

# THE POWER TO DEFINE OFFENSES AGAINST THE LAW OF NATIONS

ALEX H. LOOMIS\*

INTRODUCTION .....	418
I. TEXT.....	420
A. Surplusage and structure .....	420
B. Alternative interpretations.....	422
II. EARLY CONSTITUTIONAL HISTORY .....	424
A. The definition of “define” .....	425
B. The power to punish vaguely defined offenses .....	427
C. The clause’s purpose.....	431
D. The power to define “felonies on the high seas” and “piracy” .....	433
1. Felonies.....	434
2. Piracies.....	437
III. NEUTRALITY .....	445
A. Historical background .....	445
B. The constitutional basis for American neutrality legislation .....	449
1. Pre-Neutrality Act understanding of neutrality .....	450
2. The Neutrality Act’s legislative and post- enactment history .....	453
C. The Neutrality Act and the law of nations	461
1. Respect for neutral territory .....	461
2. Prohibition on foreign enlistment .....	462
3. Prohibition on fitting out and arming foreign vessels .....	466

---

\* J.D. Candidate, Harvard Law School, Class of 2017. I would like to thank Noah Feldman, Jack Goldsmith, Stephen Hammer, Judge Brett Kavanaugh, Michael Klarman, John Loomis, Scott Proctor, Kailan Sierra-Davidson, Vivek Suri, Trenton Van Oss, and Paul Vanderslice for helpful comments and suggestions. All errors are my own.

4. How much did the United States care about the law of nations? .....	469
D. Lessons from the Neutrality Act .....	473
IV. SUPREME COURT PRECEDENT ANALYZING THE DEFINE AND PUNISH CLAUSE.....	474
A. <i>Arjona</i> .....	475
B. <i>Quirin</i> and <i>Hamdan</i> .....	477
C. Lessons.....	482
V. WHAT CAN CONGRESS PUNISH? .....	483
A. <i>Type two</i> offenses .....	484
B. <i>Type three</i> offenses .....	486
C. <i>Type four</i> offenses.....	487
1. Foreign relations deference .....	487
2. What can't Congress punish?.....	490
VI. CONCLUSION .....	492

## INTRODUCTION

In 1865, the United States tried and convicted several people for conspiracy to assassinate under a statute giving jurisdiction for offenses against the law of war to military commissions.<sup>1</sup> One hundred and forty years later, the Supreme Court set aside a military commission's conspiracy conviction under a similar law on the grounds that conspiracy to violate the law of war is *not* an offense against the law of war.<sup>2</sup> The relevant statutory language remained the same, but international law had changed. Congress pegged the statute to international law, so the statute no longer authorized prosecutions for conspiracy in military commissions.

But suppose that Congress had instead proscribed particular law-of-war offenses, including conspiracy. This hypothetical statute would have mirrored international law in 1865 but not in 2005. Does Congress still have the power to define and punish conspiracy as an offense against the law of nations, or did Congress lose this power when international law changed?

---

1. See General Court-Martial Order No. 356 (1865), *reprinted in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 342, 342 (James Richardson ed., 1901) [hereinafter PRESIDENTS' PAPERS].

2. *Hamdan v. United States*, 548 U.S. 557, 611–12 (2006).

The answer to this question turns on whether Congress enjoys a separate *power to define* offenses against the law of nations, and if so, how broad that power is.<sup>3</sup> This issue matters. The government's power to try Guantanamo detainees in military commissions depends in part on the scope of the Define and Punish Clause.<sup>4</sup> A lurking yet expansive criminal punishment power would also allow Congress to undo some of the Supreme Court's recent federalism decisions. To take just one example, if the clause allows Congress to enact civil sanctions as well as criminal ones, a new Violence Against Women Act might be sustained as punishing international human rights violations.<sup>5</sup>

This Article argues that Congress possesses a separate and broad *power to define* the offenses against the law of nations that it chooses to punish. Congress may criminalize private conduct that does not itself violate the law of nations. In fact, the Define and Punish Clause empowers Congress to criminalize any conduct if the United States has any obligation to suppress that conduct under either an extant or developing rule of customary international law.

This view swims against the tide of scholarly<sup>6</sup> and judicial<sup>7</sup> opinion and implies that Congress has not made use of a signif-

---

3. This Article uses the modern spelling of the word "offenses" for consistency. "The law of nations," for the purposes of this Article, is interchangeable with "public international law." See WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 3 (2006). This Article generally uses the phrase "the law of nations" when referring to international law in the late-eighteenth and early-nineteenth centuries, and "international law" for references to the late-nineteenth century through the present.

4. See *Al Bahlul v. United States*, 792 F.3d 1, 15 (D.C. Cir. 2015), *rev'd on other grounds* 840 F.3d 757 (en banc). The en banc D.C. Circuit disagreed on the grounds for reversing the panel's decision. Only one judge on the D.C. Circuit argued that Congress has an extensive *power to define* offenses against the law of nations. See *id.* at 759 (Henderson, J., concurring).

5. See generally Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to 'Define and Punish . . . Offenses Against the Law of Nations'*, 42 WM. & MARY L. REV. 447, 547–48 (2000); Michael T. Morley, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109 (2002).

6. See Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U.L. REV. 1675, 1682 (2012); Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations"*, 21 VAND. J. TRANSNAT'L L. 865, 873–79 (1988). But see Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1809–10 (2009).

icant source of constitutional authority. But the Constitution's text and structure, early constitutional history, Supreme Court precedent, and foreign relations law all point in favor of interpreting the Define and Punish Clause broadly. This Article addresses each source of evidence in turn. Section I argues from the Constitution's text that Congress enjoys a separate power to define the offenses against the law of nations that it punishes. Sections II–V then flesh out the scope of that power. Section II demonstrates that the Framers and early political leaders believed that the power to define offenses against the law of nations included the power to create new offenses that other countries did not recognize. Section III shows that early American neutrality law punished offenses against the law of nations that were not recognized as such under international law. Section IV examines the Supreme Court's analysis of the Define and Punish Clause. The few cases on the subject suggest that Congress's power to define is not pegged to international law. Part V adds a foreign-relations-law perspective and explains the specific conditions that must exist before Congress may enact criminal legislation under the Define and Punish Clause.

## I. TEXT

The Constitution's text and structure suggest that Congress enjoys a *power to define* offenses against the law of nations separate from its *power to punish* those offenses. This Section, however, does not flesh out how broad this power is—Sections II–V cover that. This Section argues only that Congress has a separate *power to define*.

### A. Surplusage and structure

The text and structure of the Constitution provide two independent reasons to believe that Congress has a *power to define* separate from its *power to punish*. First, consider the clause itself: "The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>8</sup> If the Define and Punish Clause gave Congress

---

7. See *Al Bahlul*, 792 F.3d at 15; *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012). *But see* *United States v. bin Laden*, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000).

8. U.S. CONST., art. I, § 8.

no powers apart from a *power to punish*, then the words “define and” would be superfluous.<sup>9</sup> The Supreme Court made this point in an 1820 case concerning the Define and Punish Clause.<sup>10</sup> Reading the Define and Punish Clause as giving Congress a separate *power to define* avoids this surplusage problem.

That problem would not exist if the Framers attached little importance to the phrase “define and punish” and used it as a single, legally redundant phrase, like “aid and abet” today.<sup>11</sup> But the Philadelphia Convention chose the words with care and settled on the phrase “define and punish” only after debating the precise wording. The Committee of Style had originally drafted the clause as, “To define & punish piracies and felonies on the high seas, and punish offenses against the law of nations.”<sup>12</sup> Gouverneur Morris, who spoke the most at the Convention and was likely most responsible for the text’s final style,<sup>13</sup> changed the clause to its current form by proposing to strike the second “punish,” giving Congress the power to define offenses against the law of nations too. But his motion only passed by a six-to-five vote (the Convention voted by state delegations, not individual delegates).<sup>14</sup> This one-vote margin would be hard to explain if the Framers considered the *power to define and punish* to be no different than the *power to punish*.

Second, two other constitutional provisions give Congress authority to penalize private acts, but neither give Congress the power to define those offenses. Congress has the “Power . . . To provide for the Punishment of counterfeiting the Securities and

---

9. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”).

10. See *United States v. Smith*, 18 U.S. 153, 158 (1820) (“The power given to Congress is not merely ‘to define and punish piracies;’ if it were, the words ‘to define,’ would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime.”).

11. Draft criminal legislation at the time of the Framing, for example, sometimes used variants of the phrase “define and punish” as a matter of course. See, e.g., S. JOURNAL 108 (Jan. 27, 1790) (“Proceeded to the second reading of the ‘bill defining the crimes and offences that shall be cognizable under the authority of the United States, and their punishment;’ . . .”).

12. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614–15 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

13. See MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 15 n.\* (2016).

14. See 2 FARRAND’S RECORDS, *supra* note 12, at 614–15. For a more thorough discussion of this episode, see *infra* notes 51–63.

current Coin of the United States”<sup>15</sup> and the “Power to declare the Punishment of Treason,”<sup>16</sup> but not the power to define those offenses. That difference in language suggests that Congress has more discretion in defining offenses against the law of nations than it has in defining counterfeiting and treason.<sup>17</sup>

Of course, selective enumeration sometimes implies nothing. For instance, the Constitution only enumerates three criminal punishment powers, yet Congress, pursuant to the Necessary and Proper Clause, may punish unenumerated offenses with “some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.”<sup>18</sup> The Framers likely enumerated criminal punishment powers out of fear that the authority to punish those acts might not be incidental to Congress’s other powers.

But selective enumeration of the power to define is different. The power to punish any offense presupposes the power to define what conduct is criminal. Enumerating the power to define would be unnecessary unless the Framers thought the power to define vested Congress with greater creative powers than the power to punish. The Define and Punish Clause, therefore, likely provides Congress with a separate power to define piracy, felonies on the high seas, and offenses against the law of nations.

### B. *Alternative interpretations*

Three alternative interpretations of the Define and Punish Clause could undercut the preceding arguments. First, the power to define might really be a *duty to define*. That is, the word “define” might just prevent Congress from passing criminal laws that do not define offenses against the law of nations clearly enough to give the people fair notice. Second, the Define and Punish Clause might be an anti-common-law provision written to ensure that Congress takes responsibility for

---

15. U.S. CONST. art. I, § 8, cl. 6.

16. *Id.* art. III, § 3, cl. 2.

17. *Cf.* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (“[E]numeration presupposes something not enumerated.”); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“In deploying [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”).

18. *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

punishing these offenses through legislation rather than forcing the judiciary to do so with common law crimes. Third, perhaps the power to define is really a power to provide a national definition for offenses against the law of nations that is binding on the states if they decide to punish the same conduct.

But these possible interpretations are probably wrong. First, the Constitution describes the power to define as a “power,” not a duty, implying that it gives Congress “Command; authority; dominion.”<sup>19</sup> Like the Necessary and Proper Clause, the Define and Punish “[C]ause is placed among the powers of congress, not among the limitations on those powers[,]” and “[i]ts terms purport to enlarge, not to diminish the powers vested in the government.”<sup>20</sup> This interpretation would also make the power to define superfluous because Congress already has this duty under the Due Process Clause.<sup>21</sup> Finally, in *United States v. Smith*, Justice Livingston argued in a dissent in favor of the *duty-to-define* interpretation, but no Justice joined his opinion.<sup>22</sup> A majority of the Supreme Court held that the power to define does not imply an obligation to define these offenses with greater specificity than ordinary crimes.<sup>23</sup>

Nothing in the historical record suggests that the clause was meant to preclude federal common law crimes either. In 1793, the Washington administration prosecuted Americans for offenses against the law of nations, even though no statute prohibited the conduct in question.<sup>24</sup> Further, when the Supreme Court held in 1812 that there was no federal common law of crimes, it relied on entirely different grounds.<sup>25</sup> The Define and Punish Clause would therefore be superfluous if it merely barred federal common law crimes. Finally, there is no historical evidence in support of this interpretation.

Nor does the Define and Punish Clause take away any power from the states. There is no evidence from the Framing to suggest that the clause was intended to harmonize state criminal legisla-

---

19. *Power*, 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

20. *McCulloch v. Maryland*, 17 U.S. 316, 419, 420 (1819).

21. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

22. *See* 18 U.S. 153, 164–83 (1820) (Livingston, J., dissenting).

23. *See id.* at 156–63 (majority opinion).

24. *See infra* note 154 and accompanying text.

25. *See United States v. Hudson & Goodwin*, 11 U.S. 32, 32 (1812).

tion. The Framers, in fact, added the clause because many states did not criminalize these offenses at all.<sup>26</sup> Additionally, the clause is listed alongside provisions giving Congress power in Article I, Section 8 and not Section 10, which limits state power. Finally, in 1887, the Supreme Court in *United States v. Arjona* rejected this interpretation and made clear that states can define and punish law-of-nations offenses differently than Congress.<sup>27</sup>

Because these other interpretations are unpersuasive, the Constitution's text suggests that Congress enjoys a separate power to define offenses against the law of nations.

## II. EARLY CONSTITUTIONAL HISTORY

Turning to early constitutional history, there are four independent reasons why the power to define offenses against the law of nations affords Congress significant discretion. First, the Framers understood the power to define to include the power to create new offenses. Second, the power to define must have included the power to create new offenses because most "offenses against the law of nations" were indeterminate in the late-eighteenth century, and the Framers did not want legal ambiguities to constrain Congress. Third, the Framers included the Define and Punish Clause to give Congress the ability to avoid international controversy. They probably would not have wanted judges to second-guess Congress's understanding of the law of nations because doing so could provoke foreign policy crises. Fourth, the Framers believed that Congress had an expansive power to define the other crimes mentioned in the Define and Punish Clause.

---

26. See *infra* notes 65–71 and accompanying text.

27. 120 U.S. 479, 487 (1887). But see *Smith v. Turner*, 48 U.S. 283, 394 (1849). The *Turner* Court thought that Congress had an exclusive power over these offenses because "the [sovereign] nature of" the define and punish power, along with the various other powers listed in Article I, Section 8, indicates that it was beyond state jurisdiction. *Id.* The Court did not think the phrase "power to define" led to this conclusion. Further, this language was dictum, *id.* at 393 (noting that the case concerned Congress's power to regulate commerce), and was later rejected by the Court in *Arjona*. *Arjona*, which sustained a federal law criminalizing the counterfeiting of foreign currency, 120 U.S. at 487, was admittedly decided one hundred years after the Constitution was drafted and *Turner* was decided sixty years after, so neither is particularly helpful in clarifying original meaning.

