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Newly Uncovered Historical Evidence of Founding
Era Observations**

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Research Working Paper Series

December 2020

HRP 21-001

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THE ALIEN TORT STATUTE AND THE LAW OF NATIONS: NEWLY UNCOVERED HISTORICAL EVIDENCE OF FOUNDING ERA UNDERSTANDINGS

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I. The Alien Tort Statute Is in the Supreme Court Once Again

Ever since the 1980 landmark decision in *Filartiga v. Pena-Irala*,¹ the federal courts have provided a judicial forum for lawsuits against human rights violators. These cases have only grown more consequential, not to mention controversial, as courts and litigators have developed new legal theories permitting suits against multinational corporations for their involvement in human rights abuses in developing countries. While the early generation of ATS cases resulted mostly in default judgments against judgment proof defendants, the same is not the case with the more recent generation of corporate cases. These defendants have deep pockets. Unsurprisingly, this development has raised the stakes of human rights litigation by several orders of magnitude.

The statutory basis for modern human rights litigation, remarkably enough, is a previously little known, and until *Filartiga* almost never used, provision of the venerable Judiciary Act of 1789, often referred to as the Alien Tort Statute (ATS).² Despite assiduous efforts, little direct evidence has been unearthed about the origin of the ATS or what the First Congress' purpose was in enacting it – or even how contemporary lawyers would have understood the way courts would implement it. This uncertainty has proved useful to opponents of *Filartiga*, who have pressed their case against human rights litigation over the past decade mostly by constructing narrow answers to these questions based on circumstantial evidence from the early history.

Until 2004, when it decided *Sosa v. Alvarez-Machain*,³ the Supreme Court left the ATS case law to develop exclusively in the lower federal courts. By that time, the ATS's use in human rights cases had become well established, and, with some equivocation, the Court in *Sosa* reaffirmed the *Filartiga* approach. The celebrations among human rights advocates, however, proved short-lived. The Court's continuing shift to the right has spelled trouble for the ATS, and, in two recent cases, the Court, while not quite killing it off, has struck serious blows to its continuing viability.

By its terms, the ATS applies exclusively to cases brought by non-U.S. citizens.⁴ In practice, most cases were suits brought by foreign victims against their foreign abusers for acts committed in foreign territory. *Filartiga* was typical in this respect, a suit by a Paraguayan torture victim's family against his Paraguayan military tormentor.

¹ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

² An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789). With minor technical modifications, the ATS is now codified in 28 U.S.C. § 1350.

³ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁴ The original § 9 provided: "[T]he 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." § 9, 1 Stat. at 77.

In *Kiobel v. Royal Dutch Petroleum Co.*,⁵ the first of its two recent decisions, the Court went far toward shutting down this globalist approach. *Contra Filartiga*, it insisted that the ATS should be interpreted in accord with a “presumption against extraterritoriality.”⁶ The Court’s aim was to limit ATS actions to cases where the human rights abuses occurred in U.S. territory or at least directly implicated (“touched and concerned”) the United States.⁷ That ruling was manifestly intended to shut down what had been the main genre of cases under the ATS. In *Jesner v. Arab Bank, PLC*,⁸ the second case, the Court went an important step further, ruling that the ATS does not provide for foreign corporations’ liability, thus eliminating much of whatever was left of the second generation of ATS cases.

The ATS is now once again before the Court. The most recent case, *Doe v. Nestle*, which focuses on allegations that the defendants’ facilitated child slave labor practices in Sierra Leone, threatens to finish off whatever of *Filartiga* is still standing. The critical difference between *Doe*, on the one hand, and *Kiobel* and *Jesner*, on the other, is that the corporate defendants are U.S., not foreign, corporations. There are two principal issues, first, whether *Kiobel*’s presumption against extraterritoriality applies even when the defendants are U.S. nationals and, second, whether the *Jesner* Court’s rejection of corporate liability applies to U.S. as well as foreign corporations. I address the first issue here. It is the discovery of hitherto unknown and highly probative early historical precedents about the meaning and purposes of the ATS that prompts this essay.

Preliminarily, it is important to appreciate what is at stake in *Doe*. The desirability of the U.S. courts’ being available as judicial forums for the enforcement of human rights standards globally is at least debatable. For example, should ATS litigation be viewed as a laudable effort to improve human rights practices around the world, or is it another example of U.S. imperialism, in this instance being implemented through the judiciary? Given the problematic nature of U.S. human rights practices, is it unduly hypocritical for the U.S. courts to assume the role of judging foreign governments and their officials for their human rights defaults?

Whatever answers one might give to these questions, the issue in *Doe* is importantly different. The fundamental question before the Court is not whether U.S. courts will hold foreign human rights abusers accountable but whether they will hold U.S. human rights abusers accountable for what they do in other countries. The answer the Court gives to that question will go far in defining how the nation conceives of its fundamental moral commitments as a member of the international community of nations.

II. U.S. National Defendants, the Presumption against Extraterritoriality, and the Core Purposes of the ATS

In *Kiobel*, the Supreme Court recognized that a core purpose of the ATS was to prevent the United States from being held to account for the tortious actions of its citizens in violation of the law of nations.⁹ Under the law of nations, a state was required to take proper steps to disavow offenses

⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁶ *Id.* at 115-16.

⁷ *Id.* at 124-25.

⁸ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

⁹ *Kiobel*, 569 U.S. at 123-24. *See also Jesner*, 138 S.Ct. at 1396-97 (attributing the same purpose to the ATS). The Court seems to have concluded that this was not only a core, but also the exclusive purpose of the ATS. Some scholars have as well. *See, e.g.*, Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of*

against the law of nations committed by its citizens. If it failed to do so – for example by declining to prosecute the individual offenders – it could be held responsible for their offenses by the nation whose subjects were injured. As Vattel explained, “[t]he sovereign who refuses to cause reparation to be made for the damage done by his subject, or to punish the offender, or, finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.”¹⁰

In two notorious incidents during the Confederation, discussed in *Kiobel*, the United States learned this lesson the hard way. Both involved breaches of the rights of foreign Ambassadors under law of nations, and in each case, the Confederation was seriously embarrassed by its inability to bring prosecutions against the individuals responsible for the violations.¹¹ The main aim of the ATS was to rectify this potentially dangerous lacuna in federal power. In § 9 of the Judiciary Act of 1789, Congress empowered the federal courts to hear civil suits by aliens for torts in violation of the law of nations committed by American citizens and thereby signal to foreign nations its disavowal of their wrongful actions.¹²

Nor was the ATS unique in this respect. The same imperative to avoid diplomatic responsibility to foreign powers for the unlawful acts of American citizens was at the root of the Constitution’s Offenses Clause, which granted Congress the power “[t]o define and punish . . . Offences against the Law of Nations.”¹³ Indeed, the Offenses Clause was almost surely the constitutional basis for the ATS, as it was for many of the crimes included in the Crimes Act of 1790, including various statutory offenses against foreign diplomats in the United States.¹⁴

Likewise, during the Neutrality Crisis of 1793, violations of neutrality committed by Americans who joined French military campaigns against Great Britain threatened to drag the United States into the burgeoning European conflict prompted by the French Revolution. To avoid that eventuality, President Washington issued his famous 1793 Neutrality Proclamation,¹⁵ in accordance with which the

[Nations](#), 78 U. CHI. L. REV. 445 (2011). Whether that is accurate as an historical matter I do not explore here but leave for another day.

¹⁰ 2 EMMERICH DE VATTTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS bk. 2, § 77 (London, J. Newberry et al. 1759). This understanding was pervasive in the law of nations literature at the time. See also, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *68 (1769).

¹¹ See *Kiobel*, 569 U.S. 108 at 120. See also *Sosa*, 542 U.S. at 716-17.

¹² See An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789) (providing the lower federal courts with “cognizance” over suits in which “an alien sues for a tort only in violation of the law of nations.”

¹³ U.S. CONST. art. I, § 8, cl. 10.

¹⁴ An Act for the Punishment of certain Crimes against the United States, ch. 9, §§ 25-28, 1 Stat. 112, 117-18 (1790).

