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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1239

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

MINE SAFETY AND HEALTH ADMINISTRATION, et al., RESPONDENTS

KAISER COAL CORPORATION, INTERVENOR

Petition for Review of an Order of the Mine Safety and Health Administration

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No. 86-1327

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

MINE SAFETY AND HEALTH ADMINISTRATION, et al., RESPONDENTS

UTAH POWER & LIGHT COMPANY, MINING DIVISION, INTERVENOR

Petition for Review of an Order of the Mine Safety and Health Administration

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued March 17, 1987

Decided July 10, 1987

Mary Lu Jordan, with whom *Michael H. Holland* was on the brief for petitioner. *Earl R. Pfeffer* also entered an appearance for petitioner.

Jerald S. Feingold, Attorney, Department of Labor, with whom *Ann Rosenthal*, Counsel, Appellate Litigation, Department of Labor was on the brief for respondent. *Cynthia L. Attwood*, Attorney, Department of Labor also entered an appearance for respondent.

Timothy M. Biddle for intervenor, with whom *Paul W. Reidl* was on the brief for intervenor, Kaiser Coal Corporation in No. 86-1239, and with whom *Susan E. Chetlin* was on the brief for intervenor, Utah Power & Light Company in No. 86-1327.

Before: BORK, SILBERMAN and FRIEDMAN,* *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: In each of these actions the petitioner, International Union, United Mine Workers of America ("UMWA"), challenges a decision of the Mine Safety and Health Administration ("MSHA") granting indefinite interim relief from operation of a mandatory safety standard pending a decision on a petition for modification of the safety standard. We find that the court has jurisdiction to review these challenges and that the interim relief regulation at issue is in excess of the Secretary of Labor's statutory authority under section 101(c) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). We therefore grant the petitions for review.

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1982).

I.

The Mine Act is a comprehensive measure designed to regulate the mining industry. Titles II and III of the Act contain specific health and safety standards for underground coal mines. *See* 30 U.S.C. §§ 841-878 (1982). One of these standards provides that "[i]n any coal mine . . . the entries used as intake and return aircourses shall be separated from belt haulage entries." *Id.* § 863(y).[1]

The Mine Act authorizes the Secretary of Labor to promulgate additional "mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. § 811(a) (1982). It also requires the Secretary to provide, without regard to the Administrative Procedure Act, "for an emergency temporary mandatory health or safety standard . . . if he determines . . . that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and . . . that such emergency standard is necessary to protect miners from such danger." *Id.* § 811(b).

Section 101(c) of the Mine Act, which is central to this case, authorizes the Secretary to grant mine-specific exemptions from mandatory standards. Upon the peti-

[1] The MSHA has implemented this statutory requirement by regulation. *See* 30 C.F.R. § 75.326 (1986). The "entries" referred to in the statute are tunnels used to transport miners, extracted coal, and air to and from the mine. An "intake aircourse" introduces fresh air into the mine. Air which has ventilated a working section of the mine is returned to the surface through a "return aircourse." "Belt entries" are tunnels which house conveyor belts used to transport the coal from the mine to the surface. Congress sought to separate the aircourses from the belt entries because there is a potential for fire on the belt conveyor. Intake air and return air coursed through the belt entry can fan a fire and intake air so coursed can carry products of the fire to the working area. *See* H.R. Rep. No. 761, 91st Cong., 1st Sess. 81 (1969).

tion of a mine operator, or the representative of the miners, "the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a dimunition of safety to the miners in such mine." 30 U.S.C. § 811(c) (1982).

Congress also addressed in section 101(c) the procedures that the Secretary must follow after a petition for modification has been filed. The Secretary must give notice of the petition and must conduct such investigation as he finds appropriate. The investigation must include an opportunity for a hearing of record upon the request of a mine operator, the representative of the miners, or other interested party. Before granting the petition, the Secretary must publish his findings and make them available to the operator or the representative of the miners. 30 U.S.C. § 811(c) (1982).

Section 101(d) of the Mine Act provides that "[a]ny person who may be adversely affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth day after such standard is promulgated," obtain judicial review. 30 U.S.C. § 811(d) (1982). The filing of a petition for review does not operate to stay the challenged mandatory standard. *Id.*

The Secretary has issued regulations governing the procedures used to implement the requirements of section 101(c). Upon receipt of a petition for modification, the MSHA publishes a notice of the petition in the Federal Register and interested parties have thirty days from the date of publication to file written comments. 30 C.F.R. § 44.12 (1986). The MSHA then conducts an

investigation and, "[a]s soon thereafter as is practicable," the appropriate Administrator, here the Administrator for Coal Mine Safety and Health, issues a proposed decision. The decision is then served on the parties and, unless a party requests a hearing, becomes final in thirty days. *Id.* § 44.13. If a hearing is requested, the matter is referred to the Chief Administrative Law Judge for the Department of Labor and then assigned to an administrative law judge ("ALJ") for a hearing and a decision on the petition. *Id.* §§ 44.15, 44.20. The proposed decision of the ALJ becomes final unless an appeal is filed with the Assistant Secretary of Labor for Mine Safety and Health ("the Assistant Secretary"). *Id.* § 44.33(a).

The proposed decision of the Administrator is not effective pending appeal to the ALJ and the proposed decision of the ALJ is not effective pending appeal to the Assistant Secretary. 30 C.F.R. § 44.50(a) (1986). A party may, however, petition for relief pending appeal of either decision. *Id.* § 44.50(b)(1). An application which seeks to implement an Administrator's decision must be filed with the ALJ and an application which seeks to implement an ALJ's decision must be filed with the Assistant Secretary. *Id.* § 44.50(b)(3). Relief pending appeal will be granted only if the applicant shows that "the requested relief will not adversely affect the health or safety of miners in the affected mine, and . . . there is a substantial likelihood that the decision on appeal will be favorable to the applicant." *Id.* § 44.50(b)(6). Interlocutory appeal of a decision on an application for relief pending appeal is permitted only if the ALJ or the Assistant Secretary certifies that "the ruling involves an important question of law or policy as to which there are substantial grounds for difference of opinion, and . . . an immediate appeal from the ruling may materially advance termination of the proceeding." *Id.* § 44.50(b)(4).

In addition to relief pending appeal, a party may file an application "for interim relief from enforcement of a mandatory safety standard" at any time prior to a "final departmental decision on the petition for modification." 30 C.F.R. § 44.16(a) (1986). The application must be filed with and decided by the decisionmaker before whom the petition for modification is pending. *Id.* § 44.16(b). Parties have three days from receipt of the application to file written comments. *Id.* § 44.16(f). If the application is filed with and denied by the Administrator, the applicant may file a request with the Administrator for a hearing before an ALJ. *Id.* § 44.16(c). The request is then referred to the Chief Administrative Law Judge "for hearing and decision by an administrative law judge." *Id.* There is no provision for a hearing upon the grant of an application for interim relief. An application for interim relief will be granted only if the applicant "clearly show[s]" that

> (1) the petition seeking modification has been filed in good faith, and the applicant is not using the proceeding solely to postpone or avoid abatement; (2) the requested relief will not adversely affect the health or safety of miners in the affected mine, and (3) there is a substantial likelihood that the decision on the merits of the petition for modification will be favorable to the applicant.

Id. § 44.16(e).

II.

A.

In No. 86-1239, Kaiser Coal Corporation ("Kaiser") petitioned the Secretary of Labor for modification of the mandatory safety standard that requires the separation of the return and intake aircourses from belt entries at its Upper York Canyon (Cimarron) Mine. Kaiser argued that a modification was necessary because compliance with the standard would require driving three entry tunnels which, because of ground conditions, would increase the likelihood of roof falls. Joint Appendix in No. 86-1239 ("No. 86-1239 J.A.") at 10. Kaiser asserted that use of a two-entry system would be significantly safer than the traditional three-entry system because it would improve roof stability. *Id.* at 10-16. Kaiser also claimed that its use of carbon monoxide monitoring systems and fire detection devices provides an alternative method of protection against the fire hazards created by using the belt entry as an aircourse. *Id.* at 16-18.[2] In response to Kaiser's petition, the MSHA began an investigation.

Approximately two months later, on July 2, 1985, Kaiser filed an application for interim relief from the mandatory standard and requested expedited consideration of the application. No. 86-1239 J.A. at 29-36. Kaiser

[2] A startling fact in this case is that Kaiser had been utilizing a two-entry system for 12 years at the time of its petition for modification. No. 86-1239 J.A. at 19. The Secretary, or a subordinate official, had approved the two-entry system, even though it did not comply with the mandatory safety standard, as part of Kaiser's ventilation plan. Brief for the Secretary of Labor in No. 86-1239 at 20 n.7. Thus, the Secretary had implicitly granted a modification of the safety standard without regard to the procedures in § 101(c). In 1985, the Secretary, after an "internal review," changed his position and "determined that permission to utilize mining methods that did not comply with mandatory standards would no longer be granted in plan approvals, but instead only through the petition for modification process." *Id.* The UMWA contends that the decision was made in response to the fire that occurred in 1984 at the Wilburg mine in Utah. Brief for Petitioner at 10. At the time of the fire, the mine employed a two-entry system under a plan approved by the MSHA. Affidavit of Danny C. Davidson at ¶¶ 8-9, No. 86-1239 J.A. at 140. The fire claimed the lives of 27 miners. *Id.* ¶ 9. This MSHA practice of modifying through plan approvals may explain why the MSHA had never granted interim relief pursuant to 30 C.F.R. § 44.16 in a contested modification proceeding prior to Kaiser's application.

requested permission to utilize a two-entry system pending a decision on its petition for modification and stated the same grounds for relief that it had proffered in the petition for modification. The UMWA filed written oppositions to the petition for modification and to the application for interim relief. The UMWA argued that the roof conditions at the Cimarron mine could effectively be controlled by other means and that the use of a two-entry system would increase concentrations of respirable dust and the potential for explosions and fire. *Id.* at 38-39. The UMWA also argued that the use of monitoring systems would not provide the same protection afforded by the existing standard. *Id.* at 39.

On September 27, 1985, the Administrator for Coal Mine Safety and Health granted Kaiser's application for interim relief but conditioned his decision on Kaiser's agreement to certain stipulations concerning the use of monitoring systems and other safety measures. No. 86-1239 J.A. at 103-08. The basis of the decision is contained in one paragraph:

> An investigation was conducted at your mine on July 23, 1985, and the results have been filed with the Chief, Division of Safety. Based on the investigation, the requested relief will not adversely affect health and safety of the miners and there is a substantial likelihood that a decision on the petition will be favorable provided that compliance is maintained with the provisions of the petition and the following additional stipulations.

Id. at 103. On November 14, 1985, Kaiser agreed to comply with the conditions. *Id.* at 159.

In response to the decision, the UMWA filed a request with the Administrator to revoke the grant of interim relief or, in the alternative, to stay the decision pending a hearing under 30 C.F.R. § 44.16(c). No. 86-1239 J.A. at 112-14. In the request, the UMWA noted that section

44.16(c) by its terms provides for a hearing only upon the denial of an application for interim relief, *id.* at 112-13, but urged the Administrator to construe the provision as providing the miners the same right to a hearing that is afforded mine operators upon the denial of an application. *Id.* at 113. The Administrator concluded that the UMWA's request required a legal interpretation and thus forwarded the request to the Chief Administrative Law Judge for assignment to an administrative law judge. *Id.* at 115.

On December 6, 1985, the ALJ dismissed the proceeding for lack of subject matter jurisdiction. No. 86-1239 J.A. at 174-80. The ALJ phrased the issue as whether the Office of Administrative Law Judges "has jurisdiction to entertain an appeal from a grant of interim relief while modification proceedings are still pending before the Administrator" and noted that the issue of whether the grant of interim relief survived an appeal of the Administrator's proposed decision was not before him. *Id.* at 175 & n.2. The ALJ based his decision, however, on the fact that section 44.16(c) does not provide for a hearing upon a grant of interim relief, *id.* at 176, and held that "[t]he Office of Administrative Law Judges has no inherent authority to conduct hearings upon matters not subject to a statutory requirement mandating a hearing on the record." *Id.* at 177. The ALJ then dismissed the proceedings.

The UMWA then filed an appeal with the Assistant Secretary requesting a stay of the Administrator's decision and an opportunity to appeal the Administrator's decision. No. 86-1239 J.A. at 181-87. On February 21, 1986, the Assistant Secretary dismissed the UMWA's appeal on the ground that section 44.16(c) "only provides for an appeal by the applicant from a *denial* of an application for interim relief." *Id.* at 208-09.

While this separate track of appeals was proceeding, the Administrator issued a proposed decision to grant

Kaiser's petition for modification. The UMWA filed an appeal from the proposed decision and a request for a hearing. At the time of oral argument before this court, the matter had been set for a hearing in March 1987—one year and a half after the Administrator granted Kaiser's application for interim relief.

Because the proceedings had moved from the Administrator to the ALJ, the UMWA sent a letter to the Administrator regarding the status of the grant of interim relief. The UMWA reminded the Administrator that his position before the ALJ and before the Assistant Secretary had been that the interim relief would be effective only until he issued a proposed decision. No. 86-1239 J.A. at 212-13. The Administrator responded by stating his belief that all issues regarding the grant of interim relief were subject to review by the ALJ. *Id.* at 214. The Administrator also stated that "[d]uring the pendency of the UMWA's appeal, MSHA will continue to require Kaiser to abide by the terms of interim relief as granted, unless interim relief is modified by the judge." *Id.*[3] This petition for review followed.

B.

The facts in No. 86-1327 are virtually identical to those discussed above. On August 23, 1985, Utah Power &

[3] At oral argument the court attempted to elicit the Secretary's position on the issues of whether the grant of interim relief survives the Administrator's proposed decision and whether the ALJ has the authority to modify the grant of interim relief. Counsel for the Secretary stated that the Secretary is not prepared to state his position on these issues. In the Secretary's brief on appeal, however, the Secretary states that it is his position that "since no effective review of the Administrator's grant of interim relief has ever been sought, the Secretary believes that interim relief remains in effect." Brief for the Secretary of Labor in No. 86-1239 at 42 n.18. Because there is no evidence to the contrary, we have proceeded on the assumption that the interim relief is still in effect

Light Company ("UP&L") petitioned for modification of the mandatory safety standard requiring the separation of aircourses and belt entries at its Deer Creek and Cottonwood Mines. No. 86-1327 J.A. at 1-9. UP&L argued that application of the mandatory safety standard would increase the likelihood of roof falls. *Id.* at 2-3. At the same time, UP&L applied for interim relief. *Id.* at 10-14. The UMWA filed written oppositions to the petition and the request for relief. *Id.* at 15-20. On October 23, 1985, the Administrator granted the application with respect to the Deer Creek Mine[4] upon conditions similar to those imposed in No. 86-1239. *Id.* at 42-47. The Administrator's decision on the application provides:

> An investigation was conducted at your mine on September 18, 1985, and the results have been filed with the Chief, Division of Safety. Based on the investigation, the requested relief will not adversely affect health and safety of the miners and there is a substantial likelihood that a decision on the petition will be favorable provided that compliance is maintained with the provisions of the petition and the following additional stipulations.

Id. at 42. In response, the UMWA filed an appeal with the Assistant Secretary requesting a stay of the Administrator's decision and an opportunity to appeal that decision. *Id.* at 76. Three months later, the Assistant Secretary, citing his decision in the *Kaiser* case, dismissed the appeal on the ground "that there is no appeal right from the grant of interim relief in a modification proceeding." *Id.* at 91. Subsequently, the Administrator issued a proposed decision to grant the petition for modification. The UMWA filed an appeal and a request for a hearing. The hearing was set for March 1987.

[4] On January 16, 1986, the Administrator denied UP&L's application with respect to the Cottonwood Mine. UP&L did not appeal this decision.

III.

In these petitions for review, the UMWA argues that section 44.16(c), which allows the Administrator to grant indefinite interim relief without an opportunity for a hearing, exceeds the Secretary's authority under section 101(c) of the Mine Act. We agree. Before we address the merits of petitioner's argument, however, we must address several challenges to our jurisdiction.

First, the Secretary argues that the court does not have jurisdiction pursuant to section 101(d), which grants jurisdiction to this court of final decisions, because "the grant of interim relief has never been reviewed by the Assistant Secretary on its merits." Brief for the Secretary of Labor in No. 86-1239 at 18. The first problem with this argument is that the Secretary will never reach a decision on the merits of the petition; the Secretary dismissed UMWA's appeal on the ground that section 44.16(c) does not provide jurisdiction to review the merits of a grant of interim relief. The second problem with this argument is that the issue of whether interim relief should have been granted on the facts of these two cases is not before the court. The issue before us is whether the Secretary has statutory authority to grant indefinite interim relief in any case. Counsel for the Secretary conceded at oral argument that the Secretary has issued a final decision with respect to this issue. That decision has permitted Kaiser and UP&L to utilize a two-entry system, in contravention of section 303(y) of the Mine Act, and perhaps, as the UMWA strenuously argues, at the miners' peril. In effect, the Administrator has granted a modification of the mandatory safety standard for the entire period of time that the petition is pending. There is no indication that the Secretary intends to reconsider this decision or to vacate the grant of interim relief. Thus, the Secretary's decision represents the final agency position on this issue, has the status of law, and has an immediate and direct effect on the parties. *See*

Abbott Laboratories v. *Gardner*, 387 U.S. 136, 149-53 (1967). Therefore, we have no difficulty concluding that the Secretary has issued a final decision in each of these two cases. *See Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948); *National Air Carrier Ass'n* v. *CAB*, 436 F.2d 185, 191 (D.C. Cir. 1970) ("[T]he Board's description of interim approval as '*pendente lite*' should not be allowed to obscure the fact that [the] action taken . . . operates with finality.").

The Secretary also argues that the UMWA has failed to exhaust its administrative remedies. Because the proceedings are now before the ALJ, the Secretary contends, the UMWA must again challenge the grant of interim relief before this ALJ and, if unsuccessful, must appeal this ALJ's decision to the Assistant Secretary. The premise of this argument is that the ALJ who is currently considering the merits of the petition for modification "may well determine that he has the power to reexamine the question." Brief for the Secretary of Labor in No. 86-1239 at 23.

The UMWA has clearly exhausted its administrative remedies. The UMWA appealed to an ALJ the Administrator's decision to grant interim relief. The ALJ held that section 44.16(c) does not provide for review of a grant of interim relief. The UMWA appealed this decision to the Assistant Secretary, who also held that the UMWA has no right to appeal the decision pursuant to section 44.16(c). The fact that a second ALJ may choose to ignore the Assistant Secretary's interpretation of the regulation is not a ground for requiring the UMWA to go through the same proceedings it has previously exhausted. It is immaterial that the issue now would arise under section 44.50(b)(1) in the context of a petition for relief pending appeal from the Administrator's proposed decision instead of, as at the prior stage, as an attempt to appeal directly from the grant of interim relief. The

exhaustion doctrine is a prudential concept designed to discourage the "frequent and deliberate flouting of administrative processes." *McKart* v. *United States*, 395 U.S. 185, 195 (1969). We believe that the UMWA has indicated due respect for the processes it has attempted to utilize in its arduous journey to this court.[5]

[5] Intervenors Kaiser and UP&L argue that the court does not have jurisdiction pursuant to § 101(d) because that provision by its terms grants a right to review only to "[a]ny person who may be adversely affected by a mandatory health or safety standard promulgated under this section," 30 U.S.C. § 811(d), and the orders under review do not adopt mandatory health or safety standards. The Secretary disagrees, and contends that § 101(d) gives the court jurisdiction of "final agency actions *relating to* mandatory health and safety standards." Brief for the Secretary of Labor in No. 86-1239 at 16 (emphasis added). This court has previously held that § 101(d) does not limit review to challenges to mandatory health and safety standards, but also includes within its terms challenges to agency actions which modify or amend those standards. *See* Council of the Southern Mountains, Inc. v. Donovan, 653 F.2d 573, 579-80 n.26 (D.C. Cir. 1981) (decision to defer implementation of regulations is in effect an amendment to a mandatory safety standard for which § 101(d) implicitly authorizes review). Thus, because the Secretary acted pursuant to § 101(c) in promulgating the regulation at issue, and because the Administrator's decision is in effect a modification of a mandatory safety standard, this court has jurisdiction pursuant to § 101(d).

Kaiser and UP&L also argue that the grant of interim relief is in effect a decision not to enforce a mandatory safety standard and thus under the Supreme Court's reasoning in Heckler v. Chaney, 470 U.S. 821 (1985), is presumptively immune from judicial review. First, this argument does not comport with the facts of this case. The Secretary did not decide not to institute enforcement proceedings against Kaiser and UP&L. The Secretary acted pursuant to § 101(c) to grant a temporary modification of a mandatory safety standard pending a final decision on a petition for modification. If the Secretary ultimately decides to deny the petition for modification, the Secretary is free to institute enforcement proceedings against Kaiser and UP&L pursuant to § 105 of the Mine Act, 30 U.S.C. § 815 (1982). Second, none of the factors which led to the Court's decision in *Chaney* are relevant here. The Administrator's decision to grant interim relief did not require a determination of "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, . . . [or] whether the agency has enough resources to undertake the action at all." *Chaney*, 470 U.S. at 831. Furthermore, in this action, the Administrator clearly has "exercised its power in some manner" such that "[t]he action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Id.* at 832. Finally, even if the presumption of unreviewability applies, it has been overcome by Congress' provision in § 101(c) of "guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833.

IV.

We must now determine whether the Secretary's interim relief regulation is consistent with the statutory provision which it seeks to implement. We find that it is not. Instead, we conclude that section 44.16(c), as interpreted by the Secretary, is inconsistent with the language, structure, legislative history, and policy of the Mine Act.

As a preliminary matter, we must determine how the Secretary has interpreted section 44.16(c). The Secretary argues that this case presents the issue of whether the Secretary has an implied power to grant temporary interim relief when the duration of the interim relief "will usually be quite short," Brief for the Secretary of Labor in No. 86-1239 at 35, and when the Secretary has "carefully limited the scope of interim relief to no more than what is required to effectively implement Section 101(c)." *Id.* at 32-33. This is, however, not the issue that is presented on the facts of these cases. The interim relief granted in these two cases clearly is not of short duration and the Secretary has not in any way limited the indefinite grant of interim relief. The Secretary has, in effect,

granted a modification of a mandatory safety standard for the entire period that the petition for modification is pending. At the time of oral argument in these cases, the "interim relief" had been in effect for approximately one and a half years in each case and neither case had yet been heard by an ALJ. Thus, the fact is that the "interim relief" granted under section 44.16 will last for years, is not necessary to the Secretary's ultimate decision under section 101(c), is not based upon the statutory criteria in section 101(c), and is not in any way an attempt by the Secretary to provide a short-term remedy to prevent frustration of a statutory mandate. *Compare American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 311 (1953) (regulatory agencies have inherent authority to promulgate rules "aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress"); *Pan American World Airways, Inc.* v. *CAB*, 684 F.2d 31, 46-48 (D.C. Cir. 1982) (CAB may grant temporary emergency exemption only if relief is "limited to no more than is necessary to meet the crisis"); *National Air Carrier Ass'n*, 436 F.2d at 191 (agency has inherent authority to grant interim approval if necessary to meet mandate to protect the public interest and if based upon "a careful balancing of the gravity and duration of the harm likely to be inflicted upon the protesting parties against the benefits flowing from approval for the short period"); *Pennsylvania Gas & Water Co.* v. *FPC*, 427 F.2d 568, 576 (D.C. Cir. 1970) ("only a narrow class of real 'emergency' cases justifies the taking of action such as temporary certificates on an informal examination of the file without opportunity for hearing").[6]

[6] We do not decide, therefore, whether the Secretary would have authority to grant interim relief from a mandatory safety standard when there is a possibility that application of the standard will increase the danger to the miners. Nor do we decide whether the Secretary would have this authority in an "emergency" situation. Because the basic purpose of the Mine Act is to protect the miner, 30 U.S.C. § 801 (1982), this type of situation would present a more difficult issue. Section 44.16(c), however, by its terms is not meant to address this type of situation. The only finding regarding the safety of the miner that is required by § 44.16(c) is that "the requested relief will not adversely affect the health or safety of miners in the affected mine." The regulation does not require a finding that interim relief is necessary because application of the standard will adversely affect the health or safety of miners.

The real issue in this case is whether the Secretary may grant a modification of a mandatory safety standard, without regard to the requirements of section 101(c) of the Mine Act, without an opportunity for a hearing, upon three days' notice to the affected miners, over the opposition of those miners, on the basis of a one-paragraph explanation which does nothing more than paraphrase the challenged regulation, and with no provision for a right to appeal that decision. We think not.

Because the regulation at issue is an administrative interpretation of the statute the Secretary administers, we are faced with two questions. First we must determine whether Congress has addressed the precise issue in question. If so, we must give effect to the "unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). If, however, the statute is either silent or ambiguous with respect to the precise issue, we must affirm an agency interpretation if it is based on a "permissible construction of the statute," *id.* at 843, and if it represents a "reasonable policy choice." *Id.* at 845.

In reviewing the Mine Act to determine congressional intent, we begin with the recognition that:

> The primary purpose of the . . . Act was to protect mining's most valuable resource—the miner . . . . In the first section of the Act Congress noted the "urgent need to provide more effective means and measures for improving the working conditions and

> practices in the Nation's coal mines in order to prevent death and serious physical harm" . . . . In order to achieve these goals, Congress intended the Act to be liberally construed.

International Union, United Mine Workers of Am. v. *Kleppe*, 532 F.2d 1403, 1405-06 (D.C. Cir.), *cert. denied*, 429 U.S. 858 (1976); *accord Freeman Coal Mining Co.* v. *Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974); *Phillips* v. *Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 782 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975); *Reliable Coal Corp.* v. *Morton*, 478 F.2d 257, 262 (4th Cir. 1973); *St. Marys Sewer Pipe Co.* v. *Bureau of Mines*, 262 F.2d 378, 381 (3d Cir. 1959). Thus, we must determine whether the interim relief regulation is consistent with section 101(c) of the Mine Act in light of the protections afforded miners in that section.

The language of section 101(c) indicates that Congress did not intend to permit the Secretary to grant a modification of a mandatory safety standard, for any period of time, except after notice and an opportunity for a hearing and upon a finding by the Secretary that an alternative method exists "which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard" or that application of the standard "will result in a dimunition of safety to the miners in such mine." 30 U.S.C. § 811(c) (1982). In addition to the fact that there is no language in section 101(c) authorizing the Secretary to grant interim relief, we cannot identify any language in the section that could be interpreted as permiting some "implied authority" to grant such relief. Instead, the language is clear, mandatory, and specific. The interim relief regulation is not related to, and does not take account of, this clear language in any respect. The regulation does not require the Secretary to make either finding required by section 101(c). The regulation also omits the miners' right to a hearing under section 101(c) and allows the miners a mere *three* days to respond to the application. The regulation is thus inconsistent with every protection afforded the miners under section 101(c).

The absence of any stated authority in section 101(c) to grant interim relief is itself significant because Congress explicitly granted such authority in other provisions of the Mine Act. Of greatest importance is the fact that Congress in section 101(b) authorized the Secretary to provide for emergency temporary mandatory standards, without regard to the requirements of the APA, upon a finding "that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and . . . that such emergency standard is necessary to protect miners from such danger." 30 U.S.C. § 811(b) (1982). Thus, Congress considered the question of whether the Secretary should have authority to grant temporary relief under section 101 and determined that the Secretary should have this authority to impose industry-wide mandatory safety standards. Congress further limited this authority by requiring the Secretary to make findings, all of which relate to the safety of the miners. Congress did not grant similar authority with respect to "mine-specific" standards under section 101(c). This is strong evidence that Congress did not intend to allow the Secretary to grant temporary relief from mandatory safety standards pursuant to section 101(c). *See Rusello* v. *United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"), *quoting United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010, 1014 (5th Cir. 1968) ("a power which has been withheld or denied by Congress cannot be found to exist as an 'incidental' and 'necessary' power" when

Congress has specifically delineated other powers); *City of Burbank* v. *General Elec. Co.*, 329 F.2d 825, 832 (9th Cir. 1964) ("where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded").

This finding is buttressed by Congress's explicit provision for temporary relief in other parts of the Mine Act. Under section 105(b)(2), a mine operator may obtain temporary relief from the operation of a withdrawal order[7] but only if "a hearing has been held in which all parties were given an opportunity to be heard; . . . the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the appplicant; and . . . such relief will not adversely affect the health and safety of miners." 30 U.S.C. § 815 (b)(2) (1982). The provision also explicitly provides that no temporary relief shall be granted from certain other orders issued under section 104 of the Mine Act. *Id.* Thus, again Congress specifically provided for temporary relief from the enforcement of withdrawal orders—which are issued in response to violations of mandatory health and safety standards—and specifically delineated the procedures the Secretary must employ before granting such relief. Congress did not authorize the Secretary to grant temporary relief when a mine operator is in violation of those standards because the operator has also filed a petition for modification of those standards. Had Congress intended such a result it could easily have added

[7] A "withdrawal order" is an order issued after a finding that a mine operator is in violation of a mandatory health or safety standard and that the violation has not been totally abated within the time period specified by the Secretary. *See* 30 U.S.C. § 814 (1982). The withdrawal order requires the mine operator "to immediately cause all persons, except [certain designated persons], to be withdrawn from, and to be prohibited from entering, [the affected] area until an authorized representative of the Secretary determines that such violation has been abated." *Id.* § 814(b).

language to section 101(c) similar to that found in section 105(b). *See United States* v. *Naftalin*, 441 U.S. 768, 773-74 (1979) ("Respondent nonetheless urges that the phrase, . . . found only in [two] subsection[s], should be read into all three subsections. The short answer is that Congress did not write the statute that way.").