A. *The definition of “define”*

The Framers probably believed that the power to define included the power to create new offenses. Framing-era dictionaries give roughly the same definition to the verb “to define”: “To determine, to decide, to decree.”<sup>28</sup> Congress, not judges or international law scholars, therefore has the power to determine, decide, and decree what are “Piracies and Felonies Committed on the high Seas, and Offences against the Law of Nations.”<sup>29</sup>

Notes from the Philadelphia Convention support this interpretation. The Committee of Detail originally drafted the clause as, “To declare the law and punishment of piracies and felonies committed on the high seas . . . and of offenses against the law of nations . . . .”<sup>30</sup> After a separate motion replaced “declare the law and punishment” with “punish,” James Madison and Edmund Randolph moved to change “punish” to “define and punish.”<sup>31</sup> Gouverneur Morris objected. He “prefer[red] *designate* to *define*, the latter [‘define’] being as he conceived, limited to the preexisting meaning.”<sup>32</sup> Madison and Randolph’s motion passed after others reassured Morris that “define” was “applicable to the creating of offenses also, and therefore suited the case both of felonies & of piracies.”<sup>33</sup>

---

28. *Define*, 1 JOHNSON, *supra* note 19. Another used Johnson’s definition but added “to explain a thing by its qualities; to circumscribe; to mark the limit.” *Define*, THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789). Thus, Congress, not the courts, should have the power to “explain [offenses against the law of nations] by [their qualities],” “circumscribe” them, and “mark [their] limits.”

29. *Cf.* *Nixon v. United States*, 506 U.S. 224, 231 (1993) (“‘Sole’ is defined as ‘having no companion,’ ‘solitary,’ ‘being the only one,’ and ‘functioning . . . independently and without assistance or interference.’ If the courts may review the actions of the Senate to determine whether that body ‘tried’ an impeached official, it is difficult to see how the Senate would be ‘functioning . . . independently and without assistance or interference.’” (citations omitted)).

30. 2 FARRAND’S RECORDS, *supra* note 12, at 177, 182.

31. *Id.* at 315–16.

32. *Id.* at 316.

33. *Id.* In a recent case, the United States Court of Appeals for the Eleventh Circuit interpreted this exchange differently. In the court’s telling, nobody else at the Convention wanted Congress to have the power to create new offenses. *See United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1250 (11th Cir. 2012) (“Morris suggested that they should use the word ‘designate’ as opposed to ‘define’ because he felt that ‘define’ was limited to the preexisting meaning of felonies. But the delegates rejected this motion and adopted Madison and Randolph’s proposal to insert the more limited word ‘define.’” (citations omitted)). But the court seems to

Finally, the Framers believed that giving Congress the power to define treason could lead to Congress inventing new varieties of treason.<sup>34</sup> Madison explained in *Federalist No. 43* that the Constitution “insert[ed] a constitutional definition of the crime” to prevent Congress from creating “new-fangled and artificial treasons.”<sup>35</sup> If the Framers believed the power to define treason would allow the creation of “new and artificial treasons,” they probably thought the power to define offenses against the law of nations would allow Congress to do the same thing. They also understood, as Eugene Kontorovich argues, that the power to define treason “could be a means to oppress the citizen.”<sup>36</sup> Alexander Hamilton accordingly described the Constitution’s treason definition as an important rights protection in *Federalist No. 84*.<sup>37</sup> So the Framers probably knew that giving Congress a power to define offenses against the law of nations could also threaten liberty.<sup>38</sup> An Antifederal-

---

have mischaracterized the debate. It left out the Convention’s reassurances that “define” was “applicable to the creating of offenses also.” Omitting that part of the story completely changes its meaning. Eugene Kontorovich likewise writes that “[t]he response to Morris was that *creating* new crimes would only be appropriate for felonies, but not piracies.” Kontorovich, *supra* note 6, at 1700 (footnotes omitted). But the delegates actually said that the power to designate “suited the case *both* of felonies & of piracies.” 2 FARRAND’S RECORDS, *supra* note 12, at 316 (emphasis added).

A more serious objection is that the debate over this motion consists solely of Morris’s concern and the response to him. The delegates may have had little to say on this issue because they agreed with Morris, or because they attached little importance to the clause. Additionally, “others” told Morris that the word “define” allowed for the creation of new offenses, but we have no idea who these “others” were, nor do we know if everyone at the Convention agreed. But if the notes are accurate, this episode shows that the Framers gave Congress a *power to define* the crimes listed because it wanted Congress to have the authority to create new types of piracies, felonies on the high seas, and offenses against the law of nations.

34. See U.S. CONST. art. I, § 3, cl. 1.

35. THE FEDERALIST NO. 43, at 240 (James Madison) (E.H. Scott ed., 1894).

36. Kontorovich, *supra* note 6, at 1704.

37. THE FEDERALIST NO. 84, at 467 (Alexander Hamilton) (E.H. Scott ed., 1894) (“[T]he Constitution proposed by the convention contains, as well as the constitution of this State, a number of such provisions [guaranteeing rights] . . . Section 3, of the same article—‘Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.’”).

38. See also Siegal, *supra* note 6, at 867 (“The participants in the debates over the ratification of the Constitution did not overlook the possibility that Congress, acting under the offenses clause, might infringe individual rights. But there is no evidence that this alarmed them generally.” (footnotes omitted)). Kontorovich

ist even called attention to the danger of allowing Congress to define offenses against the law of nations: Congress might use this power to limit free speech.<sup>39</sup> Notably, a Federalist article responding to this concern did not argue that Congress had no such power, only that this hypothetical was unlikely.<sup>40</sup> But despite such concerns about the breadth of this power, the Constitution was ratified.

*B. The power to punish vaguely defined offenses*

In a recent case, the United States Court of Appeals for the Eleventh Circuit suggested that Congress may not, pursuant to the Define and Punish Clause, punish offenses against the law of nations that did not exist in 1789.<sup>41</sup> Some in Congress in the nineteenth century made this same argument.<sup>42</sup> This interpretation of the Define and Punish Clause is almost certainly incorrect. In 1787, very few offenses against the law of nations were clearly defined. The Framers likely gave Congress the *power to define* because they wanted Congress to have the authority to punish more than just the small set of clearly established of-

---

draws a different conclusion: Congress does not enjoy a broad power to define because “where the defining power is given in reference to an external standard, it was understood to be strictly limited to that standard.” Kontorovich, *supra* note 6, at 1704. However, the Constitution did not define treason “in reference to an external standard”—it provided an internal definition. And regardless, there was no external standard defining offenses against the law of nations at the time of the Framing. See *infra* notes 56–57 and accompanying text. So even if the Framers believed that a “defining power [] given in reference to an external standard . . . [is] strictly limited to that standard,” they probably would have still thought that Congress had the power to define new offenses against the law of nations because there was no external standard for those offenses.

39. See *Cincinnatus I: To James Wilson, Esquire*, N.Y.J., Nov. 1, 1787, reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 160, 163 (John P. Kaminski et al. eds., 2009) [hereinafter DHRC] (“[T]he proposed Congress are empowered—to define and punish offences against the law of nations—mark well, Sir, if you please—to define and punish. Will you, will any one say, can any one even think that does not comprehend a power to define and declare all publications from the press against the conduct of government, in making treaties, or in any other foreign transactions, an offence against the law of nations?”).

40. See *Anti-Cincinnatus*, HAMPSHIRE GAZETTE, Dec. 19, 1787, reprinted in 5 DHRC, *supra* note 39, at 36, 39 (“Have we the least possible ground of fear, that the United States in some future period will enter in their public treaties an article to injure the liberty of the press? What concern have foreign nations with the liberty or restraint of the American press?”).

41. See *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1253 (11th Cir. 2012).

42. See CONG. GLOBE APP’X, 27th Cong., 2d Sess. 619 (1842) (statement of Sen. Walker).

fenses against the law of nations. They did not want ambiguity in international law to constrain Congress's powers.

International law was hazy in the late-eighteenth and early-nineteenth centuries. Chief Justice John Marshall acknowledged the inherent uncertainties of divining the "unwritten" law of nations in 1815, noting that countries' interpretations often differ on the subject.<sup>43</sup> No state even attempted to codify the law of war, a branch of the law of nations, until 1863, and even then, much of it lacked detail compared to present day.<sup>44</sup>

The Framers did not intend to limit Congress to punishing the few offenses that were well established at the time. Blackstone's chapter on "Offenses Against the Law of Nations" lists only three "principal offenses": "1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy."<sup>45</sup> The first category included "acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct."<sup>46</sup> If the Framers wanted to limit the Define and Punish Clause to Blackstone's offenses, they might have just listed them individually. The clause mentions piracy by name, after all. It would have been easy to list the other two "principal offenses"<sup>47</sup> as well. That the Framers chose the umbrella term "offenses against the law of nations" implies that the clause allows Congress to punish more than the clearly illegal offenses Blackstone mentions. Additionally, the Define and Punish Clause originated as a Continental Congress resolution specifying several offenses the Congress wanted states to punish (under the Articles of Confederation, Congress had no power to pass this sort of criminal legislation). The resolution referenced one offense not mentioned in Blackstone: "infractions of treaties and conventions to which the United States are a party."<sup>48</sup> But the delegates to the Continental Congress did not think their list exhaustive. They only mentioned the ones

---

43. *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191, 198 (1815).

44. See JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 372–73 (2012); Howard S. Levie, *History of the law of war on land*, INT'L REV. RED CROSS No. 838 (June 30, 2000), <https://www.icrc.org/eng/resources/documents/article/other/57jqhg.htm> [<https://perma.cc/3TUH-LWSC>].

45. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*68.

46. *Id.*

47. *Id.*

48. 21 J. CONTINENTAL CONG. 1781, at 1136–37 (Gaillard Hunt ed., 1912).

“which are most obvious.”<sup>49</sup> The Framers likely had these “obvious” offenses in mind but did not list them in the Constitution, nor did they make the clause refer to “obvious” offenses against the law of nations.<sup>50</sup>

Records from the Philadelphia Convention, in fact, suggest that the clause empowers Congress to punish non-obvious offenses. As the Convention entered its final month, the Define and Punish Clause gave Congress only the *power to punish* offenses against the law of nations.<sup>51</sup> As mentioned earlier, Gouverneur Morris then moved to “let [offenses against the Law of Nations] be *definable* as well as punishable.”<sup>52</sup> James Wilson, a future Supreme Court Justice, fought the change: “To pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make us ridiculous.”<sup>53</sup> Morris responded, “The word *define* is proper when applied to *offences* in this case; the law of nations being often too vague and deficient to be a rule.”<sup>54</sup> The Convention passed Morris’s motion, leaving the clause as currently written. Thus, many or most of the delegates probably intended to empower Congress to define and punish offenses against the law of nations that might not be well established under international law.<sup>55</sup> In the 1820 case of *United States v. Smith*, Justice Joseph Story likely drew on this episode when explaining that Congress has the power to define international law precisely because so much of international law is ambiguous.<sup>56</sup> No “public code recognised by the common consent of nations” existed that “completely ascertained and defined” offenses against the law of nations. Thus, “there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slight-

---

49. *Id.* at 1137.

50. *But see* Kontorovich, *supra* note 6, at 1696 (suggesting that the Define and Punish Clause was intended to only cover the “subset of international wrongs” that concerned the Continental Congress).

51. 2 FARRAND’S RECORDS, *supra* note 12, at 595.

52. *Id.* at 614 (emphasis in original).

53. *Id.* at 615 (emphasis in original).

54. *Id.* (emphasis in original).

55. *See* *Al Bahlul v. United States*, 792 F.3d 1, 44 (D.C. Cir. 2015) (Henderson, J., dissenting), *rev’d on other grounds* 840 F.3d 757 (en banc); *Al-Bihani v. Obama*, 619 F.3d 1, 13 (D.C. Cir. 2010) (en banc) (mem.) (Kavanaugh, J., concurring).

56. 18 U.S. (5 Wheat.) 153, 159 (1820).

est reason to doubt that this consideration had very great weight in producing the phraseology in question.”<sup>57</sup>

Several scholars have argued that the Morris-Wilson exchange suggests a limit to the power to define: Congress may *clarify* offenses against international law but may not *invent* new offenses.<sup>58</sup> An 1805 speech from Senator John Quincy Adams<sup>59</sup> and an 1865 Attorney General Opinion made this same distinction.<sup>60</sup> The Define and Punish Clause did not give Congress “power to innovate upon those laws,” Adams explained, because “the Legislature of one individual in the great community of nations has no right to prescribe rules of conduct which can be binding upon all.”<sup>61</sup>

But this interpretation is probably wrong. Wilson’s objection that Congress would look “ridiculous” if it tried to unilaterally change the law of nations is tangential to the issue at hand. As Kontorovich explains, there is a “difference between a constitutional power to ‘define . . . the law of nations’ and an attempt to actually tinker with the law of nations itself.”<sup>62</sup> When “[i]ncorporated into the Constitution, the law of nations is no longer a body of rules for the conduct of countries but an enumerated legislative power. When Congress uses this power, the law of nations *per se* is unaffected . . . .”<sup>63</sup> The Wilson-Morris debate therefore shows only that Congress may define and punish offenses against the law of nations that lack clear definitions under international law.

---

57. *Id.*; see also *Al Bahlul*, 792 F.3d at 44 (Henderson, J., dissenting). To be clear, Justice Story’s opinion from 1820 in *Smith* is relevant not because it sheds light on Madison’s beliefs in 1787. Rather, it simply reflects an accurate description of the law at both his and Madison’s time.

58. See, e.g., Kontorovich, *supra* note 6, at 1702. But see Howard S. Fredman, Comment, *The Offenses Clause: Congress’ International Penal Power*, 8 COLUM. J. TRANSNAT’L L. 279, 289 (1969).

59. 15 Annals of Cong. 150 (1805).

60. See *Military Commissions*, 11 Op. Atty. Gen. 297, 299 (1865); see also Stephen Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SECURITY L. & POL’Y 295, 331 (2010).