¹⁵ George Washington, Neutrality Proclamation(1793), 1 American State Papers: Foreign Relations 140 (1832), 11 Stat. 753, reprinted in 12 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 472-74 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005) [hereinafter 12 WASHINGTON PAPERS] (declaring “that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the modern usage of nations, will not receive the protection of the United States, against such punishment or forfeiture: and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations, with respect to the powers at war, or any of them”).

Administration quickly instituted non-statutory prosecutions against those who were thus violating the law of nations.¹⁶ In 1794, Congress, again acting under the Offenses Clause, reinforced Washington's policy by enacting the Neutrality Act of 1794, which codified a number of such offenses.¹⁷

Nor was the Offenses Clause the only constitutional provision that reflected this imperative. Perhaps the most important at the Founding was Article III's Admiralty jurisdiction, which included federal jurisdiction over prize cases. During wartime, all "civilized" nations maintained Prize Courts, the purpose of which was to ensure that naval officers and commissioned privateers did not overstep the law of nations and offend neutral powers, giving them a just cause of war. When they captured neutral merchant vessels on the high seas, naval officers and privateers earned large bounties in the form of prize monies, which they shared with their crews. The financial incentives that this method of warfare generated greatly increased the risk of illegal captures. To avoid provoking conflict with neutral nations, Prize Courts held out the promise that the law of nations would be administered fairly by belligerents; illegal captures declared "no prize;" restitution of the captured ships and cargo granted; and, in cases where there was no probable cause for the capture, damages against the officers and privateers awarded.¹⁸

The ATS was thus only one of a number of legal mechanisms and rules designed to ensure that the U.S. government would not be held responsible for the violations of the law of nations committed

¹⁶ See *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (prosecution of U.S. citizen for serving on a French privateer attacking British shipping on the high seas). See also *id.* at 1103 (quoting Jay, C.J., Grand Jury Charge) (observing that "whoever shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding or abetting hostilities forbidden by his country, ought to lose the protection of his country against such punishment or forfeiture. But this is not all, it is not sufficient that a nation should only withdraw its protection from such offenders, it ought also to prosecute and punish them"); *id.* at 1108 (quoting Wilson, J., Grand Jury Charge) (observing that although "[i]t is impossible indeed that even in the best regulated state, the government should be able to superintend the whole behaviour of all the citizens and to restrain them within the precise limits of duty and obedience . . . [but w]hen the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made, or should punish him according to the measure of his offence. If the nation refuse to do either, it renders itself in some measure an accomplice in the guilt, and becomes responsible for the injury. To what does this responsibility lead? To reprisal certainly, and if so, probably to war").

¹⁷ See Neutrality Act of 1794, ch. 50, 1 Stat. 381 (1794). Some scholars have denied that the constitutional source of the Neutrality Act was the Offenses Clause, but that claim is unsustainable. See Alex H. Loomis, *The Power to Define Offenses Against the Law of Nations*, 40 HARV. J. L. & PUB. POL. 417, 449-61 (2017).

¹⁸ See U.S. CONST. art. 3, § 2, cl. 1 (extending the judicial power to all Cases of admiralty and maritime Jurisdiction"). For the first affirmation of the federal court's prize jurisdiction, see *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794). On the history of Prize Courts, see PHILIP C. JESSUP & FRANCIS DEÁK, NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW (1935).

Alien diversity jurisdiction is another important example, granting foreign nationals access to the federal courts to seek relief for injuries caused by U.S. citizens. See U.S. CONST. art. 3, § 2, cl. 1 (extending the judicial power to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"). As Alexander Hamilton explained in *Federalist No. 80*, the framers went beyond simply granting the federal courts jurisdiction over cases arising under treaties and the law of nations, and extended the judicial power to include all cases in which an alien was a party, because it was "at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations." THE FEDERALIST NO. 80, at 534, 536 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For further discussion, see *infra* text accompanying notes 72-76.

by its citizens. It is in light of this understanding of the purpose of the ATS that the presumption against extraterritoriality, recognized in *Kiobel*, should be interpreted and applied. In *Kiobel*, the defendants were foreign corporations with limited contacts in the United States – they had “mere corporate presence” in the United States¹⁹ – and the actions for which they were sued had little or no connection to this nation. There was thus no ground on which the United States could be charged with responsibility for the violations of the law of nations the defendants had allegedly committed. For this reason, the Court’s ruling that the presumption precluded jurisdiction under the ATS was consistent with the core purpose of the ATS as the Court had interpreted it.

The *Doe* case is strikingly different, because the corporate defendants are U.S. entities. In contrast to *Kiobel*, therefore, the tortious breaches of the law of nations alleged in the plaintiffs’ complaint, unless properly disavowed, could be attributed to the United States and cause the nation diplomatic embarrassment or worse. The case therefore fits squarely within the core of the ATS, which was to ensure that the United States would not be charged with complicity in violations committed by its nationals.²⁰

In a case of this kind, the presumption against extraterritoriality is properly “displaced,” and nothing in *Kiobel* suggests the contrary.²¹ Indeed, in applying the presumption, the Court was keen both to review the context in which the statute was adopted, and the early understandings as to its scope, to ensure that application of the presumption was consonant with the Act’s purposes. “[T]he historical background against which the ATS was enacted,” the Court reasoned, was plainly relevant in determining whether the presumption was applicable, and, as the Court in *Morrison* had observed, “[a]ssuredly context can be consulted’ in determining whether a cause of action applies abroad.”²² The *Kiobel* Court then devoted the bulk of its opinion to considering the relevant early history.

Nothing in the Act’s language, nor its purpose, suggests that, when the tortfeasor was a U.S. national for whose actions the United States might be charged with responsibility, Congress was concerned about where the actions took place. It was irrelevant whether the wrongful act was committed in U.S. territory, on the high seas, or in the territory of a foreign nation. For example, *circa* 1789, whether a U.S. citizen committed an offense against the law of nations in the United States, or only after crossing the border into East Florida, then Spanish territory, would have made no difference. If the United States failed to disavow the conduct by prosecuting the wrongdoer or providing a judicial forum in which civil liability could be imposed, it would have generated the same potential for diplomatic controversy.

III. Newly Discovered Precedents Make Clear that the ATS Was Intended to Make Relief Available to Aliens for Extraterritorial Tortious Violations of the Law of Nations by U.S. Citizens

¹⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 125 (2013).

²⁰ To be sure, it is unlikely that the Ivory Coast will protest a failure by the United States to hold the corporate defendants to account. But human rights obligations are owed to all countries in the world, and can be raised diplomatically by any of them, as well as by international organizations like the United Nations and its various organs and committees with jurisdiction over human rights practices.

²¹ *Kiobel*, 569 U.S.

²² *Id.* at 119 (quoting *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 265 (2010)).

The paucity of direct evidence about the original meaning of the ATS has hampered the ability of scholars and courts to interpret its scope, including most importantly its application to extraterritorial violations of the law of nations. The most probative early precedent on this point until now has been a 1795 opinion by Attorney-General William Bradford.²³ The issue he was asked to address arose out of a coordinated attack by a French fleet, aided by two U.S. citizens, on a British colonial settlement in Sierra Leone. It was agreed on all sides that the U.S. citizens had acted in violation of U.S. neutrality and had thereby committed a tortious breach of the law of nations. Bradford, moreover, unequivocally stated that the British victims would be entitled to sue under § 9 of the Judiciary Act.²⁴

Nevertheless, in *Kiobel*, the Supreme Court concluded that Bradford's brief opinion was too ambiguous to stand as reliable evidence of the original understanding of the ATS on the question of extraterritoriality. Perhaps, the Court suggested, Bradford had rested his conclusion on an outstanding treaty between the United States and Great Britain rather than on a violation of the unwritten law of nations. As a result, "Attorney General Bradford's opinion defies a definitive reading" and "hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality."²⁵

In fact, however, the Bradford opinion is neither the earliest nor the most probative evidence of the original understanding of the ATS in this respect. I have uncovered hitherto overlooked opinions written during the first Washington Administration by two leading officials – Thomas Jefferson, then serving as the nation's first Secretary of State, and Edmund Randolph, then serving as the first Attorney-General – which are directly relevant to the extraterritoriality issue before the Court. Two incidents presented the issue squarely in 1792 and provoked both Jefferson and Randolph to offer official opinions on the matter, making clear that extraterritorial acts *by U.S. citizens* were covered by the ATS.

