

No. 25-1043

**In the United States Court of Appeals
for the Fourth Circuit**

Suhail Al Shimari, *et al.*,
Plaintiffs-Appellees,

v.

CACI Premier Technology, Inc.
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of
Virginia, Alexandria Division

(No. 1:08-cv-00827) (The Hon. Leonie M. Brinkema)

**BRIEF OF *AMICUS CURIAE* PROFESSORS OF LEGAL HISTORY
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SAMUEL MOYN, AND ANNE-MARIE SLAUGHTER IN SUPPORT
OF PLAINTIFFS-APPELLEES**

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INTEREST OF AMICI CURIAE

Amici curiae respectfully submit this brief in support of Appellees.¹ *Amici* (listed in Appendix A) are professors of legal history who have an interest in the proper application of the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, to ensure its interpretation is consistent with the Founders’ understanding of the law of nations. *Amici* include individuals who filed an *amicus curiae* brief in this case.

ARGUMENT

The Supreme Court in *Cisco v. Doe* opined that causes of action based on modern international law would no longer be actionable through the jurisdiction provided by the Alien Tort Statute (ATS), 28 U.S.C. § 1350. *See Cisco Systems, Inc. v. Doe*, 609 U.S. ____ (June 23, 2026), slip op. at 7–12. Only causes of actions “corresponding” to the historical Blackstone three may now proceed. *Id.* at 12.

Critical to this matter are historical incidents in the late 1700s before and after the ATS’s enactment that indicate the Founders’ particular concern with cases, such as this one, where rogue actors with delegated state authority might embroil the new nation in foreign entanglements stemming from law of nations violations. Founding-era jurists understood certain actions to be lawful under the

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief’s preparation or submission.

law of nations if authorized by the state (e.g., privateering). They also understood that absent such authorization or when actors exceeded, disobeyed, or transgressed their authority, lawful behavior could be transformed into illegal conduct under the law of nations (e.g., piracy, robbery, or violations of safe conducts). In other words, when actors overstepped their specific state authority (defined by the law of nations), they became violators of the law of nations. These principles applied whether a rogue actor was a public official or private one.

The Founders were especially concerned with regulating rogue actors in matters of peace and war, including explicitly applying the law of nations to private actors. Many of the rules related to the contours of piracy and corresponding legally sanctioned behavior that permitted captures on land or sea if authorized by the state.

The law of nations included specific customs around letters of marques that allowed privateers to make lawful captures on land or sea during hostilities. *See* Articles of Confederation, art. IX (adopted Nov. 15, 1777). From the outset of the American Revolution, the Founders' regulation of privateers required that they did not mistreat or "torture" captured persons, which was "contrary to common usage, and the practice of civilized nations in war." 4 Journals of the Continental Congress 1774-1789, 253–54 (hereinafter "Continental Congress"). If these rules were violated, a privateer would become a pirate—transforming lawful hostilities

into unlawful hostilities. Importantly, the Founders viewed these instructions to be enforceable in courts where perpetrators were liable to provide “[r]eparation for all [d]amages sustained by any [m]isconduct.” *Id.* at 252.

The law of nations regarding piracy was also intertwined with acceptable peacetime behavior and as well as permissible actions for neutral parties. If violated, the perpetrator’s actions would transform from compliant with the law of nations (e.g., maintaining neutrality and amity with other nations) to being in violation of such law (e.g., breach of neutrality through piratical transgressions).

Three principles emerge from the historical record. The first two relate to piracy: first, if one violated the law of nations regarding neutrality and amity between nations, one became a perpetrator akin to a pirate; second, a private actor engaged in hostilities needed state authorization, and overstepping such authority rendered their actions unlawful and subject to liability, including in tort, as a pirate would have been. Third, as a general matter, one acting in a public capacity could not exceed their authority. In incident after incident during the late 1700s, the Founding-era jurists applied these rules to define permissible behavior in times of peace and war to ensure state officials and private actors did not engage in piratical transgressions or other law of nations violations.

When such transgressions by U.S. subjects did occur, the law of nations required the United States to go beyond simply disavowing the actions of the perpetrators. By providing redress for actions of its rogue subjects through the ATS, the Founders satisfied their international obligations and helped maintain peace by upholding the law of nations regarding lawful hostilities, peacetime relations, and neutrality. *Amici* urge this Court to do the same here and uphold this case’s previous decisions.

I. The Founders Regulated Peace and War to Ensure U.S. Subjects Did Not Take Part in Piratical Acts or Other Behavior that Was Not Part of the Custom of “Civilized” Nations.

To prevent law of nations violations and regulate wrongs committed by rogue actors, the Founders drew on the practices of “civilized” nations to provide extensive guidance on permissible, lawful actions for their subjects. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–16 (2004) (discussing Founders’ desire to join community of “civilized” nations). In particular, the Founders sought to regulate the conduct of public or private actors that could provide foreign actors with “just cause for reprisals or war.” *See Nestlé v. Doe*, 593 U.S. 628, 642 (2021) (Gorsuch, J., concurring) (discussing ATS’s enactment for this reason).