61. 15 ANNALS OF CONG. 150 (1805) (statement of Sen. Adams).

62. Kontorovich, *supra* note 6, at 1702 n.129.

63. *Id.*

*C. The clause's purpose*

States under the Articles of Confederation did not adequately criminalize offenses against the law of nations.<sup>64</sup> The Framers included the Define and Punish Clause to fix this problem. Therefore, they likely intended to give Congress sufficient flexibility in deciding what offenses it wished to punish. Otherwise, the judiciary could provoke an international crisis if it disagreed with Congress's interpretation of international law.

The Define and Punish Clause remedied a specific deficiency in the Articles of Confederation. A French diplomat was assaulted in Philadelphia, and while his assailant was eventually convicted in a Pennsylvania court, delegates to the Congress expressed concern that most states lacked civil and criminal remedies for these sorts of offenses against the law of nations.<sup>65</sup> Failure to punish such a gross violation of the law of nations provided just cause for war.<sup>66</sup> As mentioned earlier, the Continental Congress had no such power. For this reason, Jefferson encouraged Madison to push the Virginia legislature to adopt legislation punishing offenses against the law of nations like the assault in Philadelphia.<sup>67</sup> Congress also received reports of Americans seizing Spanish property, which many considered to be offenses against the law of nations because the United States was at peace with Spain.<sup>68</sup> In the last of these incidents, the Virginia state government initially announced its intention to prosecute Virginians responsible for the attack.<sup>69</sup> But Governor Edmund Randolph later expressed concern to Madison

---

64. See, e.g., Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681, 709–10.

65. 27 J. CONTINENTAL CONG. 1784, at 478, 502–03, 564–65 (Gaillard Hunt ed., 1928).

66. See 4 EMER DE Vattel, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF SOVEREIGNS* § 81 (Joseph Chitty ed., 1863) (1758); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

67. See Letter from Thomas Jefferson to James Madison (May 25, 1784), in 8 *THE PAPERS OF JAMES MADISON* 42, 43 (Robert A. Rutland & William M. E. Rachal eds., 1973) [hereinafter *MADISON'S PAPERS*]; see also *infra* Section III.A.1 (describing this theory in greater detail).

68. See 32 J. CONTINENTAL CONG. 1784, at 190 n.3 (Roscoe E. Hill ed., 1936); 24 J. CONTINENTAL CONG. 1783, at 227–28 (Gaillard Hunt ed., 1922); 14 J. CONTINENTAL CONG. 1779, at 857 (Worthington Chauncey Ford ed., 1909).

69. See 4 *JOURNALS OF THE COUNCIL OF THE STATE OF VIRGINIA* 47 (Feb. 28, 1787).

that state law might not criminalize these attacks.<sup>70</sup> Shortly after, and just a month before the Philadelphia Convention began, Madison composed a list of “Vices of the political system of the U. States.” “Violations of the law of nations and of treaties” was the third item.<sup>71</sup> The Framers thus believed that this failure to punish private actors’ violations of international law posed a real national security threat and wanted the new Constitution to fix this problem.

For this reason, Randolph argued in the first week of the Philadelphia Convention that Congress must have the power to ensure that “infractions of treaties or of the law of nations . . . be punished.”<sup>72</sup> Madison, who had originally informed Randolph about the attack on the Spanish,<sup>73</sup> concurred: “The files of Congs. contain complaints already, from almost every nation with which treaties have been formed.”<sup>74</sup> At some point “rupture with other powers” would result because “[t]he existing confederacy does [not] sufficiently provide against this evil.”<sup>75</sup>

Notably, the Define and Punish Clause intruded on traditional state prerogatives. Before the Constitution was ratified, local authorities were responsible for punishing offenses against the law of nations.<sup>76</sup> And this fact does not seem to have been lost on the public. A 1785 letter to John Dickinson, then the President of Pennsylvania (and later a delegate to the Philadelphia Convention representing Delaware), expressed concern that national “laws for punishing the infractions” against

---

70. See Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 MADISON’S PAPERS, *supra* note 67, at 368, 368 (referencing Randolph’s letter). Randolph’s letter itself seems to have been lost. See 9 MADISON’S PAPERS, *supra* note 67, at 313.

71. See James Madison, *Notes* (Apr. 1787), in 24 LETTERS OF DELEGATES TO CONGRESS 265, 265–66 (Paul H. Smith ed., 1996).

72. 1 FARRAND’S RECORDS, *supra* note 12, at 19.

73. See Letter from James Madison to Edmund Randolph (Feb. 18, 1787), in 8 MADISON’S PAPERS, *supra* note 67, at 271, 273; Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 8 MADISON’S PAPERS, *supra* note 67, 368, 368–69.

74. 1 FARRAND’S RECORDS, *supra* note 12, at 316.

75. *Id.* (second alteration in original). Madison may also have had in mind international law violations other than the attacks on the Spanish, such as southern states’ interference with the payment of pre-war debts to foreign nations, which violated American treaties. See KLARMAN, *supra* note 13, at 349 n.5.

76. See *supra* notes 48–50 and accompanying text.

the law of nations would “entrench[] too much on the sovereignty of the several individual states.”<sup>77</sup>

Channeling Madison and Randolph’s speeches in Philadelphia, *The Federalist Papers* emphasized the importance of avoiding foreign conflict. Madison discussed the Define and Punish Clause explicitly in *Federalist No. 42*. Without this power, the national government would have to rely on the states to punish offenses against the law of nations. If the states refused, “any indiscreet member [might] . . . embroil the Confederacy with foreign nations.”<sup>78</sup> Speaking in more general terms, Jay argued that compliance with international law was “of high importance to the peace of America . . . [T]his will be more perfectly and punctually done by one National Government, than it could be either by thirteen separate States . . . .”<sup>79</sup> Finally, Hamilton said that the Constitution properly granted federal courts jurisdiction over lawsuits by foreigners because federal courts would be more impartial. That was critical because “[t]he Union will undoubtedly be answerable to foreign [p]owers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it.”<sup>80</sup>

Given this context, it seems doubtful that the Framers thought Congress should be limited to punishing extant offenses against the law of nations. If even a few powerful European countries had an idiosyncratic view of international law, the United States might have every interest in abiding by their interpretation to avoid conflict. Otherwise, a federal judge who disagreed with Congress’s interpretation of international law could once again force Congress to rely on the states to punish acts that, if not suppressed, might lead to war.

*D. The power to define “felonies on the high seas” and “piracy”*

Congress also has the power to “define and punish Piracies and Felonies committed on the high Seas.”<sup>81</sup> Presumably, as Kontorovich writes, “the word ‘define’ transitively conveys the same power in regard to all three kinds of crimes in the sec-

---

77. Letter from Charles Thomson to John Dickinson (July 19, 1785), in 22 LETTERS OF DELEGATES TO CONGRESS 520, 521 (Paul H. Smith ed., 1995).

78. THE FEDERALIST NO. 42, at 233 (James Madison) (E.H. Scott ed., 1894).

79. THE FEDERALIST NO. 3, at 20–21 (John Jay) (E.H. Scott ed., 1894).

80. THE FEDERALIST NO. 80, at 435 (Alexander Hamilton) (E.H. Scott ed., 1894).

81. U.S. CONST. art. I, § 8, cl. 10.

tion.”<sup>82</sup> This section shows that Congress has significant discretion when defining felonies on the high seas and piracies. That suggests that Congress has broad power to define offenses against the law of nations too.

### 1. Felonies

The Framers gave Congress the power to define “felonies on the high Seas” because they did not want Congress to be limited to punishing felonies as defined by English common law. “Felonies” were not sufficiently defined by common law to provide a good external reference point. Additionally, the Framers (or at least Madison) did not want foreign law to limit Congress’s powers. Both concerns applied just as much to offenses against the law of nations.

First, importing English felonies into American law would prove impossible, Madison argued in *Federalist No. 42*, because “[f]elony is a term of loose signification, even in the common law of England.”<sup>83</sup> Common law and English statutory law were also inconsistent in their enumeration of felonies.<sup>84</sup> For instance, Madison explained at the Philadelphia Convention, Parliament considered “running away with vessels” a felony, but common law treated it as a “breach of trust.”<sup>85</sup> “The proper remedy for all these difficulties was to vest the power proposed by the term ‘define’ in the Natl. legislature.”<sup>86</sup> Congress needed the power to define “offenses against the law of nations” for that same reason: international law was vague. No “public code,” as Justice Story put it, “completely ascertained and defined” offenses against the law of nations.”<sup>87</sup>

Second, Madison did not think other countries’ domestic laws should limit Congress’s power to define felonies. When he and Randolph moved to give Congress the power to define piracies and felonies committed on the high seas at the Philadelphia Convention, Wilson and Dickinson resisted. They believed that Congress did not need a power to define because

---

82. Kontorovich, *supra* note 6, at 1719.

83. THE FEDERALIST NO. 42, at 233 (James Madison) (E.H. Scott ed., 1894).

84. *See id.*

85. 2 FARRAND’S RECORDS, *supra* note 12, at 316.

86. *Id.*

87. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820).

felonies were sufficiently defined at common law.<sup>88</sup> But Madison did not want English law to limit the clause. “[N]o foreign law should be a standard farther than is expressly adopted . . . .”<sup>89</sup> *Federalist No. 42* explains why: Making “any other nation[’s law] . . . a standard for the proceedings of” the United States would be “dishonorable and illegitimate.”<sup>90</sup> Madison made the same point when discussing the Define and Punish Clause in Virginia’s ratifying convention. Even though “felonies on the high seas” included piracy, the Constitution redundantly includes the word “piracy” as a “technical term of the law of nations” to signal that English law would not set the limits of Congressional power.<sup>91</sup> Making this clear was important because incorporating another country’s definition of this crime into the Constitution would be “dishonorable.”<sup>92</sup> The clause instead authorizes Congress “to introduce [offenses] into the laws of the United States.”<sup>93</sup>

Unless Congress had an expansive power to define offenses against the law of nations, foreign law would limit Congress’s powers, albeit indirectly. Courts often interpreted the law of nations at the time of the Framing by consulting other nations’ domestic statutes and interpretations of international law. Foreign municipal legislation constituted evidence of “principles of natural justice in which all the learned of every nation agree,” which Blackstone claimed was the source of the law of nations.<sup>94</sup> Foreign practice also established “usage” or “the customary law of nations.”<sup>95</sup> For this reason, Chief Justice Marshall

---

88. See 2 FARRAND’S RECORDS, *supra* note 12, at 316.

89. *Id.*

90. THE FEDERALIST NO. 42, at 233 (James Madison) (E.H. Scott ed., 1894).

91. *The Virginia Convention, June 20, 1788, Debates*, in 10 DHRC, *supra* note 39, at 163 (“Piracy is a word which may be considered as a term of the law of nations. Felony is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in these states. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorized to introduce it into the laws of the United States.”) (statement of Mr. Madison).

92. *Id.*

93. *Id.*

94. 4 BLACKSTONE, *supra* note 45, at \*67.

95. See Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 693, 693 (John T. Catanzariti ed., 1990) [hereinafter JEFFERSON’S PAPERS]; 1 VATTEL, *supra* note 66, § 25; David L.

often examined other countries' laws and interpretations of international law, as did early Attorneys General Opinions.<sup>96</sup> An 1820 House Committee Report thus recommended that Congress declare slave trading to be piracy in order to make it so under international law. If more countries punished slave trading as piracy, then the law-of-nations definition of piracy would eventually encompass it.<sup>97</sup> And courts today still look to foreign law to interpret customary international law.<sup>98</sup>

If Congress must adhere to extant definitions under the law of nations, then the Constitution would have indirectly made foreign laws a limit on Congress's power to define. Foreign law would shape international law, which would influence Congress's constitutional authorities. Because Madison did not approve of foreign law limiting Congress's power to define felonies, he probably would not have wanted foreign law to limit Congress's power to define offenses against the law of nations either. Thus, Congress's expansive power to define felonies suggests it has an equivalent power to define offenses against the law of nations.<sup>99</sup>

---

Sloss et al., *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT* 9 (David L. Sloss et al. eds., 2011).

96. See, e.g., *The Antelope*, 23 U.S. 66, 115 (1825) (holding that slave trading is not an offense against the law of nations as a matter of international law because "[i]t has claimed all the sanction which could be derived from long usage, and general acquiescence"); *Immunities of Foreign Consuls*, 2 Op. Att'y Gen. 725, 726 (1835) ("Vattel thinks [consuls] should be entitled to immunity from criminal prosecution, but no nations do that.").

97. See 36 ANNALS OF CONG. 2210 (1820); see also Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U.L. REV. 149, 195 (2009).

98. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2) (1987).

99. According to William Rawle's treatise, "The power to define either may have been introduced to authorize congress to qualify and reduce the acts which should amount to either under common law." WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 107 (2d ed. 1829) (emphasis added). But this language indicates that Rawle was not certain he was right. And his argument seems to be directly at odds with Madison's discussion of this issue. *But see* Kontorovich, *supra* note 6, at 1724.

Kontorovich points to a case, *The Ulysses*, which purportedly held that Congress cannot punish misdemeanors on the high seas and later label them felonies. *See id.* at 1722. A defense counsel made that argument, and the judge said during oral argument (but not in an opinion) that he agreed with the attorney. *See The Ulysses*, 24 F. Cas. 515, 519 (C.C.D. Mass. 1800) (No. 14,330). But neither person was talking about constitutional constraints. The counsel argued that an offense can be a felony "either by common law, or by the statute." *Id.* at 517. But to make an of-

## 2. Piracies

The United States has consistently defined piracy more broadly than international law does.<sup>100</sup> Madison hinted in *Federalist No. 42* that Congress is not tied to the law-of-nations' definition of piracy: "The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes."<sup>101</sup> Madison thus acknowledged that the power to define piracy would be unnecessary if Congress wanted to stick to the international-law definition. Congress can probably depart from it; otherwise, Congress would, in effect, have no power to define piracy. His reference to municipal piracies is also suggestive, as many European states defined piracy more broadly than did the law of nations.<sup>102</sup> Given that piracy was one of the few well-defined offenses against the law of nations, it would be surprising if Congress did not enjoy similar latitude when defining more ambiguous ones.<sup>103</sup>

Congress exercised this discretion in the early Republic. Following Britain's example, the First Congress's Crimes Act of 1790<sup>104</sup> declared privateering against the United States and murder on the high seas to be piracy, even though neither were piracy under international law.<sup>105</sup> Wilson, then a Supreme Court Justice, ex-

---

fense a "felony by . . . statute," Congress must clearly say so. *Id.* So this case at most establishes a clear statement rule for one part of the Define and Punish Clause. And it is difficult to attach too much significance to *The Ulysses* because, as Kontorovich acknowledges, it "has never been cited by other decisions." Kontorovich, *supra* note 6, at 1722 n.229.