The first incident arose in the context of border tensions between South Carolina and Georgia, on the one hand, and the Spanish Authorities in neighboring East Florida, on the other. Not only persons held in slavery, but also fugitives who had committed criminal offenses, sometimes escaped over the southern border, seeking refuge in Spanish Florida. The resulting acrimony prompted diplomatic controversy between U.S. and Spanish authorities and numerous efforts to resolve the problem.²⁶ The issue recurred in late 1791 when three Georgians crossed into East Florida and forcibly removed five enslaved persons, carrying them back to Georgia.²⁷

²³ See *Breach of Neutrality*, 1 *Op. Att'y. Gen.* 57 (1795). For extended discussion of the Bradford opinion, see Curtis A. Bradley, *Agora: Kiobel: Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 *AM. J. INT'L L.* 1 (2012).

²⁴ *Breach of Neutrality*, *supra* note 23, at 59 (asserting that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *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").

²⁵ *Kiobel*, 569 U.S. at 123.

²⁶ See *Threat of Disunion in the West: Editorial Note*, reprinted in 19 *THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION* 429-36 (James P. McClure & J. Jefferson Looney eds. 2008-20).

²⁷ See Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson (June 26, 1792), in 24 *THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION* 129-31 (James P. McClure & J. Jefferson Looney eds. 2008-20) [hereinafter 24 *JEFFERSON PAPERS*]. See also Letter from Thomas Jefferson to Edward Telfair (July 3, 1792), in 24 *JEFFERSON PAPERS*, *supra* at 155.

The second incident arose out of the conduct of a U.S. merchant ship in a French port in St. Domingo, whose shipmaster allegedly enticed some enslaved persons onboard the ship with promises of work and then brought them to the United States for sale as slaves.²⁸

Both Spain and France lodged diplomatic protests against the United States for these alleged violations of the law of nations, which were committed within their territory, and both sought redress for their injured subjects. These complaints presented an issue about which Jefferson clearly felt considerable anxiety, as was reflected in the forceful way in which he responded. He quickly replied to the diplomatic note from Spanish officials to provide assurances “that due enquiry shall be immediately made into the transaction, and that every thing shall be done on the part of this government which right shall require, and the laws authorize.”²⁹ He simultaneously brought the incident to the attention of the Governor of Georgia, informing him that the actions of the Georgians involved were “in violation of the rights of that state [*i.e.*, Spain] and the peace of the two countries.”³⁰ He then pointedly reminded the Governor of the importance of what was at stake: “Nobody knows better than your Excellency,” he observed, “the importance of restraining individuals from committing the peace and honor of the two nations.”³¹ He was, moreover, “persuaded that nothing will be wanting on your part to satisfy the just expectations of the government of Florida on the present occasion.”³²

In response to the French diplomatic note complaining of the incident in Martinique, Jefferson similarly expressed the “real concern” of the American government “that such an act should have been committed by one of our citizens.”³³ He then assured the French Minister that the government “shall lend to the agent of the parties injured, every aid which the laws permit.”³⁴ Indeed, he informed the Minister that he had obtained the opinion of the Attorney General on the legal relief available and had directed the U.S. District Attorney in Georgia, where the offender was located, to institute appropriate legal proceedings. “I presume I cannot better dispose of this letter than by committing it through you to the agent of the sufferers,” he added, who “will concert with the Attorney of the district the proceedings necessary for procuring indemnification to the persons he represents and for inflicting due punishment on the offender.”³⁵

²⁸ See Letter from Thomas Jefferson to Jean Baptiste Ternant (Nov. 9, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 603.

²⁹ Letter from Thomas Jefferson to Josef Ignacio de Viar and Josef de Jaudenes (July 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 156.

³⁰ Letter from Thomas Jefferson to Edward Telfair (July 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 156.

³¹ *Id.*

³² *Id.* By the time Jefferson wrote him, Governor Telfair had already taken steps to investigate the matter. See Letter from Edward Telfair to Thomas Jefferson (Aug. 21, 1792), reprinted in 24 JEFFERSON PAPERS, *supra* note 27, at 312; Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson (June 26, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 130-31. Unfortunately, the results of that investigation, conducted by the state Attorney-General, have been lost. See Letter from Edward Telfair to Thomas Jefferson (Aug. 21, 1792), reprinted in 24 JEFFERSON PAPERS, *supra* note 27, at 312.

³³ Letter from Thomas Jefferson to Jean Baptiste Ternant (Nov. 9, 1792), reprinted in 24 JEFFERSON PAPERS, *supra* note 27, at 603.

³⁴ *Id.*

³⁵ *Id.* See also Letter from Thomas Jefferson to Matthew McAllister (Nov. 9, 1792), reprinted in 24 JEFFERSON PAPERS, *supra* note 27, at 599. For Attorney-General Randolph’s brief opinion on the issue, see Edmund Randolph’s Opinion on the Theft of Slaves from Martinique (Nov. 1, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 551.

These incidents brought to Jefferson's attention the whole question of offenses against the law of nations committed by U.S. citizens in foreign countries and led him to analyze the options for legal redress that U.S. law made available to assuage the concerns of foreign governments.

In a memorandum dated December 3, 1792 and entitled *Opinion on Offenses against the Law of Nations*,³⁶ Jefferson considered both the constitutional power of the federal government over these offenses and the extent to which existing law already provided avenues for redress. As to the first, in his view, the only power over the subject was found in the Offenses Clause, which authorizes Congress "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations."³⁷ Because the offenses complained of were not committed on the high seas, he noted, they were neither piracy nor felonies on the high seas. As to whether they amounted to offenses against the law of nations, in contrast, he was not entirely certain. He inclined toward believing they were, at least when "the law of nations [was] taken as it may be in its whole extent, as founded, 1st. in nature 2. usage. 3. convention," and, moreover, because, "when it is considered, that unless the offenders can be punished under this clause, there is no other which goes directly to their case, and consequently our peace with foreign nations will be constantly at the discretion of individuals."³⁸ At a minimum, he argued, Congress ought to adopt such a law and leave it to the judiciary to make a final determination as to the scope of its powers.³⁹

As to how far Congress had already exercised its authority over these offenses, Jefferson maintained that it had done so only partially and not adequately. On the one hand, he observed that there was no applicable statute granting the federal courts criminal jurisdiction over offenses against the law of nations committed by U.S. citizens in foreign territory. "I find nothing else in the law applicable to this question, and therefore presume the case is still to be provided for, and that this may be done by enlarging the jurisdiction of the Courts, so that they may sustain indictments and informations on the public behalf, for offences against the law of nations."⁴⁰

In contrast, citing the ATS, Jefferson found that Congress had in fact provided for civil liability instead of criminal liability. "The [act of 1789](#), c. 20 §.9, says," he noted, that "the district Courts 'shall have cognizance concurrent with the Courts of the several States, or the Circuit Courts, of all causes, where an *alien sues for a tort only*, in violation of the law of nations.'"⁴¹ Unfortunately, even this provision for extraterritorial liability was not fully adequate, he observed, because there may be cases in

³⁶ See Thomas Jefferson, *Opinion on Offenses against the Law of Nations* (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 693. The title appears in the Jefferson Papers. See *id.* In organizing his papers, Jefferson subsequently titled the opinion "Opn. as to defect of law on crimes commd in for. countries." *Id.* at 695.

³⁷ *Id.* at 694.

³⁸ *Id.*

³⁹ See *id.* (observing "that the [Legislators](#) ought to send the case before the judiciary for discussion"). This aspect of Jefferson's opinion – as well as the opinion of Attorney-General Randolph discussed below – are also pertinent to continuing scholarly debates over the early understanding of the Offenses Clause, but I cannot pursue this issue here. For further discussion, see *infra* notes 54-55 and accompanying text.

⁴⁰ Thomas Jefferson, *Opinion on Offenses against the Law of Nations* (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 695. Notably, in response to Attorney-General Randolph's subsequent contrary opinion on this point, Jefferson revised his memorandum to acknowledge the force of Randolph's argument. See *id.*; *infra* text accompanying notes 50-51, 64, 82-89.