Finally, any party may obtain temporary relief pending judicial review of a decision of the Federal Mine Safety and Health Review Commission upon a finding by the court that "all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief; . . . the person requesting such relief [has] show[n] that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and . . . [that] such relief will not adversely affect the health and safety of miners in the coal or other mine." 30 U.S.C. § 817(a)(2) (1982).

These provisions show that Congress clearly considered the issue of temporary relief and clearly delineated the circumstances under which such relief is authorized. By negative implication, this is strong evidence that Congress did not intend to authorize the Secretary to grant temporary relief from mandatory health and safety standards as a matter of course under section 101(c).[8] Thus, the interim relief regulation is contrary to the clear congressional intent as expressed in the language of the Mine Act.

There is also no support in the legislative history of section 101(c) for the Secretary's position. None of the congressional reports mentions any authority to grant interim relief from a mandatory health or safety standard. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 25-26 (1977); S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 42-43 (1977);

[8] Again, we do not decide whether the Secretary has inherent power to grant interim relief if essential to further the purposes of the Mine Act or under other compelling circumstances. *See supra* pp. 17-18 & note 6.

see also H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 78-79 (1969) (explanation of parallel provision in the Federal Coal Mine Health and Safety Act of 1969). The legislative history does, however, provide additional evidence that Congress did not intend to grant the Secretary authority to grant interim relief from a mandatory safety standard pursuant to section 101(c).

Both the original House bill and the original Senate bill contained a provision which would have allowed a mine operator to obtain temporary relief from a mandatory standard upon a showing that

> (A) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (B) he will guarantee that employees are afforded no less than the same measure of protection they would have been provided by such standard, and (C) he has an effective program for coming into compliance with the standard as quickly as practicable.

S. 717, 95th Cong., 1st Sess. § 102(d)(1), 123 Cong. Rec. 4391 (1979); H.R. 4287, 95th Cong., 1st Sess. § 2 (1977), *reprinted in A Legislative History of the Federal Mine Safety and Health Act of 1977*, at 200-02 (1978) ("*1977 Leg. Hist.*"). These bills also provided that a temporary order could be granted only after notice to employees and an opportunity for a public hearing, and, further, that the order could be in effect no longer than necessary to achieve compliance or for six months, whichever was shorter. 123 Cong. Rec. 4391 (1977); *1977 Leg. Hist.*, at 200-01. This provision, however, was omitted by the House and Senate committees to whom the bills were referred. Similar provisions were proposed as amendments on the floor of the House and of the Senate. *See* 123 Cong. Rec. 19,993-94 (1977); 123 Cong. Rec. 23,168 (1977). These proposals

were also rejected. Thus Congress considered proposals which would have authorized the Secretary to grant temporary relief from mandatory standards and rejected them. Again, we find this to be evidence of congressional intent to preclude such authority.[9]

The foregoing demonstrates that Congress carefully considered the question of the Secretary's authority to grant interim relief and explicitly provided that authority for specific parts of the Mine Act and under specific conditions. We can discern no reason why Congress withheld this explicit authority in section 101(c) except that it intended to do just that. Thus, we must conclude that the omission expresses "the desire to achieve disparate results," *Carter* v. *Director, Office of Workers' Compensation Programs*, 751 F.2d 1398, 1401 (D.C. Cir. 1985), and that the Secretary's interim relief regulation is contrary to this clear congressional intent. We therefore grant the petitions for review and vacate the orders in these two cases awarding interim relief.

It is so ordered.

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[9] The Secretary asserts that Congress authorized the Secretary to grant interim relief under § 101(c) of the Mine Act when it did not reject the Interior Board of Mine Operations' interpretation of § 301(c) of the Coal Act, the predecessor provision to § 101(c), as containing an implied grant of power to allow interim relief. Brief for the Secretary of Labor in No. 86-1239 at 26-28. First, in the decision cited by the Secretary, the Interior Board of Mine Operations did not adopt the procedures for interim relief that the Secretary has adopted in the regulation under review. In Gateway Coal Co., 79 Interior Dec. 102 (1972), the Interior Board found that interim relief could be granted only after a hearing and upon a showing that the operator would suffer irreparable harm if interim relief were not granted. *Id.* at 106. Neither requirement has been adopted by the Secretary. Second, there is no evidence that Congress was aware of this decision when it passed the Mine Act. Thus, the Secretary's argument fails. *See* Zuber v. Allen, 396 U.S. 168, 185-86 n.21 (1969); Coalition to Preserve the Integrity of Am. Trademarks v. United States, 790 F.2d 903, 917 (D.C. Cir. 1986).

showing of a genuine attempt to ascertain what the law requires, not simply on a demonstration of the absence of bad faith. *See Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1096 (D.C.Cir.1984), *cert. denied* — U.S. ——, 105 S.Ct. 939, 83 L.Ed.2d 951 (1985), and cases cited therein. Admiral's cavalier approach to its wage records alone suffices to indicate that the magistrate did not abuse his discretion in refusing to find that Admiral acted in good faith and with reasonable grounds to believe its overtime compensation practices were lawful. It is hardly a sign of good faith that an employer prepares one set of books for his own purposes and another for the authorities "downtown." Magistrate's Decision at 42. Nor are we impressed by Admiral's plea that its records were in some cases so "unbelievably and absurdly inaccurate," Brief for Appellants at 32, as to demonstrate the absence of any motive to cover up violations of law. Carelessness of the kind in which Admiral's management indulged surely does not compel exoneration from liquidated damages liability.

For the reasons stated: (1) the judgment for Jewell is affirmed; and (2) the judgments for Dove and Pinner are vacated and their claims are remanded for the redetermination of damages due to them.

It is so ordered.

UNITED STATES of America, Appellant,

v.

Macio SINGLETON.

No. 83-2173.

United States Court of Appeals, District of Columbia Circuit.

Argued March 15, 1984.

Decided April 12, 1985.

Rehearing En Banc Denied June 25, 1985.

Following guilty verdict, the United States District Court for the District of Columbia, William B. Bryant, granted defendant's motion for judgment of acquittal on grounds evidence was insufficient. Government appealed. The Court of Appeals, 702 F.2d 1159, vacated in part, affirmed in part and remanded. Upon remand, the District Court granted new trial, and then, upon defendant's motion, suppressed key evidence. Government appealed. The Court of Appeals, Bork, Circuit Judge, held that prior decision of Court of Appeals operated to prevent District Court from suppressing evidence previously held by Court of Appeals to be reliable.

Reversed and remanded.

Swygert, Senior Circuit Judge, sitting by designation, filed dissenting opinion.

Opinion on rehearing, D.C.Cir., 763 F.2d 1432.

1. Courts ⟹99(1)

Doctrine of law of the case precludes questions decided by necessary implication as well as those decided explicitly.

2. Courts ⟹90(2)

Where earlier Court of Appeals panel had decided issue of reliability of showup identifications independently of other evidence, fact that more evidence was considered in earlier determination than Court of Appeals considered in government's appeal from district court's suppression of showup identification, evidence did not prevent application of doctrine of law of case.

3. Courts ⟹99(1)

Dissimilarity in standards of review applicable to appeal from trial court's entry of judgment of acquittal after jury had returned guilty verdict and appeal from trial court's suppression of evidence did not preclude application of law of case doctrine, where Court of Appeals was not reviewing fact-findings of district court, but rather, was determining whether district court had any discretion to review facts differently than Court of Appeals had done in prior appeal.

4. Criminal Law ⟹1180

When applying law of the case doctrine, general rule is that where evi[illegible]

on subsequent appeal is substantially same as that on first or preceding appeal, all matters, questions, points, or issues adjudicated on prior appeal are law of case on all subsequent appeals and should not be considered or readjudicated therein.

5. Criminal Law ⇐1192

Where reliability of showup identifications had already been found by Court of Appeals in original appeal by Government from district court's entry of judgment of acquittal after jury had found defendant guilty, law of the case principles precluded district court from reconsidering evidence.

6. Criminal Law ⇐1192

Although district court may be free to redecide issues reopened at trial court level, it is not free to redecide issues previously determined by appellate court, particularly if no new evidence is presented to trial court.

Appeal from the United States District Court for the District of Columbia (Criminal No. 75-00721).

Craig N. Moore, Washington, D.C., of the Bar of the Supreme Court of Cal., pro hac vice by special leave of the Court, with whom Joseph E. diGenova, U.S. Atty., Michael W. Farrell, Judith Hetherton, Theodore A. Shmanda and David W. Stanley, Asst. U.S. Attys., Washington, D.C., were on brief, for appellant.

Ed Wilhite, Washington, D.C., for appellee.

Before BORK and SCALIA, Circuit Judges, and SWYGERT,* Senior Circuit Judge.

Opinion for the Court by Circuit Judge BORK.

Dissenting opinion filed by Senior Circuit Judge SWYGERT.

BORK, Circuit Judge.

This case is before this court for the second time. Our previous decision reversed a judgment of acquittal entered by the district court after a jury verdict of guilty against Macio Singleton. The panel majority held that the evidence presented was reliable and sufficient to sustain the conviction. Upon remand the district court granted a new trial, and then, upon Singleton's motion, suppressed the key evidence. The question we now address is whether our prior decision operated to prevent the district court from suppressing evidence we had held reliable. We hold that our previous decision was binding upon the district court and we reverse the suppression order.

I.

The case arises out of a robbery of a fast food restaurant, the rapid apprehension of appellee Singleton, and an onsite showup identification, all on the evening of September 8, 1975. A complete factual account of these occurrences and the surrounding circumstances is contained in *United States v. Singleton*, 702 F.2d 1159 (D.C.Cir.1983) ("*Singleton I*"). We need not repeat the details here. After a positive identification, Singleton was charged with four counts of armed robbery, 22 D.C.Code Ann. §§ 2901, 3202 (1981); one count of possession of an unregistered firearm, 26 U.S.C. § 5861(d) (1976); and one count of possession of a firearm not identified by a serial number, 26 U.S.C. § 5861(i) (1976).

Released on bond, appellee failed to appear for arraignment and a bench warrant was issued. Appellee remained a fugitive for five and one-half years until his arrest on an unrelated arson charge in February, 1981. Prior to trial, appellee filed a motion to suppress the showup identifications on the ground that they were the product of unduly suggestive procedures and that their admission would deprive him of the process.

* Of the United States Court of Appeals for the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

The district court held a suppression hearing and denied appellee's motion, finding that the showup procedure was not overly suggestive. After a full trial, the jury found appellee guilty on all counts. At the end of the trial, appellee made a motion for new trial and a motion for judgment of acquittal. The trial judge granted appellee's motion for judgment of acquittal on the ground that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt. He did so specifically on the grounds that the onsite showup was too suggestive and that the recollections of the witnesses at trial more than five years later conflicted with a photograph of appellee taken after his arrest. The judge did not act on the motion for new trial, presumably considering the question mooted by the grant of the other motion.

On appeal, this court reviewed the fifteen-volume transcript of the case, held that neither of the district court's grounds were sustainable, found that the evidence was sufficient to support the jury's findings, and reversed and remanded. On remand, however, the district court granted appellee's pending motion for a new trial. Appellee then renewed his motion to suppress the showup identification testimony and the judge, this time, granted it upon the ground that its introduction would deprive appellee of due process of law. The suppression order, like his previous judgment of acquittal, was based upon the judge's finding that the testimony was unreliable because of the suggestiveness of the showup and because of the discrepancies between the photograph of appellee taken shortly after his arrest and the witnesses' conflicting recollection, more than five years later, of appellee's clothing and appearance that night. The district judge based this finding in part on the proposition that "people who are robbed never forget it." Joint Appendix ("J.A.") at 142. This appeal by the government followed.

II.

[1] The government argues that this court's opinion in *Singleton I* is the law of the case and therefore requires reversal of the district court's order granting appellee's motion to suppress the showup identification testimony. The doctrine of "law of the case" is a rule of practice whereby "courts generally ... refuse to reopen what has been decided." *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912). *See also In re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 678 (D.C.Cir.1981). In *White v. Murtha*, 377 F.2d 428 (5th Cir.1967), the court stated that,

> [t]he "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that ... it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

Id. at 431 (footnotes omitted). The doctrine also precludes questions "decided by necessary implication as well as those decided explicitly." *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974); *see also Boucnèt v. National Urban League, Inc.*, 730 F.2d 799, 806 (D.C.Cir.1984).

There is an obvious strong similarity between *Singleton I* and the present appeal ("*Singleton II*"). The reliability of the showup evidence was central to the first and is the sole issue being considered now. But the cases are not identical in all respects and appellee urges three points of difference that prevent the first appeal from controlling this appeal: (1) *Singleton I* explicitly stated that it was not deciding the due process issue that is now before us; (2) the review of the sufficiency of the evidence for conviction in *Singleton I* included more evidence than the showup identifications that were suppressed here; and (3) the standards of review are different in the two cases. *See* Supplemental Brief for Appellee. We address these points in turn.

A.

The panel majority in *Singleton I* stated that it was not reviewing the district court's refusal to suppress the evidence of showup identifications prior to trial and said the due process issue was "not properly before us at this time." *Singleton I*, 702 F.2d at 1166 n. 23. That was undoubtedly correct. The question, however, is whether *Singleton I*'s disavowal of any intention to rule upon the due process issue precludes the rulings that were made from governing this appeal which turns entirely upon the due process issue. We think not. The *Singleton I* panel did not focus on the due process question since that was not up for review and, being careful not to foreclose a legal issue not considered, noted that fact. That is no more than routine and praiseworthy judicial caution. In no way does that caveat prevent us from concluding that, in truth, the analysis of *Singleton I* does answer the due process question. It would be extraordinary, in fact, if we, upon finding that *Singleton I*'s analysis of the reliability of the showup evidence had effectively decided every element of the due process issue, should nevertheless consider the district court free to reach a different conclusion about the reliability of the evidence. Indeed, the dissenting judge in *Singleton I* concluded that the majority's analysis was "identical" to that used in due process cases and tended to foreclose any due process claim here. *See* Part II.C, *infra*. It seems clear, therefore, that the question for us is the substance of *Singleton I*'s analysis, not the ultimate legal question to which it was addressed.

B.

More evidence was considered by this court in *Singleton I* in holding the evidence sufficient to convict than is involved in reviewing the suppression order here. *Singleton I*, for example, considered not only the showup identifications but police testimony that one of the robbers was seen fleeing toward the spot where appellee was stopped by the police. *Singleton I*, 702 F.2d at 1163–64, 1167. We, on the other hand, are considering only the suppression of the showup testimony. Appellee argues, therefore, that *Singleton I*, in theory at least, could have held that the evidence was sufficient even if there had been no evidence of the showup identifications. Thus, that case's determination that the evidence was sufficient does not necessarily determine that the identifications were reliable. That contention would have more force if *Singleton I* had viewed the evidence as a whole and simply concluded that there was enough for the jury to convict. But that is not what *Singleton I* did. The panel majority there analyzed separately the reliability of the same evidence the district court has now ordered suppressed in the second trial. The showup identifications were subjected to that analysis independently of the other evidence. *Id.* at 1165–66. That was necessary because, as the panel majority recognized, the identification testimony was "the keystone of the Government's case against appellee." *Id.* at 1164. The question before us, therefore, is identical to one already decided in *Singleton I*. That is easily shown.

In Part C of the *Singleton I* opinion, the court dealt at length with the concerns of the trial judge about the reliability of the showup identification. The question of reliability turned upon two considerations: the suggestiveness of the showup and the inconsistencies in the witness' recollections some five and one-half years later. This court dealt with both aspects:

> We do not believe ... suggestiveness was a factor which, considered with the conflicting testimony of the witnesses, necessitated or justified a verdict of acquittal. Immediate on-the-scene showup identifications, while recognized as inherently suggestive, have long been upheld by this court. "Balancing all the doubts left by the mysteries of human perception and recognition, it appears that prompt confrontations ... will 'if anything promote fairness by assuring reliability ....'" Notwithstanding its suggestive elements, the showup at issue here took place under circumstances that would tend to promote reliability.

> ....
>
> Nor do we find fatal the incongruence in the testimony of the witnesses. There are variations, to be sure, between the recollections of the witnesses as to the robber's facial appearance and clothing and Singleton's appearance as shown by the photograph taken on the night of his arrest. Such discrepancies are to be expected, however, especially since the witnesses were recalling an event that happened over five years earlier.... [T]he weight to be given to the testimony of the witnesses is for the jury to determine.

Singleton I, 702 F.2d at 1165–66 (footnotes omitted; citations omitted).

[2] It is thus clear that *Singleton I* decided the issue of the reliability of the showup identifications independently of the other evidence. The fact that more evidence was considered in *Singleton I* than we consider here does not, therefore, prevent application of the doctrine of law of the case.

C.

[3] Appellee contends that *Singleton I* cannot be binding in *Singleton II* because the standard of review is different in the two cases. Supplemental Brief for Appellee at 10–11. In the prior case, he says, we were required to view the evidence in the light most favorable to the government in determining whether the evidence was sufficient to support the conviction. Here, by contrast, we may reverse the district court only if we can conclude that its determination was clearly erroneous. *E.g., United States v. Wellins*, 654 F.2d 550, 557 & n. 12 (9th Cir.1981); *see also* 3 C. Wright, *Federal Practice and Procedure* § 678, at 805 & n. 24 (1982). One is a *de novo* review, the other a deferential review. That is, of course, a correct statement of the legal formulations of the standards of review where factual determinations by the district judge are attacked. But that is not what is involved here. Appellant is able to produce an apparent anomaly—that we are required to uphold as not clearly erroneous the district court's determination that the evidence is unreliable despite the decision of this court that it is reliable—only by confining his arguments to standards of appellate review and ignoring the effect of the law-of-the-case doctrine upon the district court.

The answer to appellant's conundrum is that we are not reviewing fact findings by the district court. We are asking whether, as a matter of law, the district court had any discretion to view the facts differently than we had already done. We think not. The district court was bound by *Singleton I*'s determination that the showup identifications were reliable. That is true because the legal test applied by *Singleton I* was the same as that to be applied by the district court in deciding the suppression motion. The movant had the extraordinary burden of showing that the evidence was too unreliable even to be placed before a jury. Placing the burden upon the moving defendant to show that no rational jury could convict is the same as viewing the evidence in the light most favorable to the government.[1] If the movant does not carry that severe burden, the weight to which the evidence is entitled is a matter for probing and argument by counsel and for ultimate determination by the jury, a body whose capacities of discernment in matters of this sort must not be underrat-

1. The dissent suggests that the test of "reliability" has different meanings when admissibility is considered before trial and sufficiency is considered after trial. We know of no decision to that effect and the dissent cites none. Nor is the distinction well founded in reason. When a judge asks whether evidence is reliable he asks whether a reasonable person could believe the evidence. The answer ought to be the same whether the legal context is sufficiency or due process.

The dissent's further observation that most rules of evidence operate to exclude probative evidence is beside the mark. The reliability determination is precisely a decision about whether the evidence is probative in the sense that it is trustworthy enough to lay before jurors. That determination has already been made by this court in *Singleton I*.

ed. *See Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977).

Indeed, the identity of the issue before the *Singleton I* court and the issue before the district court was recognized by the dissenting judge in *Singleton I:*

> The majority states that it declines to address the due process issue. Maj. op. at 1166 n. 23. However, the court adopts an analysis of the showup testimony identical to that used in due process cases, *see e.g., id.* at 1165–66 & n. 21, and *all* of the cases relied upon by the court in its analysis are due process cases, *see id.* at 1165–66 (*citing Russell v. United States*, 408 F.2d 1280, 1284 (D.C.Cir.) *cert. denied*, 395 U.S. 928, 89 S.Ct. 1786, 23 L.Ed.2d 245 (1969); *Wise v. United States*, 383 F.2d 206, 208 (D.C. Cir.1967), *cert. denied*, 390 U.S. 964, 88 S.Ct. 1069, 19 L.Ed.2d 1164 (1968)); maj. op. at 1166 n. 21 (*citing Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)). Moreover, because it finds the showup testimony sufficient to allow a reasonable jury to convict, the majority's analysis tends to foreclose a due process claim. Otherwise, how could evidence be substantial enough to allow a reasonable jury to convict and yet be so unreliable as to be inadmissible on due process grounds?
>
> Nonetheless, the majority clearly leaves open a subsequent appeal by Mr. Singleton raising the due process issue. When such an appeal is brought, the court will have to face the issue directly. In my opinion, admission of such testimony violated due process, so that *a fortiori* the identification testimony cannot suffice to allow a reasonable jury to convict.

702 F.2d at 1174 n. 18 (Wright, J., dissenting).

This case is to be distinguished from cases enunciating the standard to be applied upon a motion to suppress evidence on the grounds that it was seized without a warrant and without probable cause. *See, e.g., United States v. Finefrock*, 668 F.2d 1168 (10th Cir.1982). The legal test there is wholly different. As *Chimel v. California*, 395 U.S. 752, 762, 89 S.Ct. 2034, 2039, 23 L.Ed.2d 685 (1969), made clear, when a search or seizure is warrantless the government carries the burden of justifying the agent's actions. The general rule is that a warrant is required and the burden of showing probable cause for a warrantless search is placed upon the government because one seeking an exemption from the rule must show a need for it. *Chimel*, 395 U.S. at 762, 89 S.Ct. at 2039. Here, by contrast, the government was seeking no exemption and there was no general rule against the evidence it offered.

Not only were the legal issues considered by *Singleton I* and, subsequently, by the district court the same, so also were the factors considered. The *Singleton I* court, as we have noted, explicitly used the factors enumerated in *Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S.Ct. 375, 382–83, 34 L.Ed.2d 401 (1972) (a due process analysis), to evaluate the reliability, and therefore the sufficiency, of the evidence. *Singleton I*, 702 F.2d at 1166 & n. 21. Under the *Biggers* due process analysis the court is required to determine reliability by considering the "totality of the circumstances." 409 U.S. at 199, 93 S.Ct. at 382. *Biggers* enumerates five factors to assist the court in making its determination:

[1] the opportunity of the witness to view the criminal at the time of the crime,

[2] the witness' degree of attention,

[3] the accuracy of the witness' prior description of the criminal,

[4] the level of certainty demonstrated by the witness at the confrontation, and

[5] the length of time between the crime and the confrontation.

Id. at 199–200, 93 S.Ct. at 382–383.

In *Singleton I*, this court applied the *Biggers* test, specifically finding four of

the five suggested factors present, and concluding that in the totality of the circumstances the showup was conducted in a manner that promoted reliability. *Singleton I*, 702 F.2d at 1166. The court found that each of the witnesses "had ample opportunity to view the [culprits] at close range in good lighting conditions" for a period of several minutes. *Id.* at 1164–66 & n. 22. The witnesses' degree of attention varied, but each had focused direct attention on the robber's face or his clothing. *Id.* The witnesses testified at the showup that they were positive that Singleton was the robber. *Id.* at 1164. Indeed, and perhaps most significant, the showup was conducted within a few minutes after the robbery. *Id.* at 1166. Factor three was the only one not shown by the police or the prosecution. Absence of only this factor, given the court's conclusions as to the other factors, is not enough to invalidate the entire showup. *See United States v. Hammond*, 666 F.2d 435 (9th Cir.1982) (failure to give prior identification not fatal under *Biggers* factors); *see also Bass v. Scully*, 562 F.Supp. 905 (S.D.N.Y.1983). Thus in *Singleton I* a due process analysis was used to determine the sufficiency of the evidence. The court recognized that when it said, "[a]lthough ... *Biggers* [was a] due process case[ ], we think the factors enumerated in *Biggers* are relevant in evaluating the weight of identification evidence as well as its admissibility." 702 F.2d at 1166 n. 21.

The district judge, in his subsequent grant of the motion to suppress, based his decision on the alleged unreliability of the evidence produced at the initial trial. The following reference shows that the district court's rationale was the same as that behind its grant of a motion of acquittal for lack of sufficient evidence at the previous trial:

> THE COURT: ... My problem is in ruling on this motion—and I suspect I can, because it was introduced in the trial. I'm as skeptical about it now as I was when I was reluctant to get it in. And if anything, I'm more certain than ever that it had all the earmarks of impermissible suggestion, and had a very dangerous potential for misidentification.
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> So I'm going to grant the motion.

J.A. at 142–43. The district court also found that the recollection of the witnesses, more than five and one-half years after the incident, was not consistent with a photograph of appellee taken shortly after his arrest. *Id.* at 129–45. In other words, the district court used the identical rationale to grant the motion to suppress the identification testimony as it did in the prior trial to grant the motion of acquittal. Indeed Singleton, on the motion to suppress, argued "that the same reasoning that lead [sic] the Trial Court to grant his motion for judgment of acquittal, required that he reverse himself on the motion to suppress identification." Brief of Appellee at 6. But that reasoning was precisely what this court rejected in *Singleton I*.

[4–6] When applying the law-of-the-case doctrine, the general rule is that where the evidence on a subsequent appeal is substantially the same as that on the first or preceding appeal, all matters, questions, points, or issues adjudicated on the prior appeal are the law of the case on all subsequent appeals and should not be reconsidered or readjudicated therein. *See Quern v. Jordan*, 440 U.S. 332, 347 n. 18, 99 S.Ct. 1139, 1148 n. 18, 59 L.Ed.2d 358 (1979); *Messenger*, 225 U.S. at 444, 32 S.Ct. at 740; *Schwartz v. NMS Industries, Inc.*, 575 F.2d 553, at 554–55 (5th Cir.1978); *White*, 377 F.2d at 431–32; 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 (1981); 1B J. Moore, *Moore's Federal Practice* ¶ 0.404[1] (2d ed. 1984). Since reliability has already been found by the *Singleton I* court, law-of-the-case principles precluded the district court from reconsidering that evidence a second time.[2] Indeed, if the district court could

2. Contrary to appellee's suggestion, this case does not present the same question as that presented in *United States v. Dovico*, 261 F.Supp. 862 (S.D.N.Y.1966). There the trial judge found that he was not bound by a decision rendered in a prior trial that evidence was

redetermine the reliability issue, it would be required to do so pursuant to the *Biggers* test—the same test used by the *Singleton I* court. This would merely substitute the opinion of the district court for that of the court of appeals. This is exactly what law-of-the-case principles were developed to avoid.

Singleton I was very carefully considered. The record was painstakingly examined. There was a careful majority opinion and a strong dissent. Only a settled conviction that a manifest injustice would otherwise occur would justify us in departing from the doctrine of law of the case. A careful study of *Singleton I*, the district court's reasoning, and the briefs now before us in *Singleton II* produce no such conviction. We cannot go on litigating and adjudicating the reliability of this same evidence forever.

The decision of the district court is reversed and the case is remanded for proceedings consistent with *Singleton I* and this opinion.

It is so ordered.

SWYGERT, Senior Circuit Judge, dissenting.

The majority's application of the law-of-the-case doctrine is premised on an invalid assumption: that in considering the "reliability" of the show-up identification in *United States v. Singleton*, 702 F.2d 1159 (D.C.Cir.1983) ("*Singleton I*"), this court necessarily passed judgment on the same factors that determine the "reliability," and hence the admissibility, of the identification for due process purposes. Because a greater degree of reliability is required to determine the admissibility, as opposed to the sufficiency, of identification evidence, I would reach the merits of the admissibility issue.

Due process requires that a suggestive out-of-court identification be excluded from evidence if there is "a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968)). On the other hand, to be sufficient to convict, the identification, in combination with other evidence, need only permit a rational trier of fact to find guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The latter determination, which was reached in *Singleton I*, requires a lesser threshold of reliability than the former. In determining sufficiency, the court considers evidence in addition to the identification; accordingly, deficiencies in the reliability of identification can be outweighed by the reliability of other evidence. An admissibility determination, by contrast, requires exclusive focus on the reliability of the identification.

The majority stresses, however, that the identification was virtually the only evidence produced against Singleton. Even in such circumstances, the standard for weighing reliability is stricter when determining admissibility. In weighing the sufficiency of evidence, the judge decides whether the *jury* could *rationally* find the identification reliable enough to convict. In weighing the admissibility of evidence, the judge makes his own independent determination of whether the identification is reliable. In the former context, the judge considers the possibility that his own views on reliability are wrong—that a jury could rationally disagree with him and find the identification reliable enough to convict. In the latter context, the judge considers only his own views on reliability: whether

admissible. On appeal, the circuit court held that the decision whether the evidence was admissible was for the trial judge at the new trial to make. 380 F.2d 325, 326 n. 1 (2d Cir.), *cert. denied*, 389 U.S. 944, 88 S.Ct. 308, 19 L.Ed.2d 302 (1967). *See also United States v. Akers*, 702 F.2d 1145, 1148 & n. 8 (D.C.Cir.1983).

Unlike *Dovico*, our case involves a district judge ruling on a question previously determined by the appellate court. Although the district court may be free to redecide issues reopenable at the trial court level, it is not free to redecide issues previously determined by the appellate court. Especially if, as here, no new evidence is presented to the trial judge.

there is "a very substantial likelihood of irreparable misidentification." *Biggers*, 409 U.S. at 198, 93 S.Ct. at 381. Because the required threshold level of reliability need not be discounted by the probability that the judge is wrong, the identification evidence must be more reliable to pass muster in this latter context.