100. See James J. Woodruff III, *The Prosecution of Piracy Under the Offenses Clause*, 2012 CARDOZO L. REV. DE NOVO 278, 286–89 (listing a series of offenses the U.S. punishes as "piracy" that are not piracy under international law).

101. THE FEDERALIST NO. 42, at 233 (James Madison) (E.H. Scott ed., 1894).

102. See, e.g., *Extradition*, 2 Op. Att'y Gen. 559, 559 (1833) (distinguishing piracy under the law of nations from piracy under the laws of Portugal); see also 1 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 16, at 164 (1836) (contrasting jurisdiction over "[p]iracy, under the law of nations" and municipal piracies).

103. Compare *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158–59 (1820) (citing THE FEDERALIST NO. 42 (James Madison)), with 1 WHEATON, *supra* note 102, § 16, at 164 ("Offenses, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations.").

104. Crimes Act of 1790, ch. 9, 1 Stat. 112.

105. See 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 251, 252 (8th ed. 1824); Crimes Act of 1790, 1 Stat. at 113–14; *Smith*, 18 U.S. (5 Wheat.) at 161 ("[R]obbery, or forcible depredations upon the sea, animo furandi, is piracy.").

pressed some “doubts” in a 1791 grand jury charge about Congress’s power to punish foreign citizens for murder on the high seas. He seems to have thought that Congress might not be able to exercise extraterritorial jurisdiction in violation of the law of nations.<sup>106</sup> But he was concerned here about Congress’s jurisdiction, not its power to define. Hamilton also seemed to think that Congress had some power to provide for novel definitions of piracy. He defended the Jay Treaty, in which Britain agreed to abandon many of its Northwestern forts in return for the United States making several concessions on neutral rights,<sup>107</sup> against the argument that it unconstitutionally defined piracy by claiming that the lawmaking and treaty powers are “concurrent,” and Congress has the power to define piracy.<sup>108</sup> Additionally, Congress used this power: It declared the slave trade to be piracy in 1820.<sup>109</sup> The Supreme Court also smiled on a broad power to define. Writing for a unanimous Court, Chief Justice Marshall commented in *The Antelope*<sup>110</sup> that slave trading, though not piracy under the law of nations, “can be made so . . . by statute.”<sup>111</sup> And Justice Story wrote

---

106. See James Wilson, A Charge to the Grand Jury in the Circuit Court for the District of Virginia (May 1791), reprinted in 3 THE WORKS OF THE HONOURABLE JAMES WILSON L.L.D. 355, 377 (Bird Wilson ed., 1804) [hereinafter WILSON’S PAPERS] (expressing “doubts” about Congress’s power to punish foreigners as pirates for murder on the high seas); see also 1 WHEATON, *supra* note 102, § 16, at 164. In the same grand jury charge, Wilson indicated that the 1790 law’s reference to “piracy” implied that the statute incorporated the common-law definition of piracy. But he never said that Congress had no power to depart from the common-law definition. See James Wilson, A Charge to the Grand Jury in the Circuit Court for the District of Virginia (May 1791), reprinted in 3 WILSON’S PAPERS, *supra*, at 355, 371 (“[M]urder, manslaughter, robbery, piracy, forgery, perjury, bribery, and extortion are mentioned as crimes and offenses [in the 1790 act]; but they are neither defined nor described. For this reason, we must refer to some *preexisting* law for their definition or description. . . . The reference should be made to the *common law*.”). But see Kontorovich, *supra* note 6, at 1706.

107. See GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 197 (2009).

108. Alexander Hamilton, *The Defence No. 37* (Jan. 6, 1796), reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON 13, 20 (Harold C. Syrett ed., 1974) [hereinafter HAMILTON’S PAPERS]. Article 21 of the treaty stipulated that any U.S. citizen serving in another country’s military in a war against Britain and any British subject serving against the United States would be tried as a pirate if captured. See Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., art. 21, 8 Stat. 116, 127 (1794).

109. Act of May 15, 1820, Pub. L. 16-13, 3 Stat. 600.

110. 23 U.S. (10 Wheat.) 66 (1825).

111. *Id.* at 122 (emphasis added). Furthermore, “the obligation of the statute cannot transcend the legislative power of the state which may enact it,” *id.*, but here, Marshall just meant that the statute could not, on its own, change the under-

in his treatise that “the true intent of” the Define and Punish Clause “was, not merely to define piracy as known to the law of nations, but to enumerate what crimes in the national code should be deemed piracies.”<sup>112</sup>

A few paragraphs in *United States v. Furlong*,<sup>113</sup> however, seem to suggest that Congress must adhere to the law-of-nations definition of piracy. Justice William Johnson, writing for a unanimous Court, declared that murder on the high seas was not “punishable by the laws of the United States, if committed by a foreigner upon a foreigner [on a foreign vessel].”<sup>114</sup> Robbery on the high seas was piracy under the law of nations, punishable by every country, but murder on the high seas was not a universal jurisdiction offense.<sup>115</sup> It would make no difference if “the law declare[d] murder to be *piracy*” because “not even the omnipotence of legislative power can confound or identify” murder on the high seas with piracy.<sup>116</sup>

---

lying law of nations. The Court ultimately decided it could not treat slave trading as piracy, but only on choice-of-law grounds: “[T]he legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs.” *Id.* at 118. Spain, the home country of the *Antelope*’s owners, did not punish slave trading as piracy, and its law controlled. *But see* Kontorovich, *supra* note 6, at 1717.

Then-Congressman John Marshall gave a speech in the House of Representatives asserting that there is a distinction between “general piracy,” that is, piracy as defined by the law of nations, and “piracy by statute,” and that Congress could only exercise universal jurisdiction over the former. *See* 10 ANNALS OF CONG. 600 (1800). But as a Congressman, he may have made this argument for political reasons. *See generally* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990) (discussing the charged political context). And at most, this speech indicates that Congress cannot exercise universal jurisdiction in violation of international law. *See* 10 ANNALS OF CONG. 607 (1800) (statement of Mr. Marshall) (“It has already been shown that the people of the United States have no jurisdiction over offenses committed on board a foreign ship against a foreign nation. Of consequence, in framing a Government for themselves, they cannot have passed this jurisdiction to that Government.”).

112. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1154, at 54 (1833).

113. 18 U.S. (5 Wheat.) 184 (1820). The case was originally called *United States v. Bowers and Matthews*, 5 Wheat. 198, but the Court consolidated it and several other piracy cases as *United States v. Pirates*, 5 Wheat. 184. This Article follows the modern convention of the *United States Reports* by listing the cases under the name *Furlong*.

114. *Furlong*, 18 U.S. (5 Wheat.) at 194.

115. *Id.* at 197.

116. *Id.* at 198.

Both the Eleventh and D.C. Circuits have argued that this language cabins the *power to define* offenses against the law of nations, as have many scholars.<sup>117</sup> But interpreting *Furlong* that way is a mistake, for three reasons. First, *Furlong* was a case about statutory, not constitutional interpretation. Second, at most Justice Johnson was arguing in favor of an extraterritoriality limit on Congress's powers, not a broader limit on its power to define. Third, regardless of what Justice Johnson wrote in *Furlong*, the majority of the Court probably did not believe that the power to define was so limited.

*Furlong* concerned statutory interpretation. Justice Johnson concluded his opinion by asserting, "Congress neither *intended* to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it."<sup>118</sup> The "had no right" language admittedly suggests that Justice Johnson inferred that Congress could not have meant to have done what it lacked the power to do. But Justice Johnson was probably referring to the United States' powers under the law of nations, not Congress's powers under the Constitution.<sup>119</sup> Under the law of nations, states could exercise universal jurisdiction over piracy as defined by international law, but not over piracies invented by municipal law.<sup>120</sup> Justice Johnson never referenced the fact that Congress had limited powers as a body. But he did express concern about "offensive interference with the governments of other nations."<sup>121</sup> He also wrote that an "omnipoten[t]" legislature would lack the power to declare murder to be piracy, which implies that the problem came from international law, not the

---

117. See *Al Bahlul v. United States*, 792 F.3d 1, 15 (D.C. Cir. 2015), *rev'd on other grounds* 840 F.3d 757 (en banc); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012); Kontorovich, *supra* note 6, at 1720; Curtis S. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 335 n.51.

118. *Furlong*, 18 U.S. (5 Wheat.) at 198 (emphasis added).

119. Kontorovich says that "[t]he *Furlong* Court made clear that that this limitation was not one found in international law, or due process, or the statute itself." Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1214 (2009). But it is unclear to what in *Furlong* he is referring. The page range he cites, 18 U.S. (5 Wheat.) at 194–95, does not seem to address this issue.

120. See *supra* note 102.

121. *Furlong*, 18 U.S. (5 Wheat.) at 198.

Constitution.<sup>122</sup> But Congress might still have the authority to enact statutes that violate international law.<sup>123</sup>

Second, even if Justice Johnson was discussing constitutional limits on Congress's powers, he was referring to constitution limits to U.S. jurisdiction, not Article I limits to the power to define. At most, he meant that Congress cannot depart from the law-of-nations definition of piracy when exercising extra-territorial jurisdiction over foreign nationals because doing so violates international law. That does not necessarily mean that Congress cannot invent new piracies when enacting statutes without extraterritorial reach. In fact, as Chancellor James Kent explained in his constitutional treatise, the Crimes Act of 1790 had "enlarg[ed] the definition of piracy" to include murder on the high seas as well.<sup>124</sup>

Third, it is doubtful that the majority of the Court believed that Congress must stick to the law-of-nations definition of piracy. This passage in *Furlong* was dictum,<sup>125</sup> and, as previously noted, it seems to be at odds with Chief Justice Marshall's opinion in *The Antelope* and Justice Story's treatise.<sup>126</sup> Additionally, two years earlier in *United States v. Palmer*, Justice Johnson had argued that Congress could only punish piracy as defined by the law of nations, but nobody joined his opinion.<sup>127</sup> And in a case decided a few weeks before *Furlong*, the Court said that Congress could punish murder committed by a foreign citizen against another

---

122. *Id.*

123. See, e.g., *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other construction remains . . ." (emphasis added)). Justice Johnson may have thought that this law-of-nations limit was also a constitutional limit, but he did not explicitly say so; see also *supra* note 111 (discussing John Marshall's 1800 speech).

124. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 176 (1826); accord Crimes Act of 1790, ch. 9, § 8, 1 Stat. 112, 113.

125. See *Furlong*, 18 U.S. (5 Wheat.) at 192–93 (explaining the holding); *id.* at 193 ("It would seem to be unnecessary to go further in the cases against *Furlong*, as this conclusion decides his fate; but this Court cannot foresee how far it may be necessary to the administration of justice, against accessories or otherwise, that the question in the cases of murder should also be decided.").

126. See *id.* at 195.

127. See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 641–42 (1818) (Johnson, J., dissenting) ("[C]ongress cannot make that piracy, which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses.").

foreign citizen on the high seas *as piracy*, even though only robbery on the high seas was piracy under the law of nations.<sup>128</sup>

Moreover, Justice Johnson signaled in *Furlong* that he was only writing for himself when arguing that there were limits to Congress's power to define piracy. After explaining the holding, he switched from writing in the first-person plural to writing in the first-person singular, which he does not seem to have done in any of his other opinions for the Court<sup>129</sup>:

It is true, that the 8th section declares murder as well as robbery to be piracy; but, *in my view*, if any thing is to be inferred from this association, it is only that they meant to assert the right of punishing murder to the same extent that they possessed the right of punishing piracy; which would be carrying the construction beyond *what I contend for*. . . . Testing *my construction* of this section, therefore, by the rule *that I have assumed*, I am led to the conclusion, that it does not extend the punishment for murder to the case of that offence committed by a foreigner upon a foreigner in a foreign ship. . . . Nor is it any objection to this opinion, that the law declares murder to be piracy.<sup>130</sup>

Justice Johnson also spent a few paragraphs explaining his separate opinion in *Palmer*.<sup>131</sup> All of this would have been oddly self-referential if he were speaking for everyone. Perhaps for this reason, while many nineteenth-century legal treatises cited *Furlong's* holdings, none seem to have mentioned Justice Johnson's comments about universal jurisdiction and the power to define.<sup>132</sup>

128. *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 151–52 (1820). But as a matter of statutory law, after *Palmer*, the murder had to take place on either a U.S. ship or a ship not under the jurisdiction of any country.

129. Justice Johnson shifted from “we” to “I” in the last paragraph beginning at the bottom of *United States v. Furlong*, 18 U.S. (5 Wheat.), 184, 195 (1820). For his other opinions, see, for example *Mut. Assur. Soc’y v. Faxon*, 19 U.S. (6 Wheat.) 606 (1821); *Union Bank v. Hyde*, 19 U.S. (6 Wheat.) 572 (1821); *Leeds v. Marine Ins. Co.*, 19 U.S. (6 Wheat.) 565 (1821); *Campbell v. Pratt*, 18 U.S. (5 Wheat.) 429 (1820); *The Venus*, 18 U.S. (5 Wheat.) 127 (1820); *Murray’s Lessee v. Baker*, 16 U.S. (3 Wheat.) 541 (1818); and *The George*, 15 U.S. (2 Wheat.) 278 (1817).

130. *Furlong*, 18 U.S. (5 Wheat.) at 196, 197, 198 (emphasis added).

131. *Id.* at 195–96.