⁴¹ Thomas Jefferson, *Opinion on Offenses against the Law of Nations* (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 694 (emphasis in original) (*quoting* § 9 (*i.e.*, the ATS) of the Judiciary Act).

which U.S. citizens commit extraterritorial offenses against the law of nations but the injury is solely to the offended nation. Without an injured alien who could bring a suit for the tort, the United States would be unable to shield itself from diplomatic complaint. “[B]ut what if there be no alien,” he queried, “whose interest is such as to support an action for the tort?”⁴² Indeed, that was “precisely the case of the aggression on Florida.”⁴³ Hence, a criminal statute was necessary: “[T]he thing desired,” he declared, was not only the ATS’ grant of a civil right of action “to an individual for the special tort,” but also an additional act giving the federal courts “cognizance of proceedings by way of indictment or information against offenders under the law of nations, for the public wrong, and on the public behalf.”⁴⁴

Jefferson thus unambiguously affirmed in his December 3 memorandum that the ATS applied to the extraterritorial torts committed by U.S. citizens. Moreover, he provided his memorandum to Attorney-General Randolph for his review, in response to which, on December 5, Randolph wrote his own memorandum agreeing with Jefferson’s interpretation of the ATS, although disagreeing with other aspects of Jefferson’s memorandum.⁴⁵ Randolph spoke with considerable authority in this regard. He had not only played a prominent role in both the Philadelphia and the Virginia Ratifying Conventions, but had also previously undertaken an exhaustive study of the Judiciary Act of 1789 at the request of Congress, about which he had reported in a lengthy memorandum.⁴⁶

In his December 5 memorandum, Randolph followed Jefferson’s lead in considering the legal options available for providing satisfaction to Spain and France for the offenses about which they complained. One possibility was to extradite the offenders, but, Randolph noted, U.S. law provided no

⁴² *Id.*

⁴³ *Id.* Jefferson did not explain why the individual from whom the enslaved individuals were taken would not have been able to sue for the tort, and the answer is not entirely clear. It may be that the individual was in fact an American citizen and, hence, ineligible to bring suit under the ATS. His name, John Blackwood, so suggests, as does the fact that the Georgians who stole his human property apparently claimed to have done so to collect on a debt, which, it might be supposed, Blackwood had contracted in Georgia. See Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson (June 26, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 130. Perhaps, Blackwood was himself a fugitive who had crossed into East Florida to escape his debts. On the other hand, the Spanish diplomatic note claimed that Blackwood was a Spanish subject, and Jefferson does not appear to have questioned that point. See *id.*; Letter from Thomas Jefferson to Edward Telfair (July 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 155.

Alternatively, and more likely, Jefferson may have believed that Blackwood was unlikely to prevail on a claim that the taking of the enslaved individuals for a bona fide debt amounted to an actionable tort under the ATS. See Forrest M. Hemke, *The Forcible Collection of a Debt*, 11 WASH. U. L. REV. 125 (1926) (surveying common law rule permitting forcible collection of debts). Perhaps, the only viable offense against the law of nations was, rather, the violation of Spanish territorial sovereignty, about which only Spain, not Blackwood, could complain – and about which it was complaining. The limited nature of the ATS suit, combined with the absence of an available criminal remedy, therefore, meant that the offense to Spain would go un-remedied, embarrassing the United States and undermining its friendly relations with a neighboring power.

⁴⁴ Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 693.

⁴⁵ See Edmund Randolph’s Opinion on Offenses against the Law of Nations (Dec. 5, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 702.

⁴⁶ See EDMUND RANDOLPH, REPORT OF THE ATTORNEY GENERAL TO THE HOUSE OF REPRESENTATIVES (1790), *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, 127, 130–31 (Maeva Marcus et al. eds., 1992).

basis upon which such a surrender could be made.⁴⁷ Nor did he believe that Congress ought, “considering the circumstances of our country,” to provide “for the surrender of malefactors, sheltered in the U.S.”⁴⁸

Randolph next observed that although the ordinary criminal jurisdiction of the United States did not extend to punishing crimes committed in the territory of other nations, the case was different with respect to offenses against the law of nations. The federal courts did have “cognizance” of offenses against the law of nations committed extraterritorially because “that law [*i.e.*, the law of nations] is attached to the U.S. from the nature of the subject, without an express adoption of it.”⁴⁹ Moreover, Congress had granted jurisdiction over such cases in § 11 of the Judiciary Act, “because offences, cognizable under the authority of the U.S. are clearly subjected by the judicial law to the circuit court.”⁵⁰ Jefferson was thus mistaken in believing that the circuit courts were without jurisdiction over the offenses in question.⁵¹

Most critically, Randolph agreed with Jefferson that the ATS provided jurisdiction for civil tort suits in extraterritorial cases of this kind. “*Civiliter*, [] damages may be recovered in the courts of the U.S., under the jurisdictions established by the judicial law, if an alien be a party.”⁵² As Jefferson had maintained, it was thus of no moment that the torts were committed in the territory of another nation. Notwithstanding any presumption against extraterritoriality, the ATS was fully applicable.

Finally, in light of his analysis, Randolph considered whether, as Jefferson had suggested, any further congressional legislation was necessary. Contrary to Jefferson’s analysis, because the federal courts already had adequate jurisdiction over extraterritorial criminal offenses, further legislation was

⁴⁷ See Edmund Randolph’s Opinion on Offenses against the Law of Nations (Dec. 5, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 702.

⁴⁸ *Id.* at 703. In this respect, he was reflecting views expressed by Jefferson elsewhere.

⁴⁹ *Id.* at 702-03.

⁵⁰ *Id.* at 703. Section 11 provided that the circuit courts “shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States.” An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78-79 (1789)

⁵¹ See Edmund Randolph’s Opinion on Offenses against the Law of Nations (Dec. 5, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 703. In response to this point, Jefferson supplemented his own memorandum, acknowledging that he had been in error. He nevertheless was still not fully satisfied that § 11 was sufficient, because it “removes the difficulty [] but one step further. For questions then arise 1. what is the peculiar character of the offence in question, to wit, treason, felony, misdemeanor or trespass? 2. what is its specific punishment, capital or what? 3. whence is the venue to come?” Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 695.

⁵² Edmund Randolph’s Opinion on Offenses against the Law of Nations (Dec. 5, 1792), in 24 Jefferson Papers, *supra* note 27, at 702. Randolph’s reference was to the, plural, “jurisdictions” granted in the Judiciary Act. In context, it is likely that he had in mind not only the ATS, on which Jefferson had focused, but also alien diversity jurisdiction, which § 11 had likewise granted, albeit with an amount in controversy requirement. See § 11, 1 Stat. at 78 (providing cognizance over all civil suits where the amount in controversy exceeded \$500 and “an alien is a party”). Hence, his assertion that under the “jurisdictions” granted in the Judiciary Act, damages relief would be available. Depending on the case, either basis of jurisdiction might suffice. Randolph went on to note that only the state courts would be available “if both plaintiff, and defendant be citizens.” Edmund Randolph’s Opinion on Offenses against the Law of Nations (Dec. 5, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 702. Because the potential defendants in both the Florida and the Martinique incidents were U.S. citizens, it seems likely that Randolph offered this observation because, notwithstanding the Spanish diplomats’ assertion that Blackwood was a Spanish subject, the U.S. courts might rule differently, making both ATS and alien diversity jurisdiction unavailable.

unnecessary in this respect. At the same time, consistent with Jefferson's view, because the ATS granted the federal courts adequate jurisdiction over extraterritorial civil suits, legislative reform was unnecessary in that respect as well.⁵³ In Randolph's view, there was only one respect in which Congress might be advised to consider extending the jurisdictional status quo. Referencing Jefferson's concern about whether the acts complained of qualified as offenses against the law of nations, Randolph suggested that Congress, invoking its power to "define" such offenses, might wish to make clear that the kinds of acts in question should be considered as qualifying: Congress had no need to act, he advised, "unless it be, to define explicitly those acts, which perhaps may not be absolutely offences against the law of nations, and yet are injurious to our harmony with foreign nations; if any such there be."⁵⁴

Although prompted by the East Florida and Martinique incidents, it is evident from their focus on the necessity for additional legislation that Jefferson and Randolph wrote their memos with a larger agenda in mind. In fact, Jefferson's growing concerns about the problem of extraterritorial violations of the law of nations led him, as early as October 15, to urge Washington to include a passage raising the issue in his annual message to Congress.⁵⁵ Accordingly, the President's November 6 message, in

⁵³ See Edmund Randolph's Opinion on Offenses against the Law of Nations (Dec. 5, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 702-03 (concluding "[n]or can [Congress'] interposition be necessary").