By blurring the distinction between the admissibility and sufficiency of evidence, the majority ignores the most fundamental premises and policies of evidence law. Most rules of evidence, and the due process considerations that often govern those rules, operate to exclude probative evidence. *Cf.* C. McCormick, *McCormick on Evidence* § 53 at 135 & n. 2 (E. Cleary 3d ed. 1984). That evidence is probative or even probative enough to convict does not mean it is sound policy to admit the evidence. The policy consideration in the present context is the limits of the rational faculties of factfinders.[1] If all jurors conformed to the "rational juror" model of *Jackson*, there would be no need to exclude as prejudicial a suggestive identification. The rational juror would discount, with precision, the probative value of the identification by the suggestiveness of the surrounding circumstances. But jurors are irrational in the sense that they tend to overvalue the weight of a suggestive positive identification, which is why courts can define such evidence as "prejudicial." Accordingly, it is the duty of the judge to decide for himself whether the evidence is sufficiently reliable to be admissible. Once the evidence is admitted, the judge merely decides whether the *jury* could rationally find the evidence sufficiently reliable to convict beyond a reasonable doubt. By interposing the independent judgment of the judge at the admissibility stage, instead of using the deferential *Jackson* standard at all stages of the proceedings, the *Biggers* test provides an important safeguard against the jury's fallibilities. In the long run, unjust convictions will be kept to a sufficiently tolerable minimum to satisfy due process.[2]

The judgment as to the sufficiency and admissibility of identification evidence, then, is governed by different standards that express different underlying policies. To be sure, in both contexts, the court considers the "reliability" of the identification and weighs the same five indicia of reliability outlined in *Biggers*. *See ante at* 181–182. But the extent of the reliability required differs: an identification may be "reliable" enough to convict yet not "reliable" enough to be admissible. In short, the same word has a different meaning in each context. This court's judgment in *Singleton I* that the identification, *if admissible*, was sufficient, along with other evidence, to convict does not preclude a judgment in the case at bar to exclude the same identification evidence on due process grounds.

The majority seems to contend, however, that notwithstanding any theoretical differences between the two reliability determinations, *Singleton I* in fact decided that the identification was reliable enough for both due process and sufficiency purposes. Yet, the majority in *Singleton I* expressly declined to reach the due process issue. *Singleton I*, 702 F.2d at 1166 n. 23. It is true that issues decided as a "necessary implication" of the court's holding are a part of the law of the case. *See Bouchet v. National Urban League, Inc.*, 730 F.2d

1. Often, deterrence is the countervailing consideration that requires the suppression of relevant, probative evidence. The Supreme Court, however, has held that the desirability of deterring suggestive show-ups is not to be considered in determining whether to admit the identification evidence. *Manson v. Brathwaite*, 432 U.S. 98, 111–14, 97 S.Ct. 2243, 2251–53, 53 L.Ed.2d 140 (1977).

2. It could be argued that the rational juror standard of *Jackson* would adequately protect against this problem. Yet, it is rare that a judge can conclude with certitude that no rational juror could convict on the basis of suggestive identification: the prejudicial effect of such evidence is real, but usually too subtle and too unquantifiable to permit such a conclusion in any particular case. Accordingly, the best safeguard—and, in any event, the safeguard adopted by the Supreme Court—is to rely on the independent judgment of the trial judge that there was not a substantial likelihood of irreparable misidentification.

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799, 806 (D.C.Cir.1984). A decision as to admissibility may have been necessary in *Singleton I* in the sense that a defendant can only be convicted on the basis of admissible evidence. But nothing prevented the court from assuming *arguendo* that the identification evidence was admissible and then deciding the sufficiency issue; in this way, the district court would be allowed, on remand, to resolve the due process issue in the first instance. This is precisely what the majority in *Singleton I* decided to do, and it is this determination not to reach the due process issue that is the law of the case.

I recognize that the majority in *Singleton I* stated that "[n]otwithstanding its suggestive elements, the showup at issue here took place under circumstances that would tend to promote reliability." *Singleton I*, 702 F.2d at 1166. The necessary implication of this statement is that there was not a "very substantial likelihood of irreparable misidentification." *See Biggers*, 409 U.S. at 198, 93 S.Ct. at 381. Yet, this statement, and its necessary implication, were not the holding of the case. The court held only that the identification was reliable enough to be sufficient to convict; it expressly refused to reach the due process issue. The extent to which the showup's reliability exceeded this threshold showing and any implication that it may have been reliable enough to satisfy due process concerns were dicta. This court has held that dicta is not part of the law of the case. *National Souvenir Center, Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 511 (D.C.Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 103, 83 L.Ed.2d 48 (1984); *accord Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir.1982); *Russell v. Commissioner*, 678 F.2d 782, 785 (9th Cir.1982); *see Quern v. Jordan*, 440 U.S. 332, 347 n. 18, 99 S.Ct. 1139, 1148 n. 18, 59 L.Ed.2d 358 (1979) (law-of-the-case doctrine does not preclude consideration of any matter left open by the superior court's mandate); Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 Utah L.Rev. 1, 5 ("[o]bviously, the decision of the appellate court has no effect on matters not ruled upon").

I would therefore decide the due process issue on its merits. For the reasons stated in Judge Wright's dissent in *Singleton I*, the identification evidence should be suppressed. Accordingly, I would affirm the order below.

Stephanie TRAKAS, Appellant,

v.

QUALITY BRANDS, INC.

No. 84-5229.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 23, 1985.

Decided April 16, 1985.

Plaintiff brought suit for breach of contract and for sex-based discrimination violation of Title VII and Equal Pay Act. The United States District Court for the District of Columbia, Norma Holloway Johnson, J., dismissed case with prejudice for want of prosecution, and plaintiff appealed. The Court of Appeals, Mikva, Circuit Judge, held that trial judge abused her discretion by denying continuance and dismissing suit with prejudice.

Reversed and remanded.

Scalia, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⇐818

Dismissal is an extremely harsh sanction and may be reversed when discretion is abused. Fed.Rules Civ.Proc.Rule 41(b), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1723

Dismissal is sanction of last resort to be applied only after less dire alternatives

UNITED STATES of America,
Appellant,

v.

Macio SINGLETON.

No. 83-2173.

United States Court of Appeals,
District of Columbia Circuit.

Suggestion May 3, 1985.

Opinions June 25, 1985.

On Appellee's Suggestion for Rehearing En Banc.

Ed Wilhite, Washington, D.C., appointed by this court, was on Appellee's Suggestion for Rehearing En Banc.

Before ROBINSON, Chief Judge, and WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges.

ORDER

PER CURIAM.

Appellee's suggestion for rehearing *en banc*, filed May 3, 1985, has been circulated to the full court. A majority of the judges in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the court *en banc*, that the suggestion is denied.

Circuit Judges J. SKELLY WRIGHT, WALD, and MIKVA would grant the suggestion for rehearing *en banc*.

A statement of Circuit Judge HARRY T. EDWARDS, concurring in denial of rehearing *en banc*, joined by Chief Judge SPOTTSWOOD W. ROBINSON, III and Circuit Judge GINSBURG, is attached.

A statement of Circuit Judge BORK, joined by Circuit Judge SCALIA, is attached.

A statement of Circuit Judge J. SKELLY WRIGHT, dissenting from denial of rehearing *en banc*, joined by Circuit Judge MIKVA, is attached.

HARRY T. EDWARDS, Circuit Judge, with whom SPOTTSWOOD W. ROBINSON, III, Chief Judge and GINSBURG, Circuit Judge, join, concurring in denial of rehearing en banc:

I find it difficult to subscribe to the panel's decision in this case; however, I do not believe that the case should be reheard *en banc*.

In *United States v. Singleton* ("*Singleton I*"), 702 F.2d 1159 (D.C.Cir.1983), this court held that the District Court improperly granted a motion for a post-verdict judgment of acquittal. In the instant appeal, *Singleton II*, the panel majority held that our earlier decision had, in effect, also resolved the question whether the showup at which Singleton was identified as a robber violated his due process rights and thus rendered evidence of that identification inadmissible. Therefore, the majority reasoned, the law of the case precluded the District Court from considering the due process issue on retrial. Unlike the majority, I believe the issue before the court in *Singleton I* to have been sufficiently distinct from that raised in *Singleton II*, so that the law of the case doctrine was not applicable.[1]

Although I have serious doubts about the panel's decision, I am convinced that it does not alter the existing law of the circuit or create any new law. The decision does not impede the authority of the District Court to enter post-verdict judgments of acquittal based on the insufficiency of the evidence and does not change the standard of appellate review of such judgments, ar-

1. A court ought not invoke "law of the case" to deprive a litigant of a right to consideration and decision of a fundamental constitutional question. On such important matters, "litigants are entitled to have the law correctly applied to their lawsuits. The courts have a duty to use reasonable amounts of time to make [illegible] that this is done. Deviation from this [illegible] occur only when there are exceptio[illegible] Vestal, *Law of the Case: Single Su[illegible]* 1967 Utah L.Rev. 1, 31.

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ticulated by this court *en banc* in *United States v. Singleton*, 702 F.2d 1182 (1983). Nor does it affect the legal standard to be used in determining whether a suggestive identification procedure violates due process. *See Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Because consideration by the full court is not necessary "to secure or maintain [the] uniformity of [our] decisions" and because, despite the vital importance of this appeal to the appellant, no legal "question[s] of exceptional importance" are involved, *en banc* rehearing is not appropriate. FED.R.APP.P. 35(a).

By declining to rehear the case, however, "[w]e do not sit in judgment on the panel; we do not sanction the result it reached." *Jolly v. Listerman*, 675 F.2d 1308, 1311 (D.C.Cir.) (Robinson, C.J., concurring in denial of rehearing *en banc*) (footnote omitted), *cert. denied*, 459 U.S. 1037, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982). We decide merely that, because the case does not present questions of "'real significance to the legal process as well as to the litigants,'" review by the full court is not justified. *Id.* at 1310 (quoting *Church of Scientology v. Foley*, 640 F.2d 1335, 1341 (D.C.Cir.1981) (*en banc*) (dissenting opinion), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981)).

Statement of Circuit Judge BORK, joined by Circuit Judge SCALIA.

BORK, Circuit Judge:

Both the dissent from and the concurrence in the court's denial of the suggestion for rehearing *en banc* state that the panel erred by applying the doctrine of law of the case. It is noteworthy, however, that neither the dissent nor the concurrence gives an adequate reason why that is so. We think it worth adding a word to demonstrate that the panel majority's result was not merely allowable or correct but inevitable. It is always perilous in legal disputation to claim that a proof is so rigorous as to deserve the name "mathematical." But we think we may claim that here. In fact, the governing principle in this case was first formulated by a geometer.

In *United States v. Singleton*, 702 F.2d 1159 (D.C.Cir.1983) ("*Singleton I*") a panel majority reversed a judgment of acquittal entered by the district court after a jury verdict of guilty. Upon remand the district court granted a motion for a new trial and then granted a motion to suppress evidence. In *United States v. Singleton*, 759 F.2d 176 (D.C.Cir.1985) ("*Singleton II*") the panel majority reversed the order to suppress on the ground that the law of the case, established in *Singleton I*, bound the district court to hold the evidence admissible.

The key evidence in *Singleton I* concerned a showup identification of Macio Singleton as an armed robber. The district court found that evidence so unreliable as to be insufficient to support the jury verdict. The issue before this court was the sufficiency of the evidence. After exhaustive analysis, the *Singleton I* majority held that the showup identification, which it assessed independently of the other evidence, was reliable. 702 F.2d at 1165–66. The majority said that it did not reach any due process question because no order suppressing evidence was before it. *Id.* at 1166 n. 23. That was formally correct. Nevertheless, reliability is the test both for the sufficiency of evidence to support a verdict and for the admissibility of evidence to survive a motion to suppress. *Id.* at 1166 n. 21. No reason appears why reliability should be judged differently under a due process standard than it is under a sufficiency standard. To uphold the suppression order in *Singleton II* we would have had to hold that another panel of this court was wrong on the question of reliability in *Singleton I* and that the judgment there should have been one of affirmance rather than reversal.*

* We could, of course, do just that if we thought "manifest injustice" had been done. For the reasons stated in *Singleton II*, we do not think that. Our dissenting colleague has argued that

There seems to us no mode of analysis that can avoid the conclusion that *Singleton I* governed *Singleton II*. Indeed, our colleague who dissents today also dissented in *Singleton I*. He then recognized, though he was unhappy about it, that the *Singleton I* majority relied upon due process case law and that its analysis was "identical" to a due process analysis. 702 F.2d at 1174 n. 18. He displays no such recognition today, but we think he was clearly right in his characterization of the nature of the majority's reasoning and conclusions then. That identity determined the outcome of *Singleton II*.

When the district court upon remand considered the motion to suppress the showup identification under due process criteria, it was repeating precisely the analysis of the evidence's reliability already undertaken by this court in *Singleton I*. There was thus no occasion for us, in reviewing the suppression order, to apply a "clearly erroneous" standard. The issue was not factual but legal. The issue in *Singleton I* was reliability and the issue subsequently before the district court was reliability. In deciding that the district court was bound by the doctrine of law of the case to reach the same result as *Singleton I*, we therefore applied an ancient and self-evident maxim: "Things which are equal to the same thing are also equal to one another." Common Notion No. 1, I *The Thirteen Books of Euclid's Elements* 155 (T. Heath trans. 2d ed. 1956). This court, even sitting *en banc*, could not reverse that principle.

J. SKELLY WRIGHT, Circuit Judge, with whom MIKVA, Circuit Judge, joins, disenting from denial of rehearing en banc:

I agree with Chief Judge Robinson and Circuit Judges Edwards and Ginsburg that the issue in *Singleton I* was "sufficiently distinct from that raised in *Singleton II*," concurring statement of Edwards, J. at 1, and that, thus, the law of the case doctrine is completely inapplicable. Indeed, the *Singleton I* court seemed to say precisely that it thought the due process issue—the core of *Singleton II*—distinct from the sufficiency issue before it. *See United States v. Singleton*, 702 F.2d 1159, 1166 n. 23 (D.C.Cir.1983). It is only the second panel that transformed *Singleton I's* sufficiency ruling into a ruling on the due process issue that is the basis of this appeal. Admittedly, the dissent in *Singleton I* argued that the due process issue should have been reached, but the majority explicitly rejected that view. 702 F.2d at 1166 n. 23. Now, however, we are told that, in fact, the due process issue has already been decided and need not be considered again by this court.

The context of this appeal should be stressed, for it is important to remember that we are considering a criminal proceeding against an individual person, not some abstract legal puzzle. On the night of September 8, 1975, Macio Singleton was walking on a Washington street in the direction of his mother's house. A Gino's restaurant in the area had just been robbed. Police officers seized Singleton; the apprehending officer later testified that he believed Singleton to be a man he had seen leaving the restaurant and running at the sight of the police. The police brought Singleton to the restaurant. Before showing him to the four counterwomen, the police told the counterwomen that they had a suspect in the robbery, and they asked for a positive identification. The police, who had not previously asked for a description of the robber, now brought Singleton before the counterwomen. Singleton was in handcuffs. The police placed a gym bag used in the robbery next to Singleton; the bag had not been found on or near Singleton. The sawed-off shotgun used in the robbery was in the bag and may have been visible. In response to this "show-up," three of the four counterwomen, who were grouped together throughout the identification process, answered the request for identification affirmatively. *See Singleton I*, 702

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The show-up was admitted at Singleton's trial. *Singleton I*, 702 F.2d at 1165. The jury convicted. Judge Bryant overturned the verdict on insufficiency of the evidence grounds. He emphasized that the show-up was "a clear-cut example of the dangerous potential of the one-man 'show-up' for tragic misidentification." *United States v. Singleton*, Criminal No. 75–721 (D.D.C. Sept. 3, 1981), *quoted in Singleton I*, 702 F.2d at 1165 n. 18, and that the show-up identifications were "flatly contradicted by the independent recollections of the [identifying] witnesses.'" *United States v. Singleton*, Criminal No. 75–721 (D.D.C. Sept. 3, 1981), *quoted in Singleton I*, 702 F.2d at 1165 n. 19.

In a split decision this court reversed. Emphasizing that it had reviewed "with considerable care the fifteen-volume transcript in this case," *Singleton I*, 702 F.2d at 1163, the court found the evidence, including the show-up, sufficient for conviction. As noted, the court specifically declined to reach the due process issue. *Id.* at 1166 n. 23.

On remand, Judge Bryant ordered a new trial. He then ordered the show-up suppressed because, in his view, it violated due process. On appeal, two of the three judges refused to consider whether Judge Bryant had correctly determined that the show-up violated due process. Instead, they relied on "law of the case" and said that the *Singleton I* majority had settled the due process issue even though the *Singleton I* majority had explicitly disavowed such an intention.

I am convinced that law of the case should not govern for three reasons. First, the sufficiency determination of *Singleton I* included other evidence. The *holding* of that case was that the sum of the evidence—all fifteen volumes, as the *Singleton I* majority stressed—was sufficient to convict. *See also Singleton I*, 702 F.2d at 1167 (emphasizing the entirety of the evidence). On this appeal, in contrast, there is no other evidence, and the show-up must be considered on its own. Second, as the Supreme Court has clearly stated, the due process analysis set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), requires underlying judicial "finding[s] of historical fact," *Sumner v. Mata*, 455 U.S. 591, 597 n. 10, 102 S.Ct. 1303, 1307 n. 10, 71 L.Ed.2d 480 (1982) (*per curiam*). As this court has repeatedly held, a trial court's factual determinations compel appellate deference under the "clearly erroneous" standard. *See, e.g., United States v. Weisz*, 718 F.2d 413, 429 (D.C.Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1285, 79 L.Ed.2d 688 (1984); *United States v. Hinckley*, 672 F.2d 115, 119 (D.C.Cir.1982). *See also United States v. Damsky*, 740 F.2d 134, 140 (2d Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 298, 83 L.Ed.2d 233 (1985) (applying "clearly erroneous" standard to finding underlying *Neil v. Biggers* analysis). Unquestionably, that was not the standard in *Singleton I*. Third, even if law of the case were somehow applicable, I am convinced that the *Singleton I* analysis is severely flawed, and the law of the case doctrine does not permit the perpetuation of a manifest injustice. *See Arizona v. California*, 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 1392 n. 8, 75 L.Ed.2d 318 (1983).

It is urged, however, that, even though wrongly decided, *Singleton II* makes no new law, and is thus inappropriate for *en banc* consideration. I find this argument completely unpersuasive for two reasons. First, it is clear that, as Judge Bryant concluded, there is a very serious possibility that this show-up has such a potential for unreliability that it is fundamentally unfair to permit its use. Since we are considering a criminal proceeding in which conviction and incarceration may well result from the use of the show-up, I view that question of fundamental fairness, even in the context of a single case, as "a question of exceptional importance." Fed.R. App.P. 35(a). Second, I cannot agree that reciting the proper standard and grossly misapplying it somehow insulates a case from *en banc* review. The life of legal

standards, after all, is in their application, not in their abstract purity, and we should be willing to grant *en banc* review for a troubling misapplication of the governing standard, particularly in a criminal context.

I respectfully dissent from the denial of rehearing *en banc*.

Harold WEISBERG

v.

U.S. DEPARTMENT OF JUSTICE, Appellant.

Harold WEISBERG, Appellant,

v.

U.S. DEPARTMENT OF JUSTICE.

Harold WEISBERG

v.

U.S. DEPARTMENT OF JUSTICE, Appellant.

Harold WEISBERG, Appellant,

v.

U.S. DEPARTMENT OF JUSTICE.

Nos. 82-1229, 82-1274, 83-1722 and 83-1764.

United States Court of Appeals, District of Columbia Circuit.

June 4, 1985.

As Amended July 31, 1985.

Following remand, 631 F.2d 824, requester of materials concerning assassination of Dr. Martin Luther King, Jr., appealed from rulings of United States District Court for the District of Columbia that Department of Justice had performed adequate and good-faith search of its records, that Freedom of Information Act exemptions claimed by Department were properly invoked, and that Department did not owe consultancy fee to requester. The Court of Appeals, 745 F.2d 1476, decided all issues on appeal in favor of Department. On petition for rehearing, the Court of Appeals held that Section 403(e) of the Federal Courts Improvement Act of 1982 [28 U.S.C.A. § 171 note] did not divest Court of jurisdiction over case, which contained a contract claim against Department of Justice, since notice of appeal in the case was filed prior to the effective date of the Act.

Bork, Circuit Judge, dissented and filed opinion.

Federal Courts ⇐1067

Section 403(e) of the Federal Courts Improvement Act of 1982 [28 U.S.C.A. § 171 note] did not divest District of Columbia Court of Appeals of jurisdiction over Freedom of Information Act case that contained a less substantial contract claim against Department of Justice, since notice of appeal in the case was filed prior to the effective date of the Act.

James H. Lesar, Washington, D.C., was on the Petition for Rehearing for appellant/cross-appellee Weisberg and the supplemental briefs in connection therewith.

Leonard Schaitman, Jo[illegible] S. Koppel, Dept. of Justice, Washington, D.C., with whom Richard K. Willard, Acting Asst. Atty.Gen., and Stanley S. Harris, U.S.Atty., Washington, D.C., were on the supplemental briefs for appellee/cross-appellant Dept. of Justice.

Before MIKVA, BORK and STARR, Circuit Judges.

Opinion PER CURIAM.

Dissenting opinion filed by Circuit Judge BORK.

PER CURIAM:

This motion for rehearing grows out of what was, at bottom, a FOIA case that also contained a less substantial contract claim against the Department of Justice. We decided all issues on appeal in favor of the Department of Justice, *see Weisberg v. Department of Justice*, 745 F.2d 1476 (D.C. Cir.1984), whereupon Mr. Weisberg peti-

have found somewhat implausible the assertion that Phelps Dodge applied the policy in all cases. Although this implausibility would do little to cast doubt on positive evidence that the company consistently adhered to the policy, it was probative here, where the evidence showed that Phelps Dodge only rarely punished operators for speeding.

The plainest evidence of the purported policy's unreasonableness was that showing the unreliability of the speedometers. The ALJ could have construed the testimony of one worker to mean that an operator would quite regularly have a speedometer reading of fifteen miles per hour when he was in fact travelling no more than five miles per hour, and vice versa. *See* J.A. 55. The ALJ could rightly have thought such pronounced unreliability made doubtful the company's assertion that it relied on the tapes from those speedometers as a matter of routine. Only slightly less suspect was the claim that the company regularly enforced an implied ten-miles-per-hour speed limit on slow-order days, even though employees were not aware of any such implicit maximum.[12] To punish employees for violating norms not clearly communicated to them in advance is unfair enough to raise doubt that the company in fact regularly did so. Moreover, the ALJ could have thought it unlikely that a company that does not care enough about a purported rule to make it well known to employees would regularly discipline employees who violate it.

The second flaw in the Commission's reasoning is that the unreliability of the speed tapes and the vagueness of the slow order do not cast doubt on the plausibility of the company's defense simply by showing the unreasonableness of the purported disciplinary policy. In addition, both facts directly undercut the company's claim that only a handful of employees have found themselves in Chacon's position and consequently its claim that this accounts for the infrequency of discipline for speeding. With such erratic speedometers, quite a few of the thousands of trains that derailed in the few years preceding Chacon's discipline must have had speed tapes indicating fifteen miles per hour or more, even if no train in fact ever travelled that fast. It does not seem unreasonable for the ALJ to have thought that the company would have punished far more employees than it did had it punished every operator of a train that derailed on a slow-order day and that bore a high speedometer reading.

By the same token, given that employees were ignorant of any implicit limit, one would expect that they would quite regularly have strayed unknowingly beyond it. Thus, even if the speedometers were completely accurate, the ALJ could reasonably have thought that the company would have punished many more employees than it did had it consistently disciplined all workers in Chacon's position. Indeed, the very fact that there was disagreement over what a slow order implied suggests that the company did not usually enforce the particular meaning of a slow order it attempted to enforce in Chacon's case. For nothing would more quickly have brought an implicit speed limit to the workers' attention than a consistent effort to enforce it.

Considered as a whole, therefore, the record more than amply supported the ALJ's conclusion that Phelps Dodge singled Chacon out for punishment because he had pressed for safety reforms and that it would not have punished him had he derailed his trains in the same manner before he began his safety campaign. Accordingly, the Commission exceeded its statutory authority when it substituted a competing view of the facts for the ALJ's reasonable factual determinations. We note that apparently nothing in the ALJ's factual findings, and certainly nothing in our view of the substantial evidence supporting those findings, hinges on the fact that *Pasula* required Phelps Dodge to bear a burden of persuasion on its defense rather than a burden of production. We therefore have no occasion to consider attacks by the Secretary and Phelps Dodge on the allocation of burdens of proof established in *Pasula*, see *Boich v. FMSHRC*, 704 F.2d 275 (6th Cir. 1983) (striking *Pasula* rule that employer bears burden of persuasion on defense, rather than mere burden of production).

12. Chacon was not the only employee who so testified. *See* J.A. 60–61.

III

The petition for review is granted and the case remanded to the Commission for disposition consistent with this opinion.

It is so ordered.

John Cary SIMS, et al.

v.

CENTRAL INTELLIGENCE AGENCY, Appellant.

John Cary SIMS, et al., Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, Administrator, Stansfield Turner.

Nos. 82-1945, 82-1961.

United States Court of Appeals, District of Columbia Circuit.

Argued April 20, 1983.

Decided June 10, 1983.

Freedom of Information Act suit was brought seeking disclosure by Central Intelligence Agency of names of individuals and institutions who conducted secret research for the agency under its so-called MKULTRA program. On remand, 642 F.2d 562, the United States District Court for the District of Columbia, Oberdorfer, J., rendered decree, from which appeal was taken. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that the "intelligence source" exemption, as provided by National Security Act, is not satisfied merely by an agency grant of secrecy and that the district court was to determine whether the agency could reasonably expect to obtain the information without pledging its providers confidentiality.

Reversed and remanded.

Bork, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. Federal Courts ⇐950

Where on initial appeal in Freedom of Information Act suit the appellate court defined "intelligence source" for purpose of exemption for matters specifically exempted from disclosure by statute that definition became law of the case, for purpose of proceedings on remand. 5 U.S.C.A. § 552(b)(3).

2. Records ⇐56

Fact that provider of information requested and was granted promise of secrecy by Central Intelligence Agency was not determinative of his status as an "intelligence source," within meaning of National Security Act, for purpose of exemption from Freedom of Information Act for matters specifically exempted from disclosure by statute, and proper procedure was to define the type of information provided by various researchers and then determine whether the agency could reasonably expect to obtain information of that kind without pledging its providers confidentiality, and evidence that specific researchers requested and received guarantees of confidentiality was relevant but not controlling. 5 U.S.C.A. § 552(b)(3); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3).

3. Records ⇐56

Where it could be concluded that Central Intelligence Agency could reasonably expect to obtain certain kinds of information from persons without guaranteeing them confidentiality, but the agency, to avoid adverse public reaction, wished to maintain secrecy, the "intelligence source" exemption from disclosure requirements of Freedom of Information Act, i.e., matters specifically exempted from disclosure by statute, would not apply. 5 U.S.C.A.

§ 552(b)(3); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3).

4. Records ⇐62

It is only in cases where a great deal of information is not self-evidentially sensitive, where the reasons why its sources would desire confidentiality are not obvious and where desire for secrecy seems to derive principally from fear of public outcry resulting from revelation of details of its past conduct, that the Central Intelligence Agency is obliged to adduce extrinsic evidence to demonstrate its entitlement to the "intelligence source" exemption of National Security Act from disclosure requirements of Freedom of Information Act. 5 U.S.C.A. § 552(b)(3); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3).

Appeals from the United States District Court for the District of Columbia (D.C. Civil Action No. 78-2251).

Michael Kimmel, Atty. Dept. of Justice, Washington, D.C., with whom Stanley S. Harris, U.S. Atty., and Robert E. Kopp, Atty., Dept. of Justice, Washington, D.C., were on the brief, for appellant and cross-appellee.

Paul Alan Levy, Washington, D.C., with whom Alan B. Morrison and David C. Vladeck, Washington, D.C., were on the brief, for appellees and cross-appellants.

Before EDWARDS and BORK, Circuit Judges, and FAIRCHILD,* Senior Circuit Judge for the Seventh Circuit.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

Separate statement, concurring in part and dissenting in part, filed by Circuit Judge BORK.

HARRY T. EDWARDS, Circuit Judge:

This decision marks the end of another inconclusive chapter in a course of litigation that has already been unduly prolonged. In 1977–1978, the appellants filed first a request and then a suit under the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. V 1981) ("FOIA"), seeking disclosure by the CIA of the names of the institutions and individuals who, in the late 1950's and early 1960's, had conducted secret research for the CIA under its so-called MKULTRA program. The grisly details of the situation that gave rise to the appellants' request, and the history of the agency's responses to their demand, are recounted in our prior decision in the case, reported at 642 F.2d 562 (D.C.Cir.1980). For present purposes, we need only highlight the critical events associated with this litigation.