132. The silence is particularly striking because many nineteenth-century commentators discussed *Furlong*. See, e.g., THOMAS F. GORDON, A DIGEST OF THE LAWS OF THE UNITED STATES, INCLUDING AN ABSTRACT OF THE JUDICIAL DECISIONS RELATING TO THE CONSTITUTIONAL AND STATUTORY LAW 739 (1837); 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES & MISDEMEANORS 136 (Daniel Davis ed., 1824); THOMAS SERGEANT, CONSTITUTIONAL LAW 334 (1830); 2 FRANCIS

It would be strange today for a majority of Justices to sign on to an opinion they disagreed with, but between 1815 and 1823, separate opinions were extremely unusual—more so than at any other time during the Marshall Court.<sup>133</sup> Because the Justices considered it important to appear unanimous, the Court's opinions during this time generally only reflected the views of the opinions' authors. Often, the Justices failed to even show one another draft opinions because, as G. Edward White explains, "circulation only gave other Justices who concurred in the result an opportunity to object to the opinion's language or reasoning."<sup>134</sup> In sum, we should not attach too much importance to stray dictum that was written in the first-person singular and at odds with several contemporary cases.

But even if this Article's interpretation of *Furlong* is wrong and the Define and Punish Clause does not grant Congress a power to define piracy for itself, that would not necessarily affect Congress's power to define offenses against the law of nations. Congress would still have a broad power to define felonies, as explained earlier. And "offenses against the law of nations" were more like "felonies" than "piracies" because offenses against the law of nations, like felonies and unlike piracies, lacked a clear external reference point.<sup>135</sup>

\* \* \*

Early constitutional history therefore suggests that Congress's power to define offenses against the law of nations authorizes it, at minimum, to punish vague offenses against the law of nations. It may even be able to use its power to create new ones.<sup>136</sup>

---

WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 533 (5th ed. 1861); HENRY WHEATON, A DIGEST OF THE OPINIONS OF THE SUPREME COURT OF THE UNITED STATES 14, 117, 167, 401 (1821). The first treatise that seems to have cited the language at issue was published eighty-eight years after *Furlong*. See ALBERT H. PUTNEY, UNITED STATES CONSTITUTIONAL HISTORY AND LAW § 153, at 261 (1908).

133. See G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 42 (1984).

134. *Id.* at 38.

135. See *supra* notes 56–57 and accompanying text.

136. Kontorovich argues that Madison's Report of 1800 indicates "that Congress's use of the define Offenses power is strictly limited by international law can be reviewed against the standard." Kontorovich, *supra* note 6, at 1714 (citing Report of 1800 (Jan. 20, 1800), reprinted in THE VIRGINIA REPORT OF 1799–1800 (J.W.

Randolph ed., 1850)). That is not right. In the Report of 1800, Madison said that the Define and Punish Clause authorizes Congress to exercise two different kinds of powers: (1) a power to punish law-abiding citizens of foreign states that had wronged the United States, and (2) a power to punish any person who violates U.S. law. The former came from the law of nations and was therefore “strictly limited by international law,” in Kontorovich’s words. *Id.* But Madison never said that international law limited the latter.

Some background is necessary. In 1798, a Federalist-dominated Congress passed the Alien Enemies Act and the Alien Friends Act (often referred to together as “The Alien Acts”). The Alien Enemies Act authorized the detention and deportation of nationals of any country at war with the United States. *See* An Act respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798). The Alien Friends Act allowed the President to deport any foreign national that the President determined to be “dangerous to the peace and safety of the United States.” An act concerning Aliens, ch. 58, § 1, 1 Stat. 570, 571 (1798). The Virginia and Kentucky Legislatures then passed resolutions, drafted by Madison and Jefferson, respectively, declaring the Alien and Sedition Acts to be unconstitutional and calling on other legislatures to do the same. No other state did so; in fact, several Northern states defended the Acts. Madison wrote the Report of 1800 as part of a committee for the Virginia Legislature to rebut the Northern states’ arguments. *See generally* WOOD, *supra* note 107, at 269–71. Some had defended the constitutionality of the Alien Acts by claiming that Congress could declare under the Define and Punish Clause “that to be dangerous to the peace of society is, in aliens,” an offense against the law of nations. Report of 1800, *supra*, at 205. Madison responded as follows.

Laws enacted pursuant to the Define and Punish Clauses, Madison explained, are “penal act[s],” so “the punishment [a law] inflicts . . . must be justified by some offense that deserves it.” *Id.* Alien friends may be only “tried and punished” for violating “municipal [that is, federal] law.” *Id.* “Alien enemies,” by contrast, are also “liable to be punished for offences against [the law of nations].” *Id.* By this, Madison did not mean that alien friends cannot be prosecuted for violating criminal statutes enacted pursuant to the Define and Punish Clause. After all, a U.S. statute criminalizing offenses against the law of nations would still be “municipal law.” *Cf. supra* note 102 and accompanying text (distinguishing between “municipal” piracies and piracy under the law of nations). Rather, he meant that alien enemies can be punished for violations of the law of nations committed by their home state.

This punishment power came from international law. Once the United States was at war with another state, Democratic-Republicans believed, it could avail itself of all the privileges and powers of belligerency. *See* Andrew Lenner, *Separate Spheres: Republican Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 250, 267 (1997) (citing other Democratic-Republicans who made this argument more clearly than did Madison). Because the power came from international law, the United States could go no further than international law authorized. *See also* 8 ANNALS OF CONG. 1582 (1798) (statement of Mr. Gallatin) (“[A]lien enemies might be removed . . . by a principle which existed prior to the Constitution and coeval with the law of nations.”). Deporting alien enemies was therefore permissible because “the laws of [war] authorize[]” belligerents to expel one another’s citizens as a type of retributive act during war. Report of 1800, *supra*, at 206.

The power to enact municipal criminal legislation under the Define and Punish Clause, by contrast, came from the Constitution alone. And Madison never said that the law of nations limited it. In short, the Report of 1800 has nothing to do

## III. NEUTRALITY

Congress passed the Neutrality Act of 1794 pursuant to the Define and Punish Clause. The Act punished conduct that did not actually violate the law of nations. The Third Congress enacted this law only seven years after the Philadelphia Convention without anyone suggesting the law might be unconstitutional. And many of the key players in the debates over the Act—Washington, Hamilton, Jay, and Madison—played a large role in the Convention, the Ratification debates, or both.<sup>137</sup> Accordingly, as a matter of original public understanding, there is strong evidence that Congress may use its power to define to criminalize acts that do not actually violate the law of nations.<sup>138</sup> At minimum, this law establishes a strong precedent for a broad understanding of the Define and Punish Clause.<sup>139</sup>

A. *Historical background*

The French Revolution began in 1789. Worried about the Revolution's ideological ramifications, Austria and Prussia formed an alliance against France in February 1792, prompting France to declare war on Austria in April.<sup>140</sup> Prussia and Sardinia joined the fight against France that same year.<sup>141</sup> In January 1793, the French Republic executed Louis XVI and, on February 1, declared war on Britain and the Netherlands.<sup>142</sup>

The United States had signed treaties with France, the Netherlands, Britain, and Prussia guaranteeing “a firm, inviolable and universal Peace.”<sup>143</sup> America was thus committed to re-

---

with the scope of Congress's power to define offenses against the law of nations when enacting municipal criminal legislation.

137. See CASTO, *supra* note 3, at 1.

138. Cf. *Myers v. United States*, 272 U.S. 52, 136 (1926).

139. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (noting that the Court places significant weight on “historical practice”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *Al Bahlul v. United States*, 840 F.3d 757, 764 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

140. See JOHN HAROLD CLAPHAM, *THE CAUSES OF THE WAR OF 1792*, at 201–03 (1898)

141. See 1 JONATHAN ELLIOT, *THE AMERICAN DIPLOMATIC CODE* 10 (1834).

142. See MIKE RAPPORT, *THE NAPOLEONIC WARS: A VERY SHORT INTRODUCTION* 24, 26 (2013).

143. See *Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Fr.-U.S.*, art. 21, 8 Stat. 12, 24 (1782) [hereinafter

main neutral,<sup>144</sup> which was the U.S. government's preference. The United States was too weak to fight another war.<sup>145</sup> As news of the Netherlands and Britain's entry into the war began trickling into the United States by late March and early April,<sup>146</sup> President Washington and his Cabinet unanimously decided that, to stay neutral, they must prevent private Americans citi-

---

U.S.-France Treaty of Amity and Commerce]; Treaty of Amity and Commerce between their High Mightiness the States General of the United Netherlands, and the United States of America, to wit: New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut [sic], New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, Neth.-U.S., art. 19, 8 Stat. 32, 44 (1782) [hereinafter U.S.-Dutch Treaty of Amity and Commerce]; Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, Gr. Brit.-U.S., art. 7, 8 Stat. 80, 83 (1783); A Treaty of Amity and Commerce Between his Majesty the King of Prussia and the United States of America, Prussia-U.S., art. 20, 8 Stat. 84, 94 (1785) [hereinafter U.S.-Prussia Treaty of Amity and Commerce].

144. See John Jay, Charge to the Grand Jury (May 22, 1793), *Henfield's Case*, reprinted in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49, 54 (1849). The United States was bound by treaty to defend France's colonies in the West Indies, but the French national government decided not to invoke this provision "because America was an insignificant military power. . . . Instead of military assistance, France wished the United States to remain neutral and support France by paying off the loan from the Revolutionary War, providing food, and facilitating a French maritime campaign against British shipping." CASTO, *supra* note 3, at 17; see also Treaty of Alliance Between the United States of America and His Most Christian Majesty, Fr.-U.S., art. 11, 8 Stat. 6, 10 (1778).

145. See CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 14, 17 (1931); see also CASTO, *supra* note 3, at 22, 162-63; 1 PHILIP C. JESSUP & FRANCIS DEÁK, NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW 260 (1935); CHARLES S. HYNEMAN, THE FIRST AMERICAN NEUTRALITY 19. In April 1793, Vice President John Adams told Assistant Treasury Secretary Tench Coxe that "absolute total Neutrality is our only hope." 2 PAGE SMITH, JOHN ADAMS 840 (1962) (quoting Letter from John Adams to Tench Coxe (Apr. 25, 1793)). Randolph expressed the same sentiment a few years later to Monroe. See Letter from Edmund Randolph to James Monroe (June 1, 1795), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 705, 706 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833) [hereinafter AM. STATE PAPERS].

146. See, e.g., Letter from Thomas Jefferson to George Washington (Apr. 1, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 395, 395 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005) [hereinafter WASHINGTON'S PAPERS]; Letter from Alexander Hamilton to George Washington (Apr. 5, 1793), in 12 WASHINGTON'S PAPERS, *supra*, at 412, 413; Letter from Thomas Jefferson to George Washington (Apr. 7, 1793), in 12 WASHINGTON'S PAPERS, *supra*, at 419, 419; Letter from Alexander Hamilton to George Washington (Apr. 8, 1793), in 12 WASHINGTON'S PAPERS, *supra*, at 424, 424; Letter from Tobias Lear to George Washington (Apr. 8, 1793), in 12 WASHINGTON'S PAPERS, *supra*, at 434, 434.

zens from joining hostilities.<sup>147</sup> Because Americans were generally sympathetic to the French, the government's failure to act would have unduly disadvantaged the other powers.<sup>148</sup> Washington issued a Proclamation of Neutrality on April 22, which stated that the United States would remain "friendly and impartial toward the belligerent [sic] Powers" and threatened to punish Americans who might compromise American noninvolvement.<sup>149</sup> Thanks to Secretary of State Jefferson's lobbying, Washington did not use the word "neutrality" in the proclamation itself. Jefferson's reasons were two-fold. First, the President lacked constitutional authority to decide whether the United States would enter the war.<sup>150</sup> Second, the United States should use the promise of such a declaration to extract from the belligerents "the broadest privileges of neutral nations."<sup>151</sup> But the public quickly came to understand the pronouncement to be a declaration that America would remain neutral.<sup>152</sup>

---

147. See Letter from George Washington to Alexander Hamilton (Apr. 12, 1793), in 12 WASHINGTON'S PAPERS, *supra* note 146, at 447, 447; Letter from George Washington to Thomas Jefferson (Apr. 12, 1793), in 12 WASHINGTON'S PAPERS, *supra* note 146, at 448, 448; Minutes of a Cabinet Meeting (Apr. 19, 1793), in 12 WASHINGTON'S PAPERS, *supra* note 146, at 459, 459.

148. See THOMAS, *supra* note 145, at 33.

149. The Proclamation of Neutrality (Apr. 22, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 140, 140. By then, to discourage attacks on their commercial ships, states often informed belligerents that they planned on staying neutral. See 10 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 47 (1979).

The administration did not believe that the Proclamation itself gave it the power to prosecute Americans. Under Attorney General Edmund Randolph's legal theory, the United States could prosecute any American who attacked a country at peace with the United States. See Edmund Randolph, Opinion on Gideon Henfield (May 30, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 145, 145-46. The Proclamation merely warned Americans that they faced prosecution. See George Washington, Fifth Annual Message (Dec. 3, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 21, 22 (explaining the Proclamation's purpose).

150. Letter from Thomas Jefferson to James Madison (June 23, 1793), in 15 MADISON'S PAPERS, *supra* note 67, at 37, 37. Alexander Hamilton and James Madison later wrote a series of essays debating this issue under the pseudonyms *Pacificus* and *Helvidius*, respectively, with Hamilton defending the President's power to issue the Proclamation and Madison arguing that the President lacked the authority.

151. *Id.*

152. See THOMAS, *supra* note 145, at 35-36, 45-46.

The Cabinet encouraged U.S. attorneys to prosecute Americans who jeopardized U.S. neutrality.<sup>153</sup> In one famous case, William Rawle, the U.S. attorney for Philadelphia and future author of a leading treatise on constitutional law, indicted Gideon Henfield for serving on a French privateer, only to see the jury acquit.<sup>154</sup> Shortly after, the administration requested that France recall Edmond Charles Genêt, its minister to the United States, because he “was undertaking to authorize the fitting and arming vessels in that port, enlisting men, foreigners and citizens, and giving them commissions to cruize [sic] and commit hostilities against nations at peace with us.”<sup>155</sup>

Worried by Henfield’s acquittal and Genêt’s activities, Washington in December 1793 asked Congress to enact a law to “correct, improve, or enforce” his administration’s neutrality policy.<sup>156</sup> In June 1794, Congress passed the Neutrality Act, which prohibited:

- (1) any American from accepting a commission from a foreign country,
- (2) any person from enlisting himself or recruiting another person for foreign military service,
- (3) any person from fitting out or arming vessels with the intent that such vessels be used by a foreign country to attack countries at peace with the United States,
- (4) any person from “increasing or augmenting the force of any ship” belonging to a foreign state at war with any country that the United States was at peace with, and

---

153. Letter from Thomas Jefferson to William Rawle (May 15, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 40, 40–41; accord Letter from Thomas Jefferson to Richard Harison (June 12, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 261, 261.