⁵⁴ *Id.* at 703. As previously noted, Randolph's opinion, like Jefferson's, although not entirely consistently, sheds significant light on the early understanding of the Offenses Clause. See *supra* note 39 and accompanying text; *infra* note 55.

⁵⁵ See Thomas Jefferson, Paragraphs for the President's Annual Message to Congress (Oct. 15, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 486. Although he had already dealt with the East Florida incident by this time, Jefferson was not yet aware of the Martinique incident. He only received the French Minister's diplomatic note complaining of the incident on October 27. See Letter from Thomas Jefferson to Edmund Randolph (Oct. 28, 1792), reprinted in 24 JEFFERSON PAPERS, *supra* note 27, at 540 (noting, in editorial comment, that the French Minister's letter was received on October 27 and "recorded in SJL as received the same day, but not found"). Evidently, this new incident brought the whole issue back to Jefferson's mind – and powerfully amplified his concerns – leading him on November 1 to write a revised passage strengthening his earlier draft. See Thomas Jefferson, Revised Paragraph for the President's Annual Message to Congress (Nov. 1, 1792), reprinted in 24 JEFFERSON PAPERS, *supra* note 27, at 552; Thomas Jefferson, Paragraphs for the President's Annual Message to Congress (Oct. 15, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 486-87 (editorial note discussing "the circumstances which gave rise to TJ's emphasis on the need to restrain American citizens from violating the territorial integrity of other nations"). (It was Jefferson's revised language that was included in the President's November 6 annual message. See *id.* at 486). Perhaps, as well, Jefferson was not comforted by the memorandum he received the same day from Randolph, which characterized the offending Captain's conduct as either a "theft" or "piracy." Randolph's Opinion on Theft of Slaves from Martinique (Nov. 1, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 551. As to the latter, moreover, Randolph imagined that "it may prove, when the precise place of its commission shall be fixed, to be of a merely municipal kind." *Id.* In other words, it was Randolph's view (at least implicitly) that neither offense would constitute an offense against the law of nations and thus justify an exercise of extraterritorial criminal jurisdiction. It was likely this aspect of Randolph's memorandum that convinced Jefferson to suggest somewhat boldly in his December 3 memorandum that Congress should embrace a broad interpretation of its powers under the Offenses Clause and leave the constitutional validity of its act to the courts for their ultimate judgment. See Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 694. "[W]hen it is considered, that unless the offenders can be punished under this clause," he pleaded, "there is no other which goes directly to their case, and consequently our peace with foreign nations will be constantly at the discretion of individuals." *Id.* For further discussion, see *supra* text accompanying notes 37-39; *infra* text accompanying note 81. (Note, by the time he wrote his December 3 memorandum, Jefferson had apparently concluded – perhaps based on correspondence that is no longer extant – that the Martinique incident did not qualify as piracy. See *supra* text accompanying note 38).

language drafted by Jefferson, urged Congress, “by timely provisions, to guard against those Acts of our own Citizens, which might tend to disturb [the peace with other nations], and to put ourselves in a condition to give that satisfaction to foreign nations which we may sometimes have occasion to require from them.”⁵⁶ The message “particularly recommend[ed] to [Congress’] consideration the means of preventing those aggressions by our Citizens on the territory of other Nations, and other infractions of the law of Nations, which, furnishing just subject of complaint, might endanger our peace with them.”⁵⁷

In response, Oliver Ellsworth, the Chairman of the Senate Judiciary Committee, wrote Jefferson on December 4, scheduling a meeting between Jefferson and the Committee for December 6. In his note, Ellsworth, who was not only a leading Founder but the key author of the Judiciary Act,⁵⁸ expressly asked Jefferson to discuss the quoted passage from President Washington’s annual message.⁵⁹ In thus pursuing the issue raised by Washington, Ellsworth was almost certainly executing a charge from the Senate to the Committee to investigate the matter and report back its findings and recommendations.⁶⁰ Indeed, it was Congress’ customary practice to proceed in that fashion in responding to the President’s annual messages.⁶¹

Strikingly, by the next day, Jefferson must have felt a bit awkward about the upcoming meeting. At the time he drafted the language for Washington’s message, he had been concerned about the lack of a statutory basis for the jurisdiction of the federal courts to impose criminal punishments on violators of the law of nations. In his December 3 memorandum, despite his confidence that the ATS imposed civil liability for such extraterritorial “aggressions,” he remained concerned about the perceived lack of a separate grant of criminal jurisdiction. Indeed, on the same day he wrote his December 3

⁵⁶ George Washington, Address to the United States Senate and House of Representatives (Nov. 6, 1792), *reprinted in* 11 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 342, 345-46 (Christine S. Patrick ed. 2002).

⁵⁷ *Id.* at 346.

⁵⁸ Evidently, Ellsworth had also personally drafted the ATS. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719 & n.13 (2004). Moreover, he was a member of the Continental Congress that adopted a 1781 resolution urging the states to enact legislation both punishing offenses against the law of nations and providing for civil relief for injured parties, and a member of the Connecticut legislature that adopted in response a statute on which the ATS seems to have been modeled. *Id.* at 716, 719. He was also, of course, later to become Chief Justice of the Supreme Court.

⁵⁹ See Letter from Oliver Ellsworth to Thomas Jefferson (Dec. 4, 1792), *in* 24 JEFFERSON PAPERS, *supra* note 27, at 698. In his brief note to Jefferson, Ellsworth explained that the purpose of the meeting was for the Committee to receive from Jefferson “information relative to that part of the [President’s speech](#) at the opening of the session which alludes to ‘aggressions by our citizens on the territory of other nations and other [infractions of the law of Nations.](#)’” *Id.* Notably, that was the only subject for the meeting that Ellsworth mentioned.

⁶⁰ Unfortunately, the surviving records of the Senate’s early proceedings, reprinted in the *Annals of Congress*, are sketchy and do not record the Senate’s action. Nevertheless, as was customary, in their Address to the President of the United States in answer to his Speech, the Senate assured Washington that it would “take into consideration the several objects you have been pleased to recommend to our attention.” 1 ANNALS OF CONG. 612 (1789) (Joseph Gales & William Winston Seaton eds., 1849). Similarly, in its Address, the House promised that the “matters which you have communicated and recommended, will, in their order, receive the attention due to them.” *Id.* at 678.

⁶¹ Both Houses had proceeded similarly in response to Washington’s previous annual messages, charging various Committees with responsibility for investigating Washington’s recommendations and reporting back their findings.

memorandum, he also drafted a proposed statute to fill in the gap in statutory law he had identified.⁶² Notably, he did not include any language providing for civil, as opposed to criminal, liability.⁶³

Nevertheless, Jefferson's perspective shifted dramatically after he received Randolph's December 5 memorandum, in which Randolph maintained that §11 of the Judiciary Act had indeed included a grant of precisely the criminal jurisdiction that Jefferson believed was missing. Jefferson was convinced, writing in an Addendum to his memorandum: "On further examination it does appear that the 11th. section of the judiciary act above cited gives to the Circuit courts exclusively cognizance of all crimes and offences cognizable under the authority of the U.S. and not otherwise provided for."⁶⁴ At this stage, having recognized his own error on the key point, Jefferson may well have regretted his earlier determination to include the issue in Washington's message and wondered how the Judiciary Committee would react upon learning that he no longer believed legislation was necessary.⁶⁵

There is no surviving historical record reporting what transpired in the scheduled meeting. Given the Committee's charge, it seems inevitable that the Committee members would have inquired into the legal basis for the President's concerns and that Jefferson, in turn, would have outlined the analyses detailed in his December 3 (with its Addendum) and Randolph's December 5 memos. The Committee, in turn, would have reported to the Senate on its findings. Viewed in context, the fact that the meeting did not prompt further legislation in the Senate suggests that not only the Washington Administration but also Oliver Ellsworth, the Senate Judiciary Committee, and perhaps even the Senate, were in accord on these critical points. Under these circumstances, to limit the scope of liability of U.S. nationals under the ATS to violations committed within the territory of the United States would be to flout the evident intention of Congress.

