated the 9th of July, 1778, but not completed by final ratification
until the first of March 1781.”\textsuperscript{175} (emphasis omitted).

The Court then reviewed the provisions in the Articles of Con-
federation which vested in the United States the power to establish
courts for deciding all cases of capture, and the Court also reviewed
the act of Congress establishing the Court of Appeals in Cases of Cap-
ture. It pointed out at length that the jurisdiction conceded to the
Court of Appeals was not simply jurisdiction over cases of capture,
but rather jurisdiction over cases of capture “as prize.”

The Court then considered whether the three brigs had captured
the \textit{Betsey} “as prize” and decided they had not. “In fact,” the Court
said, “it was not a real but a pretended capture \textit{as prize} by them.”\textsuperscript{176}
This left open the issue whether the original taking of the \textit{Betsey} as

\begin{itemize}
\item \textsuperscript{172} Davis, \textit{supra} note 73, at 32.
\item \textsuperscript{173} Id. at 33-34.
\item \textsuperscript{174} 10 U.S. (5 Cranch) 115, 132 (1809).
\item \textsuperscript{175} \textit{Talbot}, 1 U.S. (1 Dall.) at 99.
\item \textsuperscript{176} Id. at 104.
\end{itemize}
prize by Talbot made the whole case, including the second taking of the *Betsey* by the three brigs, one of capture "as prize."

This led the Court to ask what the courts in England would say in such a situation, and to refer to *Le Caux v. Eden*, *Lindo v. Rodney*, and even the *Silesian Loan Report*. However, the Court bluntly declared that even if the English courts would call the case one of capture "as prize," it would not follow their decision because, it said, now "we have assumed our station among the powers of the earth."\(^{177}\)

In concluding that it had the right to exercise jurisdiction over the appeal because the case was not really one of capture "as prize," the Court said: "We will endeavour to promote justice, according to the intentions of the Commonwealth, conveyed in the laws; and not demit any part of her sovereignty, unless we are convinced beyond a doubt, that it is our duty to do so."\(^{178}\)

Before dealing with the issue whether it, rather than the Court of Appeals in Cases of Capture, had jurisdiction on appeal, the High Court had considered, but not resolved, the original question: whether the Court of Admiralty had jurisdiction in Talbot's case. However, it had laid down two basic propositions. First, if the case was not one of prize, the Admiralty Court would still have jurisdiction over the case as an "instance court."\(^{179}\) Second, as an instance court, the Admiralty Court would not be deprived of jurisdiction because a common law court could also exercise jurisdiction over the case.\(^{180}\)

Once the High Court had concluded it had jurisdiction over the appeal because the case was not really one of capture as prize, it had no difficulty ruling that the Admiralty Court could not have taken jurisdiction over Talbot's case as a court of prize. Thus it 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.

### D. Ellsworth's Draft

Ellsworth was a member of the Committee which reversed the decision of the Admiralty Court of Pennsylvania in the case of the *Active*. He was elected to the Committee twice.\(^{181}\) The draft of the

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177. *Id.* at 106.
178. *Id.* at 107.
179. *Id.* at 98.
180. *Id.* at 99.
act for the Court of Appeals in Cases of Capture is in his handwriting.\textsuperscript{182} It is fair to presume that he was well versed in the law of prize and well understood why the High Court of Pennsylvania would reject English cases such as \textit{Le Caux v. Eden} and \textit{Lindo v. Rodney}. These two cases had held that the court of prize had exclusive jurisdiction over anything which was related to a capture \textit{jure belli}, and by this standard the appeal in Talbot's case belonged to the Court of Appeals in Cases of Capture.

He was thus confronted with a political problem. In the second clause of his draft for Section 9 of the Judiciary Act, he was giving the federal district courts exclusive original jurisdiction over all civil causes of admiralty. The occurrence of war would automatically vest the federal district courts with exclusive jurisdiction over all cases of capture as prize, without the need for enabling legislation.\textsuperscript{183} This exclusive jurisdiction would include, under the law of prize inherited from England, any matter incidental to a capture. Hence the effect of the second clause would be to deny the courts of Pennsylvania jurisdiction over a suit brought “only” for reparation in damages of a wrong related to a capture.