154. See *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

155. Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 649, 650; see also THOMAS, *supra* note 145, at 227–31 (discussing the administration’s decision to request Genêt’s recall).

156. George Washington, Fifth Annual Message (Dec. 3, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 21, 22. Washington acted unilaterally for half a year because Congress was not in session from April through December. See CASTO, *supra* note 3, at 18.

(5) preparing military expeditions against countries at peace with the United States.<sup>157</sup>

It also gave federal courts jurisdiction to decide on the legality of prizes captured within territorial waters and authorized the President to enforce these provisions and to expel foreign vessels within United States territory.<sup>158</sup>

*B. The constitutional basis for American neutrality legislation*

When formulating U.S. policy in 1793, the Washington administration consistently referred to neutrality violations as offenses against the law of nations. The legislative history surrounding the bill's passage is less robust, but it too provides strong, albeit indirect, evidence that Congress enacted the Neutrality Act pursuant to the Define and Punish Clause. And in the decades after the Act's passage, prominent American politicians and scholars referred to neutrality violations as offenses against the law of nations and the Neutrality Act as passed pursuant to the Define and Punish Clause.<sup>159</sup>

---

157. Neutrality Act of 1794, ch. 50, §§ 1–5, 1 Stat. 381, 381–84. Prohibitions (1) and (2) are distinct because only officers received “commissions.” See *Commission*, 1 JOHNSON, *supra* note 19. Prohibition (1) thus covered officers, whereas prohibition (2) forbade the levying of ordinary soldiers and seamen. To “fit out” a vessel meant “to furnish; to equip; to supply with necessaries.” *Id.* Prohibitions (3) and (4) are distinct because prohibition (3) punished the *equipping and fitting out of any vessels* if there was *an intent* that such vessels be used by one state against another state which was at peace with the United States. (4), by contrast, only prohibited the *arming* of vessels *owned by a foreign state* at war with a state with whom the United States was at peace. Prohibition (3) thus contained a more stringent mens rea requirement, and prohibition (4) only applied to the arming of vessels already in a foreign state's service.

158. Neutrality Act of 1794, §§ 6–8, 1 Stat. at 384.

159. A few scholars have recently argued that the Neutrality Act could not have been enacted pursuant the Define and Punish Clause because it punished several acts that were not actually offenses against the law of nations. See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 207 (2007); Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1, 16 n.86 (1983). This argument, in short, assumes that Congress has a minimal power to define—the opposite of this Article's thesis.

1. *Pre-Neutrality Act understanding of neutrality*

The Neutrality Act's criminal provisions can be grouped into two general categories.<sup>160</sup> First, the United States punished Americans and U.S. residents who committed or aided and abetted hostilities against any of the belligerents by:

- (1) becoming an officer in a foreign army or navy,
- (2) enlisting himself or someone else to fight for a foreign power as a soldier, seaman, or privateer,
- (3) outfitting or arming a foreign states' vessels, or
- (4) preparing a military expedition against a foreign power at peace with the United States.<sup>161</sup>

Second, the prohibitions on enlisting Americans and U.S. residents, fitting out or arming war vessels, and preparing military expeditions covered "any person," including foreign government officials.<sup>162</sup> Throughout 1793 and early 1794, American officials referred to both categories as offenses against the law of nations. This Section goes through each in turn.

The Proclamation of Neutrality itself is explicit in stating that any American who commits hostilities against one of the belligerents violates the law of nations. Its operative provisions are reprinted below:

And I do hereby also make known, that whatsoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by *committing, aiding, or abetting hostilities against any of the said Powers . . .* and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, *violate the law of nations, with respect to the Powers at war, or any of them.*<sup>163</sup>

---

160. The Act's other provisions mentioned above—giving U.S. courts jurisdiction over captures made within territorial powers and the President's enforcement powers—did not prohibit any private conduct. Therefore, those provisions are not relevant for this Article's argument because Congress was not making use of the Define and Punish Clause.

161. Neutrality Act of 1794, §§ 1–5, 1 Stat. at 381–84.

162. *Id.* §§ 2–5, 1 Stat. at 383–84.

163. The Proclamation of Neutrality (Apr. 22, 1793), *reprinted in* 1 AM. STATE PAPERS, *supra* note 145, at 140, 140 (emphasis added).

The Proclamation thus informed the public that Washington had instructed U.S. attorneys to prosecute anybody who “violate[s] the law of nations” by “committing, aiding, or abetting hostilities against any” belligerents.

The U.S. government soon expanded on the legal theory underlying the Neutrality Proclamation. United States Chief Justice John Jay seems to have offered the first full explanation in his charge to a Virginia grand jury. He argued that “committing, aiding, and abetting” hostilities against the belligerents was an offense against the law of nations because the United States was at peace with the warring parties.<sup>164</sup> He also quoted Vattel for the proposition that states have an obligation under the law of nations to prevent their citizens from harming other states.<sup>165</sup> During Henfield’s trial, Rawle and his panel of three judges, Supreme Court Justices James Wilson and James Iredell and district court Judge Richard Peters, made the same arguments and described Henfield’s conduct as an offense against the law of nations.<sup>166</sup> As Rawle put it, “any aggression on the subjects of other nations done in an *hostile* manner and under *colour of war* [that is, under a foreign state’s commission] is a violation of that neutrality. . . . If *not* under the colour of war it would be an act of *piracy*.”<sup>167</sup> The Cabinet agreed.<sup>168</sup> And in his

---

164. See John Jay, Charge to the Grand Jury (May 22, 1793), *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 49, 56.

165. See *id.* at 55 (“[T]he nation or sovereign ought not to suffer the citizens to do any injury to the subjects of another State.” (quoting 2 VATTEL, *supra* note 66, § 72)).

166. See James Wilson, Charge to the Grand Jury, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 59, 64–65 (citing Vattel for the proposition that failure by the United States to prosecute its citizens would put it in breach of its international legal obligations); Grand Jury Indictment, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 66, 70, 71, 76, 76–77 (indicting Henfield for offenses against the law of nations); William Rawle, Argument, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 78, 79–80 (explaining that Henfield violated treaties of peace, which is an offense against the law of nations); James Wilson, Charge to the Petit Jury, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 83, 84–85 (“It is the joint and unanimous opinion of the Court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. . . . As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an *ex post facto* law, but a law that was in existence long before Gideon Henfield existed.”).

167. William Rawle, Argument, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 78, 78.

letter to then-minister to France Gouverneur Morris outlining America's understanding of neutrality law, Jefferson made the same arguments and sent copies of Wilson and Jay's charges for further elaboration.<sup>169</sup>

Turning to the second category, American officials also argued that foreign governments' recruitment of Americans and outfitting and arming of their ships in American ports were offenses against the law of nations. Quoting Vattel, Jay told the Virginia grand jury that to recruit Americans without the U.S. government's permission was to violate U.S. sovereignty.<sup>170</sup> In a letter to Richard Harison, the U.S. attorney for New York, Hamilton made the same argument, calling such acts "offense[s] against the law of Nations."<sup>171</sup> Hamilton's memorandum to Washington, written in response to Genêt's recruiting Americans and fitting out French privateers, expanded on the point. He claimed, without citation, that "[t]he equipping manning and commissioning [sic] of Vessels of War" was "essentially of the same nature" as levying troops.<sup>172</sup> Both were

---

168. See Edmund Randolph, Opinion on the case of Gideon Henfield (May 30, 1793), in 1 AM. STATE PAPERS, *supra* note 145, at 152, 152; Thomas Jefferson, Notes on Neutrality Questions (July 13, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 498, 498–99 (noting that the Cabinet unanimously agreed with Randolph's opinion).

169. See Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 697, 702. To be clear, nobody was arguing, along the lines of Blackstone, that neutrality violations were "acts of hostilities against such as are in amity, league, or truce with [the United States]" that amounted to violations of "a general implied safe-conduct." BLACKSTONE, *supra* note 45, at \*68. A safe conduct was a right to "safely pass through the places where he who grants it is master," which included U.S. territory and places where U.S. troops were present. 3 VATTEL, *supra* note 66, § 265 (emphasis added); *accord id.* § 268; see also BLACKSTONE, *supra* note 45, at \*68 (discussing "acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct" (emphasis added)); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 873 (2006) (discussing same). Indirectly harming another country in U.S. territory, by joining the navy of that country's enemy or outfitting its enemy's ships, did not count as "acts of hostilities."

170. John Jay, Charge to the Grand Jury (May 22, 1793), *Henfield's Case*, reprinted in WHARTON, *supra* note 144, at 49, 56 (citing 3 VATTEL, *supra* note 66, § 15).

171. Letter from Alexander Hamilton to Richard Harison (June 13–15, 1793), in 14 HAMILTON'S PAPERS, *supra* note 108, at 539, 539; *accord* Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON'S PAPERS, *supra* note 108, at 454, 455.

172. Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON'S PAPERS, *supra* note 108, at 454, 455.

“among the highest and most important exercises of sovereignty,” and it is an offense against the law of nations “for one Nation to do acts of the above description, within the territories of another, without its consent or permission.”<sup>173</sup> To preserve its neutrality, the United States must ban such practices because it was “contrary to the duty of a Neutral Nation to suffer itself to be made an instrument of hostility, by one power at war against another.”<sup>174</sup> The Cabinet unanimously agreed.<sup>175</sup>

Finally, in March 1794, Washington issued a second proclamation with the Cabinet’s unanimous approval forbidding the enlisting of Americans to fight against countries with which the United States is at peace.<sup>176</sup> His administration had heard news that a group of Kentuckians was planning to attack Spanish Florida.<sup>177</sup> Genêt had commissioned General George Rogers Clark, the group’s leader, and promised to fund the expedition.<sup>178</sup> The Proclamation described these “unwarrantable measures” as “contrary to the Laws of nations and to the duties incumbent on every citizen of a neutral state.”<sup>179</sup>

## 2. *The Neutrality Act’s legislative and post-enactment history*

The Neutrality Act’s legislative history provides both direct and indirect evidence that Congress enacted the law pursuant to the Define and Punish Clause. The direct evidence mostly comes from Washington’s request for legislation. He asked Congress to codify his neutrality rules because “penalties on violations of the

---

173. *Id.*

174. *Id.*

175. See Thomas Jefferson, Notes on Neutrality Questions (July 13, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 498, 498; see also Memorandum from Edmund Randolph (May 28–30, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 137, 137; Memorandum from Henry Knox (May 16, 1793), in 12 WASHINGTON’S PAPERS, *supra* note 146, at 595, 596.

176. Alexander Hamilton, Cabinet Meeting, Opinion on a Proclamation Against Forces to Be Enlisted in Kentucky for the Invasion of Spanish Territory (Mar. 18–19, 1794), in 16 HAMILTON’S PAPERS, *supra* note 108, at 162, 162. By this point, Jefferson had left the Cabinet, Randolph had become Secretary of State, and William Bradford had become Attorney General.

177. CHARLES G. FENWICK, THE NEUTRALITY LAWS OF THE UNITED STATES 24 (1913) (“One army was preparing, it was said, to lay siege to New Orleans, then in the possession of Spain, while another was planning to march across Georgia and invade the Floridas.”).

178. See THOMAS, *supra* note 145, at 178–79.

179. See Proclamation on Expeditions Against Spanish Territory (Mar. 24, 1794), reprinted in 15 WASHINGTON’S PAPERS, *supra* note 146, at 446, 446.

law of nations may have been indistinctly marked, or are inadequate.”<sup>180</sup> This language mirrored notes Jefferson prepared for Washington to consider when composing his speech:

Whether the duties of a nation at peace towards those at war, imposed by the laws and usages of nature, and nations, and such other offences against the law of nations as present circumstances may produce are provided for by the municipal law with those details of internal sanction and coercion, the mode and measure of which that alone can establish?<sup>181</sup>

In the margin next to this sentence, Jefferson noted that Jay’s and Wilson’s grand jury charges accurately described the United States’ international duties. He also added, “Offences against the Law of Nations. Genet’s conduct is one.”<sup>182</sup> That both Jefferson and Washington wanted Congress to enact a statute to criminalize “violations of the law of nations” and “offenses against the law of nations” suggests that they thought Congress would enact the law pursuant to the Define and Punish Clause.

Congressional debates surrounding the Neutrality Act’s passage offer mostly indirect evidence about the law’s constitutional basis. The bill was undoubtedly controversial. It was raised in Congress on at least thirteen occasions.<sup>183</sup> But almost none of the Congressional debates were recorded. What has survived reveals that many Congressmen believed that the Neutrality Act would punish offenses against the law of nations. Congressman Fisher Ames thought it important that Congress enact a law specifying neutrality violations because “[j]uries . . . are not equal to the task of determining points of the Law of Nations.”<sup>184</sup> Congressman William Vans Murray said the law was needed because “our Courts of Justice were incapable of enforcing” the law of nations.<sup>185</sup> He also repeated the administration’s argu-

---

180. George Washington, Fifth Annual Message (Dec. 3, 1793), *reprinted in* 1 AM. STATE PAPERS, *supra* note 145, at 21, 22.

181. Thomas Jefferson, Materials for the President’s Address to Congress (Nov. 22, 1793), *in* 27 JEFFERSON’S PAPERS, *supra* note 95, at 421, 423.

182. *Id.*

183. Those dates were February 12, 13, 14, 18, 20, and 25; March 7, 11, 12, and 13; and June 3, 4, and 5. *See* 4 ANNALS OF CONG. 43, 44, 47, 56, 64, 65, 66–67, 68, 117–18, 120 (1794).

184. *Id.* at 743.