IV. The Jefferson and Randolph Memoranda Also Demonstrate the Original Understanding that the Law of Nations – aka, Customary International Law – Was Incorporated by the Constitution into the Law of the United States

Beyond their implications for the ATS, the Jefferson and Randolph opinions provide insights into the early understanding of other important constitutional matters. I can only focus here on one of the most salient issues, leaving a fuller discussion of the others to await the completion of a larger project on the subject.

⁶² See Thomas Jefferson, Clause for Bill on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 693 (proposing new statute providing "that wherever any offence against the law of Nations, for which no act of Congress hath yet presented specific punishment, shall be committed by a citizen of the U.S. the same shall be cognisable before the Circuit courts on presentment or information and indictment").

⁶³ See *id.* Plainly, if Jefferson had had any concern about the correctness of his interpretation of the ATS, he would have included additional language clarifying the point in his proposed legislation. His failure to do so only further underscores the degree of his confidence that the ATS applied extraterritorially to offenses committed by U.S. citizens in foreign countries.

⁶⁴ Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 695.

⁶⁵ Conceivably, Jefferson might still have believed that some legislation was at least advisable. Although he was satisfied that § 11 solved the jurisdictional issue, he did continue to raise concerns in his Addendum about the absence of a statute specifying the punishments to be imposed and the venue for trial. See *id.* For further discussion, see *infra* notes 40, 51, and 89 and accompanying text. If he did in fact press these concerns with the Judiciary Committee, it would seem the Committee disagreed.

Certainly the most controversial issue addressed in the memos is the status of the law of nations at the time of the Founding. Many scholars and, increasingly, many federal judges maintain that the law of nations was at that time only “general law.”⁶⁶ On this view, like other forms of general law – most importantly the common law – the law of nations was not federal in nature and consequently was not part of the law of the United States, though often applied by the federal courts. Rather, the law of nations – or as it is generally referred to today, customary international law – was state law but only to the extent the states wished to make it so and was thus subject to the discretionary decisions of the various state legislatures and courts as to whether to comply with or disregard its mandates.

In other words, Publius was radically misinformed when at the outset of *The Federalist* he expressed precisely the opposite understanding. “[U]nder the national Government,” he declared, “treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and executed in the same manner.”⁶⁷ This happy prospect did not rest on faith that the states and their courts would uphold the nation’s international obligations in a consistent and unwavering fashion. On the contrary, Publius was keenly aware of the diplomatic disasters that had resulted from the states’ unwillingness to comply with and enforce the law of nations during the Confederation. With that experience in mind, he underscored their unsuitability for the purpose: “[A]djudications on the same points and questions, in thirteen States . . . will not always accord or be consistent; and that as well from the variety of independent courts and judges appointed by different and independent Governments, as from the different local laws and interests which may affect and influence them.” He then commended

⁶⁶ The views of many judges have been heavily influenced by Professors Jack Goldsmith and Curtis Bradley’s now landmark article, which first made this claim. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). Then Judge Kavanaugh vigorously defended this view when sitting on the Court of Appeals for the District of Columbia. See *Al-Bihani v. Obama*, 619 F.3d 1, 9, 13-18 (2010) (Kavanaugh, J., concurring in the denial of rehearing en banc). Earlier, Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justice Thomas, made the same claim. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739, 739-41, 744-46, 749-51 (2004) (Scalia, J., concurring in part and concurring in the judgment). More recently, in *Jesner*, Justice Gorsuch, in a concurring opinion, stated flatly his view that the law of nations at the Founding was only general law. *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1412, 1416 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). In support of this proposition, Justice Gorsuch cited, and quoted from, an 1872 case, *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 228 (1872) (asserting, according to Justice Gorsuch, that “[t]he law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States”). The quote, however, is from the argument of counsel, not the Court’s opinion. See *id.* 227-31 (reporting the argument of “Messrs. J. Hubley Ashton and B. Stanton”). The opinion begins on page 231 and contains nothing to support this position. Moreover, in the passage immediately following the quote in Justice Gorsuch’s opinion, even counsel doubts whether the law of nations was really subject to the discretionary control of the states. See *id.* at 228-29 (noting that “[i]t is true that the courts of the United States, like the courts of the States, and of all other civilized countries, recognize the law of nations as binding upon them; and it is argued that as the government of the United States is charged with the management and control of our foreign relations, the courts of the United States ought to have the power of deciding in the last resort, all questions of international law, otherwise difficulties may arise with foreign nations on account of erroneous decisions by the State courts which the government of the United States could not provide against”). According to counsel, however, it was unnecessary to decide the issue in *Caperton*. See *id.* at 229.

⁶⁷ THE FEDERALIST NO. 3, *supra* note 18, at 13, 15 (John Jay).

“[t]he wisdom of the [Convention](#) in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national Government.”⁶⁸

Strikingly, Publius chose to make this point about the law of nations as his first argument in favor of the Constitution. “Among the many objects to which a wise and free people find it necessary to direct their attention,” he began, “that of providing for their *safety* seems to be the first.”⁶⁹ According to Publius, the danger of foreign wars would always be proportional to the number of “*just* causes of war [that] are likely to be given.”⁷⁰ Because the just causes of war arose from violations of the law of nations, it was “of high importance to the peace of America, that she observe the laws of nations towards all [] Powers.”⁷¹ His assertion that the Constitution lodged all power over the administration and enforcement of the law of nations in the national government and its courts, quoted above, followed immediately thereafter.

Publius repeatedly returned to this theme in *The Federalist* essays. Perhaps most prominently, in the concluding numbers he again explicitly linked the importance of federal jurisdiction over the law of nations to the question of war and peace. In *Federalist No. 80*, for example, he insisted on the necessity of extending federal court jurisdiction to cases arising under treaties and the law of nations, because these “relate to the intercourse between the United States and foreign nations” and, therefore, “involve the PEACE of the CONFEDERACY.”⁷²

Indeed, such a jurisdictional grant alone, he insisted, would not have been capacious enough. “A distinction may perhaps be imagined,” he noted, “between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law,” the latter being appropriately left to the states in contrast to the former.⁷³ The distinction, however, was misguided because a denial of justice to foreign nationals, whether “by the sentences of courts [or] in any other manner,” is “classed among the just causes of war.”⁷⁴ Moreover, it was equally “an aggression upon [a foreign citizen’s] sovereign” whether the unjust sentence was “wholly relative to the *lex loci* [or was] one which violated the stipulations of a treaty or the general law of nations.”⁷⁵ It was therefore “not less essential to the preservation of the public faith, than to the security of the public tranquility” that the Constitution extend federal court jurisdiction not only to cases arising under the law of nations but to “all causes in which the citizens of other countries are concerned.”⁷⁶

⁶⁸ *Id.* at 15.

⁶⁹ *Id.* at 13-14.

⁷⁰ *Id.* at 14.

⁷¹ *Id.*

⁷² THE FEDERALIST No. 80, *supra* note 18, at 534 (Alexander Hamilton). This point rested, Publius further explained, “on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART.” The Union would “undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.” *Id.* at 535-36.