The CIA refused to reveal most of the information that was initially requested by the appellants. In defense of its recalcitrance, the agency invoked exemptions 3[1] and 6[2] of the FOIA; however, agency officials expressly renounced reliance on exemption 1.[3] After affording the CIA several opportunities to present evidence in support of its positions, the District Court rejected both of the arguments advanced by the agency. On appeal, a panel of this court upheld the District Court's disposition of the CIA's exemption 6 argument. The panel concluded, however, that the trial court's analysis of the agency's exemption 3 defense was hampered by the unavailability of a coherent definition of an "intelligence source" within the meaning of the National Security Act.[4] Accordingly, the court formulated a definition of that crucial phrase and remanded the case for reconsideration of the agency's argument in light of its holding. *Sims v. CIA [Sims I]*, 642 F.2d 562, 571–72 (D.C.Cir.1980).

On remand, the District Court invited the CIA to submit evidence that would indicate which of the institutions and individuals whose identities the agency sought to withhold fell within the prescribed definition of "intelligence source." The CIA's responses were neither thorough nor prompt.[5] Eventually, however, the trial court did succeed in assembling a significant body of relevant information. After examining and analyzing the parties' various submissions, the court issued two opinions separating the individuals and institutions into various categories, determining whether the members of each group satisfied the definition of "intelligence source," and ordering disclosure of the identities of those who failed to qualify. Memorandum Opinion, Dec. 22, 1981, *reprinted in* Appendix ("App.") 27–34; Memorandum Opinion, June 15, 1982, *reprinted in* App. 35–40.

Almost all of the District Court's various rulings were judicious and proper. One aspect of its analysis, however, was flawed; the court misconceived the level of generality at which the definition of "intelligence source" should apply. We are obliged, therefore, to reverse that portion of the District Court's decision and remand the case for further proceedings.

I.

[1] *Sims I* defined an "intelligence source" as:

> a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

642 F.2d at 571. It is beyond dispute that the foregoing definition constitutes both the law of the case and the law of this circuit. The only reason for the reversal of the District Court's decision in *Sims I* was to allow the trial court on remand to reconsider, on the basis of this definition, its evaluation of the CIA's invocation of exemption 3. *See id.* at 571–72. Clearly, therefore, the definition itself is part of the holding of the *Sims I* decision.

Moreover, since the issuance of *Sims I*, the court has had an opportunity once again to consider the meaning of "intelligence source"; in *Holy Spirit Association for the Unification of World Christianity v. CIA*, 636 F.2d 838, 844 (D.C.Cir.1980), *other portions of the decision vacated and remanded as moot*, 455 U.S. 997, 102 S.Ct. 1626, 71 L.Ed.2d 858 (1982), a second panel expressly reaffirmed the definition enunciated in *Sims I*.[6] Thus, the argument advanced by the agency on this appeal—that the last clause of that definition should be regarded as mere dictum, the validity of which is subject to reevaluation by the present panel at this juncture—is either disingenuous or obtuse.

II.

Unfortunately, the District Court on remand failed to adhere to the instructions in

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (Supp. V 1981).

1. Exemption 3 authorizes withholding of "matters that are ... specifically exempted from disclosure by statute (other than [5 U.S.C. § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (1976). In invoking this provision, the CIA relied on the well-established rule that § 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3) (1976), which provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," meets the statutory requirements. *See, e.g., Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir.1982).

2. Exemption 6 authorizes withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1976).

3. Exemption 1 authorizes withholding of "matters that are ... (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (1976).

4. *See* note 1 *supra*.

5. The CIA never complied with the District Court's repeated suggestions that, in order to obtain some evidence of the status of the individual researchers, the agency should contact them and ascertain their understanding of the terms of their past relationship with the CIA.

6. *See also McGehee v. CIA*, 697 F.2d 1095, 1112 n. 78 (D.C.Cir.1983) (reiterating our commitment to the definition).

Sims I regarding the manner in which the definition of "intelligence source" should be applied. In *Sims I*, it was made clear that the first thing the trial court should do is define "the class or 'kind' of information involved." 642 F.2d at 571. Such a determination, it was indicated, would make it possible for the court then to assess "the likelihood that disclosure would undermine CIA access to information *of that kind.*" *Id.* (emphasis added). In *Holy Spirit Ass'n* (issued prior to the District Court's decisions on remand), the court again emphasized that application of the definition of "intelligence source" requires an identification of the "type" of information that was provided by a particular source. 636 F.2d at 844. After such a determination has been made, the trial court can and should consider whether the agency could reasonably expect to obtain information *of that type* without guaranteeing its providers confidentiality. *See id.*

We do not mean to suggest that the District Court simply ignored or totally misconstrued the holding of *Sims I*. Some comments in the District Court's memorandum opinions do reflect an attempt first to identify the types of information involved in the MKULTRA program and then to assess the ease with which the agency could obtain data of those types without pledging its sources secrecy. Thus, at one point, the court observed:

> [F]or many of the subprojects, even assuming that a guarantee was given, it is doubtful at best whether it was necessary. Examples include Subproject No. 104, research on the ecological relations involved in the deterioration of petroleum products; No. 92, an exploration of the usefulness of mechanization in foreign language training; No. 112, a study of current problems in vocational guidance; No. 111, a study of the measurement of motivation; No. 96, a study of the psychology of personal constructs as it applies to foreign cultures; No. 123, a study of emerging ethnic images in three countries; No. 84, a study of high motivation by development of specific interpersonal relationships; and No. 85, a study of blood groupings as a means of identifying individuals. It seems clear that such research, which goes on constantly at many places, could have been done without a guarantee of confidentiality. At least, the defendant has provided no evidence to rebut this inference.

Dec. 22 Opinion at 5–6, *reprinted in* App. 31–32. Unfortunately, the court's attention to questions of this order was deflected by its interest in whether the agency had, in fact, promised confidentiality to individual researchers. The court's concern over whether such specific promises were made seems to have derived from its belief that "[a] necessary prerequisite to the satisfaction of [the third] portion of the definition is that the CIA have in fact made a guarantee of the confidentiality of the source; obviously if no guarantee was given, and the information was nonetheless obtained, then, under the Court of Appeals' definition, no guarantee was necessary." *Id.* at 3, *reprinted in* App. 29.

[2] Proof that the CIA did or did not make promises of secrecy (either express or tacit) to specific informants would undoubtedly be helpful to a court when deciding whether the agency could expect to obtain information of the kind they provided without guaranteeing confidentiality to sources of it. Evidence that data was obtained despite the fact that the agency failed or refused to pledge secrecy to a source would certainly give rise to an inference that, in general, the agency is capable of securing data of that type without providing guarantees of confidentiality. Conversely, a pledge of secrecy made by the CIA would be probative at least of the agency's belief that the source desired anonymity. But, in neither case could such evidence be dispositive of the question whether a given informant qualifies as an "intelligence source." A particular researcher may have been atypically unconcerned with his reputation or safety; that he was willing to provide information without a promise of confidentiality does not mean that, in general, the agency could obtain information *of the kind* he provided without guaranteeing confidentiality to sources of it. Conversely, an informant may have been unreasonably and atypically leery of providing the agency with innocuous information; if the agency readily and openly could have obtained, from other sources, data of the sort he provided, he would not constitute an "intelligence source."[7] In short, it was error for the District Court to rule that those six researchers who apparently did request confidentiality automatically qualified as "intelligence sources" and that those who did not request such a pledge automatically did not qualify.[8]

The dissent objects to the foregoing explication of the *Sims I* definition on the grounds of both "precedent and common sense." With regard to "common sense," we think that the marginal risk that a few persons, who provided the agency with information it readily could have obtained elsewhere but who nevertheless requested a promise of confidentiality, might be surprised to learn that their identities could not be shielded under exemption 3 is more than offset by two considerations. First, there is the serious potential for widespread evasion of the letter and spirit of the FOIA that would be created by the rule advocated by the dissent. *See* note 7 *supra*. Second, there is the fact that, if revelation of the identity of a source of information would in any way impair national security, the agency can easily justify withholding his name by invoking exemption 1 of the Act.

The dissent's reliance upon "precedent" warrants a more extended response. The dissent makes much of a sentence used by a panel of this court in *Holy Spirit Ass'n*, pointing to the fact that information contained in three of the documents at issue in that case had been obtained from "persons who gave [the] information with the understanding that it would be kept in confidence." 636 F.2d at 844. The dissent concludes that the foregoing reference establishes as the law of this circuit that "an informant-solicited promise of secrecy . . . automatically qualifies the informant as an intelligence source." We find this suggestion to be quite extraordinary.

For two reasons, the language from *Holy Spirit Ass'n* cannot possibly support the weight the dissent would place upon it. First, the panel in *Holy Spirit Ass'n* never intimated that proof that the agency promised a source secrecy conclusively establishes that the promisee was an "intelligence source." Indeed, the court did not even purport to consider the issue. Furthermore, the most natural reading of the language in question suggests the contrary: the panel in *Holy Spirit Ass'n* recognized, as do we, that the fact that a pledge was made is *probative* of the fact that information of the type provided could not have been obtained without guaranteeing its sources confidentiality; in the absence of any evidence in the record in *Holy Spirit Ass'n* capable of undermining the foregoing inference, the panel saw no reason to overturn the district court's decision that the documents were shielded by exemption 3. The fact that the panel did not elaborate upon its reasoning in more detail is readily explainable by the posture in which the case appeared before the court. *Holy Spirit Ass'n* was briefed and argued before issuance of the decision in *Sims I*. Consequently, neither the district court nor the parties on appeal had the benefit of our reformulated definition of an "intelligence source" when considering the applicability

7. A further reason for not automatically allowing the CIA to shield the identities of informants who request anonymity is the possibility of collusion between the agency and its sources. A rule that any informant who asks for a guarantee of confidentiality qualifies as an "intelligence source" (regardless of the nature of the information he provides) would make it easy for the agency to seek shelter in exemption 3 by simply "suggesting" to all of the persons with whom it deals that they sign a form expressing their desire for secrecy and then memorializing its accession to their "requests."

8. Our rejection of a *per se* rule that an informant qualifies as an "intelligence source" if and only if the agency can show that he himself requested and was promised confidentiality is reinforced by our sensitivity to the agency's argument that keeping records of such pledges would be administratively burdensome.

of exemption 3. Faced with the task of deciding an issue that, on one hand, had not been addressed by the litigants or the trial judge and, on the other hand, seemed clear-cut on the facts of the case, the panel not surprisingly was somewhat curt in its *ratio decidendi*.

Second, the sentence highlighted by the dissent is sandwiched between two more extensive discussions in the *Holy Spirit Ass'n* opinion emphasizing the importance of identifying the *type* of information at issue and whether the agency could obtain information of that *type* without promising secrecy to providers of it. In the preceding paragraph, the panel quotes the *Sims I* definition in full and reiterates the principle that "the appropriate focus is on 'the practical necessity of secrecy.'" 636 F.2d at 844. Clearly, the existence of "an informant-solicited promise of secrecy" does not conclusively establish "the practical *necessity* of secrecy." And in the succeeding paragraph, the panel in *Holy Spirit Ass'n* expressly grounds its ruling that four other documents were properly withheld on its judgment that "the information contained in those documents is of the type that the Agency could not obtain without a guarantee of confidentiality." *Id.* In short, if we are bound by precedent on this issue, we are bound to reject rather than accept a rule that proof that an informant requested and was granted a promise of secrecy is determinative of his status as an intelligence source.

On remand, therefore, the District Court should undertake the two-step analysis prescribed in *Sims I*. The court should begin by defining the type or types of information provided by the various researchers. Because the nature of the subprojects varied considerably,[9] this may require delineation of several categories of data.[10] The court should then determine whether the CIA could reasonably expect to obtain information of each of those kinds without pledging its providers confidentiality.[11] In deciding the latter question, the court may rely upon evidence in the record indicating that specific researchers did or did not in fact request and receive guarantees of confidentiality; but, for the aforementioned reasons, such evidence cannot be controlling.

III.

[3] Two other issues raised by the parties, regarding the meaning of *Sims I*, merit brief attention. First, the District Court on the first remand of this case correctly concluded that the definition of "intelligence source" is satisfied only when the *sources* of information of a particular sort would be unwilling to provide it to the CIA in the absence of confidentiality. In a situation where it may be concluded that the CIA could reasonably expect to obtain certain kinds of information from persons without guaranteeing them confidentiality, but the *agency*, in order to avoid adverse public reaction, wishes to maintain secrecy, the "intelligence source" exemption would not apply.

[4] Second, the agency's professed fear that it will be able to invoke exemption 3 in the future only by presenting elaborate proof of the circumspection of its sources is unfounded. Much of the information obtained by the CIA obviously could only be gathered through some kind of covert activity. There is no question that the agency in general could not reasonably expect to obtain data of that type without guaranteeing secrecy to those who provide it. Thus, the agency will be able successfully to resist a request for disclosure of the identity of a source of such information merely by informing the court of the nature of the material involved.[12] It is only in cases like the present, where a great deal of the information is not self-evidently sensitive, where the reasons why its sources would desire confidentiality are not obvious, and where the agency's desire for secrecy seems to derive principally from fear of a public outcry resulting from revelation of the details of its past conduct,[13] that the CIA will be obliged to adduce extrinsic evidence in order to demonstrate its entitlement to the statutory exemption.

9. The projects ranged from the drafting of a manual on sleight-of-hand tricks to various experimental programs "involving the surreptitious administration of LSD to unwitting nonvolunteer subjects 'at all social levels, high and low, native American and foreign.'" *See* FINAL REPORT OF THE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S.REP. No. 755, 94th Cong., 2d Sess., Bk. I at 393 (1976); Defendant's Answers to Plaintiffs' Interrogatories of Nov. 13, 1980, at 10, *reprinted in* App. 73.

10. In view of the fact that the MKULTRA program is now declassified, it would seem practicable and appropriate for the court on remand to request both parties to submit, on the public record, memoranda proposing alternative schemes for categorizing the information at issue in the case. Such a procedure would be consistent with the line of decisions in this circuit requiring maximum adversarial testing of claims of FOIA exemptions. *See, e.g., Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 832–33 (D.C. Cir.1979); *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C.Cir.1976).

11. The spirit in which the court should make this determination is described in *Sims I*, 642 F.2d at 571–72.

CONCLUSION

For the foregoing reasons, the District Court's determination regarding which of the individual researchers satisfy the "need-for-confidentiality" portion of the definition of "intelligence source" promulgated in *Sims I* is reversed. All other aspects of the court's decision are affirmed. The case is remanded for expeditious reconsideration of the researchers' statuses.

So ordered.

BORK, Circuit Judge, concurring in part and dissenting in part:

While I am in general agreement with much of the majority's position, I dissent from the holding on one point, decline to join in one statement, and express some doubt concerning the ruling of this court in *Sims v. CIA*, 642 F.2d 562 (D.C.Cir.1980) ("*Sims I*").

1. The court holds that an informant is not an "intelligence source," even though he sought and received a promise of confidentiality, "if the agency readily and openly could have obtained, from other sources, data of the sort he provided." Majority opinion at 99. In such cases, the CIA must disclose the informant's identity in response to a request under the Freedom of Information Act. The majority recognizes that proof of an informant's demand for and receipt of a pledge of confidentiality would be evidence that the information sup-

12. *Cf. Holy Spirit Ass'n v. CIA*, 636 F.2d at 844 ("The index with respect to four documents does not specifically mention confidentiality, but we are satisfied from the descriptions that the information contained in those documents is of the type that the Agency could not obtain without a guarantee of confidentiality." (footnote omitted)).

13. The dissent takes issue with this characterization of the most plausible explanation for the agency's desire for secrecy. The dissent argues that there already has been "substantial 'public outcry' about MKULTRA," as if to suggest that the agency has little to fear from fuller revelation of the nature and purpose of its "experiments." Our prior decision in this case flatly refutes this suggestion. As noted in *Sims I*, "the CIA destroyed most of its substantive records pertaining to the project in 1973." 642 F.2d at 564. Indeed, it never has been seriously disputed that, for the most part, only "general descriptions" of the MKULTRA program are in the public domain. *Id.* The horrifying features of some of those descriptions, *see* note 9 *supra*, suggest that the agency has much to fear from the kind of fuller disclosures of its past behavior that discussions with the participating researchers might make possible.

The dissent goes on to suggest that there are "many reasons more plausible than fear of public outcry for the CIA's resistance to releasing the names of the researchers." However, the conduct of the agency before the District Court casts considerable doubt on each of the motives the dissent offers. The dissent argues that the CIA may wish (1) not to "embarrass" researchers, (2) to protect researchers from harm, or (3) to keep its promises to researchers. These possibilities are plainly belied by the fact that the agency repeatedly refused to contact the researchers to ascertain their understanding of their prior relationship with the agency or their wishes regarding further concealment of their participation in the program. *See Sims I*, 642 F.2d at 565–66, note 5 *supra*. And the agency's express renunciation of reliance on exemption 1 renders implausible the suggestion that it believes that "revelation of the identities of the researchers could aid foreign intelligence operations in discovering sensitive information."

plied is of a sort the CIA could not reasonably expect to obtain without a promise of confidentiality. But the majority is incorrect, I believe, in holding that an informant-solicited promise of secrecy does not automatically qualify the informant as an intelligence source. This seems to me to follow both from precedent and common sense.

This court's opinion in *Holy Spirit Ass'n v. CIA*, 636 F.2d 838 (D.C.Cir.1980), applied the *Sims I* definition of "intelligence source," *id.* at 844, and focused on the type of information obtained in explaining its conclusion that certain of the documents at issue were properly withheld because their release would disclose intelligence sources, *id.* at 844 n. 12 (documents 21, 22, 23, and 39). With respect to at least three of the other documents at issue, however, *id.* at 844 n. 10 (documents 12, 17, and 31), the court did not focus at all on the type of information given. The court instead stated as its complete explanation of the reason it was proper to withhold the documents that "[t]he Document Disposition Index submitted by the Agency specifically indicates that three of the ten documents are withheld because their disclosure would identify persons who gave information with the understanding that it would be kept in confidence." *Id.* at 844 (footnotes omitted). The court in no way suggested that this conclusion was merely evidentiary. It drew no inference about the type of information from the existence of promises of confidentiality. It relied solely on the existence of those promises.

Only by straining and by supplying missing language can the *Holy Spirit* opinion be read as treating a promise of confidentiality as mere evidence. Neither does consistency with the *Sims I* definition demand that reading. The term "kind" is sufficiently general to encompass cases in which informants believe they need confidentiality before providing the information requested. The *Holy Spirit* court apparently thought that to be so, and *Holy Spirit* is as much a binding decision of this circuit as is *Sims I*. In any event, the majority's narrow reading of *Sims I* and *Holy Spirit* should be rejected not only because it is strained but also because it produces pernicious results.

A promise-of-confidentiality test for Exemption 3 seems to me necessary in order for 50 U.S.C. § 403(d)(3) (1976) to serve its function of "protecting intelligence sources and methods from unauthorized disclosure." Without it, individuals who give information to the CIA on the understanding that their names will be kept secret cannot rely on the promise of confidentiality if the information turns out to be the sort the CIA can get elsewhere without promising secrecy, something the sources of the information will often not be in a position to know. There is, moreover, no guarantee that a judge, examining the situation years later and deciding on the basis of a restricted record, will come to an accurate conclusion. Reasonable people will differ about such judgments. The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing. Our national interest, which is expressed in the authority to keep intelligence sources and methods confidential, requires no less.

Many persons who expect pledges of confidentiality to be honored will be shocked to learn, long after they give information in return for such a promise, that their identities will be disclosed. Because of the ever-present possibility of a future breach of trust ordered by the judiciary under the vague standard laid down today, the CIA will probably lose many future sources of valuable intelligence. Moreover, in this very case, retrospective application of a rule interpreting section 403(d)(3) to focus exclusively on the type of information may be profoundly unjust. It will certainly be so if it results in the disclosure of the identities of the six researchers who fully, and justifiably, expected the government to keep its commitment and to protect them from the wide range of dangers that may have concerned them when they insisted on confidentiality. This is not an honorable way for the government of the United States to behave, and the dishonor is in no way lessened because it is mandated by a court of the United States.

2. My second disagreement with the majority opinion is not with any holding but with its gratuitous speculation that "the agency's desire for secrecy seems to derive principally from fear of a public outcry resulting from revelation of the details of its past conduct." Majority opinion at 101. We have no basis for that attribution of motive. For one thing, there has already been substantial "public outcry" about MKULTRA as a result of the executive and congressional investigations and reports on the program. More important, there are many reasons more plausible than fear of public outcry for the CIA's resistance to releasing the names of the researchers. Among them are a desire to live up to commitments of confidentiality the CIA made or believes it made many years ago, even if those commitments cannot be proven; desire to protect from harm and embarrassment individuals who were witting or unwitting sources for the CIA; belief that breaching past trusts will endanger its future ability to attract potential intelligence sources; and belief that revelation of the identities of the researchers could aid foreign intelligence operations in discovering sensitive information. What is perhaps oddest, however, about the majority's speculation about the CIA's motives for resisting disclosure is that the CIA may yet prevail on the merits of the case, thus vindicating its position. In any event, the CIA's litigating position is hardly frivolous, and disagreement with the CIA's assessments either of its intelligence needs or of its legal obligations is insufficient reason to cast doubt on the CIA's good faith belief in those assessments. In these circumstances, it is inappropriate for the court to suggest that the CIA's position was adopted in bad faith.

3. With the exceptions just discussed, I concur in the court's opinion. I do so, however, only because we are bound by the definition of "intelligence source" given in *Sims I*. Were we free to reconsider that definition, I might adopt a different one. Since we have not had the benefit of briefing and argument on this question, I do not state flatly that a different definition should be adopted, but the matter is troublesome enough to warrant a word or two.

I will not here fully analyze the weaknesses I find in the *Sims I* definition or in the analysis supporting the definition. I will focus instead on what I regard as the central difficulty. It seems to me that "the practical necessity of secrecy," on which the *Sims I* court relied in deriving its construction of section 403(d)(3), requires that the CIA's interest in information be protected from disclosure. I know of no reason to think that section 403(d)(3) was meant to protect sources of information only if secrecy was needed in order to obtain the information. It seems far more in keeping with the broad language and purpose of that provision to conclude that it authorizes the nondisclosure of a source of information whenever disclosure might lead to discovery of what subjects were of interest to the CIA. One need not be an expert in intelligence work to know that it is often possible to deduce what a person is doing, thinking, or planning by knowing what questions he is asking or what information he is gathering. That is true even when the answers and information are publicly available. The mere fact that the CIA pursues certain inquiries tells our adversaries much that there is no reason to think Congress intended them to know.

Accordingly, if presented the opportunity to reconsider *Sims I*, I would consider adopting a definition of "intelligence sources and methods"—separating the two components of the phrase artificially narrows a statute probably intended to be quite sweeping in its authorization of secrecy—that focuses not solely on the need for secrecy in gathering information but also on the need for secrecy about what information is sought. Under such a definition, public availability of information and the lack of any need to promise confidentiality to obtain it would be no ground for finding the identity of an information source subject to disclosure.

23

this court responds favorably to the present request.

These circumstances clearly necessitate a reopening of the matter. Just as clearly, they could not have been foreseen by Gallup during the normal time period for presentation of a petition for rehearing.[18] We thus will allow Gallup to file its petition for rehearing, and will reinstate Gallup's Group III petition for review. We will, however, transfer that petition to the Tenth Circuit, wherein the remainder of the litigation is now pending,[19] the administrative record has been ordered filed,[20] and exclusive jurisdiction to review will reside.[21]

Order accordingly.

Hanoch TEL-OREN, in his capacity as father, on behalf of the deceased, Imry Tel-Oren, et al., Appellants,

v.

LIBYAN ARAB REPUBLIC, et al.

Hanoch TEL-OREN, et al., Appellants,

v.

LIBYAN ARAB REPUBLIC, et al.

Nos. 81-1870, 81-1871.

United States Court of Appeals, District of Columbia Circuit.

Argued March 24, 1982.

Decided Feb. 3, 1984.

Survivors and representatives of persons murdered in armed attack on civilian bus in Israel brought suit against defendants for compensatory and punitive damages for alleged multiple tortious acts in violation of law of nations, treaties of the United States, and criminal laws of United States as well as common law. The United States District Court for the District of Columbia, 517 F.Supp. 542, Joyce Hens Green, J., dismissed action for lack of subject-matter jurisdiction and as barred by applicable statute of limitations, and plaintiffs appealed. The Court of Appeals held that action was properly dismissed.

Harry T. Edwards and Bork, District Judges, and Robb, Senior Circuit Judge, filed separate concurring statements.

Federal Courts ⇐161, 162, 192

District Court properly dismissed, for lack of subject-matter jurisdiction, action brought by Israeli citizens who were survivors and representatives of persons murdered in armed attack on civilian bus in Israel seeking compensatory and punitive damages from Libyan Arab Republic and various Arab organizations for multiple tortious acts in violation of law of nations, treaties of the United States, and criminal laws of United States, as well as common law. 28 U.S.C.A. §§ 1330, 1331, 1332, 1350, 1602-1611.

Appeals from the United States District Court for the District of Columbia (D.C. Civil Action Nos. 81-0563 & 81-0564).

Michael S. Marcus, Arlington, Va., with whom Oren R. Lewis, Jr., and Richard H. Jones, Arlington, Va., were on brief, for appellants.

Karla J. Letsche, Washington, D.C., for appellee, National Association of Arab Americans. Cherif Sedky and Lawrence Coe Lanpher, Washington, D.C., were on brief, for appellee, National Association of Arab Americans.

Michael Kennedy, New York City, was on brief, for appellee, Palestine Information Office.

18. See Fed.R.App.P. 40(a).

19. See 28 U.S.C. § 2112(a) (1976).

20. See text *supra* at note 15.

21. See 16 U.S.C. § 825*l*(b) (1982).

Michael E. Tigar, Washington, D.C., entered an appearance for appellee, Palestine Congress of North America.

Before EDWARDS and BORK, Circuit Judges, and ROBB, Senior Circuit Judge.

Concurring opinions filed by Circuit Judge HARRY T. EDWARDS, Circuit Judge BORK, and Senior Circuit Judge ROBB.

PER CURIAM:

Plaintiffs in this action, mostly Israeli citizens, are survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel in March 1978. They filed suit for compensatory and punitive damages in the District Court, naming as defendants the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.[1]

In their complaint, plaintiffs alleged that defendants were responsible for multiple tortious acts in violation of the law of nations, treaties of the United States, and criminal laws of the United States, as well as the common law. Jurisdiction was claimed under four separate statutes: 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1332 (diversity jurisdiction); 28 U.S.C. § 1350 (providing jurisdiction over actions by an alien alleging a tort committed in violation of the law of nations or a treaty of the United States); and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611. For purposes of our jurisdictional analysis, we assume plaintiffs' allegations to be true.

The District Court dismissed the action both for lack of subject matter jurisdiction and as barred by the applicable statute of limitations. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C. 1981). Plaintiffs appeal the District Court's rulings on two of their claimed jurisdictional bases, 28 U.S.C. §§ 1331, 1350, and on the statute of limitations issue.

We affirm the dismissal of this action. Set out below are separate concurring statements of Judge Edwards, Judge Bork, and Senior Judge Robb, indicating different reasons for affirming the result reached by the District Court.

HARRY T. EDWARDS, Circuit Judge, concurring:

This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the "law of nations." As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.

At issue in this case is an aged but little-noticed provision of the First Judiciary Act of 1789, which gives federal courts jurisdiction over a minute class of cases implicating the law of nations. Thus, it is not startling that the central controversy of this action has now produced divided opinions between and within the circuits. The opinions of Judge Bork and Judge Robb are fundamentally at odds with the decision of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), which, to my mind, is more faithful to the pertinent statutory language and to existing precedent. Although I cannot concur in the opinions of my colleagues, I do agree with them that the decision of the District Court should be affirmed. I write separately to underscore the rationale for my decision; I do this because, as will be apparent, there are sharp differences of viewpoint among the judges who have grappled with these cases over the meaning and application of 28 U.S.C. § 1350 (1976).[1]

1. Plaintiffs do not pursue their claim against the Palestine Congress of North America on appeal.

1. That I confine my remarks to issues directly related to the construction of § 1350 should in no respect be read as an endorsement of other aspects of my colleagues' opinions. Indeed, I disagree with much of the peripheral discussion they contain.

My analysis also is limited to the allegations against the Palestine Liberation Organization. I agree with the District Court that the com-

I. Background

On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization (hereinafter "the PLO") turned a day trip into a nightmare for 121 civilian men, women and children. The PLO terrorists landed by boat in Israel and set out on a barbaric rampage along the main highway between Haifa and Tel Aviv. They seized a civilian bus, a taxi, a passing car, and later a second civilian bus. They took the passengers hostage. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded. Most of the victims were Israeli citizens; a few were American and Dutch citizens. They turned to our courts for legal redress and brought this action for damages asserting jurisdiction under 28 U.S.C. §§ 1331 and 1350 (1976). The District Court dismissed the action for lack of subject matter jurisdiction. The critical issue on appeal is whether plaintiffs alleged sufficient facts to meet the jurisdictional elements of those sections.

II. The Filartiga Decision

My inquiry into the sufficiency of plaintiffs' allegations is guided by the Second Circuit's decision in *Filartiga*. For reasons set out below, I adhere to the legal principles established in *Filartiga* but find that factual distinctions preclude reliance on that case to find subject matter jurisdiction in the matter now before us. Specifically, I do not believe the law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law. Absent direction from the Supreme Court on the proper scope of the obscure section 1350, I am therefore not prepared to extend *Filartiga*'s construction of section 1350 to encompass this case.