185. *Id.* at 746.

ment that foreign recruitment of American soldiers and seamen violated U.S. sovereignty.<sup>186</sup>

The controversy surrounding the bill also provides indirect evidence that it was enacted pursuant to the Define and Punish Clause. The law touched on deep ideological divisions: Democratic-Republicans were more sympathetic to France, whereas Federalists saw the French Revolution as destabilizing. Because both sides assumed that Britain would benefit more from American neutrality, Federalists were more inclined to support stricter neutrality measures than Republicans.<sup>187</sup> *The Annals of Congress* does not record the margin by which the House passed the Neutrality Act. But most of the votes surrounding the bill were very close. Vice President John Adams had to break ties in the Senate:

- (1) to keep in place a provision banning the sale of belligerents' prizes in U.S. ports (the House later struck this part),
- (2) to preserve a section allowing the President to enforce the act with the militia and military,
- (3) to allow the bill to move on to the third reading, and
- (4) to pass the bill.<sup>188</sup>

Commenting on one of the votes, Adams wrote his wife that the issue "seemed to me to involve nothing less than Peace and War."<sup>189</sup> The Senate also rejected by two votes an amendment to sunset the bill after six months.<sup>190</sup> The House was more pro-French than the Senate and initially tabled the bill, only taking it up for discussion and passing it after learning of the attempted military expedition against Louisiana, discussed earlier.<sup>191</sup>

Given the bill's controversy, it seems safe to assume that Republicans who favored more lax neutrality rules would have used every argument they could think of against the bill. But

---

186. *Id.*

187. See, e.g., WOOD, *supra* note 107, at 175–85.

188. 2 S. JOURNAL, 3rd Cong., 1st Sess. 43, 44, 47 (1794).

189. Letter from John Adams to Abigail Adams (Mar. 12, 1793), in 2 LETTERS OF JOHN ADAMS, ADDRESSED TO HIS WIFE, at 146, 146 (Charles Francis Adams ed., 1841).

190. 2 S. JOURNAL, 3rd Cong., 1st Sess. 43 (1794).

191. See CASTO, *supra* note 3, at 160.

there is no evidence anywhere, in private correspondence or the remaining debates, that anyone had any doubts about the bill's constitutionality. Many at the time believed that Congress could only enact criminal legislation pursuant to the three clauses in the Constitution expressly vesting Congress with punishment powers: the Counterfeiting, Define and Punish, and Treason Clauses. During the Virginia and North Carolina debates over ratifying the Constitution, for example, George Nicholas and James Iredell, a future Supreme Court Justice, made this argument.<sup>192</sup> Madison did too when speaking against the Sedition Act in 1798.<sup>193</sup> Many others in Congress expressed this view over the next half-century.<sup>194</sup> The Crimes Act of 1790, the country's first federal criminal law, had thus been extremely limited, only criminalizing treason, felonies committed in areas under exclusive federal jurisdiction, piracies, felonies on the high seas, counterfeiting, offenses against the law of nations, and crimes interfering with the function of U.S. courts (like perjury). The Neutrality Act was the second criminal statute Congress ever passed, it had no jurisdictional limits, and it related to a particularly salient foreign policy issue. That nobody argued that it might be unconstitutional suggests that people understood the law to have been passed pursuant to one of Congress's three enumerated criminal punishment powers. The Define and Punish Clause is the likeliest candidate.<sup>195</sup>

---

192. *The Virginia Convention, June 16, 1788, Debates* (statement of Mr. Nicholas), in 10 DHRC, *supra* note 39, at 1299, 1333–34; *Marcus IV, NORFOLK AND PORTSMOUTH J.*, Mar. 12, 1788, reprinted in 16 DHRC, *supra* note 39, at 379, 381.

193. 8 ANNALS OF CONG. 2152 (1798).

194. See 1 REG. DEB. 155 (1825); 12 REG. DEB. 1171 (1836); CONG. GLOBE APP'X, 24th Cong., 1st Sess. 284 (1836); CONG. GLOBE, 33rd Cong., 1st Sess. 1111 (1854).

195. Kontorovich finds it noteworthy that Congress "did not describe the law as Offenses legislation when it was passed" because "Washington repeatedly invoked the law of nations in his proclamation, and it was frequently mentioned in *Henfield's Case*." Kontorovich, *supra* note 6, at 1710. He also notes that the 1790 Crimes Act that punished piracy, violation of safe conduct, and infringement of ambassadors' rights referenced the law of nations. The Neutrality Act of 1794 did not, which implies it was not actually enacted pursuant to the Define and Punish Clause. *Id.* (discussing the Crimes Act of 1790, ch. 9, §§ 8, 25–28, 1 Stat. 112, 113–14, 117–18).

His first argument conflates absence of evidence with evidence of absence. Almost no debates remain, so we should not consider this relative silence to be particularly striking. And as discussed, a few legislators did invoke the law of nations.

There is no other obvious constitutional basis for the legislation. Michael Ramsey and Eugene Kontorovich have proposed two alternatives: a general power to “carry[] into effect the President’s power to . . . declare neutrality” and the Declare War Clause.<sup>196</sup> But the text of the Constitution does not explicitly give Congress a power to carry into effect the President’s foreign policy.<sup>197</sup> Many also doubted that the President had the power to declare neutrality in the first place.<sup>198</sup> So somebody probably would have objected to the Act on constitutional grounds had that been the sole basis for the Act. Finally, in his Fifth Annual Message, Washington said he wished to leave it to “Congress to

---

Kontorovich’s second argument probably does not work either. The argument takes for granted a level of consistency in draftsmanship across two early Congresses that may not have existed. It also assumes either that whenever Congress punished a criminal offense, it referred to the law’s constitutional underpinnings, or that Congress just did so for offenses against the law of nations. The first possibility does not seem to be true, as the Neutrality Act itself lacks any reference to the constitutional provisions that authorize it. The second possibility seems a little ad hoc, and it does not hold true even for the three provisions Kontorovich mentions in the Crimes Act of 1790. Of those, only people who sued or prosecuted ambassadors were explicitly labeled “violators of the law of nations.” Section 28 also references the law of nations with regards to violating safe-conduct, but only as a catch-all: “any person shall violate any safe-conduct or passport . . . or shall assault, strike, wound, imprison, or in any other manner infract the law of nations.” 1 Stat. at 118 (emphasis added). And, as Kontorovich points out, the piracy provision contains no reference to the law of nations. Kontorovich, *supra* note 6, at 1710; Crimes Act of 1790, § 8, 1 Stat. at 113–14. He notes that this provision was later amended to do so. Kontorovich, *supra* note 6, at 1710 n.160. But Congress enacted that amendment to expand the definition of piracy following *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), which had narrowed the piracy statute, not to clarify the statute’s constitutional foundation. See Joel H. Samuels, *The Full Story of United States v. Smith, America’s Most Important Piracy Case*, 1 PENN. ST. J.L. & INT’L AFF. 320, 334 (2012). So only one of the three provisions in the Crimes Act could be read as referencing “the law of nations” to explain the constitutional underpinnings of the law. The other two mention it solely to clarify what Congress was punishing. By contrast, defining neutrality violations by reference to the “law of nations” would have made little sense: Washington had asked for the law because he thought the law of nations too unclear a reference point. See George Washington, Fifth Annual Message (Dec. 3, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 21, 22.

196. RAMSEY, *supra* note 159, at 207; accord Kontorovich, *supra* note 6, at 1710.

197. See also *supra* notes 192–93 and accompanying text.

198. See, e.g., James Madison, “*Helvidius*” No. II, GAZETTE OF THE U.S., Aug. 31, 1793, reprinted in 15 MADISON’S PAPERS, *supra* note 67, at 80, 86 (“It is certain that a faithful execution of the laws of neutrality may tend as much in some cases, to incur war from one quarter, as in others to avoid war from other quarters. The executive must nevertheless execute the laws of neutrality whilst in force, and leave it to the legislature to decide whether they ought to be altered or not.”).

correct[] [and] to improve" his policy, which implies that Congress could do more than just make his rules more effective.<sup>199</sup>

There is next to no historical support for the Declare War Clause theory either. The argument for this view is that prohibiting neutrality violations acts was "necessary and proper" to preserve Congress's power to decide whether to go to war. In his 1793 letter to Morris, Jefferson referred to Americans who attacked foreign countries in violation of neutrality rules as being "at war" with those countries when the Constitution only gives Congress the authority to go to war.<sup>200</sup> Justice Wilson made a similar point in his charge to the petit jury in *Henfield's Case*.<sup>201</sup> But these references to the Declare War Clause were just rhetorical flourishes. Congress, after all, had not yet acted, so they could not have been arguing that the Declare War Clause provided the constitutional basis for the prosecutions. Nor did anybody explicitly state over the following decades that Congress enacted the Neutrality Act pursuant to the Declare War Clause. At most, some people referred to American neutrality violators as making war, just as Jefferson and Wilson did. But often those same people or their contemporaries referred to neutrality violations as offenses against the law of nations.<sup>202</sup>

---

199. George Washington, Fifth Annual Message (Dec. 3, 1793), *reprinted in* 1 AM. STATE PAPERS, *supra* note 145, at 21, 22.

200. Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* 26 JEFFERSON'S PAPERS, *supra* note 95, at 697, 701.

201. James Wilson, Charge to the Petit Jury, *Henfield's Case*, *reprinted in* WHARTON, *supra* note 144, at 83, 84.

202. In 1856, for example, Congressman Lemuel Evans asserted that the power to declare war implies a power to prevent "filibusters," military expeditions launched by private citizens against foreign countries (prohibited by § 5 of the Neutrality Act). But he also said that U.S. neutrality laws punished offenses against the law of nations because "compromis[ing] the pacific relations of [one's] own Government . . . is an offense against . . . the public code of nations." CONG. GLOBE APP'X, 34th Cong., 1st Sess. 1304 (1856). Around the same time, a few other Congressmen and Presidents Millard Fillmore and James Buchanan referred to filibusters as offenses against the law of nations and the Neutrality Acts as passed pursuant to the Define and Punish Clause. *See* CONG. GLOBE, 35th Cong., 1st Sess. 293 (1858) (statement of Rep. Stephens); *id.* at 503 (statement of Rep. Winslow); Millard Fillmore, Second Annual Message (Dec. 2, 1851), *reprinted in* 5 PRESIDENTS' PAPERS, *supra* note 1, at 113, 115; James Buchanan, Message to the Senate of the United States (Jan. 7, 1858), *reprinted in* 5 PRESIDENTS' PAPERS, *supra* note 1, at 466, 466. No other President ever opined on the issue. Some have interpreted President Ulysses S. Grant as implying that the Neutrality Act was passed under the "declare war" clause: "[I]ndividual citizens can not be tolerated in making war." Ulysses S. Grant, Message to the Senate and House of Representatives (June 13,

By contrast, political leaders and legal treatises over the coming decades referred to neutrality violations as offenses against the law of nations and neutrality legislation as enacted pursuant to the Define and Punish Clause. During the 1797 debate surrounding reauthorization of the Neutrality Act (the original bill was set to expire in March 1793), Representative William Vans Murray claimed that the bill criminalized offenses against the law of nations.<sup>203</sup> A 1798 letter from James Madison to Thomas Jefferson likewise argued that only Congress had the power to lift a ban on the arming of merchantmen, a measure

---

1870), reprinted in 7 PRESIDENTS' PAPERS, *supra* note 1, at 64, 66. But this looks like the same sort of rhetorical device that Jefferson and Wilson used, not a statement about the constitutional source of the law.

Kontorovich also points to an 1866 Report of the House of Representatives' Committee on Foreign Affairs claiming that "[t]he act of 1794 was not passed in pursuance of the provisions of the Constitution making the duty of Congress to punish offenses against the law of nations." Kontorovich, *supra* note 6, at 1710 n.174 (citing the Report of the Committee on Foreign Affairs (July 26, 1866), reprinted in THE COUNTER CASE OF GREAT BRITAIN AS LAID BEFORE THE TRIBUNAL OF ARBITRATION CONVENED AT GENEVA UNDER THE PROVISIONS OF THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND MAJESTY THE QUEEN OF GREAT BRITAIN CONCLUDED AT WASHINGTON, MAY 8 1871, at 677, 678 (1872) [hereinafter THE COUNTER CASE OF GREAT BRITAIN]). But this report did not cite any authority for this assertion. It just pointed out that no other nation had passed a similar law before. See THE COUNTER CASE OF GREAT BRITAIN, *supra*, at 674. Nor did it say that there was any other constitutional basis for the law. For that matter, the report probably would not have bothered making this claim about the Define and Punish Clause unless it was responding to what it believed to be a somewhat widely-held misconception. There is, after all, little point in attacking a view that nobody holds. Finally, the committee's legal judgments come off as politicized and very unreliable. The report's author wanted to repeal U.S. neutrality laws because he wished to legalize private invasions of Canada carried out by the Fenian Brotherhood, an Irish nationalist group that had launched an attack from the United States that same year. See *id.* at 684 ("The recent memorable invasion of Canada offers a signal exhibition of the spirit and character of our Government. Great Britain has given us no cause to respect her sense of justice or her disregard for right."). Lobbying from the shipbuilding industry probably biased the report too. A district court had, pursuant to the Neutrality Act, just blocked the sale of a war vessel to Chile for fear that it might be used in its war against Spain. Repealing neutrality laws would open new markets. See FENWICK, *supra* note 177, at 47–48.

203. 6 ANNALS OF CONG. 2229 (1797) ("The offense which was forbidden by the first section of the [Neutrality Act], was an offense against the Law of Nations . . ."); accord Neutrality Act of 1794, ch. 50, § 10, 1 Stat. 381, 384; see also 35 ANNALS OF CONG. 1273–74 (1820) (statement of Rep. Pindall) ("Congress has power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. . . . Accordingly, the acts of 1794, 1800, 1807, and other laws on this subject, abound throughout with directions concerning libels, prizes, indictments, definitions of offenses, penalties and imprisonment. These acts are all warranted by that clause of the Constitution . . .").

put into place earlier to enforce the Neutrality Act, because the regulation “comes expressly within the power to ‘define the law of Nations’ given to Congress.”<sup>204</sup> In a footnote of his edition of Blackstone, St. George Tucker listed the Neutrality Act’s operative provisions as examples of “offenses against that universal law, committed by private persons.”<sup>205</sup> Chancellor James Kent’s legal treatise said that Henfield committed an “offense against the law of nations.”<sup>206</sup> Kent also wrote, “The violation of a treaty of peace . . . [was] a violation of the law of nations.”<sup>207</sup> Decades after he prosecuted Henfield, Rawle wrote a treatise that was silent about the Neutrality Act but grounded the Neutrality Proclamation under the President’s power to enforce treaties.<sup>208</sup> He presumably meant what he said at Henfield’s trial: Henfield had committed an offense against the law of nations because he violated peace treaties. So Rawle’s treatise also provides support for the Define and Punish Clause thesis.<sup>209</sup> Finally, Congressman Edward Livingston’s 1828 pro-

---

204. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 30 JEFFERSON’S PAPERS, *supra* note 95, at 238, 239; accord Henry Knox, Enforcing the Neutrality Act of 1794 (July 21, 1794), reprinted in 2 AM. STATE PAPERS, *supra* note 145, at 77, 77; see also Lobel, *supra* note 159, at 15 n.86 (treating Madison’s letter as evidence that the Neutrality Act was passed pursuant to the Define and Punish Clause); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 182 n.63 (1997) (same). Madison wrote this letter in response to President John Adams’s announcement that he would lift the ban without Congressional approval. See 8 ANNALS OF CONG. 1272 (1798) (message of President Adams).