⁷³ *Id.* at 536.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* According to Publius, moreover, the Framers’ aim to extend the Judicial Power to all cases potentially affecting “the PEACE of the CONFEDERACY” – and hence all cases arising under the law of nations – required additional, overlapping grants of jurisdiction. Thus, for example, they had also granted the federal courts admiralty and maritime jurisdiction. As Publius explained, even “[t]he most bigoted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally

Strikingly, these themes are carried forward and reflected in the Jefferson and Randolph memoranda in especially revealing ways. Following Publius, for example, Jefferson underscored the link between enforcement of the law of nations and the safeguarding of the nation's peace. Violations of the law of nations posed direct threats to the peace, and unless they could be redressed by the national government, "our peace with foreign nations will be constantly at the discretion of individuals."⁷⁷ Even the language he employed was similar to Publius', for example, characterizing the actions of the Georgians as an "aggression on Florida"⁷⁸ and calling upon Congress to provide "the means of preventing those aggressions by our citizens on the territory of other nations, and other infractions of the law of Nations, which furnishing just subject of complaint, might endanger our peace with them."⁷⁹

Also like Publius, Jefferson insisted on the need to accord the federal government broad criminal jurisdiction over the actions of Americans causing injuries to foreign nationals. In *Federalist No. 80*, Publius had explained that federal court jurisdiction over foreign nationals ought to extend not only to cases arising under treaties and the law of nations but even more broadly to all suits in which a foreign national was a party.⁸⁰ Similarly, Jefferson insisted that the criminal jurisdiction of the federal government under the Offenses Clause ought to be construed as extending not only to punishing technical violations of the law of nations but also more broadly to punishing any extraterritorial offenses that if not properly redressed would provide a just cause of war to foreign powers.⁸¹

Nevertheless, at least initially, Jefferson perceived a statutory lacuna that he feared left the federal courts without the necessary jurisdiction to punish individual transgressors. Here a subtle point is especially revealing. The statutory lacuna he identified was not the failure of the Crimes Act of 1790 to codify a sufficiently comprehensive list of offenses against the law of nations, including offenses that would have covered the Florida and Martinique incidents. Rather, his focus was on what he perceived

depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." *Id.* at 538.

Similarly, the Framers extended the Judicial Power to include all cases affecting ambassadors, other public ministers and consuls, "as th[ose cases] have an evident connection with the preservation of the national peace." *Id.* at 540. Indeed, they went further and granted the Supreme Court original jurisdiction in these cases. "All questions in which they are concerned," he explained, "are directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation." THE FEDERALIST NO. 81, *supra* note 18, at 541, 548 (Alexander Hamilton). Indeed, as with cases in which a foreign national is a party and admiralty and maritime cases, it was necessary to go further than simply extending the federal courts jurisdiction over cases involving the law of nations. As Publius further explained, "[t]hough consuls have not in strictness [*i.e.*, under the law of nations] a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them." *Id.* In other words, even in cases where the law of nations was unlikely to be in issue – because consuls were not entitled to the immunities of diplomats – it was nevertheless important to ensure that they were correctly decided in the first instance in order to avoid any potential conflicts with the governments that had sent them.

⁷⁷ Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 694.

⁷⁸ *Id.*

⁷⁹ Thomas Jefferson, Revised Paragraph for the President's Annual Message to Congress, in 24 JEFFERSON PAPERS, *supra* note 27, at 552.

⁸⁰ See *supra* text accompanying notes 73-76.

⁸¹ Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 694.

to be the lack of a provision in the Judiciary Act of 1789 granting federal courts jurisdiction over offenses against the law of nations. In other words, what Jefferson believed was needed was simply an authorization to the courts to exercise jurisdiction over offenses that were already prohibited by national law even though not enacted into statutory form by Congress.⁸²

Jefferson's thinking in this respect is confirmed by his discussion of the ATS. Congress had enacted no statute generally prohibiting tortious violations of the law of nations; nor did Jefferson suggest that it ought to do so. Instead, he simply quoted § 9 of the Judiciary Act, *i.e.*, the ATS, and presumed on that basis that the courts would adjudicate any and all tort claims for violations of the law of nations as part of the already existing law. As he succinctly put it: "If the act in describing the jurisdiction of the Courts, had given them cognizance of proceedings by way of indictment or information against offenders under the law of nations, for the public wrong, and on the public behalf, as well as to an individual for the special tort, it would have been the thing desired."⁸³

In his memorandum, Randolph was even more explicit on this point. Indeed, although he wrote the memorandum at least in part to correct an error in Jefferson's argument, his own analysis only served to reveal their larger agreement on the fundamental constitutional point. Disagreeing with Jefferson, Randolph maintained that no further legislation was necessary because the federal judiciary already had "cognizance of offences against the law of nations."⁸⁴ The courts had jurisdiction, first, because the Constitution had implicitly adopted the law of nations as part of the municipal law of the United States, or, as he put it, because the law nations "attached to the U.S. from the nature of the subject, without an express adoption of it."⁸⁵ Second, they had jurisdiction – and here was Jefferson's error – because § 11 of the Judiciary Act already granted the courts cognizance over the subject, which

⁸² The problem, he noted, was that he could "find nothing else in the law applicable to this question, and therefore presume the case is still to be provided for, and that *this may be done by enlarging the jurisdiction of the Courts, so that they may sustain indictments and informations on the public behalf, for offences against the law of nations.*" *Id.* at 695 (emphasis added). At the same time, he drafted a proposed statute to accomplish his purposes. It too was a jurisdictional statute, not a codification of offenses, though it did include additional language specifying punishments, venue and other procedural details. The draft provided:

Be it enacted &c.

that wherever any offence against the law of Nations, for which no act of Congress hath yet presented specific punishment, shall be committed by a citizen of the U.S. the same shall be cognisable before the Circuit courts on presentment or information and indictment, shall be tried by a jury of the district where he is apprehended or to which he shall be first brought, and shall be punished at the discretion of the court, by imprisonment not exceeding months, or by fine not exceeding the double of the damages done, or by both: but if the offence be murder then he shall be punished by death.

Thomas Jefferson, Clause for Bill on Offenses against the Law of Nations (Dec. 3, 1792), *in* 24 JEFFERSON PAPERS, *supra* note 27, at 693.

⁸³ Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), *in* 24 JEFFERSON PAPERS, at 694. In the very next sentence, moreover, he quoted § 13 of the Judiciary Act, 1 Stat. at 80, which granted the federal courts "jurisdiction of suits or proceedings against *ambassadors, or other public ministers, or their domestics or domestic servants*, as a Court of Law can have or exercise consistently, with the Law of nations." *Id.* (emphasis in original). This section, he noted, did not solve the problem either, but not because of a missing congressional statute creating a right of action for torts committed against diplomat representatives, but because "this is not [such a] case, no ambassador being concerned here." *Id.* at 695.

⁸⁴ Edmund Randolph's Opinion on Offenses against the Law of Nations (Dec. 5, 1792), *in* 24 JEFFERSON PAPERS, *supra* note 27, at 702-03.

⁸⁵ *Id.* at 703.

is to say, “because offences, cognizable under the authority of the U.S. are clearly subjected by the judicial law to the circuit court.”⁸⁶ This latter point, Randolph gently noted, “Mr. J. seems to doubt, and is therefore referred to the [11th. Section.](#)”⁸⁷

In Randolph’s view, then, the law of nations was incorporated into the law of the United States, and the courts would apply it in any case over which Congress granted them jurisdiction. Jefferson’s reaction to Randolph’s position, moreover, confirms his agreement. Rather than taking issue with Randolph on either point, he immediately added an addendum to his memorandum implicitly agreeing that the law of nations “attached to the U.S. from the nature of the subject, without an express adoption of it” and acknowledging his error with respect to § 11, writing: “On further examination it does appear that the 11th. section of the judiciary act above cited gives to the Circuit courts exclusively cognizance of all crimes and offences cognizable under the authority of the U.S. and not otherwise provided for.”⁸⁸ As far as he was concerned, that vitiated the need he had raised in his memorandum for new jurisdictional legislation.⁸⁹

Strikingly, the same issue would again emerge six months later, only this time in a context posing an incomparably greater risk to the peace of the United States. Both Jefferson and Randolph remained in their respective positions in the Washington Administration during the explosive controversies provoked by Citizen Gênet, the new Minister from an increasingly radical French

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), *supra* note 36, in 24 JEFFERSON PAPERS, at 695. Jefferson’s paraphrasing of § 11 is particularly revealing. The pertinent language from the statute provides that the circuit courts “shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct.” An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 79 (1789). Jefferson read the grant as extending to *all* crimes falling with the cognizance of the federal government except those that Congress had “otherwise provided for.” That reading meant that § 11 encompassed common law crimes in areas over which the United States has jurisdiction, precisely the position that many Federalists defended and that Jefferson and his followers would later strenuously contest. This aspect of the memorandum has potentially significant implications for our understanding of the controversy over the so-called federal common law of crimes, but I cannot pursue the matter here.