The pertinent allegations in *Filartiga* are as follows. Dr. Joel Filartiga, a Paraguayan known to oppose the Paraguayan Stroessner regime, and his daughter, Dolly, alleged that, in 1976, the defendant Pena-Irala, a Paraguayan police official, had kidnapped and tortured to death Dr. Filartiga's 17-year-old son, Joelito. They claimed he was killed in retaliation for his father's political activities. On the day of the murder, Dolly Filartiga was taken to Pena's home and confronted with her brother's body, which bore marks of severe torture. Thereafter, Filartiga commenced a murder action against Pena in a Paraguayan court. The action was still pending at the time of the Second Circuit opinion.

Pena entered the United States in 1978 on a visitor's visa and remained beyond the term of the visa, living in Brooklyn, New York. Dolly Filartiga, living in Washington, D.C., learned of his presence and notified the Immigration and Naturalization Service. She also filed a civil complaint against him, alleging that he had wrongfully caused her brother's death by torture and seeking compensatory and punitive damages of ten million dollars. Jurisdiction was claimed under the general federal question provision, 28 U.S.C. § 1331 (1976), and under the Alien Tort Statute, 28 U.S.C. § 1350 (1976). The District Court dismissed the complaint on jurisdictional grounds. In so doing, the trial court relied on prior cases in which the Second Circuit had defined the "law of nations" to encompass only relationships between states, or an individual and a foreign state, and not a state's treatment of its own citizens. *E.g., Dreyfus v. von Finck*, 534 F.2d 24, 30-31 (2d Cir.), *cert. denied*, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975). It concluded that a Paraguayan plaintiff's suit against a Paraguayan defendant did not implicate the law of nations and, therefore,

plainants' allegations against the Palestine Information Office and the National Association of Arab Americans are too insubstantial to satisfy the § 1350 requirement that a violation of the law of nations be stated. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542, 549 (D.D.C.1981). Jurisdiction over Libya is barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1976), which preserves immunity for tort claims unless injury or death occurs in the United States. 28 U.S.C. §§ 1604, 1605(a)(5) (1976).

did not fit within the jurisdictional limits of section 1350. The Second Circuit reversed the district court and remanded for further proceedings.

Section 1350 provides that a district court shall have original jurisdiction over civil actions "*by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*" In the absence of an allegation of a treaty violation, the critical issue in *Filartiga* was whether torture constitutes a violation of the law of nations. In determining that it does, Judge Kaufman reviewed the accepted sources of international law—the usage of nations, judicial opinions and the works of jurists—and concluded that *official torture* of both aliens and citizens is prohibited by the law of nations. 630 F.2d at 884. That section 1350 was enacted in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77, when world perceptions both of the role of international law and its substantive provisions differed considerably from perceptions of today, did not preclude this result. Judge Kaufman took guidance from *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900) (holding that the traditional prohibition against seizure of an enemy's coastal fishing vessels had ripened from a standard of comity into a settled rule of international law), and observed that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." 630 F.2d at 881.

The opinion thus established several propositions. First, the "law of nations" is not stagnant and should be construed as it exists today among the nations of the world. *Id.* Second, one source of that law is the customs and usages of civilized nations, as articulated by jurists and commentators. *Id.* at 884. Third, international law today places limits on a state's power to torture persons held in custody, and confers "fundamental rights upon all people" to be free from torture. *Id.* at 885. Fourth, section 1350 opens the federal courts for adjudication of the rights already recognized by international law. *Id.* at 887.

Because I am substantially in accord with these four propositions, and Judge Bork and Judge Robb apparently are not, I am unable to join in their opinions.

III. Section 1350 as the Source of the "Right to Sue"

First, and most fundamentally, I diverge from the views of my colleague Judge Bork regarding the necessary elements of this court's jurisdiction. The Second Circuit did not require plaintiffs to point to a specific right to sue under the law of nations in order to establish jurisdiction under section 1350; rather, the Second Circuit required only a showing that the defendant's actions violated the substantive law of nations. In contrast, Judge Bork would deny jurisdiction to any plaintiff—presumably including those in *Filartiga*—who could not allege a specific right to sue apart from the language of section 1350 itself. In Part A, below, I outline the Second Circuit's formulation of section 1350 and summarize my reasons for endorsing it. In Part B, I offer an alternative formulation of section 1350 under which domestic tort law, not the law of nations, provides plaintiffs with the substantive right needed to trigger application of section 1350. I am less comfortable with the alternative formulation; however, in the face of the obscure history of section 1350, I would be remiss were I to ignore a tenable construction of this difficult statutory provision.

A. *Section 1350 Provides a Right of Action and a Forum: The* Filartiga *Formulation*

Judge Bork's suggestion that section 1350 requires plaintiffs to allege a right to sue granted by the law of nations is seriously flawed. Initially, it assumes that the "law of nations" could provide a specific, articulated right to sue in a form other than a treaty or executive agreement. Yet no evidence is offered to indicate that jurists or commentators have ever looked to the law of nations to determine when a wrongful deed is *actionable*. This absence of evidence is not surprising, because it is clear that "[i]nternational law itself, finally, does

not require any particular reaction to violations of law.... Whether and how the United States wished to react to such violations are domestic questions...." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972) (footnote omitted).

The law of nations thus permits countries to meet their international duties as they will, *see* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 116 (1980); *cf.* 1 C. HYDE, INTERNATIONAL LAW 729 n. 5 (2d rev. ed. 1945). In some cases, states have undertaken to carry out their obligations in agreed-upon ways, as in a United Nations Genocide Convention, which commits states to make genocide a crime, L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra*, or in bilateral or multilateral treaties. Otherwise, states may make available their municipal laws in the manner they consider appropriate. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 3 comment h & illustration 5 (1965) (domestic law of a state may provide a remedy to a person injured by a violation of a rule of international law). As a result, the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach—particularly on the technical accoutrements to an action—and it is hard even to imagine that harmony ever would characterize this issue.

In consequence, to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the "law of nations" portion of section 1350. There is a fundamental principle of statutory construction that a statute should not be construed so as to render any part of it "inoperative or superfluous, void or insignificant," 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973), and there exists a presumption against a construction yielding that result. *See Federal Trade Commission v. Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988, 994 (D.C. Cir.1975). Yet, the construction offered by Judge Bork would have the effect of voiding a significant segment of section 1350.[2]

Judge Bork argues that the statute retains meaning under his interpretation because he recognizes that the drafters of section 1350 perceived of certain offenses against the law of nations. He enumerates three offenses recognized by Blackstone—violation of safe-conducts, infringement of the rights of ambassadors, and piracy—and insists that these were the offenses that the drafters of section 1350 had in mind. This explanation is specious, not responsive. Judge Bork does nothing more than concede that, in 1789, the law of nations clause covered three substantive offenses. However, under his construction of section 1350, this concession is meaningless unless it is also shown that the law of nations created a private right of action to avenge the three law of nations violations to which Blackstone averted—a showing that would require considerable skill since the law of nations simply does not create rights to sue. Indeed, in the very passage quoted by Judge Bork, Blackstone makes clear that it was the municipal laws of England, not the law of nations, that made the cited crimes offenses: "The principal offenses against the law of nations, *animadverted on as such by the municipal laws of England*, are of three kinds: 1. Violation of safeconducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 BLACKSTONE'S COMMENTARIES 67 (Welsby ed. 1854) (emphasis added). In short, under Judge Bork's construction of the statute, section 1350 would lose virtually all meaning.

Equally basic, to require an express right to sue is directly at odds with the language of the statute, which grants jurisdiction over civil actions for a tort "committed in violation of the law of nations." Unlike section 1331, which requires that an action "arise under" the laws of the United States, section 1350 does not require that the action "arise under" the law of nations, but only mandates a "violation of the law of nations" in order to create a cause of action. The language of the statute is explicit on this issue: by its express terms, nothing more than a *violation* of the law of nations is required to invoke section 1350. Judge Bork nevertheless would propose to write into section 1350 an additional restriction that is not even suggested by the statutory language. Congress, of course, knew full well that it could draft section 1350 with "arising under" language, or the equivalent, to require a "cause of action" or "right to sue," but it chose not to do so.[3] There simply is no basis in the language of the statute, its legislative history or relevant precedent to read section 1350 as though Congress had required that a right to sue must be found in the law of nations.[4]

2. In obvious contrast is a treaty, which may create judicially enforceable obligations when that is the will of the parties to it. *See People of Saipan v. Department of Interior*, 502 F.2d 90, 97 (9th Cir.1974) (elaborating criteria to be used to determine whether international agreement establishes affirmative and judicially enforceable obligations without implementing legislation), *cert. denied*, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975). Unlike the law of nations, which enables each state to make an independent judgment as to the extent and method of enforcing internationally recognized norms, treaties establish both obligations and the extent to which they shall be enforceable.

We therefore must interpret section 1350 in keeping with the fact, well-known to the framers of section 1350, that a treaty and the law of nations are entirely different animals. As Judge Bork states, for two hundred years it has been established that treaties by their terms and context may create enforceable obligations. Similarly, for two hundred years, it has been established that the law of nations leaves up to municipal law whether to provide a right of action to enforce obligations created by the law of nations. Section 1350 opened federal courts to aliens to challenge violations of treaties insofar as treaty terms expressly or impliedly established affirmative and judicially enforceable obligations. Congress also opened courts to aliens to challenge violations of the law of nations, to the extent that the law of nations established a binding obligation. Section 1350 thus provides a forum for actions brought to enforce obligations binding on parties, whether as a result of treaties or the law of nations. To argue that § 1350, under any formulation, could create a right to sue or somehow make all treaties self-executing, when parties to the treaties intend otherwise, is to throughly misconstrue the nature of treaty law.

3. It might be argued that in 1789 Congress had not enacted general federal question jurisdiction, with its "arising under" provision, and could not have used that phraseology as a reference point. Not until 1875 did Congress give federal courts general original jurisdiction over federal question cases. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. However, in its original form, the predecessor to § 1350 did not contain the word "committed." The pertinent part of the clause granted jurisdiction "where an alien sues for a tort only in violation of the law of nations." The word "committed" appears in a 1948 recodification of the Judicial Code, Act of June 25, 1948, ch. 646, § 1350, 62 Stat. 869, 934, but was absent in earlier recodifications. *See, e.g.*, Act of Mar. 3, 1911, ch. 231, § 24, par. 17, 36 Stat. 1087, 1093. By 1948 the term "arising under" was a well-established element of federal question jurisdiction, *see American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916) (a suit "arises under" the law that creates the action), and would have been the obvious choice of wording had Congress wished to make explicit that, in order to invoke § 1350, a right to sue must be found in the law of nations.

4. I disagree both with Judge Bork and with plaintiffs in this action that for purposes of the issues raised in this case, the jurisdictional requirements of § 1331 and § 1350 are the same.

However, for several reasons I believe plaintiffs' claim under § 1331 fails as well. My analysis on that issue proceeds on two paths, depending on whether the plaintiff is a citizen or an alien.

As to aliens, most of the plaintiffs here, jurisdiction under § 1331 is available at least to the extent that § 1350 applies. If it does, their action "arises under" § 1350 and, therefore, under a law of the United States, as required by § 1331.

Citizens of the United States, in this action the Tel-Oren plaintiffs, do not meet the alienage requirement of § 1350 and must seek other law under which their action might arise. The only plausible candidate is the law of nations itself.

Assuming, without deciding, that the law of nations constitutes a law of the United States for § 1331 jurisdictional purposes, *see* Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 291 97 (arguing that § 1331 includes cases arising under a federal decisional law of foreign relations); cf. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 222 23 (1972) (federal courts determine international law and apply it as though it were federal law), the language of § 1331, unlike § 1350, suggests that plaintiffs must identify a remedy granted by the law of

Indeed, a 1907 opinion of the United States Attorney General suggests just the opposite. It asserts that section 1350 provides both a right to sue and a forum. Responding to an inquiry about the remedies available to Mexican citizens harmed by the actions of an American irrigation company along the Rio Grande River, the Attorney General wrote,

> As to indemnity for injuries which may have been caused to citizens of Mexico, I am of opinion that existing statutes *provide a right of action and a forum.* Section 563, Revised Statutes, clause 16, gives to district courts of the United States jurisdiction "of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States." . . . *I repeat that the statutes thus provide a forum and a right of action.* I can not, of course, undertake to say whether or not a suit under either of the foregoing statutes would be successful. That would depend upon whether the diversion of the water was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty, and could only be determined by judicial decision.

26 Op. Att'y Gen. 250, 252–53 (1907) (emphasis added). The opinion bolsters the view of the Second Circuit,[5] which I endorse, that section 1350 itself provides a right to sue for alleged violations of the law of nations.[6]

Judge Bork, in his rejection of *Filartiga,* reasons as follows: (a) international law grants plaintiffs no express right to sue in a municipal court; (b) for numerous reasons, primarily related to separation of powers, it would be inappropriate to imply one; (c) since section 1350 requires that international law give plaintiffs a cause of action, and it does not, we cannot find jurisdiction. In my view, the first two steps in the analysis are irrelevant and the third step is erroneous. The decision in *Filartiga* did not hold that, under section 1350, the law of nations must provide a cause of action—that is, a right to sue—in order to find jurisdiction. The existence of an express or implied cause of action was immaterial to the jurisdictional analysis of the Second Circuit. By

nations or argue successfully for one to be implied. Plaintiffs here are not able to point to a right to sue in international law and I decline to imply one, given my belief, set out *supra,* that the law of nations consciously leaves the provision of rights of action up to the states.

As an alternative basis for declining § 1331 jurisdiction, I note that the law of nations quite tenably does not provide these plaintiffs with any substantive right that has been violated. As I discuss at length in Section VI of this opinion, I do not believe that the law of nations, as currently developed and construed, holds individuals responsible for most private acts; it follows logically that the law of nations provides no substantive right to be free from the private acts of individuals, and persons harmed by such acts have no right, under the law of nations, to assert in federal court. Thus, even if the law of nations constitutes a law of the United States, and even if § 1331 did not require that a right to sue be granted by the relevant law of the United States, plaintiffs still would have no § 1331 jurisdiction because no legal right has been violated.

5. The Second Circuit read § 1350 "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Filartiga,* 630 F.2d at 887. I construe this phrase to mean that aliens granted substantive rights under international law may assert them under § 1350. This conclusion as to the meaning of this crucial yet obscure phrase results in part from the noticeable absence of any discussion in *Filartiga* on the question whether international law granted a right of action.

6. While opinions of the Attorney General of course are not binding, they are entitled to some deference, especially where judicial decisions construing a statute are lacking. *See, e.g., Oloteo v. INS,* 643 F.2d 679, 683 (9th Cir.1981) (opinion deserves some deference); *Montana Wilderness Ass'n v. United States Forest Serv.,* 496 F.Supp. 880, 884 (D.Mont. 1980) (opinions are given great weight although not binding), *aff'd. in part,* 655 F.2d 951 (9th Cir.1981), *cert. denied,* 455 U.S. 989 (1982); *Pueblo of Taos v. Andrus,* 475 F.Supp. 359, 365 n. 4 (D.D.C.1979); *cf. Blake v. Klute,* 612 F.2d 718, 724 n. 13 (3d Cir.1979) (state attorney general opinions are entitled to great respect and should be followed where judicial decisions construing statute are lacking) (citing *In re Jackson,* 268 F.Supp. 434, 443 (E.D.Mo.), *aff'd. Zuke v. Mercantile Trust Co.,* 385 F.2d 775 (8th Cir.1967)) *cert. denied,* 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1112 (1980).

focusing on this issue, Judge Bork has skirted the threshold question whether the statute even requires that the law of nations grant a cause of action. I do not believe that the statute requires such a finding, or that the decision in *Filartiga* may be lightly ignored.

At this point, it is appropriate to pause to emphasize the extremely narrow scope of section 1350 jurisdiction under the *Filartiga* formulation. Judge Kaufman characterized the torturer in *Filartiga* as follows: "Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis,* an enemy of all mankind." *Filartiga,* 630 F.2d at 890. The reference to piracy and slave-trading is not fortuitous. Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them. As one writer has explained,

> Before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a '*hostis humani generis.*' According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character. . . . Piracy is a so-called 'international crime'; the pirate is considered the enemy of every State, and can be brought to justice anywhere.

1 L. OPPENHEIM, INTERNATIONAL LAW § 272, at 609 (H. Lauterpacht 8th ed. 1955) (footnote omitted); *see also id.* § 151, at 339 (every state can punish crimes like piracy or slave trade on capture of the criminal, whatever his nationality); Dickinson, *Is the Crime of Piracy Obsolete?,* 38 HARV.L.REV. 334, 335 (1925). Judge Kaufman did not argue that the torturer is like a pirate for criminal prosecution purposes, but only for civil actions. The inference is that persons may be susceptible to civil liability if they commit *either* a crime traditionally warranting universal jurisdiction *or* an offense that comparably violates current norms of international law. To identify such crimes, I look for guidance to the RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 702 (Tent.Draft No. 3, 1982), which enumerates as violations of international law state-practiced, -encouraged or -condoned (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) consistent patterns of gross violations of internationally recognized human rights. *See also* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala,* 22 HARV.INT'L L.J. 53, 90 (1981) (focusing on genocide, summary execution, torture and slavery as core human rights violations). I, of course, need not determine whether each of these offenses in fact amounts to a law of nations violation for section 1350 purposes. The point is simply that commentators have begun to identify a handful of heinous actions—each of which violates definable, universal and obligatory norms, *see* Blum & Steinhardt, *supra,* at 87–90—and in the process are defining the limits of section 1350's reach.[7]

The *Filartiga* formulation is not flawless, however. While its approach is consistent with the language of section 1350, it places an awesome duty on federal district courts to derive from an amorphous entity—*i.e.* the "law of nations"—standards of liability applicable in concrete situations. The difficult law of nations questions animating this particular case suggest the burden that

7. Indeed, international law itself imposes limits on the extraterritorial jurisdiction that a domestic court may exercise. It generally recognizes five theories of jurisdiction, the objective territorial, national, passive, protective and universal. *See* RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 402 (Tent.Draft No. 2, 1981); *see also United States v. James-Robinson,* 515 F.Supp. 1340, 1344 n. 6 (S.D.Fla.1981). The premise of universal jurisdiction is that a state "may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern." RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED), *supra* § 404, even where no other recognized basis of jurisdiction is present.

would attach to each case of this kind. In the 18th century this pursuit was no doubt facilitated both by a more clearly defined and limited body of "international crimes" than exists today, and by the working familiarity of jurists with that body of law. Although I am convinced that it is possible to discover governing standards of liability, the formidable research task involved gives pause, and suggests consideration of a quite plausible alternative construction of section 1350.

B. *An Alternative Approach: Municipal Law as the Standard of Liability*

Under an alternative formulation, section 1350 may be read to enable an alien to bring a common law tort action in federal court without worrying about jurisdictional amount or diversity, as long as a violation of international law is also alleged. Unlike the first approach, set out above, the substantive right on which this action is based must be found in the domestic tort law of the United States. The text of the 1789 Judiciary Act, coupled with the concerns of 18th century legal scholars for a single judicial voice on foreign affairs, as expressed in the Federalist Papers and elsewhere, provide some support for this interpretation of the statute.[8] However, the formulation also raises a host of complex problems of its own.

1. *Historical Underpinnings*

I begin by tracing the historical setting in which the original section 1350 was drafted. The First Judiciary Act granted to circuit courts

> original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. This early grant of diversity jurisdiction opened federal courts to civil suits by aliens, provided they were able to meet the requisite jurisdictional amount.[9] Not content to treat aliens like citizens of a non-forum state, the drafters also gave district courts concurrent original jurisdiction with both state courts and 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." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. There is evidence, set out *infra*, that the intent of this section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis. If left with diversity jurisdiction alone, aliens would have to turn to state courts to bring actions below the jurisdictional amount. Concern that state courts might deny justice to aliens, thereby evoking a belligerent response from the alien's country of origin, might have led the drafters to conclude that aliens should have the option of bringing suit in federal court, whatever the amount in controversy.[10]

8. One § 1350 case, discussed at length, *infra*, has adopted this framework, *see Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961), and one law review note has endorsed the approach. *See* Note, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F.L.Rev 105, 123 (1979)

9. Despite confusion in an early case, *Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264, 2 L.Ed. 266 (1804), by 1809 it was clear that the Constitution bars extending diversity jurisdiction to suits between aliens. *See Hodgson & Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 3 L.Ed. 108 (1809)

10. It might also be argued that § 1350 addressed actions for tortious violations only of the law of nations, not domestic law, and that the 1789 Act's grant of diversity jurisdiction covered domestic torts only. However, when the 1789 Judiciary Act was drafted, lawyers had no doubt that the law of nations was a part of the common law encompassed by the diversity jurisdiction statute. *See* Dickinson, *The Law of Nations as Part of the National Law of the United States (pt. I)*, 101 U.Pa.L.Rev. 26, 27 (1952); 4 Blackstone's Commentaries 66-67 (Welsby ed. 1854), *see also Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116-17, 1 L.Ed. 59 (1784) (common law criminal prosecution for violation of law of nations); *cf.* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49, 73 (1923) (arguing that federal courts were intended to assert both statutory and common law criminal jurisdiction, including over law of nations offenses). Section 1350 therefore offered to aliens who could meet the diversity jurisdiction criteria, and therefore bring an action in the circuit court, an alternative forum, under some circumstances. For aliens unable to meet those criteria, § 1350 opened the district courts for assertion of their claims.

The Federalist Papers demonstrate unequivocally the "importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field...." *Hines v. Davidowitz*, 312 U.S. 52, 62 n. 9, 61 S.Ct. 399, 401 n. 9, 85 L.Ed. 581 (1941) (citing The Federalist Nos. 3, 4, 5, 42 & 80). The Constitution reflects this concern with an array of techniques for centralizing foreign relations, including Article III, § 2, which extends judicial power, *inter alia*, to controversies between a state or its citizens and foreign states, citizens or subjects.

This interest in the rights of aliens is hardly surprising when considered in the context of early American history and traditional precepts of the law of nations. Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state's territory. 1 L. Oppenheim, International Law § 165a, at 366 (H. Lauterpacht 8th ed. 1955). If the court's decision constitutes a denial of justice,[11] or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state. A private act, committed by an individual against an individual, might thereby escalate into an international confrontation. *See* J. Brierly, The Law of Nations 284-91 (6th ed. 1963). The focus of attention, then, was on actions occurring within the territory of the United States, or perpetrated by a U.S. citizen, against an alien. For these acts, the United States was responsible.

Alexander Hamilton outlined precisely this fear as justification for the Constitution's grant of federal jurisdiction for all cases involving aliens:

> The union will 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. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

The Federalist No. 80, at 536 (A. Hamilton) (J. Cooke ed. 1961).[12] Having raised the specter of war to convince his readers that "the peace of the *whole* ought not to be left at the disposal of a *part*," *id.* at 535 (emphasis in original), Hamilton considered whether he should distinguish between "cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law." *Id.* at 536. He wrote,

11. Brierly enumerates "corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it" as instances of a denial of justice. J. Brierly, The Law of Nations 287 (6th ed. 1963)

12. Similarly, at the Virginia Convention James Madison said, "We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 Elliot's Debates 583 (1888). *See also* P. Bator, P. Mishkin, D. Shapiro & M. Wechsler Hart and Wechsler's The Federal Courts and the Federal System 17 (2d ed. 1973) (concluding that "the need for a grant [of federal judicial power] going beyond cases involving treaties and foreign representatives seems to have been undisputed") *But see* Warren, *supra* note 10, at 56 & n. 13 (1923) (among the proposed amendments to the Constitution was "the elimination of all jurisdiction based on diverse citizenship and status as a foreigner")

The former kind may be supposed proper for the federal jurisdiction, the latter for that of the states. But it is 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 in a treaty or the general laws of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complection and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals

Id. See also Note, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F.L.REV. 105, 113–15 & nn. 62–65 (1979). *Cf.* THE FEDERALIST No. 3 (J. Jay), No. 42 (J. Madison).[13]

The First Judiciary Act clearly did not go as far as Hamilton might have hoped. It withheld much of the judicial power that constitutionally might have been granted—for example, federal courts did not have complete federal question jurisdiction until 1875[14]—and enumerated relatively narrow criteria for subject matter jurisdiction. In particular, diversity jurisdiction under the Act kept out of federal court aliens who could not plead the jurisdictional amount or complete diversity. Given the fears articulated by Hamilton and others, it is easy to speculate that the drafters were worried about possible repercussions from a state's denial of justice to an alien in any action, no matter how slight in monetary value. Recall, in this regard, Hamilton's concerns about any incident, even one "wholly relative to the *lex loci*." THE FEDERALIST No. 80 (A. Hamilton). As Hamilton noted, whatever the fears attaching to "merely" local actions, civil suits also implicating the law of nations were surely fit for federal adjudication. Since the five hundred dollar limit created the potential for mischief by state courts, it would have been logical to place under federal jurisdiction at least the local actions most likely to create international tension. Recalling that each additional statutory grant of federal jurisdiction to lower courts was the product of struggle and compromise, *cf.* Warren, *supra* note 10, at 53–54, it would hardly be surprising that the section 1350 grant, too, reflects a compromise between, on the one hand, placing all actions involving aliens in federal courts and, on the other hand, reserving to state courts exclusive jurisdiction over all civil actions at common law and in equity.

Curiously, the language of the original section 1350, as well as its location in the Judiciary Act, can be construed to support either the *Filartiga* or the alternative formulation for the application of section 1350. As it appeared in section 9 of the 1789 Judiciary Act, the predecessor to section 1350 granted district courts jurisdiction, "concurrent with the courts of the several States, or the circuit courts, as the case may be."[15] A logical inference is that some

13. This formulation of § 1350's underlying intent casts doubt on the appropriateness of federal jurisdiction over suits between two aliens. The United States might be less concerned about the appearance of condoning a wrongful act if its own citizen were not the perpetrator, because the state of the wrong-doer should provide the forum for relief, or suffer the consequences. However, let us assume a tort is committed by an alien against an alien of different nationality, and the injured alien sues the offender under a state's tort law. No diversity jurisdiction exists. *See Hodgson & Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 3 L.Ed. 108 (1809). A denial of justice might create the perception that the United States is siding with one party, thereby affronting the state of the other. While the potential for retribution is not direct, it would seem to be present, particularly when the tort occurs on United States soil.

14. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

15. In the First Judiciary Act, district courts were granted original jurisdiction over a mixture of actions. The complete authorization was as follows:

> Sec. 9. *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 for 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.

1 Stat. 73, 76–77 (footnotes omitted) (emphasis added).

actions cognizable in the circuit courts also were cognizable under section 1350. The carefully delimited diversity jurisdiction of the circuit courts was set out in section 11; that section included the grant of jurisdiction, "of all suits of a civil nature at common law or in equity," in which an alien is a party, and no other grant of civil jurisdiction in actions involving aliens.[16] The section 9 reference to concurrent jurisdiction with the circuit courts therefore might reasonably have referred to actions by an alien "at common law or in equity," for a tort, involving more than five hundred dollars—in other words, to domestic torts cognizable under diversity jurisdiction. However, the reference to concurrent circuit court jurisdiction might also refer to actions implicating the law of nations; both courts would have had jurisdiction over such actions, circuit courts as an element of their common law jurisdiction, and district courts directly. In that case, the mention of concurrent jurisdiction would support the *Filartiga* formulation for the application of section 1350.

The structure of the Act also provides support for both the *Filartiga* and the alternative formulations. A comparison of district and circuit court jurisdiction discloses that while each had its own classes of cases, the circuit courts were the more significant

16. The circuit courts received much broader original jurisdiction than the district courts. The authorization was as follows:

> Sec. 11. *And be it further enacted*, That the circuit courts shall have *original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars*, and the United States are plaintiffs, or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And 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, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided.

1 Stat. 73, § 11, 79 (footnotes omitted) (emphasis added).

courts of general original jurisdiction. *See* notes 15 and 16, *supra*. The district court was viewed "primarily as [a] court[ ] of special jurisdiction," 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 475 (1971), and "as a very inferior court indeed." *Id.* at 473. The district court judge was to be "the resident expert" on his state's jurisprudence, *id.*, and actions placed in district courts were in essence local. Moreover, district court actions were in some respects minor versions of actions eligible to be brought in the circuit courts. Thus while the circuit courts—staffed by a district court judge and two Supreme Court Justices, pursuant to section 4 of the Act—had exclusive jurisdiction of "all crimes and offenses cognizable under the authority of the United States," with some exceptions, the district courts also had jurisdiction over less serious crimes. Similarly, the district courts could hear actions that did not meet the amount in controversy necessary for circuit court diversity jurisdiction.[17]

While the parallel between greater and lesser punishments and greater and lesser amounts in controversy might be persuasive, the district courts also had admiralty and maritime jurisdiction. That power suggests these courts were not merely local petty action tribunals but important forces in the enforcement of maritime law. The drafters' decision to grant district courts admiralty jurisdiction suggests perhaps that the district courts were perceived as appropriate tribunals to handle matters affecting foreign states. It is perhaps anomalous that drafters concerned that decentralized courts might spark international conflict would place in a local court complete control over actions implicating the laws of nations, rather than using that court solely as a diversity jurisdiction catch-all. However, because district courts were located in each state, while circuit courts were scattered more sparsely, Judiciary Act of 1789, ch. 20, §§ 2–5, 1 Stat. 73, 73–75, district court jurisdiction also made federal courts more accessible to aliens, and thereby facilitated their actions.