A. From the Outset of the American Revolution, the Founders Regulated Private Actors During Peacetime, Neutrality, and Hostilities to Avoid Reprisals and War.

From the outset of the American Revolution, the Founders distinguished lawful and unlawful hostilities by private actors—a critical aspect of the law of nations’ regulation of peace and war. Private actors, including privateers, were important to war efforts of the time, but differentiating between lawful and unlawful actors required setting up safeguards to distinguish state-sanctioned action from piracy. *See* Congressional Research Service (CRS), Letters of Marque and Reprisal (Part 1) (LSB11272) (2025); *see also* William Casto, “Regulating the New Privateers of the Twenty-First Century,” 37 Rutgers L.J. 671, 675–80 (2006) (noting most American “naval forces were privateers” and Founders’ understood that privateers’ “thirst for wealth,” “if left unchecked ... could lead to appalling abuse”). Thus, the law of nations regarding “piracy” was deeply intertwined with maintaining peace, preserving neutrality, and regulating private actors’ lawful use of force during hostilities. The Founders’ elaborate system of checks on privateers and captures, established in 1775 and 1776, exemplifies how they viewed the law of nations and its regulation of private actors. *See* Congressional Research Service (CRS), The Captures Clause (Part 1) LSB11253 (2024) (discussing need to regulate private actors lest they “unintentionally inflict violence on neutral

vessels”) (citing 3 Continental Congress at 373–74); *id.* (noting that rules were defined by law of nations) (citing 13 Continental Congress at 283–84).

In early 1776, the Continental Congress issued letters of marque and reprisal and set up mechanisms to adjudicate disputes. *See* 4 Continental Congress at 251–54; *see also* CRS, Captures Clause. This was part of a broader effort to regulate peace and war on both land and sea through the law of nations. *Id.* Regulating private actors’ involvement in hostilities was also prominent in the 1777 Articles of Confederation. *See* Articles of Confederation, art. IX (national government given exclusive authority over “peace and war” and to “establish[] rules for deciding ... what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the [U]nited States shall be divided or appropriated.”); *see also* CRS, Captures Clause. The first national court was indeed a prize court, where the law of nations was applied. *Id.* *See also* U.S. Constitution, art. I, §8, cl. 11 (discussing captures on land and sea).

Throughout the Revolution, the Founders repeatedly confirmed the role of the law of nations in regulating lawful behavior by private actors during hostilities. In 1778, they affirmed that commanders in actions against “enemies” on “land or water” must “[take] care not to infringe or violate the laws of nations, or the laws of neutrality.” 10 Continental Congress at 196. In response to complaints about the acts of privateers, Congress reaffirmed American actors must pay “sacred regard”

to the law of nations and avoid “unjustifiable and piratical acts.” 11 Continental Congress at 486; *see also* 11 *Revolutionary Diplomatic Correspondence of the United States* 425 (Wharton ed., 1889); Casto, 37 Rutgers L.J. at 675–80.

B. The Founders Viewed the Mistreatment and Torture of Captured Persons by Private Actors as a Forfeiture of State Authorization that Could Also Lead to Liability.

In regulating private actors during war and peace to prevent piratical acts, the Founders specifically dictated that torture, cruel, and inhuman treatment of captured persons was prohibited. The Continental Congress confirmed that private actors who exceeded delegated state authority would “be responsible to the party grieved” for “reparation [of] all damages.” 4 Continental Congress at 253–54. An important Continental Congress document from April 1776 tells the story. Spurred by a letter from General George Washington in 1776, the Continental Congress provided detailed instructions to the colonies regarding treatment of persons from captured vessels. *Id.* at 250–54. In relevant part, the instructions to privateers stated:

If you, or any of your officers or crew, shall, in cold blood, kill or maim, or *by torture or otherwise, cruelly, inhumanly, and, contrary to common usage, and the practice of civilized nations in war*, treat any person or persons surprized in the ship or vessel you shall take, the offender shall be severely punished.

Id. at 253-54 (emphasis added). *See also* Wynham Beawes, *Lex Mercatoria Rediviva* 205-06 (1771) (Admonishing “Torture” and “heinous and inhuman

Offenses,” including “tormenting” captives to extort confessions); 1 William Blackstone, *Commentaries on the Laws of England* *411 (1765) (rejecting “torture” of prisoners of war); *Letter From George Washington to Charles Gravier, comte de Vergennes*, Nov. 21, 1782, Founders Online (measuring British mistreatment of American prisoners against law of nations); Emmerich de Vattel, *The Law of Nations*, bk. 3, ch. 8, §§ 145–47, 150 (1759).