I submit that in view of the political situation, Ellsworth did not want to contest the jurisdiction asserted by the High Court of Errors and Appeals of Pennsylvania over suits brought “only” for reparation in damages of a wrong related to a capture. Therefore, he chose to maintain intact the exclusive jurisdiction of the federal district courts over the legality of a capture as prize and over any claim for reparation in damages of a wrong related to the capture in the case. But so long as the legality of a capture was not in issue, and the suit was “only” for the reparation in damages of a wrong related to a capture, he would recognize the jurisdiction of the common law courts of the several states over such a suit, subject to one proviso: if the suit was brought by a foreigner, the federal district courts would have concurrent jurisdiction with the state courts.

The grant to the federal district courts of the jurisdiction they were to share with the state courts had to be expressly stated. That is what Ellsworth did in the third clause of his draft for Section 9 of the Judiciary Act. It is an elegant piece of draftsmanship, but awfully cryptic. We must assume it was understandable to persons steeped in the politics of the time, as the members of the new Congress must

\textsuperscript{182} 16 \textsc{Journals of the Continental Congress} 1774-1789, \textit{ supra} note 23, at 14, 17.

\textsuperscript{183} The \textit{Amiable Nancy}, 16 U.S. (3 Wheat.) 546, 557-58 (1818).
have been. But it was a provision manufactured for an odd situation not likely to recur in the future, and it had such a narrow political object that it would become more and more difficult to understand as time went by and political conditions changed. I do not know of any case in which the clause has been properly applied by a court.

V. POSTSCRIPT: THE PAQUETE HABANA REDEEMED

In the professional circle to which I belong, everybody is familiar with The Paquete Habana case.\textsuperscript{184} I shall proceed quickly to make a point about its language because of what I have said earlier in these pages of the law of prize.

The Supreme Court of the United States was sitting in the case as a court of prize. In so doing, it remained, of course, a court of the United States, but it was not sitting as such. In the famous words of Lord Stowell, it was sitting as "a Court of the Law of Nations."\textsuperscript{185} He meant to emphasize by these words that a court of prize never applies domestic law and applies only the law of nations and treaties, if there are any. The authorities cited or quoted in the preceding pages amply support this proposition.

The Court was searching for the rule of prize law applicable to the capture of fishing vessels. It tried to find out whether the applicable rule of prize law had been declared in a treaty, or an executive or legislative act, or in a judicial decision.\textsuperscript{186} It did not find a treaty, or an executive or legislative act, or a judicial decision, declaring the rule of prize law applicable to fishing vessels. In this situation, the only alternative was for the Court to search the customs and usages of civilized nations.

This is a far cry from concluding, as some have, such as the Eleventh Circuit Court of Appeals in Garcia-Mir v. Meese,\textsuperscript{187} that the Court was asserting it would rely on the customs and usages of civilized nations only if there was no treaty, executive or legislative act, or judicial decision to the contrary. Such a reading implies that the United States was free at any time to disregard the customs and usages of civilized nations by treaty, executive or legislative act, or judi-

\begin{itemize}
  \item \textsuperscript{184} 175 U.S. 677 (1899).
  \item \textsuperscript{185} The Recovery, 6 C. Rob. 341, 349, 165 Eng. Rep. 955, 958 (Adm. 1807).
  \item \textsuperscript{186} The Paquete Habana, 175 U.S. 677, 700 (1899).
  \item \textsuperscript{187} 788 F.2d 1446 (11th Cir. 1986).
\end{itemize}
cial decision\textsuperscript{188} and is nothing but a nonsensical construction of what the Supreme Court was actually saying in the case.

\textsuperscript{188} In \textit{Garcia-Mir}, the Eleventh Circuit interpreted \textit{The Paquete Habana} to hold that an executive decision could override customary international law. \textit{Id.} at 1453. This led the court to conclude that a directive by the Attorney General was enough to override customary international law. \textit{Id.} at 1454.
APPENDIX

Section 9 of the First Judiciary Act

And be it further enacted, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; 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; and shall also have exclusive 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; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also 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. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. 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.