2. *A Paradigm of the Alternative Formulation:* Adra v. Clift

To probe the mechanics of the alternative formulation for the application of section 1350, I turn to the single case in which it has been adopted. In *Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961), a Lebanese plaintiff, then Ambassador to Iran, sued his former wife, a Turkish-born Iraqi national resident in the United States, and her American husband under section 1350. The plaintiff contended that he was legally entitled to custody of his daughter by his former wife, that the daughter was wrongfully being withheld from him, and that defendants had concealed the child's name and nationality by falsifying her passport, in violation of the law of nations. The court found jurisdiction to exist by identifying a purely municipal tort—"[t]he unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody." 195 F.Supp. at 862. The court then determined that the defendant had misused her Iraqi passport by including her Lebanese child on it, in order to conceal the child's name and nationality. The misuse of a passport was found to constitute a violation of the law of nations, and jurisdiction was established.

If we change the facts slightly in *Adra v. Clift*, and assume both defendants are American citizens, the case becomes a paradigm of the alternative formulation for the application of section 1350.[18] Diversity jurisdiction is unavailable if the amount in controversy is not met. The action is grounded directly on a domestic tort but implicates an international law violation. If plaintiff were denied justice, that denial might be perceived in Lebanon, plaintiff's

17. To be sure, the parallel is not perfect, since district courts could hear actions for any amount in controversy if they met the former § 1350's requirements.

18. As noted earlier, I have some misgivings about the propriety of § 1350 actions between two aliens under this formulation. *See* note 13, *supra*.

home state, as an affront by the United States itself.

At this juncture it is worthwhile to observe that the second formulation is not susceptible of the same criticism as the first—that the district court would have difficulty parsing the law of nations for an applicable legal standard. It is apparent that because domestic law provides the standard, the burden of discovering that standard is removed. However, the *Adra* case suggests that this formulation raises some thorny questions of its own.

Under the alternative approach suggested by *Adra*, the law of nations violation is only one aspect of a multifaceted jurisdictional test and apparently need not be so rigidly defined as under the first approach adopted by *Filartiga*. The *Filartiga* formulation posits a violation of the law of nations as the trigger for section 1350 jurisdiction. The *Adra* formulation adopts a two-step jurisdictional test, requiring what would appear to be a looser allegation of a law of nations offense, coupled with a municipal tort.[19] That *Adra* eschewed the analysis that would have been required under the *Filartiga* approach, and instead spoke only in general terms about the law of nations, suggests a less rigorous showing under the law of nations would be mandated under the *Adra* approach.

The court in *Adra* might convincingly have argued that passport abuse amounts to a serious law of nations violation. The argument would be that countries are entitled, under the law of nations, to rely on passports as evidence of fact, *see Kent v. Dulles*, 357 U.S. 116, 120–21, 78 S.Ct. 1113, 1115–16, 2 L.Ed.2d 1204 (1958) (quoting *Urtetiqui v. D'Arbel*, 34 U.S. (9 Pet.) 692, 9 L.Ed. 276 (1835)), and that nations that do rely are responsible, also under that law, for the safe passage of the passport holder. *See* 4 BLACKSTONE'S COMMENTARIES 68–69 (Welsby ed. 1854). Fraudulent use by an individual might therefore disrupt states' recognized duties, which are grounded in reliance on a passport's authenticity. Misuse by a person entrusted to abide by international norms would amount to a law of nations violation.

The *Adra* court made no effort to tease out of international law an explicit duty, placed on individuals, that had been violated. Instead, it merely identified the important role that passports play in the international arena, implicitly concluded that the defendants were obliged by the law of nations to adhere to international norms regarding passports, and determined that their failure to do so constituted the requisite violation.

That section 1350 jurisdiction might be triggered by offenses less severe than are required under the *Filartiga* formulation gives rise to a new question: how much less severe? No doubt the law of nations condemns passport violations; whether they reach the level of international crimes is another matter entirely. Perhaps the two approaches focus on different segments of the spectrum of international offenses. In the range from the petty to the heinous, the first formulation might look to the upper range only—to those acts that are recognized as international crimes—while the second might encompass a wider scope. It might, for example, refer to a violation of any of the many duties imposed on nations by international law, as set out in detail in the Restatement (Second) of Foreign Rela-

19. Because even under this approach the *Hanoch* plaintiffs do not allege a law of nations violation, it is unnecessary to consider Article III implications of the formulation. It would appear, however, that there are no serious Article III problems associated with the *Adra*-type application of § 1350.

If § 1350 is limited to actions by aliens against citizens, *see* note 13, *supra*, then constitutional diversity jurisdiction exists.

If § 1350 is read more broadly to cover alien versus alien suits, it might still be possible to find that the action arises under the laws of the United States. This is so because the law of nations is "an ingredient" of this action. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824), and is also an integral part of the laws of this country, *see The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900). Therefore, since, any action under the *Adra* formulation would involve as a threshold issue the law of nations it would "arise under" the laws of the United States for Article III purposes.

tions Law. That is an issue with which any future court accepting the *Adra*-type formulation must grapple, however. I need not test the limits of each standard, for while I have no doubt that the official torture cited in *Filartiga* violated the law of nations by any definition, I am not convinced that the unofficial acts at issue in this case in any way implicated the law of nations.

I note, however, that it is thoroughly inconsistent with the impetus behind section 1350 under the *Adra* formulation—to keep the United States *out* of international confrontations—to construe the statute to enable courts to burrow into disputes wholly involving foreign states. I therefore believe the *Adra* formulation makes sense only if construed to cover actions by aliens for domestic torts that occur in the territory of the United States and injure "substantial rights" under international law, *see* 26 Op. Att'y Gen. 250, 252–53 (1907), or for universal crimes, as under the first formulation, or for torts committed by American citizens abroad, where redress in American courts might preclude international repercussions.

Not surprisingly, these limits are consistent with the basic parameters that international law establishes for a domestic court's exercise of jurisdiction over extraterritorial activities. *See* RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) §§ 402–404 (Tent.Draft No. 2, 1981) (enumerating permissible bases of "jurisdiction to prescribe," applicable both to criminal and civil law). They are not, contrary to Judge Bork's assertion, my own "unguided policy judgments," but rather the well-established, prudential judgments of the law of nations. Of course, other municipal law doctrines pertaining to a court's exercise of jurisdiction, such as *forum non conveniens* and attainment of personal jurisdiction, must be met as well.

A second difficult question raised by the facts in *Adra* involves the requisite nexus between the domestic and the international tort. The *Adra* court applied, at best, a "but for" causation test to determine whether the international and domestic torts were sufficiently related to establish jurisdiction. "But for" the passport abuse, defendants could not have concealed the daughter's entry into the United States, and therefore could not have retained custody. This framework opens the courts to a potential deluge of actions. In this case, for example, plaintiffs might have alleged that the PLO violated Israeli immigration laws by landing in Israel without passports, perhaps skirting the problem, addressed *infra*, of individual liability for torture. The formulation poses the difficult question of the necessary degree of convergence between the domestic and international tort. Had I to address the issue, I would recall my basic premise—that the intent of the statute was to avoid or mitigate international conflict—and determine what degree of overlap would be required to achieve that goal. However, since the *Hanoch* plaintiffs focus on one event alone, the issue is not directly presented.

C. *A Summary Comparison of the* Filartiga *and* Adra *Formulations*

From the foregoing analysis it is clear that the *Filartiga* and *Adra* formulations might produce radically different results. *Adra v. Clift* itself is an example. Under its facts, jurisdiction would fail under the *Filartiga* formulation, because the law of nations violation, even if sufficiently severe, caused plaintiff no harm, and plaintiff could not sue under section 1350 for the domestic tort. In contrast, the facts of *Filartiga* would likely produce a finding of jurisdiction under either the *Filartiga* or *Adra* formulation. Whatever the difference in the formulations, however, they do have in common one crucial characteristic: under neither one must plaintiffs identify and plead a right to sue granted by the law of nations. On that point, I espy no reason in the statutory language, history, or case law to conclude otherwise.

IV. MEANING OF THE "LAW OF NATIONS"

In addition to our disagreement over the "right to sue" issue, I also have great difficulty in understanding Judge Bork's effort to restrict the scope of section 1350 to the principal offenses against the law of nations recognized centuries ago by Blackstone, *see* text at notes 2–3, *supra*, instead of construing it in accord with the current definition of the law of nations. While conceding that the legislative history offers no hint of congressional intent in passing the statute, my colleague infers Congress' intent from the law of nations at the time of the passage of section 1350. The result of this analytical approach is to avoid the dictates of *The Paquete Habana* and to limit the "law of nations" language to its 18th century definition. In *The Paquete Habana*, the Supreme Court noted that, in construing the "law of nations,"

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

175 U.S. at 700, 20 S.Ct. at 299. As was pointed out in *Filartiga*,

> *Habana* is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." *Id.* at 694, 20 S.Ct. at 297; *accord, id.* at 686, 20 S.Ct. at 297. Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796) (distinguishing between "ancient" and "modern" law of nations).

630 F.2d at 881.

In light of the evidence at hand, it seems clear beyond cavil that violations of the "law of nations" under section 1350 are not limited to Blackstone's enumerated offenses. Indeed, the Supreme Court stated as much almost a century ago, when it announced that counterfeiting of foreign securities constitutes an offense against the law of nations. *See United States v. Arjona*, 120 U.S. 479, 7 S.Ct. 628, 30 L.Ed. 728 (1887).

V. THE DUTY TO EXERCISE JURISDICTION

To the extent that Judge Bork rejects the *Filartiga* construction of section 1350 because it is contrary to his perception of the appropriate role of courts, I believe he is making a determination better left to Congress. It simply is not the role of a judge to construe a statutory clause out of existence merely on the belief that Congress was ill-advised in passing the statute. If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions "exacerbate tensions" and should not be heard.

To be sure, certain judge-made abstention rules, such as the Act of State Doctrine, require courts to decline to reach certain issues in certain instances, notwithstanding a statutory grant of jurisdiction. Where the Act of State Doctrine applies, the Supreme Court has directed the courts not to inquire into the validity of the public acts of a *recognized* foreign sovereign committed *within its own territory*. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 84 S.Ct. 923, 926, 11 L.Ed.2d 804 (1964). The doctrine does *not* require courts to decline jurisdiction, as does the Foreign Sovereign Immunities Act, but only not to reach the merits of certain issues. As Judge Bork admits, the doctrine is not controlling here. Indeed, to apply it at this stage of the case would be to grossly distort the doctrine, first by considering it as a jurisdictional issue, and second, by extend-

ing it beyond its carefully limited confines. Unless and until the Supreme Court reconsiders the Act of State Doctrine and applies it as a jurisdictional matter to acts by nonrecognized entities committed in the territory of a recognized state, it simply is not relevant to this case.

While not claiming that the Act of State Doctrine controls, Judge Bork looks for guidance toward the concerns that he believes animate it. To ignore the Supreme Court's cautious delineation of the doctrine in *Banco Nacional de Cuba v. Sabbatino* and its progeny, and to cite the doctrine's rationale as broad justification for effectively nullifying a statutory grant of jurisdiction, is, to my view, an inappropriate exercise of lower federal court power. It is particularly so in this case, given the considerable disagreement among the Justices regarding the rationale, scope, and flexibility of the doctrine, *see First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773–76, 92 S.Ct. 1808, 1816–17, 32 L.Ed.2d 466 (1972) (Powell, J., concurring in judgment), and congressional efforts to override judicial abdication of the kind directed by the Act of State Doctrine. *See* 22 U.S.C. § 2370(e) (1976) (barring judicial invocation of Act of State Doctrine in certain expropriation actions).

My troubles with Judge Bork's efforts to limit the reach of section 1350 go even deeper. Contrary to my colleague's intimations, I do recognize that there are separate branches of Government. In fact, that is precisely my point. I am the first to admit that section 1350 presents difficulties in implementation, but to construe it out of existence on that ground is to usurp Congress' role and contravene its will.

Judge Bork virtually concedes that he is interposing a requirement that the law of nations provide a right to sue simply to void a statute of which he does not approve—and to avoid having to extend and distort existing doctrine on nonjusticiability to reach the same result. As a first step, he sets forth an interpretation of the statute that completely writes out of the statute the clause at issue. The law of nations provides no private right to sue for the only offenses against the law of nations that he recognizes. Under his view, therefore, the clause in the statute had no meaning when passed by Congress and none today. To enforce a construction that yields that result is not only to insult Congress, but inappropriately to place judicial power substantially above that of the legislature.

Logically, of course, under Judge Bork's formulation, were the law of nations ever to provide a right to sue, federal courts would have to hear the cases. To avoid this contingency, Judge Bork adds yet another obstacle, stating that "considerations of justiciability" would, necessarily, come into play in that event. With this remark, Judge Bork virtually concedes that he would keep these cases out of court under any circumstance, and he places himself squarely beside Judge Robb, who advocates dismissal of this action on political question grounds. Vigorously waving in one hand a separation of powers banner, ironically, with the other he rewrites Congress' words and renounces the task that Congress has placed before him.

Most surprisingly, Judge Bork's analysis—and his critique of my own—*completely* overlooks the existence of state courts. Subject to the same constraints that face federal courts, such as personal jurisdiction, and perhaps in some instances to other limitations, such as preemption, state courts could hear many of the common law civil cases, brought by aliens, that Judge Bork believes should not be heard at all. As best we can tell, the aim of section 1350 was to place in federal court actions potentially implicating foreign affairs. The intent was not to provide a forum that otherwise would not exist—as Judge Bork assumes—but to provide an *alternative* forum to state courts. Indeed, the Supreme Court has at least twice cited section 1350 as a statutory example of congressional intent to make questions likely to affect foreign relations originally cognizable in federal courts. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 & n. 25, 84 S.Ct. 923, 939 & n. 25, 11 L.Ed.2d 804 (1964); *Ex Parte Quirin*, 317 U.S. 1, 27–30 & n. 6, 63 S.Ct. 1, 10–12 & n. 6, 87 L.Ed. 3 (1942). Not only is it patently indefensible to ignore this mandate. It is also erroneous to assume that the troublesome cases will disappear altogether from state courts, as well as federal, if section 1350 becomes mere historical trivia. In that event, no doubt, my colleagues would either assert nonjusticiability generally or turn the issue on its head and argue, precisely as the section 1350 drafters recognized, that state courts are inappropriate fora for resolution of issues implicating foreign affairs.

VI. Liability of the Non-State Actor Under the Law of Nations

While I endorse the legal principles set forth in *Filartiga*, I also believe the factual distinctions between this case and the one faced by the Second Circuit mitigate its precedential value in this case. To be sure, the parallels between the two cases are compelling. Here, as in *Filartiga*, plaintiffs and defendants are both aliens. Plaintiffs here allege torture in their complaint, as did plaintiffs in *Filartiga*.[20] Here, as in *Filartiga*, the action at issue undoubtedly violated the law of the nation in which it occurred (in this case, the law of Israel). *See Filartiga*, 630 F.2d at 889.

The two fact patterns diverge, however, on the issue of *official torture*. The Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law. In contrast, the Paraguayan official in *Filartiga* acted under color of state law, although in violation of it. The Second Circuit surveyed the law of nations and concluded that *official torture* constituted a violation. Plaintiffs in the case before us do not allege facts to show that official or state-initiated torture is implicated in this action. Nor do I think they could, so long as the PLO is not a recognized member of the community of nations.[21]

20. On the basis of international covenants, agreements and declarations, commentators have identified at least four acts that are now subject to unequivocal international condemnation: torture, summary execution, genocide and slavery. *See* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv.Int'l L.J. 53, 90 (1981), *see also* P. Sieghart, The International Law of Human Rights 48 (1983) (cataloguing as recognized international crimes certain war crimes, crimes against humanity, genocide, apartheid and, increasingly, torture). Plaintiffs in this action allege both torture and murder that amounts to summary execution. *Filartiga* accepted the view that official torture in fact amounts to a law of nations violation. Analysis along the same lines would likely yield the conclusion that state-sponsored summary executions are violations as well. However, by definition, summary execution is "murder conducted in uniform," as opposed to lawful, state-imposed violence, Blum & Steinhardt, *supra*, at 95, and would be inapplicable here. *See id.* at 95–96. Therefore, for purposes of this concurrence, I focus on torture and assume, *arguendo*, that torture amounts to a violation of the law of nations when perpetrated by a state officer. I consider only whether non-state actors may be held to the same behavioral norms as states.

21. Our courts have in the past looked to the foreign policy of this nation, in particular to the recognition or non-recognition of a foreign government, to determine the applicability of a given legal doctrine. For example, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the Supreme Court explicitly tied the application of the Act of State Doctrine to whether the foreign state was recognized by the United States. *See* 376 U.S. at 401–428, 84 S.Ct. at 926, 940. *See also Oetjen v. Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (Supreme Court takes judicial notice of Washington's recognition of Mexican government, applies Act of State Doctrine retroactively to pre-recognition incidents). Indeed, the Court has made clear that the judiciary is not to second guess the determination of the other branches as to "[w]ho is the sovereign, *de jure* or *de facto*, of a territory." *Oetjen*, 246 U.S. at 302, 38 S.Ct. at 311. We therefore are bound by the decision of the Executive not to recognize the PLO, and we must apply international law principles accordingly.

I note, however, that it is conceivable that a state not recognized by the United States is a state as defined by international law and therefore bound by international law responsibilities. To qualify as a state under international law, there must be a people, a territory, a government and a capacity to enter into relations with other states. *See* 3 U.N. S.C.O.R. (383d Mtg.) at 9–12, U.N. Doc. S/P.V. 383, pp. 21–35 (1948) (remarks of Professor Philip C. Jessup) (advocating Israeli membership in the

A. *The Lack of Consensus on Individual Responsibility*

The question therefore arises whether to stretch *Filartiga*'s reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law. The extension would require this court to venture out of the comfortable realm of established international law—within which *Filartiga* firmly sat—in which states are the actors.[22] It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals. It would require a determination of where to draw a line between persons or groups who are or are not bound by dictates of international law, and what the groups look like. Would terrorists be liable, because numerous international documents recognize their existence and proscribe their acts? *See generally* R. LILLICH, TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY (1982) (reprinting numerous international anti-terrorism accords); *see also* Lauterpacht, *The Subjects of the Law of Nations (pt. 1)*, 63 L.Q. REV. 438, 444-45 (discussing international obligations of insurgents). Would all organized political entities be obliged to abide by the law of nations? Would *everybody* be liable? As firmly established as is the core principle binding states to customary international obligations, these fringe areas are only gradually emerging and offer, as of now, no obvious stopping point. Therefore, heeding the warning of the Supreme Court in *Sabbatino*, to wit, "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it," 376 U.S. at 428, 84 S.Ct. at 940. I am not prepared to extend the definition of the "law of nations" absent direction from the Supreme Court. The degree of "codification or consensus" is simply too slight.

While I do not believe that international harmony exists on the liability of private individuals, it is worth noting that a number of jurists and commentators either have assumed or urged that the individual is a subject of international law. *See Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 297 (E.D.Pa.1963) (violation of law of nations, in section 1350, means, "at least a violation by one or more individuals"); *Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961) (individual violation of law of nations); Judgment of the International Military Tribunal, 22 Trial of the Major War Criminals Before the International Military Tribunal, Proceedings, 411, 465-66 (1948), 41 AM.J. INT'L L. 172, 220-21 (1947) (international law "imposes duties and liabilities upon individuals as well as upon States"), *reprinted in* The Nuremberg Trial 1946, 6 F.R.D. 69, 110-11 (1947); G.A.Res. 95, UN.Doc. A/64/Add. 1, at 188 (1947) (affirming Nuremberg principles); *see also* Sohn, *supra* note 22, at 9-11 (summarizing shift since 1945 in individual rights and duties under international law); Note, *The Law of Nations in the District Courts: Federal Jurisdiction Over Tort Claims by Aliens Under 28 U.S.C. § 1350*, 1 B.C.INT'L & COMP. L.J. 71, 82 (1977). Confusion arises because the term "individual liability" denotes two distinct forms of liability. The first, now well-implanted in the law of nations, refers to individuals acting under color of state law. Commentators routinely place the origin of this development at the Nuremberg Trials, *see, e.g.*, Sohn, *supra* note 22, at 9-11, and it was in this context that the International Military Tribunal wrote of individual responsibility for war crimes.[23] The second, currently less-established meaning addresses the responsibility of individuals acting separate from any state's authority or direction. That the defendant in *Filartiga* was an official, not the state itself, placed him squarely within the first meaning. In contrast, in the case before us, the second formulation of individual liability is at issue.

Even in the truly private arena there is support for the concept of individual responsibility. Inferences from case law suggest that courts over the years have toyed with the notion of truly individual liability both under section 1350 and more generally. Section 1350 case law, unfortunately, is sparse. Other than *Filartiga*, only two cases brought under section 1350 have established jurisdiction. Both involved private-party defendants. In one, *Bolchos v. Darrell*, 3 Fed.Cas. 810 (D.S.C.1795) (No. 1607), a predecessor to section 1350 provided jurisdiction for an action, grounded on a treaty violation, involving a title dispute concerning neutral property on a captured enemy vessel. It is worthwhile to note that, although *Bolchos* involved a treaty obligation, at the time of the *Bolchos* case individual defendants were in fact found to violate the law of nations, although not necessarily in actions based on section 1350. *See, e.g., United States v. Smith*, 18 U.S. (5 Wheat.) 153, 5 L.Ed. 57 (1820) (indictment for crime of piracy, as defined by the law of nations). In a more recent case, *Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961), an individual was in fact found to have violated the law of nations, and section 1350 jurisdiction was thereby established. The action, discussed extensively, *supra*, involved a child custody suit between two aliens; the court found that defendant's wrongful withholding of custody was a tort and that her misuse of passports to bring the child into the United States violated international law. To reach this conclusion on individual responsibility, the court relied primarily on one commentator, who asserted that some acts violate the law of nations and may be prosecuted when committed by a private offender. *Adra*, 195 F.Supp. at 863-64 (citing 1 C. HYDE, *supra* note 22, § 11A, at 33-34); it then leapt to a conclusion that passport violations are among such acts. *Id.* at 861-65. As I shall demonstrate, *infra*, Hyde's position, while certainly compelling, is not so widely accepted doctrinally or practically as to represent the consensus among nations.[24]

United Nations), *quoted in* Liang, *Notes on Legal Questions Concerning the United Nations*, 43 AM.J.INT'L L. 288, 300 (1949). Jurisdiction over the territory must be exclusive. G. VON GLAHN, LAW AMONG NATIONS 62 (4th ed. 1981). Even assuming, *arguendo*, that the law of nations obligates unrecognized states that meet this standard, and that § 1350's intent was to hold liable even those states the U.S. does not recognize, there is no allegation here that the PLO does or could meet this standard.

22. Classical international law was predominantly statist. The law of nations traditionally was defined as "the body of rules and principles of action which are binding *upon civilized states* in their relations with one another." J. BRIERLY, *supra* note 11, at 1 (emphasis added); *see also* G. VON GLAHN, *supra* note 21, at 61-62, 1 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 2A, at 4 (2d ed. rev. 1945). Non-state actors could assert their rights against another state only to the extent that their own state adopted their claims, and as a rule they had no recourse against their own government for failure to assist or to turn over any proceeds. 1 C. HYDE, *supra*, § 11B, at 36. *See also* Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM.U.L.REV. 1, 9 (1982). That the International Court of Justice permits only party-states to appear in cases before the court highlights this outlook. Article 34(1), Statute of the International Court of Justice, *done* June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153 (entered into force for United States October 24, 1945).

23. For example, responding to a "following orders" defense, the court cited Article 8 of the Charter annexed to the agreement establishing the Nuremberg Tribunal, which declared, "The fact that the defendant acts pursuant to orders of his Government or a superior shall not free him from responsibility, but may be considered in mitigation of punishment." 6 F.R.D. at 110-11.

24. Three other cases have suggested jurisdiction might be available under § 1350. Of these, two implicated private defendants. In *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir.1975), an action against the Immigration and Naturalization Service and others alleging the illegal seizure and removal of Vietnamese babies from Vietnam in the final hours of U.S. involvement there, the court noted in dicta that jurisdiction might be available under § 1350, and that, if it were, private adoption agencies that participated in the "babylift" might be joined as joint tortfeasors. *Id.* at 1201 n. 13. In a 1907 Opinion, 26 Op. Att'y Gen. 250 (1907), the Attorney General indicated that a predecessor to § 1350 might provide a forum to Mexican citizens seeking redress for damages suffered when an American irrigation company altered the channel of the Rio Grande River. The third case, *O'Reilly de Camara v. Brooke*, 209 U.S. 45, 28 S.Ct. 443, 52 L.Ed. 676 (1908), suggests that a United States officer's seizure of an alien's property in a foreign country might fall within § 1350.

Numerous other § 1350 actions have been dismissed on jurisdictional grounds for failure to allege a violation of the law of nations, *see*

B. *Historical Evolution of the Role of the Individual in International Law*

That the individual's status in international law has been in flux since section 1350 was drafted explains in part the current mix of views about private party liability. Through the 18th century and into the 19th, writers and jurists believed that rules of international law bound individuals as well as states. *See, e.g., United States v. Smith*, 18 U.S. (5 Wheat.), 153, 5 L.Ed. 57 (1820) (piracy violates law of nations; individual liable); *Respublica v. DeLongchamps*, 1 U.S. (1 Dall.) 111, 1 L.Ed. 59 (1784) (assault on French consul-general violates law of nations; individual liable), 4 BLACKSTONE'S COMMENTARIES 66-73 (Welsby ed. 1854) (recounting various offenses against law of nations, committed by private persons, punishable under English statutory law); *see generally* Dickinson, *supra* note 10, at 26-27, 29-30; Dickinson, *The Law of Nations as Part of the National Law of the United States (pt. 2)*, 101 U.PA.L.REV. 792, 792-95 (1953); Korowicz, *The Problem of the International Personality of Individuals*, 50 AM.J.INT'L L. 533, 534 (1956). In the 19th century, the view emerged that states alone were subjects of international law, and they alone were able to assert rights and be held to duties devolved from the law of nations. Under that view—which became firmly entrenched both in doctrine and in practice, *see* Korowicz, *supra*, 50 AM.J.INT'L L. at 535, 541—individual rights existed only as rights of the state, *see* Lauterpacht, *The Subjects of the Law of Nations (pt. 1)*, 63 L.Q.REV. 438, 439-40 (1947), and could be asserted, defended or withdrawn by the state. *See* P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL 38 (1960); *see also* note 22, *supra*.

In this century, once again writers have argued that both the rights and duties of international law should be applied to private parties. *See* P. REMEC, *supra*, at 8-18; Hill, *International Affairs: The Individual in International Organization*, 28 AM.POL. SCI.REV. 276, 282 & nn. 20-23 (1934) (describing shift from statism and emergence of view that individual is subject of international law); Korowicz, *supra*, 50 AM.J.INT'L L. at 537-39 (observing trend toward recognition of international personality of individuals, especially in their assertion of rights). However, their discussions are more prescriptive than descriptive; they recognize shifts in firmly entrenched doctrine but are unable to define a clear new consensus. And for each article sounding the arrival of individual rights and duties under the law of nations, another surveys the terrain and concludes that there is a long distance to go. *See, e.g.*, Brownlie, *The Place of the Individual in International Law*, 50 VA.L.REV. 435 (1964).

C. *Whether Torture, Like Piracy, Is an Exception to the Rule*

One strand of individual liability apparently survived the 19th century swing toward statism—private responsibility for piracy. It remained, with only a handful of other private acts, such as slave trading, as a confutation of the general principle of statism. *See* Korowicz, *supra*, 50 AM.J.INT'L L. at 545, 558; *cf.* Lauterpacht, *The Subjects of the Law of Nations (pt. 2)*, 63 L.Q. REV. 438, 441-42. Explanations of the basis for this continued recognition of individual responsibility vary. In one view, these acts are private violations of the law of nations, *e.g., United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161-62, 5 L.Ed. 57 (1820). In another view, international law merely authorizes states to apply sanctions of their municipal law, whatever the nationality of the offender. "The state of the offender is not authorized to apply normal consular or diplomatic protection. International provisions against [acts such as piracy] . . allow the state which captures the offenders to proceed according to its own internal law." Korowicz, *supra*, 50 AM.J.INT'L L. at 545. *See also Harvard Research in International Law, Piracy*, 26 AM.J.INT'L L.SUPP. 739, 754, 759-60 (1932) (piracy a special ground of state jurisdiction); *see generally* Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L.REV. 334 (1925) (discussing doctrinal confusion about piracy as an international or municipal crime).

generally Annot., 34 A.L.R. 1-10, 388 (1977) (reviewing cases). The most common shortcoming of these actions is in the allegation of a municipally recognized tort, such as fraud. *Trans-Continental Inv. Corp., S.A. v. Bank of Commonwealth*, 500 F.Supp. 565 (C.D.Cal. 1980), or libel. *Akbar v. New York Magazine Co.*, 490 F.Supp. 60 (D.D.C.1980), that does not have the stature of a law of nations violation.