⁸⁹ It did not, however, fully resolve a new set of doubts in Jefferson’s mind. The problem he now identified was the absence of a statute specifying whether the offenses were a misdemeanor or felony, the punishment to be imposed, and the venue for trial (given that the offenses about which he was concerned were extraterritorial and Article III provides that when an offense is “not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed,” U.S. CONST. art. III, §2, cl.3). As Jefferson put it, § 11 solved the jurisdictional issue, but that only “removes the difficulty however but one step further. For questions then arise 1. what is the peculiar character of the offence in question, to wit, treason, felony, misdemeanor or trespass? 2. what is it’s specific punishment, capital or what? 3. whence is the venue to come?” Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 695. How Randolph may have responded to these further concerns is impossible to say. The surviving historical record, however, suggests that Jefferson was ultimately satisfied even on these issues, as he appears thereafter to have dropped his pursuit of his proposed legislation. The editors of the JEFFERSON PAPERS so conclude, observing “TJ evidently drafted this clause for consideration by Congress, but he probably decided to take no further action on it after receiving an opinion from the Attorney General.” Thomas Jefferson, Clause for Bill on Offenses against the Law of Nations (Dec. 3, 1792), in 24 JEFFERSON PAPERS, *supra* note 27, at 693 (referring to Randolph’s memorandum). For further discussion, see *supra* text accompanying notes 55-65.

revolutionary regime, who arrived in the United States in the spring of 1793.⁹⁰ In retrospect, the Florida and Martinique incidents were dress rehearsals, conducted in a calmer moment, for the far graver diplomatic crisis they would soon face.

When war broke out between Britain and Revolutionary France, many Americans sided with France. At Gênet's prompting, some began fitting out (*i.e.*, arming) privateering vessels in U.S. ports and even joined in French naval attacks on British shipping. These acts constituted offenses against the law of nations – in this case, breaches of neutrality – and posed an imminent threat of involving the United States in the war. The Washington Administration quickly responded by issuing President Washington's famous Neutrality Proclamation.⁹¹ Written by Randolph and supported by Jefferson, the Proclamation warned Americans to comply with their duties as neutrals and threatened to institute prosecutions "against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations, with respect to the powers at war."⁹² In other words, the Administration decided to respond to the increasingly chaotic and dangerous situation it confronted by implementing the understanding that Jefferson and Randolph had worked out in late 1792.

Recall that after having concluded in the addendum to his December 3 memorandum that § 11 of the Judiciary Act provided a sufficient basis for non-statutory prosecutions of offenses against the law of nations – and after presumably having conferred with Oliver Ellsworth and the Senate Judiciary Committee about the matter – Jefferson evidently withdrew as superfluous the suggestion that Congress adopt his proposed legislation. Congress in turn took no further action on the subject.⁹³ When the Neutrality Crisis erupted, therefore, matters stood precisely where they had in 1792 when the Florida and Martinique incidents took place.

Consistent with their memos, Jefferson and Randolph – and, indeed, the Washington Administration as a whole – pursued the prosecutions Washington had threatened, most famously in the case of Gideon Henfield, who had served as a privateer aboard a French vessel under a commission issued by Gênet. In a note to Randolph, Jefferson once again underscored their common view that the Constitution had incorporated the law of nations into the law of the United States. Indeed, he predicted, quite accurately as it would turn out, that "[t]he Judges having notice of the proclamation, will perceive that the occurrence of a foreign war has brought into activity the laws of neutrality [that is, the law of nations], as a part of the law of the land."⁹⁴ Jefferson was spot on, as the judges, including

⁹⁰ For an historical overview of the ensuing Neutrality Crisis, see STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 330-64 (1993).

⁹¹ See George Washington, *Neutrality Proclamation* (1793), 1 *American State Papers: Foreign Relations* 140 (1832), 11 Stat. 753, reprinted in 12 *WASHINGTON PAPERS*, *supra* note 15, at 472-74. See also Thomas Jefferson, *Cabinet Opinion on Washington's Questions on Neutrality and the Alliance with France* (Apr. 19, 1793), in 25 *THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION* 570, 571 (James P. McClure and J. Jefferson Looney eds., 2008-20) [hereinafter 25 *JEFFERSON PAPERS*]; *supra* notes 15-16 and accompanying text.

⁹² George Washington, *Neutrality Proclamation* (1793), 1 *American State Papers: Foreign Relations* 140 (1832), 11 Stat. 753, reprinted in 12 *WASHINGTON PAPERS*, *supra* note 15, at 473.

⁹³ See *supra* notes 55-65 and accompanying text.

⁹⁴ Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), reprinted in 25 *JEFFERSON PAPERS*, *supra* note 91, at 691, 692. Jefferson repeated this point on numerous occasions. For an example, see Letter from Thomas Jefferson to Edmond Charles Genet (June 5, 1793), reprinted in 26 *THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION* 195, 196 (James P. McClure and J. Jefferson Looney eds., 2008-20) (asserting, in a diplomatic note which "drew

Chief Justice Jay and Justices Wilson and Iredell in *Henfield's Case*, would quickly confirm.⁹⁵ Consistent with the analysis in the Jefferson and Randolph memos, Justice Wilson, for example, explained:

It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. It has been asked by his counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed.⁹⁶

The Jefferson and Randolph memos thus have large implications for our understanding of the status of the law of nations in the Founding era. Of course, two memos alone cannot be considered conclusive, but neither should their significance be underestimated. They were rendered during the first Washington Administration, a period that constitutional historians and scholars – and the Supreme Court – have always privileged for its uniquely probative evidence of the original meaning of the Constitution. They were written by two of the most important statesmen of the Founding era, one of whose preeminence is obvious and the other of whom, Attorney-General Randolph, played a central role in both the Philadelphia and the Virginia Ratifying Conventions and who additionally had intimate familiarity with the Judiciary Act of 1789. The memos, moreover, addressed issues that had no discernable partisan cast and were written at a time when the intense controversies between Federalists and Republicans still lay mostly in the future. Nor is there reason to believe that the views expressed by Jefferson and Randolph generated any controversy going forward. More likely, they spoke for the Washington Administration as a whole and presumably had the concurrence of the First Congress as well, or at least of Oliver Ellsworth and the Senate Judiciary Committee.

The Jefferson and Randolph memos establish at least three critical points:

First, they demonstrate that the idea of non-statutory prosecutions for violations of the law of nations was not born out of the emergency circumstances of the Neutrality Crisis but had already been affirmed by leading Founders in the ordinary administration of the government during the first Washington Administration – indeed, by Jefferson and Randolph who would later take leading roles (in Jefferson's case, the leading role) in the fierce Republican struggles against the so-called federal common law of crimes in the late 1790s. This development casts an important new light on the more familiar actions of the Washington Administration during the Neutrality Crisis, including Washington's Neutrality Proclamation and the Henfield prosecutions.

Second, the memos provide new and important evidence that under the original understanding of the Constitution the law of nations was incorporated into the law of the United States and was

heavily on Randolph's advice," his understanding of "the laws of the land, of which the law of nations makes an integral part").

⁹⁵ See *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793).

⁹⁶ *Id.* at 1119, 1120 (Wilson, J., Jury Charge) (announcing the unanimous opinion for the Circuit Court, consisting of Justices Wilson and Iredell and District Judge Peters). See also *id.* at 1100, 1102 (Jay, C.J., Grand Jury Charge) (declaring that "the laws of nations, [] as has been already remarked, form a very important part of the laws of our nation").

decidedly not law the states were free to adopt or disregard as they might individually choose. The implications for the enforcement of customary international law today – at least for those adhering to originalist methodologies – should be clear. Especially important are the implications for the judicial enforcement of international human rights law against U.S. states, which have sometimes shown determined resistance to complying with international standards.

Third, and contrary to what some scholars have claimed, the memos further suggest that the Republican opposition to the idea of a federal common law in the late 1790s did not extend to the constitutional incorporation of the law of nations as law of the United States. That Republicans like Jefferson and Randolph would later revolt from the notion that the common law of England formed part of the law of the United States in no way suggests that they also denied that status to the law of nations. At a minimum, their memos – not to mention other expressions of their views – are to the contrary.