II. Founding-era Jurists Understood the Alien Tort Statute to Provide Redress for Unauthorized Rogue Acts, Including Those Exceeding Delegated State Authority.

During the 1700s, English and American jurists consistently recognized civil liability for law of nations violations committed by actors who acted without authorization or overstepped their delegated authority. Such conduct corresponded to piracy.

A. Prior to Enactment of the Alien Tort Statute, English and Founding-Era Jurists Recognized Liability for Rogue Actors That Corresponded to Piracy and Other Law of Nations Violations.

Prior to the passage of the ATS, English and American authorities uniformly recognized liability for actors who exceeded delegated state authority or acted without authorization. As discussed above, the Continental Congress set up prize courts to adjudicate exactly these types of law of nations questions. While the

underlying offenses varied across incidents, their unauthorized nature corresponded to piracy and other established violations of the time.

In 1709, for example, an international incident in England led to a group of accomplices being found guilty of conspiring to assault and arrest a Russian ambassador. The conspiracy included law enforcement and court officials who exceeded their authority, violating the law of nations. *See* Charles de Martens, *Causes célèbres du droit des gens* 74–96 (1827). This foreshadowed a 1787 incident that informed the passage of the ATS: a New York constable overstepped his authority by arresting a servant in the Dutch ambassador’s household. The Dutch complained to a U.S. official who urged state action; eventually, a New York state “court sentenced the constable to three months in jail for violating the laws of nations as adopted by the common law.” *See* William Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 494 & nn.151–53 (1986).

In 1787, General George Clark, commissioned with state authority from Virginia, overstepped his delegated authority by trying three Spanish subjects in a military tribunal and capturing their property in violation of safe conducts. *See* L.C. Helderman, *The Northwest Expedition of George Rogers Clark, 1786-1787*, 3 *The Mississippi Valley Historical Review* 317, 329 (1938). Officials in Virginia and the Continental Congress “disavow[ed]” Clark’s commission and emphasized

that a law of nations violation required “the institution of legal proceedings.” 4 Journals of the Council of the State of Virginia (Dec. 7, 1786-Nov. 10, 1788), 47; 32 Continental Congress at 190–97.

B. After the Enactment of the ATS, American Jurists Recognized That Acts Beyond Delegated State Authority by Rogue Actors Were Law of Nations Violations Corresponding to Piracy.

After the ATS’s passage, jurists applied the same rules under the law of nations. In 1792, three Americans entered Spanish Florida and stole enslaved individuals belonging to a Spanish subject. *See Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson*, June 26, 1792, reprinted in 24 *Jefferson Papers*, at 129–130. Upon receiving a complaint from Spain, Secretary of State Thomas Jefferson and Attorney General Edmund Randolph identified the ATS as available to provide redress for robbery, which was essentially a piratical act on land. *See Thomas Jefferson, Opinion on Offenses Against the Law of Nations*, Dec. 3, 1792, in *Jefferson Papers*, at 693–95; Edmund Randolph, *Edmund Randolph’s Opinion on Offenses Against the Law of Nations*, Dec. 5, 1782, in *Jefferson Papers*, at 702. Without delegated authority for their actions, the Americans had become unlawful, rogue actors under the law of nations.

Another ATS case involved an unauthorized act related to the breach of neutrality, which was intertwined with piracy. In 1794, U.S. citizens breached U.S. neutrality by aiding French sailors in attacking a British settlement. They

“attack[ed] the settlement, and plunder[ed] or destroy[ed] the property of British subjects.” 1 U.S. Op. Att’y Gen. at 57–58. In response, the British insisted that the U.S. must “adopt[] the most vigorous measures” to address “illegal and piratical aggressions.” Brief of *Amici Curiae* Professors of Legal History at App. 9–11, in *Cisco v. Doe* (S. Ct., No. 24-856) (Letter of British official). The U.S. Attorney General had “no doubt” the ATS provided a civil remedy: no unauthorized U.S. subject “committing, aiding, or abetting hostilities” against foreign subjects would “receive the protection of the United States,” for such perpetrators were “liable to punishment under the law of nations.” 1 U.S. Op. Att’y Gen. 57, 59 (1795); *see also Henfield’s Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (No. 6360); Neutrality Proclamation No. 3 (1793), in 11 Stat. 753 (1859).

From the outset of the American Revolution through the 1790s, the Founders demonstrated a clear understanding that the law of nations prohibited rogue actors from operating outside or beyond the bounds of state authorization lest they become akin to pirates. This was true for piratical transgressions ranging from violations of customs of privateering to robbery (piracy on land) to breaches of neutrality, all of which required redress under the law of nations.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to uphold the existing decisions in the case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation set by Fed. R. App. P. 29(a)(5) because it contains 2,597 words, calculated by the word processing system used in its preparation (Microsoft Word), and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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