It is worthwhile to consider, therefore, whether torture today is among the handful of crimes to which the law of nations attributes individual responsibility. Definitions of torture set out in international documents suggest it is not. For example, torture is defined in the Draft Convention on the Elimination of Torture in part as any act "by which severe pain or suffering" is inflicted, "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/L.1576) of 6 March 1981, *reprinted in* P. SIEGHART, *supra* note 20, § 14.3.5, at 162. Similarly, the United Nations General Assembly definition requires that the actor be "a public official." *See* Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N.GAOR Supp. (No. 34) at 91-92, U.N.Doc. A/10034 (1975), *reprinted in* P. SIEGHART, *supra* note 20, § 14.3.5, at 162. *See also* Blum & Steinhardt, *supra* note 20, at 93, 95-96. Against this background, I do not believe the consensus on non-official torture warrants an extension of *Filartiga*. While I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states, I decline to read section 1350 to cover torture by non-state actors, absent guidance from the Supreme Court on the statute's usage of the term "law of nations."

VII. TERRORISM AS A LAW OF NATIONS VIOLATION

I turn next to consider whether terrorism is itself a law of nations violation.[25] While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous states. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.

To witness the split one need only look at documents of the United Nations. They demonstrate that to some states acts of terrorism, in particular those with political motives, are legitimate acts of aggression and therefore immune from condemnation. For example, a resolution entitled "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes," G.A.Res. 3103, 28 U.N. GAOR at 512, U.N.Doc. A/9102 (1973), declared:

> The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law.

It continued that armed conflicts involving such struggles have the full legal status of international armed conflicts, and that violation of that status "entails full responsibility in accordance with norms of international law." *Id.* at 513. *See also* Definition of Aggression, G.A.Res. 3314, 29 GAOR Supp. (No. 31) at 142-44, U.N.Doc. A/9631 (1974) (nothing in definition of term "aggression" should prejudice right of self-de-

25. At least one law review note has suggested that we decide this case in favor of plaintiffs by identifying terrorism as a law of nations violation. *See* Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236 (1982).

termination or struggle, particularly of peoples under "colonial and racist regimes or other forms of alien domination"). In contrast, there is of course authority in various documents and international conventions for the view that terrorism is an international crime. Many Western nations condemn terrorist acts, either generally, as in the Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance,[26] or with reference to particular terrorist acts, as in the International Convention Against the Taking of Hostages,[27] or the Hague Convention on the Suppression of Unlawful Seizure of Aircraft.[28] *See also* R. FRIEDLANDER, TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL 38 (1983) (describing the international division on the legitimacy of terrorist acts); *see generally* R. LILLICH, TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY (1982).

The divergence as to basic norms of course reflects a basic disagreement as to legitimate political goals and the proper method of attainment. Given such disharmony, I cannot conclude that the law of nations—which, we must recall, is defined as the principles and rules that states feel themselves bound to observe, and do commonly observe[29]—outlaws politically motivated terrorism, no matter how repugnant it might be to our own legal system.

VIII. MY COLLEAGUES' OPINIONS

My colleague Judge Robb argues that this case is a nonjusticiable "political question" and that it therefore was properly dismissed. With all due respect, I disagree with this approach to appellate adjudication. A judge should not retreat under facile labels of abstention or nonjusticiability, such as the "political question doctrine," merely because a statute is ambiguous. In the words of one eminent jurist, "[o]*bscurity of statute* or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and *cast a duty upon the courts to declare it* retrospectively in the exercise of a power frankly legislative in function." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1921) (emphasis added). Or, as another jurist framed the issue, "The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM.L.REV. 527, 529 (1947).

Nonjusticiability based upon "political question" is *at best* a *limited* doctrine, and it is wholly inapposite to this case. In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court held that the question whether a state legislative district apportionment plan violates the Constitution is not a political question and therefore not nonjusticiable. In so doing, the Court rejected the notion that the doctrine rendered nonjusticiable all "political cases"—a doctrine advanced by Justice Frankfurter writing for a plurality of the Court in *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Instead, it observed, the nonjusticiability of a question is "essentially a function of the separation of powers." 369 U.S. at 217, 82 S.Ct. at 710. The Court then identified several categories of political questions:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The opinion also observed that the doctrine in no respect requires that all questions implicating foreign affairs be ruled political questions. *Id.* at 211, 82 S.Ct. at 706.

Subsequently Justice Brennan, the author of *Baker v. Carr*, emphasized the narrowness of the political question doctrine as it applies to matters of foreign relations. Dissenting in *Goldwater v. Carter*, 444 U.S. 996, 1006, 100 S.Ct. 533, 538, 62 L.Ed.2d 428 (1979)—in which only four Justices agreed that a Congressman's challenge to the President's Taiwan treaty termination presented a nonjusticiable political question—Justice Brennan explained, "Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutionally commit[ted].'" *Id.* at 1006, 100 S.Ct. at 538 (quoting *Baker v. Carr*, 369 U.S. 186, 211-13, 82 S.Ct. 691, 706-08, 7 L.Ed.2d 663 (1962)) (brackets in original). I simply do not believe that the doctrine in either of these narrow formulations counsels a finding of nonjusticiability in this case.

Initially, the action before us does not implicate separation of powers principles, and therefore is not even related to the central concern of the political question doctrine. *See Baker v. Carr*, 369 U.S. at 210, 217, 82 S.Ct. at 706, 710. We have here no clash between two branches of government that requires us to resolve the apportionment of power between them. Nor do we potentially transgress by reviewing any exercise of authority by another branch of government, much less one committed to another branch by the Constitution. Far from it, in fact, in implementing section 1350, courts merely carry out the existing view of the legislature that federal courts should entertain certain actions that implicate the law of nations.[30] Moreover, none of the categories identified in *Baker* is applicable here. We do not lack judicially discoverable and manageable standards. The parties do not invoke constitutional or statutory provisions that resist judicial application. The Supreme Court, in *The Paquete Habana*, explicitly acceded to the task of applying the law of nations and instructed lower courts on how to approach the task of discovering it. I therefore can hardly conclude that courts *lack* the means of determining what standards to apply. That the task might be difficult should in no way lead to the conclusion that it should not be accomplished. Nor do I believe either that

26. Signed Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (entered into force for United States Oct. 20, 1976).

27. Adopted Dec. 17, 1979, G.A.Res. 34/146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/34/819 (1979).

28. Signed Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force for United States Oct. 18, 1971).

29. 1 C. HYOT, *supra* note 22, at 1.

30. To the extent that Judge Robb's reliance on political question principles arises from his concern about court intervention in foreign affairs, the Act of State Doctrine delineates the bounds of proper judicial restraint. The doctrine arises in cases which, under Judge Robb's formula, would be deemed political question cases. Yet, we cannot ignore the fact that they are not treated as political question cases and ruled nonjusticiable.

The doctrine applies only to judicial review of the acts of *recognized* foreign governments committed *within their own territory*. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804 (1964). It is, in effect, a doctrine of deference, requiring that courts not second guess the judgments of such sovereigns in a category of contexts. When a § 1350 action implicates such action by a recognized sovereign, the Act of State Doctrine might bar further inquiry. Such is not the case here. Similarly, the Foreign Sovereign Immunities Act restrains courts from asserting jurisdiction, but, again, only to the extent Congress has deemed appropriate. Considering that the Supreme Court—in the Act of State Doctrine—and the Congress—in the Foreign Sovereign Immunities Act—have each delimited the scope of necessary judicial restraint in cases involving foreign affairs, I am not inclined to fashion yet another doctrine of nonjusticiability, simply because this case, and the difficulties of the law of nations, are not of easy resolution or implicate foreign affairs generally.

any of the other concerns in *Baker* arise here.[31]

I note, in addition, that to expand the doctrine at this juncture would be to counter the movement of courts and scholars in the opposite direction. Indeed, commentators have noted the "judicial indifference and scathing scholarly attack" recently directed at the political question doctrine, *see* McGowan, *Congressmen in Court*, 15 GA.L. REV. 241, 256 (1981). As Judge McGowan has noted, other than the Taiwan treaty case, *Goldwater v. Carter*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979), the last Supreme Court case to cite the doctrine in any meaningful way was *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973), and the last Supreme Court case to rely squarely on it was *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). *See* McGowan, *supra*, at 256–57.

It is therefore clear that the political question doctrine is a very limited basis for nonjusticiability. It certainly does not provide the judiciary with a carte blanche license to block the adjudication of difficult or controversial cases. And the doctrine surely may not be employed here to vitiate section 1350.

I decline to address further Judge Bork's critique of my opinion. He has completely misread my opinion to say that the primary purpose of section 1350 was to authorize courts to "regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States." I only wish the issues posed were so simple. Judge Bork seriously distorts my basic premises and ignores my expressed reservations. Accordingly, I prefer to let this opinion speak for itself, in the belief that it belies my colleague's mischaracterizations, and that any further exposition would be redundant.

IX. CONCLUSION

In light of the foregoing, I conclude that the appellants have not, and could not, allege facts sufficient to remain in court under existing precedent. I therefore vote to affirm the District Court's dismissal for lack of subject matter jurisdiction.

BORK, Circuit Judge, concurring:

This case grows out of an armed attack on a civilian bus in Israel on March 11, 1978. Appellants (plaintiffs below) are sixty-five of the persons seriously injured in the attack and the survivors of twenty-nine of the persons killed. Appellees (defendants below) are the Libyan Arab Republic ("Libya"), the Palestine Liberation Organization ("PLO"), the Palestine Information Office ("PIO"), and the National Association of Arab Americans ("NAAA").[1] Appellants alleged in their complaint that appellees were responsible for the 1978 attack, and they sought compensatory and punitive damages. Specifically, appellants charged appellees with torts committed in violation of international law and of some treaties and statutes of the United States as well as with commission of and conspiracy to commit various intentional common law torts. Jurisdiction over the common law tort

31. This case therefore is distinguishable from *Crockett v. Reagan*, 720 F.2d 1355 (D.C.Cir. 1983), in which a panel of this court recently affirmed the dismissal of an action on political question grounds. In *Crockett*, we held that the inquiry into whether United States advisers stationed in El Salvador were in a situation of imminent hostilities was beyond the fact finding power of this court and hence constituted a political question. That case, unlike this one, involved the apportionment of power between the executive and legislative branches. The case was brought by a group of Congressmen challenging the President's failure to report to Congress under the War Powers Resolution. Our opinion adopted that of the District Court, which had articulated an extremely narrow view of the political question doctrine. Even within that narrow view, it was apparent that *Baker v. Carr*'s category of "judicially discoverable and manageable standards" would bar judicial interference in the dispute between the two branches. Here we have no such dispute and no such fact finding problems and, therefore, no legitimate grounds for a finding of nonjusticiability.

1. Appellants have not pursued the appeal against a fifth defendant named in the complaint, the Palestine Congress of North America ("PCNA").

counts is pendent and will fail if the other counts fail.

The district court dismissed the action for lack of subject matter jurisdiction.[2] *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C.1981). We agree that the complaint must be dismissed, although our reasons for agreement differ. I believe, as did the district court, that, in the circumstances presented here, appellants have failed to state a cause of action sufficient to support jurisdiction under either of the statutes on which they rely. 28 U.S.C. §§ 1331, 1350 (1976 & Supp. V 1981).[3] Neither the law of nations nor any of the relevant treaties provides a cause of action that appellants may assert in courts of the United States. Furthermore, we should not, in an area such as this, infer a cause of action not explicitly given. In reaching this latter conclusion, I am guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations.

I.

According to the complaint, on March 8, 1978, thirteen heavily armed members of the PLO left Lebanon for Israel. They were under instructions from the PLO to seize and hold Israeli civilians in ransom for the release of PLO members incarcerated in Israel jails. If their plans broke down, the terrorists were to kill their hostages.

The complaint's allegations of what happened upon the terrorists' arrival in Israel constitute a tale of horror. Since my analysis does not turn upon the particulars of those events, they need not be described in detail. The thirteen terrorists landed by boat and, after killing an American photographer they encountered on the beach, made their way to the main highway between Haifa and Tel Aviv. There they stopped and seized a civilian bus, a taxi, a passing car, and, later, a second civilian bus, taking the passengers hostage. While proceeding toward Tel Aviv with their many hostages gathered in the first bus, the terrorists fired on and killed numerous occupants of passing cars as well as some of their own passengers. They also tortured some of their hostages.

The police finally brought the terrorist-controlled bus to a halt by shooting at the tires and engine of the bus as it passed through a police barricade. The terrorists reacted by shooting a number of their hostages and, eventually, by blowing up the bus with grenades. As a result of the terrorists' actions, twenty-two adults and twelve children were killed, and sixty-three adults and fourteen children were seriously wounded.

Appellants in this case are most of those wounded and the survivors of most of those killed, as well as the guardians and next friends of those wounded minors who may not sue in their own capacity. Appellants alleged their complaint that appellees are responsible for the deaths and injuries. According to the complaint's allegations, the PLO not only recruited and trained the thirteen terrorists but also planned, financed, supplied, and "claimed responsibility" for the operation. Libya, plaintiffs alleged, trained the PLO instructors who trained the thirteen terrorists, planned, supplied, financed, and "claimed responsibility" for the operation, and gave an official "hero's welcome" to the ship that carried the terrorists to Israel. As for the PIO and

2. The district court dismissed the action against all defendants on the alternative ground that it was barred by the local one-year statute of limitations for certain torts. D.C.Code Ann. § 12-301(4) (1981). *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542, 550-51 (D.D.C.1981). Because we agree that the complaint was properly dismissed on other grounds, we need not reach this ground. Nor need we reach the district court's dismissal of the action against the NAAA and PIO (as well as the PCNA) on the ground that the allegations of the complaint were insufficiently specific. *See* note 4 *infra*.

3. In the district court appellants also argued that jurisdiction rested on 28 U.S.C. § 1330 (1976) (Foreign Sovereign Immunities Act) and on 28 U.S.C. § 1332 (1976) (diversity). The district court rejected both grounds of jurisdiction, 517 F.Supp. at 10 n. 3, and appellants have abandoned them on appeal.

the NAAA, the complaint contains only the general allegations that the PIO is an agent and instrumentality of the PLO and that both the PIO and the NAAA helped plan, finance, outfit, and direct the terrorist operation.[4]

Though the complaint sought recovery under five theories of liability, only two need be considered to decide this appeal. Count II charges defendants with tortious actions in violation of the law of nations. Count III charges defendants with tortious actions in violation of various treaties of the United States.[5] The district court granted the NAAA's motion to dismiss for lack of jurisdiction. The portion of the district court's inquiry that is relevant here is whether the allegations of Counts II and III sufficed to support jurisdiction under sections 1331 or 1350.

Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1350 provides: "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." With respect to Count III's allegation of treaty violations, the district court found jurisdiction lacking on the ground that none of the treaties alleged to be violated either expressly or impliedly gave rise to a private right of action. 517 F.Supp. at 545–48. With respect to Count II's allegation that appellees violated the law of nations, the district court held that neither section 1331 nor section 1350 provided jurisdiction. Section 1331 jurisdiction is lacking, the court held, because federal common law, which incorporates the law of nations, cannot be constituted to grant a cause of action without "judicial interference with foreign and international relations." 517 F.Supp. at 548. Section 1350 jurisdiction is lacking, the district court held, for the same reason: International human rights law grants no private right of action, and section 1350, like section 1331, must be interpreted narrowly to require such a right in suits for violation of international law. 517 F.Supp. at 549–50.

In this appeal, appellants agree with the district court that, for purposes of the issues raised in this case, the jurisdictional requirements of sections 1331 and 1350 are the same. *See* Brief for Appellants at 35–36; 517 F.Supp. at 549 n. 2 ("[P]laintiffs themselves recognize that the jurisdictional bases of § 1331 and § 1350 are identical as to the role of the law of nations."). Contrary to the holding of the district court, however, they contend that at least some of the treaties they cite in their complaint impliedly provide private rights of action for the claims in Count III and that federal common law provides private rights of action for the claims in Count II. Thus, appellants argue, section 1350 gives jurisdiction over the claims of the alien plaintiffs and section 1331 gives jurisdiction over the claims of all the plaintiffs, including those who are United States citizens.[6]

4. The district court found the complaint's allegations against the PIO and the NAAA (and against the PCNA) insubstantial, vague, and devoid of any factual detail. It therefore held those allegations insufficient to support a tort action for damages. 517 F.Supp. at 549

5. Count I charges defendants with the torts of assault, battery, false imprisonment, and intentional infliction of mental distress. It also charges defendants with a tort it describes as the intentional infliction of cruel inhuman, and degrading treatment. Count IV charges defendants with tortious actions in violation of various criminal laws of the United States. Count V charges defendants with conspiracy to commit the torts specified in Counts I through IV

The district court dismissed Count IV on the ground that none of the federal statutes relied on by plaintiffs, 18 U.S.C. §§ 371, 956–957, 960, 1651–1652, 1654, 1661 (1976), provides a private right of action for damages. 517 F.Supp. at 545. Appellants have not appealed this ruling. Counts I and V provide no independent basis for federal jurisdiction under the two statutes alleged to vest the district court with jurisdiction. 28 U.S.C. §§ 1331, 1350 (1976 & Supp. V 1981)

6. The Tel-Oren plaintiffs are citizens of the United States, and the Drory plaintiffs are citizens of the Netherlands. The other plaintiffs are citizens of Israel. All the plaintiffs reside in Israel

For the reasons given below, appellants' contentions must be rejected. I first consider separation of powers principles that counsel courts, in a case like this, not to infer any cause of action not expressly granted. I then show that the treaties on which appellants rely create no private causes of action. Turning next to appellants' claim under general principles of international law, I conclude that federal common law does not automatically accord appellants a cause of action and that appellants have not been granted a cause of action by federal statute or by international law itself. Finally, in order to clarify what I believe we should and should not have decided, I discuss the recent decision of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), a case having some similarities to this one.

II.

The question in this case is whether appellants have a cause of action in courts of the United States for injuries they suffered in Israel. Judge Edwards contends, and the Second Circuit in *Filartiga* assumed, that Congress' grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results. For reasons I will develop, it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal. It will be seen below, however, that no body of law expressly grants appellants a cause of action; the relevant inquiry, therefore, is whether a cause of action is to be inferred. That inquiry is guided by general principles that apply whenever a court of the United States is asked to act in a field in which its judgment would necessarily affect the foreign policy interests of the nation.

The Supreme Court explained in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), that to ask whether a particular plaintiff has a cause of action is to ask whether he "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.* at 240 n. 18, 99 S.Ct. at 2274 n. 18. The Court said that the "question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Id.* at 241, 99 S.Ct. at 2275 (emphasis in original). In addressing the question, as the *Davis* opinion itself makes clear, the focus may be at least as much on the character of the issues presented for decision as on the character of the class of litigants seeking an adjudication, and the result of the inquiry might well be that certain claims cannot be litigated at all in certain forums.

This case presents a question not covered by the analyses described by the *Davis* Court for statutory and constitutional causes of action. An analysis of the appropriateness of providing appellants with a cause of action must take into account the concerns that are inherent in and peculiar to the field of international relations. My assessment of those concerns leads me to a conclusion different from that reached in *Davis*, for here there appear to be "special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971). The factors counseling hesitation are constitutional, they derive from principles of separation of powers.

The crucial element of the doctrine of separation of powers in this case is the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726 (1918). That principle has been translated into a limitation on judicial power in the international law area principally through the act of state and political question doctrines. Whether or not this case falls within one of these categories, the concerns that underlie

them are present and demand recognition here.

"The act of state doctrine in its traditional formulation precludes the courts from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 84 S.Ct. 923, 926, 11 L.Ed.2d 804 (1964). Originally, the doctrine rested primarily on notions of sovereignty and comity. *See Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897). In more recent formulations, there has been "a shift in focus from the notions of sovereignty and the dignity of independent nations . . . to concerns for preserving the 'basic relationships between branches of government in a system of separation of powers,' and not hindering the executive's conduct of foreign policy by judicial review or oversight of foreign acts." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir.1979) (quoting *Sabbatino*, 376 U.S. at 423, 84 S.Ct. at 937).

The *Sabbatino* Court explained that, although the Constitution does not compel the act of state doctrine, the doctrine has "'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." 376 U.S. at 423, 84 S.Ct. at 937. The Court emphasized the separation of powers basis for the doctrine when it observed that the doctrine's "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Id.* at 427–28, 84 S.Ct. at 939–40. In its principal post-*Sabbatino* act of state case, the Supreme Court again stressed the centrality of separation of powers concerns: "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 697, 96 S.Ct. 1854, 1863, 48 L.Ed.2d 301 (1976).[7] The courts of appeals have likewise emphasized the decisive role played, in applying the doctrine, by the two relevant aspects of separation of powers: the potential for interference with the political branches' functions and the fitness of an issue for judicial resolution. *See, e.g., International Association of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358–61 (9th Cir.1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d at 1292–93; *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77–79 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 605–08 (9th Cir.1976).

The same separation of powers principles are reflected in the political question doctrine. The Supreme Court gave that doctrine its modern formulation in *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied. *See id.* at 211–14, 82 S.Ct. at 706–08. If it were necessary, I might well hold that the political question doctrine bars this lawsuit, since it is arguable, as much of the remainder of this opinion will show, that this case fits several of the categories listed in *Baker v. Carr*. Such a determination is not necessary, however, because many of the same considerations that govern application of the political question doctrine also govern the question of the appropriateness of providing appellants with a cause of action.[8]

Neither is there a need to consider whether the act of state doctrine applies to bar this case from going forward. Although the act of state doctrine might well apply to Libya's alleged role in the 1978 bus attack, it would seem not to apply, in its current formulation, to the alleged acts of the PLO, the PIO, and the NAAA, none of which would seem to be a state under internation-

7. The Supreme Court also discussed the act of state doctrine in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972), but the case produced no majority opinion. Nonetheless, all of the Justices except Justice Douglas, who scarcely addressed the act of state doctrine, stated that judicial abstention from pronouncing judgment on the validity of a foreign act of state turns on separation of powers concerns.

Four Justices said that application of the act of state doctrine depends chiefly on the potential for interference with, or usurpation of, the political branches' primary role in foreign affairs. Justice Rehnquist, joined by Chief Justice Burger and Justice White, stated: "The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government." 406 U.S. at 765, 92 S.Ct. at 1812 (Opinion of Rehnquist, J.). He also stated: "The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government." *Id.* at 767–68, 92 S.Ct. at 1813. Justice Powell, writing separately, echoed these views. The act of state doctrine, he said, bars adjudication when and only when "it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches." *Id.* at 775–76, 92 S.Ct. at 1813 (Powell, J., concurring in the judgment).

Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun, disagreed with the view that the act of state doctrine was exclusively concerned with interference with other branches' conduct of foreign relations. Rather, he wrote, the act of state doctrine is one part of the political question doctrine and therefore depends for its application on a variety of considerations, no one of which—not even the Executive's declaration that adjudication will not interfere with foreign relations—can be conclusive on the ultimate determination whether an issue is fit for judicial resolution. 406 U.S. at 785–93, 92 S.Ct. at 1822–25 (Brennan, J., dissenting).

8. A plaintiff who has no cause of action is, according to *Davis v. Passman*, 442 U.S. at 240 n. 18, 99 S.Ct. at 2274 n. 18, not entitled to "invoke the power of the court." He is not entitled to a pronouncement on the legal merits of his claim. In that respect he is more like a plaintiff who lacks standing than he is like a plaintiff facing a motion to dismiss for failure to state a claim. That is especially true in a case like this, where judicial consideration of the legal merits is of constitutional concern, so that parties should not be able to waive the claim that no cause of action exists. In these circumstances, whether a cause of action exists is a threshold issue that involves a question of the limits of judicial powers.

I do not conceive that, in a case like this, the political question doctrine must be considered first because it is jurisdictional. The jurisdictional aspect of that doctrine extends no further than its rationale: to prevent courts from reaching the merits of issues that, for a variety of reasons, are not theirs to decide. *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710. By deciding that there is no private cause of action here we do not reach substantive issues that are best decided by the political branches. It may be, moreover, that while the existence of a cause of action is not a jurisdictional issue in the ordinary case, it is, or is closely akin, to a jurisdictional issue when its decision implicates, as here, considerations linked to the proper exercise of the judicial power granted by Article III of the Constitution. It is probably better not to invoke the political question doctrine in this case. That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court, *see Goldwater v. Carter*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979), and among scholars, *see, e.g.*, Henkin, *Is There A "Political Question" Doctrine?*, 85 Yale L.J. 597, 622–23 (1976). Given this situation, I would rather not decide whether a political question is involved in a case where that issue has not been briefed and argued. By contrast, the grounds upon which I do decide were thoroughly explored through vigorous adversarial presentations.

al law. *See* Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 Den.J.Int'l L. & Pol'y 1, 2–3 (1980).[9] Nevertheless, to the extent the act of state doctrine is based predominantly, if not exclusively, on separation of powers concerns (as it has increasingly come to be), its own rationale might justify extending it to cover the acts of such entities as the PLO where adjudication of the validity of those acts would present problems of judicial competence and of judicial interference with foreign relations. Such an extension would bring the act of state doctrine closer, especially in its flexibility, to the political question doctrine. *Cf. First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 785–93, 92 S.Ct. 1808, 1822–25, 32 L.Ed.2d 466 (1972) (Brennan, J., dissenting) (act of state doctrine as elaborated in *Sabbatino* equivalent to political question doctrine). Whether the two doctrines should be merged and how, if merged, they would apply to the allegations of appellants' complaint are issues beyond the scope of our inquiry. Instead, those doctrines are drawn upon for what they say about the separation of powers principles that must inform a determination of the appropriateness of appellants' litigating their claims in federal court.

Those principles counsel against recognition of a cause of action for appellants if adjudication of their claims would raise substantial problems of judicial interference with nonjudicial functions, such as the conduct of foreign relations. Appellants' complaint requires a determination, either at the jurisdictional stage or at the stage of defining and applying a rule of decision, whether international law has been violated.[10] I am therefore guided in large measure by the Supreme Court's observation in *Sabbatino* that

> the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

376 U.S. at 428, 84 S.Ct. at 940. There is no need to decide here under what circumstances considerations such as these might deprive an individual of a cause of action clearly given by a state, by Congress, by a treaty, or by international law.[11] In the absence of such a cause of action, they lead to the conclusion that adjudication of appellants' claims would present grave separation of powers problems. It is therefore inappropriate to recognize a cause of action allowing appellants to bring this suit.[12]

Most important, perhaps, even appellants concede that the incidents described in appellants' complaint are properly understood only when viewed in the context of the continuing conflicts in the Middle East. Indeed, appellants point out that "[o]ne of the primary purposes of the March 11 attack was to sabotage the foreign relations of the United States and its negotiations by destroying the positive efforts made in the Camp David accords." Brief for Appellants at 15. The Camp David accords, of course, were but one of the major efforts made by the United States to resolve the myriad problems behind the series of military and political conflicts that have kept the Middle East at or near the center of American foreign relations for at least the last fifteen years. A judicial pronouncement on the PLO's responsibility for the 1978 bus attack would likely interfere with American diplomacy, which is as actively concerned with the Middle East today as it has ever been.[13]

The potential for interference with foreign relations is not diminished by the PLO's apparent lack of international law status as a state. Nor does it matter whether the Executive Branch officially recognizes, or has direct dealings with, the PLO. The fact remains that the PLO bears significantly upon the foreign relations of the United States. If any indication of that role is needed, it is provided by the official "observer" status that the PLO has been accorded at the United Nations, G.A.Res. 3237, 29 U.N.GAOR Supp. (No. 31) at 4, U.N.Doc. A/9631 (1974), as well as by the diplomatic relations that the PLO is reported to have with some one hundred countries around the world, see Kassim, *supra*, 9 Den. J.Int'l L. & Pol'y at 19; Friedlander, *The PLO and the Rule of Law: A Reply to Dr. Anis Kassim*, 10 Den.J.Int'l L. & Pol'y 221, 232 (1981).

The nature of appellants' international law claims provides a further reason for reluctance to recognize a cause of action for appellants. Adjudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching "sharply on national nerves." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428, 84 S.Ct. at 940. The *Sabbatino* Court warned against adjudication of such international law issues. *Id.* Because I believe that judicial pronouncements on the merits of this case should be avoided, I mention only briefly some of the difficulties raised by some of the claims in appellants' complaint.

Appellants would have to argue, if their case were adjudicated, for an exception to the general rule that international law im-

9. "The state as a person of international law should possess the following qualifications: a) a permanent population, b) a defined territory, c) government; and d) capacity to enter into relations with the other states." Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19. *See also Restatement (Second) of the Foreign Relations Law of the United States* § 4 (1965). Furthermore, the act of state doctrine would still not apply, even if the PLO is said to have been the agent of Libya, since the attack did not take place "within [Libya's] own territory." *Sabbatino*, 376 U.S. at 401, 84 S.Ct. at 926.

10. If jurisdiction rested on section 1331, at least one necessary rule of decision would have to be supplied by international law, the federal law under which the case arose. *See Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, — U.S. —, 103 S.Ct. 2841, 2846–48, 77 L.Ed.2d 420 (1983). If jurisdiction rested on section 1350, there are three arguable theories about what law would supply the rule of decision. The rule of decision might be the international law (treaty or customary international law) violated; it might be a federal common law of torts; or it might be the tort law of whatever jurisdiction applicable choice of law principles would point to. *Cf.* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 Harv. Int'l L.J. 53, 99–100 (1981). Under the latter two constructions, of course, whether international law was violated would have to be decided as a jurisdictional prerequisite.

11. A state-court suit that involved a determination of international law would require consideration of much that I discuss here as well as the principle that foreign relations are constitutionally relegated to the federal government and not the states. *See Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968).

12. The existence of severe separation of powers problems in adjudicating appellants' claims reinforces my conclusion, *see intra* pp. 816–819, that international law affords appellants no cause of action. The potential for interference with governments conducting their foreign relations is central both to separation of powers limits on jurisdiction and to international law's general refusal to grant private rights of action. The existence of such a potential in any case must count strongly against international law's providing a private right of action for that case.

13. Libya must be dismissed from the case because the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (1976), plainly deprives us of jurisdiction over Libya. *See Verlinden B.V. v. Central Bank of Nigeria*, — U.S. —, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) (court must decide immunity question, which is jurisdictional). Because the alleged actions of the PLO and the NAAA all involve giving assistance to the PLO's alleged actions, an adjudication of the claims against them would require adjudication of the claims against the PLO. If, as I conclude, the latter presents sufficiently serious problems that no cause of action can be inferred, so too must the former. I therefore concern myself only with the PLO. Of course, adjudication of the complaint against Libya would present many of the same separation of powers problems as would adjudication of the complaint against the other defendants.

poses duties only on states and on their agents or officials. *See* L. Henkin, R. Pugh, O. Schachter & H. Smit, *International Law*, 246–47 (1980); *Restatement of the Foreign Relations Law of the United States (Revised)* § 101, at 21 (Tent.Draft No. 1, 1980) ("'International law' . . . deals with the conduct of states and of international organizations, and with their relations inter se, as well as some of their relations with persons, whether natural or juridical."); *id.* §§ 701-722, at 137-257 (Tent.Draft No. 3, 1982) (stating international law protections of persons solely in terms of state obligations). If, as would appear, the PLO is not a state, a finding that it should nonetheless be held to the duties imposed by the customary rules of international law governing the conduct of belligerent nations, *e.g.*, Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Protocols I and II of the Geneva Convention of 12 August 1949, June 7, 1977, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, *reprinted in* 16 I.L.M. 1391, 1443 (1977), would not entail merely the application of an agreed principle to new facts. Rather, a finding that because of its governmental aspirations and because of the role it has played in the Middle East conflicts the PLO should be subject to such rules would establish a new principle of international law. Likewise, to interpret various human rights documents as imposing legal duties on nonstates like the PLO would require both entering a new and unsettled area of international law and finding there an exception to international law's general rule.[14]

Another difficulty presented by appellants' complaint is that some of the documents on which they rely as statements of customary principles of international law expressly make the purposes of an action relevant to its unlawfulness. For example, appellants allege that appellees violated the proscription, in article 51 of the Protocol I of the Geneva Conventions of 12 August 1949, on "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population." They also allege that appellees violated the proscription on genocide, defined in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, to mean acts calculated to bring about the physical destruction, in whole or in part, of a national, ethnic, racial, or religious group. Adjudication of these claims would require inquiry into the PLO's intention in planning the 1978 bus attack (assuming the PLO's involvement) and into the organizational goals of the PLO. The dangers of such inquiry into the intentions of the PLO are similar to those attending an inquiry into the intentions of a state. *See Hunt v. Mobil Oil Corp.*, 550 F.2d at 77 (act of state doctrine bars inquiry into Libya's motivation for actions: "Inquiry could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention . . . .").

In addition, appellants' principal claim, that appellees violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East. Some aspects of terrorism have been the subject of several international conventions, such as those concerning hijacking, *e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Convention on the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219, and attacks on internationally protected persons such as diplomats, *e.g.*, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532. But no consensus has developed on how properly to define "terrorism" generally. G. von Glahn, *Law Among Nations* 303 (4th ed. 1981). As a consequence, "'[i]nternational law and the rules of warfare as they now exist are inadequate to cope with this new mode of conflict.'" *Transnational Terrorism: Conventions and Commentary* xv (R. Lillich ed. 1982) (quoting Jenkins, International Terrorism: A New Mode of Conflict 16 (California Seminar on Arms Control and Foreign Policy, Research Paper No. 48, 1975)). "The dismal truth is that the international community has dealt with terrorism ambivalently and ineffectually." Shestack, *Of Private and State Terror—Some Preliminary Observations*, 13 Rutgers L.J. 453, 463 (1982).

Customary international law may well forbid states from aiding terrorist attacks on neighboring states. *See* Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 Am.U.L.Rev. 217, 251–76 (1977). Although that principle might apply in a case like this to a state such as Libya (which is not a proper party here, *see supra* note 13), it does not, at least on its face, apply to a nonstate like the PLO. More important, there is less than universal consensus about whether PLO-sponsored attacks on Israel are lawful. One important sign of the lack of consensus about terrorism generally, and about PLO activities in particular, is that accusations of terrorism are often met not by denial of the fact of responsibility but by a justification for the challenged actions. *See* Blum & Steinhardt, *supra* note 10, 22 Harv.Int'l L.J. at 92. Indeed, one of the key documents relied on as evidence of an international law proscription on terrorism, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A.Res. 2625, 25 U.N.GAOR Supp. (No. 28) at 121, U.N.Doc. A/8028 (1970), was said by at least one state at the time of its promulgation not to be applicable to Palestinian terrorist raids into Israel supported by Arab states. 24 U.N.GAOR 297, U.N.Doc. A/C.6/SR. 1160 (1969) (remarks of Mr. El Attrash of Syria), discussed in Lillich & Paxman, *supra*, 26 Am.U.L.Rev. at 272 (qualification is significant). Attempts to secure greater consensus on terrorism have foundered on just such issues as the lawfulness of violent action by groups like the PLO fighting what some states view as "wars of national liberation."[15] *See* Franck & Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 Am.J.Int'l L. 69 (1974); Paust, *"Nonprotected" Persons or Things*, in *Legal Aspects of International Terrorism* 341, 355-56 (A. Evans & J. Murphy eds. 1978); *cf.* Verwey, *The International Hostages Convention and National Liberation Movements*, 75 Am.J.Int'l L. 69 (1981) (obligations of national liberation movements were major problem in drafting and promulgating International Convention against the Taking of Hostages).

There is, of course, no occasion here to state what international law should be.

14. One aspect of this problem is the apparent assumption of state action in the definition of certain international legal principles. Thus, the United Nations General Assembly has defined torture as "any act by which severe pain or suffering is intentionally inflicted by or at the instigation of a public official." G.A.Res. 3452, art. 1, 30 U.N.GAOR Supp. (No. 34) at 91, U.N.Doc. A/10034 (1975). This assumption of state action is one reason why it is by no means utterly obvious that the torture alleged in appellants' complaint would be prohibited by international law.

15. It is worth noting that even the 1972 United States Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, 67 Dep't St.Bull. 431 (1972), would present some problems to appellants. First, it makes motive a key to violation. Second, like the European Convention on the Suppression of Terrorism, Jan. 27, 1977, 15 I.L.M. 1272 (1976), the 1972 Draft Convention relies on criminal remedies for the vindication of the rights specified, thus leaving the power to invoke remedies in the hands of states. Third, the 1972 Draft Convention does not protect citizens of a state against attack within the state.

Nor is there a need to consider whether an extended and discriminating analysis might plausibly maintain that customary international law prohibits the actions alleged in the complaint. It is enough to observe that there is sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles that litigation of appellants' claims would present, in acute form, many of the problems that the separation of powers principles inherent in the act of state and political question doctrines caution courts to avoid. The lack of clarity in, and absence of consensus about, the legal principles invoked by appellants, together with the political context of the challenged actions and the PLO's impingement upon American foreign relations, lead to the conclusion that appellants' case is not the sort that is appropriate for federal-court adjudication, at least not without an express grant of a cause of action.

I turn next to examine treaties, common law, congressional enactments, and customary international law to determine whether any of these sources of law provides a cause of action for appellants. In light of what has been said, it would require a very clear showing that these other bodies of law grant appellants a cause of action before my concerns about the principles of separation of powers could be overcome. But, as will be seen, there is no clear grant of a cause of action to be found. In truth, the law concerning treaties and customary international law of its own force appears actually to deny appellants any cause of action.

III.

Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314, 7 L.Ed. 415 (1829), *overruled on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1833); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C.Cir.1980), *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert. denied*, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976). Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action. *Head Money Cases*, 112 U.S. 580, 598-99, 5 S.Ct. 247, 253-54, 28 L.Ed. 798 (1884); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 470-71 (D.C.Cir. 1940), *aff'd on other grounds*, 311 U.S. 470, 489, 61 S.Ct. 351, 355, 85 L.Ed. 288 (1941); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d at 1298. When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action. *See Diggs v. Richardson*, 555 F.2d 848, 851 (D.C.Cir.1976).

In Count III of the complaint, appellants alleged that defendants violated the following "treaties of the United States":

—Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287;

—Articles 1 and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993;

—Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Conventions);

—Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135;

—Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (Organization of American States (OAS) Convention);

—Protocols I and II to the Geneva Conventions of 12 August 1949, June 7, 1977, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, *reprinted in* 16 I.L.M. 1391, 1442 (1977);

—Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A.Res. 2625, 25 U.N.GAOR Supp. (No. 28) at 121, U.N.Doc. A/8028 (1970);

—Universal Declaration of Human Rights, G.A.Res. 217, U.N. 3 GAOR, U.N. Doc. 1/777 (1948);

—International Covenant on Civil and Political Rights, Annex to G.A.Res. 2200, 21 U.N.GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966);

—Basic Principles for the Protection of Civilian Populations in Armed Conflicts, G.A.Res. 2675, 25 U.N.GAOR Supp. (No. 28) at 76, U.N.Doc A/8028 (1970);

—Convention on the Prevention and Punishment of the Crime and Genocide, Dec. 9, 1948, 78 U.N.T.S. 277;

—Declaration of the Rights of the Child, G.A.Res. 1386, 14 U.N.GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959); and

—American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, *reprinted in* 9 I.L.M. 101 (1970), 65 Am.J.Int'l L. 679 (1971).

Only the first five of these alleged treaties are treaties currently binding on the United States. *See* Treaties Affairs Staff, Office of the Legal Adviser, Department of State, *Treaties in Force* (1983). Even if the remaining eight are relevant to Count II of the complaint as evidence of principles of international law, they are not treaties of the United States. Since Count III (tortious actions in violation of the treaties of the United States) purports to state a cause of action distinct from that stated in Count II (tortious actions in violation of the law of nations), the last eight of the thirteen alleged treaties of the United States can provide no basis for jurisdiction over the claims in Count III under the treaty components of sections 1331 and 1350.

Of the five treaties in force, none provides a private right of action. Three of them—the Geneva Convention for the Protection of Civilian Persons in Time of War, the Geneva Convention Relative to the Treatment of Prisoners of War, and the OAS Convention to Prevent and Punish Acts of Terrorism—expressly call for implementing legislation. A treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing. *See Foster v. Neilson*, 27 U.S. (2 Pet.) at 311-14, 7 L.Ed. 415; *United States v. Postal*, 589 F.2d 862, 876-77 (5th Cir.), *cert. denied*, 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 40 (1979). These three treaties are therefore not self-executing. Indeed, with respect to the first Geneva Convention, one court has already so held. *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir.1978).

Articles 1 and 2 of the United Nations Charter are likewise not self-executing. They do not speak in terms of individual rights but impose obligations on nations and on the United Nations itself. They address states, calling on them to fulfill in good faith their obligations as members of the United Nations. Sanctions under article 41, the penultimate bulwark of the Charter, are to be taken by states against other states. Articles 1 and 2, moreover, contain general "purposes and principles," some of which state mere aspirations and none of which can sensibly be thought to have been intended to be judicially enforceable at the behest of individuals.[16] These considerations compel the conclusion that articles 1 and 2 of the U.N. Charter were not intended to give individuals the right to enforce them in municipal courts, particularly since appellants have provided no evidence of a contrary intent. *See Paulling v. McElroy*, 164 F.Supp. 390, 393 (D.D.C.1958), *aff'd*, 278 F.2d 252 (D.C.Cir.), *cert. denied*, 364 U.S.

16. For example, private enforcement of what is perhaps the fundamental principle of the Charter—the nonaggression principle of article 2, section 4—would flood courts throughout the world with the claims of victims of alleged aggression (claims that would be extremely common) and would seriously interfere with normal diplomacy.

835, 81 S.Ct. 61, 5 L.Ed.2d 60 (1960); *Dreyfus v. Von Finck*, 534 F.2d at 30; *People of Saipan v. Department of Interior*, 502 F.2d 90, 100–03 (9th Cir.1974) (Trask, J., concurring), *cert. denied*, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975); *Sei Fujii v. State*, 38 Cal.2d 718, 242 P.2d 617 (1952).

The Hague Conventions similarly cannot be construed to afford individuals the right to judicial enforcement. Although the Conventions contain no language calling for implementing legislation, they have never been regarded as law private parties could enforce. If they were so regarded, the code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the Hague Conventions violated in the course of any large-scale war. Those lawsuits might be far beyond the capacity of any legal system to resolve at all, much less accurately and fairly; and the courts of a victorious nation might well be less hospitable to such suits against that nation or the members of its armed forces than the courts of a defeated nation might, perforce, have to be. Finally, the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations. It is for these reasons that the Conventions are best regarded as addressed to the interests and honor of belligerent nations, not as raising the threat of judicially awarded damages at war's end. The Hague Conventions are not self-executing. The Second Circuit has drawn the same conclusion, *Dreyfus v. Von Finck*, 534 F.2d at 30, and appellants have pointed to no case holding otherwise in the more than three-quarters of a century since the Conventions were adopted.

None of the five treaties relied on by appellants thus even impliedly grants individuals the right to seek damages for violation of their provisions. Appellants have, therefore, failed to state a cause of action for violation of any treaties of the United States. Count III of their complaint, consequently, does not come within the arising-under jurisdiction of section 1331. Nor does it come within section 1350, because this provision, like section 1331, is merely a jurisdiction-granting statute and not the implementing legislation required by non-self-executing treaties to enable individuals to enforce their provisions. *See Dreyfus v. Von Finck*, 534 F.2d at 28 (affirming dismissal for lack of cause of action under treaties in suit by alien where jurisdiction expressly based on sections 1331 and 1350).[17]

IV.

Appellants' argument that they may recover damages for violations of international law is simple. International law, they point out, is part of the common law of the United States. This proposition is unexceptionable. *See, e.g., The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 5 L.Ed. 57 (1820). But appellants then contend that federal common law automatically provides a cause of action for international law violations, as it would for violations of other federal common law rights. I cannot accept this conclusion.[18]

17. Because none of the treaties cited by appellants provides them a cause of action it is unnecessary to decide whether any of the treaties imposes duties on parties such as appellees here. Thus, in particular, there is no need to inquire into the contacts with the United States of appellees and their actions. That inquiry is also unnecessary for a decision on Count II of appellants' complaint, as I conclude that appellants have no cause of action for that count on grounds independent of the closeness of appellees' United States contacts.

18. The district court rejected it on the general ground that "an action predicated on norms of international law must have at its basis a specific right to a private claim" found in international law itself. 517 F.Supp. at 549. That formulation is very likely too strong, as it would seem to deny Congress the power to provide individuals a statutory right of action to seek damages for international law violations not actionable under international law itself.

Appellants' argument reflects a confusion of two distinct meanings of "common law". That term has long referred to the body of court-made law whose origins can be traced to the medieval English legal system. It has also come to refer generally to law (mostly court-made) not based on a statute or constitution. "Federal common law", in particular, has been used "to refer generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973) ("*Hart & Wechsler*"). To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts. It is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief.

Thus, the step appellants would have us take—from the phrase "common law" to the implication of a cause of action—is not a simple and automatic one. Neither is it advisable. The considerations of separation of powers rehearsed above provide ample reason for refusing to take a step that would plunge federal courts into the foreign affairs of the United States.

Appellants, seeking to recover for a violation of international law, might look to federal statutes either for a grant of a cause of action or for evidence that a cause of action exists. These notions may be quickly dismissed. The only plausible candidates are the two jurisdictional statutes relied on by appellants, sections 1331 and 1350 of Title 28 of the United States Code. Neither of those statutes either expressly or impliedly grants a cause of action. Both statutes merely define a class of cases federal courts can hear; they do not themselves even by implication authorize individuals to bring such cases. As the Supreme Court has stated, "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951). *See also Dreyfus v. Von Finck*, 534 F.2d at 28 (neither 1331 nor 1350 grants a cause of action).

Although the jurisdictional statutes relied on by appellants cannot be read to provide a cause of action, those statutes might conceivably provide evidence of Congress' recognition (as opposed to creation) of one. Appellants do not suggest that section 1331 is evidence of any such recognition, as nothing in its language or history could support such a reading. Rather, appellants focus on section 1350, which is concerned expressly and only with international law (treaties and customary international law) and therefore might suggest that Congress understood, when providing jurisdiction through section 1350, that some individuals would be able to take advantage of that jurisdiction because they had causes of action for torts committed in violation of the law of nations.[19]

The broadest reading of section 1350 as evidence of congressional recognition of such a cause of action is that it merely requires that a plaintiff prove that the actions complained of violated international law. If that jurisdictional prerequisite is met, according to appellants, the plaintiff has a cause of action for tort damages, as he would for any tort. This approach is adopted by the Second Circuit in *Filartiga*, as well as by Judge Edwards. I believe, nonetheless, that this construction of section 1350 must be rejected for several reasons.

19. Appellants argue that a citizen's access to federal courts to seek damages for a tort committed in violation of international law should be the same as an alien's access. International law's special concern for aliens might suggest to the contrary, *see* L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 685, 803, 805, and the restriction of section 1350 to aliens might reflect that concern. This question need not be pursued, however, since for reasons having nothing to do with appellants' citizenship, they have no cause of action in this case.

First, appellants' broad reading would have to apply equally to actions brought to recover damages for torts committed in violation of treaties, since treaties stand in exactly the same position in section 1350 as principles of customary international law (the law of nations). Such an application would render meaningless, for alien plaintiffs, the well-established rule that treaties that provide no cause of action cannot be sued on without (express or implied) federal law authorization. *See supra* p. 784.

Judge Edwards' approach, as well as the analysis of the Second Circuit in *Filartiga*, would also make all United States treaties effectively self-executing. As appellants here seek evidence of a cause of action to vindicate an asserted international law right that they do not assert itself affords them a private right of action, their claim is indistinguishable, under the language of section 1350, from a claim brought to vindicate rights set forth in a non-self-executing treaty.

In addition, appellants' construction of section 1350 is too sweeping. It would authorize tort suits for the vindication of any international legal right. As demonstrated below, that result would be inconsistent with the severe limitations on individually initiated enforcement inherent in international law itself, and would run counter to constitutional limits on the role of federal courts. Those reasons demand rejection of appellants' construction of section 1350 unless a narrow reading of the provision is incompatible with congressional intent. There is no evidence, however, that Congress intended the result appellants suggest.

What is known of the origins of section 1350 was perhaps best described by Judge Friendly in *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975): "This old but little used section is a kind of legal Lohengrin; . . . no one seems to know whence it came."

Section 1350 was enacted, in almost its current form, as part of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77.[20] I have discovered no direct evidence of what Congress had in mind when enacting the provision. The debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly. *See* 1 Annals of Cong. 782–833 (J. Gales ed. 1789).

Historical research has not as yet disclosed what section 1350 was intended to accomplish. The fact poses a special problem for courts. A statute whose original meaning is hidden from us and yet which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great circumspection. It will not do simply to assert that the statutory phrase, the "law of nations," whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules. It will not do because the result is contrary not only to what we know of the framers' general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs.

What little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations. *The Federalist* No. 80 (A. Hamilton). A broad reading of section 1350 runs directly contrary to that desire. It is also relevant to a construction of this provision that until quite recently nobody understood it to empower courts to entertain cases like this

20. Section 1350, the Alien Tort Claims Act, was enacted by the First Congress in section 9 of the Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 76–77. The original statute read "[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."

one or like *Filartiga*.[21] As Justice Frankfurter said in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379, 79 S.Ct. 468, 483, 3 L.Ed.2d 368 (1959):

> The considerations of history and policy which investigation has illuminated are powerfully reinforced by the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes. A reluctance which must be even more forcefully felt when the expansion is proposed, for the first time, eighty-three years after the jurisdiction has been conferred.

In the case of section 1350, the period before the expansion was proposed is more than twice eighty-three years.

Though it is not necessary to the decision of this case, it may be well to suggest what section 1350 may have been enacted to accomplish, if only to meet the charge that my interpretation is not plausible because it would drain the statute of meaning. The phrase "law of nations" has meant various things over time. It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover. *See, e.g.*, Hassan, *International Human Rights and the Alien Tort Statute: Past and Future*, in *Human Rights Symposium: Further Commentary*, 5 Hous.J.Int'l L. 131, 139 (1982); Oliver, *A Brief Replication: The Big Picture and Mr. Schneebaum's Reply*, in *Human Rights Symposium: Further Commentary*, 5 Hous.J.Int'l L. 151, 153 (1982); 1 L. Oppenheim, *International Law* § 292 (2d ed. 1912), *quoted in* Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 Hous.J.Int'l L. 13, 26–27 (1981). *See also* Hassan, *supra*, 4 Hous.J. Int'l L. at 19–20. Clearly, cases like this and *Filartiga* were beyond the framers' contemplation. *Id.* at 24–26. That problem is not avoided by observing that the law of nations evolves. It is one thing for a case like *The Paquete Habana* to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation with which we are at war. It is another thing entirely, a difference in degree so enormous as to be a difference in kind, to find that a rule has evolved against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. The latter assertion raises prospects of judicial interference with foreign affairs that the former does not. A different question might be presented if section 1350 had been adopted by a modern Congress that made clear its desire that federal courts police the behavior of foreign individuals and governments. But section 1350 does not embody a legislative judgment that is either current or clear and the statute must be read with that in mind.

What kinds of alien tort actions, then, might the Congress of 1789 have meant to bring into federal courts? According to Blackstone, a writer certainly familiar to colonial lawyers, "the principal offences against the law of nations, animadverted on as such by the municipal laws of England, [were] of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and 3. Piracy." 4 W. Blackstone, *Commentaries* 68, 72, *quoted in* 1 W.W. Crosskey, *Politics and Constitution in the History of the United States* 459 (1953) ("Crosskey"). One might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction

21. In nearly two hundred years, jurisdiction has been predicated successfully under section 1350 only three times. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980) (jurisdiction over allegation of official torture not ratified by official's state); *Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961) (child custody dispute between two aliens; wrongful withholding of custody is a tort, and defendant's falsification of child's passport to procure custody violated law of nations); *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C.1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; treaty with France superseded law of nations, 1350 alternative basis of jurisdiction)

for suits by aliens in order to avoid conflicts with other nations.[22]

The Constitution, of course, gave particular attention to piracy and to the rights of ambassadors. Article I, section 8, links piracy and the law of nations by granting Congress power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." And Article III, section 2, gives the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other Public Ministers and Consuls." Section 9 of the Judiciary Act of 1789 (now section 1350) gave jurisdiction to district courts, concurrent with that of state courts and circuit courts, over tort suits by aliens for violations of the law of nations. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77. This may well have envisaged a tort like piracy (a citizen could use diversity jurisdiction).[23]

The idea that section 9 of the original Judiciary Act, now section 1350, was concerned with the rights of ambassadors (and other foreign representatives) is suggested by another provision of the statutes. Section 13 gave the Supreme Court such original and exclusive jurisdiction over all suits *against* ambassadors "as a court of law can have or exercise consistently with the law of nations" (emphasis added). Judiciary

22. That Blackstone refers to these three classes of offenses as not only violations of the law of nations, but censured as such by the municipal law of England does not require the conclusion that in America these three types of violations did not carry with them a private cause of action for which section 1350 gave the necessary jurisdiction to federal courts. The former colonies picked up the law of England as their own. As stated in the Preface to the American Edition of Blackstone: "The *common law* is as much the birth-right of an American as of an Englishman. It is our law, as well as the law of England, it having been brought thence, and established here as far forth as it was found fitted to our institutions and the circumstances of the country." W. Blackstone, *Commentaries* vii (1854) (emphasis in original). English statutes, which were, of course, part of the municipal law, were also adopted as part of American common law, to the extent that their "collective and equitable principles had become so interwoven with the common law, as to be scarcely distinguishable therefrom." *Fitch v. Brainerd*, 2 Conn. 163 (1805), *quoted in* Jones, *The Reception of the Common Law in the United States in* H. Jones, J. Kernochan, & A. Murphy, *Legal Method: Cases and Text Materials* (1980). And at least some offenses against the law of nations, such as violations of safe conducts, resulted not only in criminal punishment but in restitution for the alien out of the offender's effects. W. Blackstone, *Commentaries* 69.

23. The crime of piracy was often defined as piracy *jure gentium*—piracy by the law of nations, as distinguished from piracy by municipal law. *E.g.*, 2 J. Moore, *A Digest of International Law* § 311, at 951–52 (1906); Dickinson, *Is the Crime of Piracy Obsolete?*, 38 Harv. L. Rev. 334, 335–36 (1925) ("*The Crime of Piracy*"). The crime of piracy was thought to be sufficiently defined by the law of nations. *The Federalist* No. 42 (J. Madison) ("The definition of piracies might, perhaps, without inconvenience, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas, is evidently requisite."). Although the Congress, in defining piracy in the Federal Crimes Act of 1790 confused the concepts of piracy defined by the law of nations and piracy defined by municipal law, Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14; *see The Crime of Piracy* at 342–49, Congress later changed the definition in reaction to the very first Supreme Court case construing section 8, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L.Ed. 471 (1818). The new statute punished "the crime of piracy," as defined by the law of nations." Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14. *See The Crime of Piracy* at 342–49. Thus, Justice Story, in *United States v. Smith*, 18 U.S. (5 Wheat.) 71, 75, 5 L.Ed. 57 (1820), wrote that "whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea." Furthermore, in a celebrated footnote of more than eight and one-half pages, Justice Story showed that "piracy is defined by the law of nations." *Id.* at 75–84, 5 L.Ed. 57.

Opening federal courts to tort suits based on piracy would not, apparently, have involved courts in foreign relations since piracy was, as stated in *United States v. Smith*, merely robbery on the high seas. It could not be committed by nations, or by anyone acting for reasons other than for plunder. According to Hackworth, "when the acts in question are committed from purely political motive, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime." G. Hackworth, *Digest of International Law* § 203, at 681 (1941).

Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81. That section, however, gave the Court original but not exclusive jurisdiction of "all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party" (emphasis added). This appears to tie in to the grant of tort jurisdiction for suits by aliens in what is now section 1350. (Section 1350's use of the broader term "aliens" may merely indicate that the torts of piracy and violations of safe-conduct, which would involve plaintiffs other than ambassadors, were included.)

An intent to protect the rights of ambassadors is also plausible historically. According to Crosskey, the Convention, in assigning to Congress the power to "define and punish . . . Offences against the Law of Nations" had in mind, aside from piracy, the rights of ambassadors. Crosskey at 459. He draws this conclusion from the notoriety of a case discussed by both Lord Mansfield, of the Court of King's Bench, and by Blackstone. An ambassador of the Czar had been arrested by his English creditors, and, was, in the process "somewhat roughed up before the arrest was accomplished." *Id.* He demanded of the Queen that his assailants be subjected to "severe 'corporal Punishment.'" *Id.* at 460. English law at the time, however, did not permit punishment severe enough to satisfy the offended ambassador, who protested to Czar Peter. The Czar demanded that the offenders be put to death. As a result, the law was changed, giving the Chief Justice of Queen's Bench, among other members of the "executive" branch, the power to try any offenders against ambassadors, and the Czar was placated. *Id.* at 461–62. This "slightly ridiculous affair," according to Crosskey, was well-known because of repeated comment upon it. *Id.* at 462. If this was indeed the incident the Convention considered in allocating to Congress the power to "define and punish . . . Offences against the Law of Nations," it may be that the First Congress, sensitive to the international ramifications of denying ambassadors redress, enacted section 1350 to give ambassadors the option of bringing tort actions in federal courts as well as in state courts.

These thoughts as to the possible original intention underlying section 1350 are admittedly speculative, and those who enacted the law may well have had additional torts in mind. I offer these possibilities merely to show that the statute could have served a useful purpose even if the larger tasks assigned it by *Filartiga* and Judge Edwards are rejected. Moreover, if the offenses against the law of nations listed by Blackstone constituted the torts the framers of section 1350 had in mind, then the creation of federal jurisdiction for the redress of aliens' grievances would tend to ease rather than inflame relations with foreign nations. That result comports with Hamilton's expressed desire. Whether evidence so slim as to the intended office of the statute provides materials from which courts today may properly make substantive law is a jurisprudential issue with which, given the grounds upon which I would place our decision, I need not grapple today. But when courts go beyond the area in which there is any historical evidence, when they create the substantive rules for topics such as that taken up in *Filartiga* or in Judge Edwards' formulations, then law is made with no legislative guidance whatever. When that is so, it will not do to insist that the judge's duty is to construe the statute in order not to flout the will of Congress. On these topics, we have, at the moment, no evidence what the intention of Congress was. When courts lack such evidence, to "construe" is to legislate, to act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend. Any correspondence between the will of Congress in 1789 and the decisions of the courts in 1984 can then be only accidental. Section 1350 can probably be adequately understood only in the context of the premises and assumptions of a legal culture that no longer exists. Perhaps historical research that is beyond the capacities of appellate judges will lift the darkness that now envelops this topic, but that has not yet occurred, and we should not attempt to anticipate what may or may not become visible.