205. 5 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 72–73, 73 n.14 (Paul Finkelman & David Cobin eds., 1996) (1803).

206. 1 KENT, *supra* note 124, at 312.

207. *Id.* at 169. That Kent does not mention the Neutrality Act in his chapter on offenses against the law of nations is not too probative. That chapter only addresses the “most obvious” offenses at the time, all of which were, probably not coincidentally, mentioned by Blackstone: “the violations of safe conduct, infringements of the rights of ambassadors, and piracy.” *Id.* at 170. Kent also discussed the slave trade, but only because Congress had declared slave trading to be piracy. See *id.* at 181.

208. See RAWLE, *supra* note 99, at 75.

209. Kontorovich finds it suspicious that Justice Joseph Story, in his treatise, “did not mention the famous and controversial law in [his] discussion of” the Define and Punish Clause. See Kontorovich, *supra* note 6, at 1715. But this silence is not at all suggestive. Story did not mention *any* statutes as having been passed pursuant to Congress’s *define and punish* power, even though, at minimum, the first Congress criminalized piracies, felonies on the high seas, assaults on ambas-

posed national penal code listed neutrality violations as offenses against the law of nations, as did Francis Wharton's mid-nineteenth and John Barbee Minor's late-nineteenth century treatises on criminal law.<sup>210</sup> There is accordingly strong evidence that the Neutrality Act of 1794 was enacted pursuant to the Define and Punish Clause.

### C. *The Neutrality Act and the law of nations*

The United States took on more neutral duties than the law of nations required. Neutrals had to prevent hostilities in their territorial seas but had no obligation to prevent their citizens joining foreign militaries or outfitting belligerents' vessels.<sup>211</sup> By the end of the nineteenth century, the international law of neutrality mirrored the obligations set out by the Neutrality Act,<sup>212</sup> but the Act was novel in 1794. International law followed America's example, not the other way around. This disconnect between early American neutrality legislation and international law bothered some. Yet nobody seems to have thought that Congress was constitutionally limited to punishing offenses against neutrality recognized by the law of nations.

#### 1. *Respect for neutral territory*

By the middle of the eighteenth century, it was relatively well-established that neutrals must prevent belligerents from conducting hostile acts on their territory.<sup>213</sup> This was the first neutral duty to be recognized, neutrality being a new concept in the 1700s.<sup>214</sup>

---

sadors, and violations of safe passage. See 3 STORY, *supra* note 112, §§ 1152–1162, at 52–58; Crimes Act of 1790, ch. 9, §§ 8–12, 25–28, 1 Stat. 112, 113–15, 117–18.

210. See EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE UNITED STATES OF AMERICA 54 (1828); JOHN BARBEE MINOR, EXPOSITION OF THE LAW OF CRIMES AND PUNISHMENTS 18 (1894); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 80 (2d ed. 1852) (1846).

211. W.E. HALL, INTERNATIONAL LAW § 21, at 64 (1880); FENWICK, *supra* note 177, at 4–5.

212. See GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW, WITH AN ACCOUNT OF ITS ORIGIN, SOURCES AND HISTORICAL DEVELOPMENT 434 (1903).

213. HALL, *supra* note 211, § 209, at 504–05; see also JESSUP & DEÁK, *supra* note 145, at 256, 257 & n.31.

214. See JESSUP & DEÁK, *supra* note 145, at 249 (first neutral duty); GEOFFREY BUTLER & SIMON MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 231 (1928) (duty emerged in the eighteenth century).

Many ignored this obligation, but by 1793, at least seven European states, including Britain, had agreed to it in principle.<sup>215</sup>

The United States complied with this duty. Just ten days after the United States issued the Neutrality Proclamation, British minister to the United States George Hammond informed Jefferson that a French frigate had captured the British ship *Grange* in Delaware Bay. Citing “this infringement on [American] neutrality,” Hammond requested the United States attempt to restore the *Grange* to its British owners.<sup>216</sup> The Cabinet agreed with Hammond that belligerents may not attack one another in neutral waters, and Jefferson wrote to French Minister Jean Baptiste Ternant on May 15 requesting that the ship be restored to the British.<sup>217</sup> The Neutrality Act subsequently helped the United States comply with this neutral obligation by giving federal courts jurisdiction to rule such captures unlawful and authorizing the President to expel foreign vessels in territorial waters, as mentioned above.<sup>218</sup>

## 2. Prohibition on foreign enlistment

As we saw earlier, a major part of American neutrality policy was the prohibition on Americans and U.S. residents joining belligerents’ militaries. The Act banned both groups from ac-

---

215. See HANNIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW § 607, at 639 (1901) (noting that many countries ignored this principle); HALL, *supra* note 211, § 209, at 504–05 (same); THOMAS ALFRED WALKER, THE SCIENCE OF INTERNATIONAL LAW 429 (1893) (same); JESSUP & DEÁK, *supra* note 145, at 256 (“[T]he sanctity of neutral territory had been recognized before the dawn of the nineteenth century by at least Great Britain, France, Genoa, Portugal, the Netherlands, Denmark and Hamburg. The rule was also laid down in numerous treaties. Occasional breaches of the law by the various states do not destroy the recognition of this principle.” (footnotes omitted)); *id.* at 252 (“In 1747 at least, English legal opinion fully recognized that neutral waters must be respected.”); see also BUTLER & MACCOBY, *supra* note 214, at 242.

216. See Memorial from George Hammond to Thomas Jefferson (May 2, 1793), in 25 JEFFERSON’S PAPERS, *supra* note 95, at 637, 637–38.

217. See Edmund Randolph, Opinion on the *Grange* (May 14, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 31, 35; Letter from Thomas Jefferson to Jean Baptiste Ternant (May 15, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 42, 43–44.

218. Neutrality Act of 1794, ch. 50, §§ 6–8, 1 Stat. 381, 384. In this respect, the Act was just codifying the status quo. The Supreme Court in *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794) had held that district courts could decide on the legality of captures within U.S. territorial waters. And the President had already been using the armed forces to enforce his neutrality rules. See THOMAS, *supra* note 145, at 278–79.

cepting letters of marque or commissions, enlisting, or enlisting others in a foreign army or navy to fight against a country at peace with the United States.<sup>219</sup> The law of nations did not require the United States to go so far, as can be seen by late-eighteenth-century state practice and the leading treatises of the day. The Washington administration's arguments in favor of its interpretation were, consequently, quite weak.

There was next to no precedent for this American policy. It was common for states to recruit foreign mercenaries from neutral countries; Britain continued this practice through the eighteenth century.<sup>220</sup> In the sixteenth and seventeenth centuries, according to Philip Jessup and Francis Deák, "[t]he practice of permitting levies of troops was common and frequently sanctioned by treaty."<sup>221</sup> But just as often, treaties contained "reciprocal provisions by which a state agreed not to permit levies by the enemy of the other contracting party."<sup>222</sup> As of the 1700s, a few states prohibited their subjects from enlisting with foreign armies, but they enacted those laws to prevent their subjects from strengthening hostile powers, not out of a sense of neutral duty.<sup>223</sup> As the Supreme Court recognized in *The Three*

---

219. Neutrality Act of 1794, §§ 1–3, 1 Stat. at 381–83.

220. See TRAVERS TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES* § 223, at 454–56 (2d. ed. 1875) (1861); 10 VERZIJL, *supra* note 149, at 93.

221. JESSUP & DEÁK, *supra* note 145, at 25.

222. *Id.* at 27; see also 2 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 844, at 693 (1922) (same). The United States included such provisions in its treaties with France, the Netherlands, Sweden, and Prussia. See U.S.-France Treaty of Amity and Commerce, *supra* note 143, art. 21, 8 Stat. at 24; U.S.-Dutch Treaty of Amity and Commerce, *supra* note 143, art. 19, 8 Stat. at 44; Treaty of Amity and Commerce Concluded between his Majesty the King of Sweden and the United States of North-America, art. 23, 8 Stat. 60, 74 (1783); U.S.-Prussia Treaty of Amity and Commerce, *supra* note 143, art. 20, 8 Stat. at 94.

223. See HALL, *supra* note 211, § 211, at 511 ("England and Holland for municipal reasons enacted laws expressly to restrain their subjects from entering the service of foreign state . . . ." (emphasis added)). Britain, for instance, forbade its subjects from enlisting with foreign militaries as of the beginning of the seventeenth century, and it renewed this statute several times out of fear that its subjects might join armies of the deposed Stuart Kings. See An act to prevent the listing Her Majesties subjects to serve as soldiers without Her Majesties license, 13 Anne, c. 10 (1713); An act to prevent the listing his Majesty's subjects to serve as soldiers without his Majesty's license, 9 George II, c. 30 (1736); Act of 29 George II, c. 17 (1756); CHARLES WARREN, *A MEMORANDUM OF LAW ON THE CONSTRUCTION OF SECTION 10 OF THE FEDERAL PENAL CODE* 10–11 (1915); 2 WHEATON, *supra* note 102, § 14, at

*Friends*,<sup>224</sup> the Neutrality Act of 1794 was the first such statute enacted as a neutrality law.<sup>225</sup>

Only in 1778, 1779, and 1780 did European states (specifically, Hamburg, Venice, Genoa, Tuscany, the Papal States, the Two Sicilies, and the Netherlands) begin issuing neutrality proclamations like Washington's.<sup>226</sup> Seven proclamations in three years might indicate that a new rule under the law of nations was emerging. But these regulations probably did not establish a neutral duty to prevent one's subjects from enlisting in a war, for three reasons.<sup>227</sup> First, nobody in the United States mentioned these proclamations in 1793 or 1794; it is possible that nobody knew they existed.<sup>228</sup> Second, the United States did not subscribe to this principle during the Revolutionary War. Before France entered the war, U.S. agents recruited privateers in France to attack the British.<sup>229</sup> Third, these proclamations differed in scope from Washington's. Some did not forbid their subjects from serving in foreign militaries.<sup>230</sup> Others went further than the American Proclamation. All the Italian states, for instance, barred their subjects from taking belligerent soldiers as passengers, and Venice and the Two Sicilies prohibited their subjects from selling contraband to the belligerents.<sup>231</sup> The Washington administration, by contrast, never seems to have considered the first policy and informed the French and British ministers that contraband could be confiscated by the warring parties under the law of nations, but the United States had no obligation to suppress it.<sup>232</sup> If Washington's administration be-

---

153. The Neutrality Act of 1794 used the same phrases as these statutes, which suggests that Congress used them as a model. See WARREN, *supra*, at 9.

224. 166 U.S. 1 (1897).

225. See *id.* at 52–53; see also 10 VERZIJL, *supra* note 149, at 96.

226. See HALL, *supra* note 211, § 211, at 512–13.

227. See *id.* § 211, at 513 (“Custom in these matters was growing; it was not yet established.”).

228. See HYNEMAN, *supra* note 145, at 16.

229. See Precedents Appealed to by the United States, reprinted in THE COUNTER CASE OF GREAT BRITAIN, *supra* note 202, at 38, 40.

230. See, e.g., Regulations Regarding the Commerce and Navigation of Hamburg during War (Sept. 18, 1778), reprinted in 1 A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 633, 633–36 (Francis Deák & Philip C. Jessup eds., 1939).

231. See BUTLER & MACCOBY, *supra* note 214, at 243.

232. See Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 38, 39. The administration was on solid legal ground. See VERZIJL, *supra* note 149, at 86.

lieved that these neutrality edicts inaugurated a new rule of the law of nations, they presumably would have cited them or at least copied them more closely.

The leading eighteenth-century international law treatises generally did not recognize such a rule either. To take just two examples, Cornelius Van Bynkershoek's treatise argued that neutrals had a "duty to be every way careful not to intermeddle at all with the war, and not to do more or less justice to one party than to the other."<sup>233</sup> Emer de Vattel said that "a neutral *nation*" must not "furnish troops, arms, ammunition, or any thing of direct use in war."<sup>234</sup> But they only meant that neutral *states* must not assist the belligerents, not that neutral states *must prevent their subjects* from doing so.<sup>235</sup> Both permitted the levying of troops in neutral territory, at least in some cases.<sup>236</sup> Only G.F. von Martens, in a 1789 passage never cited by anyone in Washington's Cabinet, suggested that a neutral state was obliged to prohibit its people from accepting foreign letters of marque.<sup>237</sup> But he justified this view on the ground that many recent commercial treaties contained such provisions.<sup>238</sup> And as we have seen, treaties guaranteed the right to levy troops in neutral territory just as often.<sup>239</sup> Therefore, no such rule existed.<sup>240</sup>

As mentioned earlier, the administration had also argued that under rules of state responsibility, all states, not just neutrals in war, must punish their subjects who harm other states.<sup>241</sup> Failure to punish Americans and U.S. residents who

---

233. CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 67 (Peter Stephen Du Ponceau trans., 1810) (1737).

234. 3 VATTEL *supra* note 66, § 104 (emphasis added).

235. See HALL, *supra* note 211, § 210, at 508.

236. See BYNKERSHOEK, *supra* note 233, at 508; 3 VATTEL *supra* note 66, § 15.

237. GEORG FRIEDRICH VON MARTENS, SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE; WITH A LIST OF THE PRINCIPAL TREATIES, CONCLUDED SINCE THE YEAR 1748 DOWN TO THE PRESENT TIME, INDICATING THE WORKS IN WHICH THEY ARE TO BE FOUND 312 n.† (William Cobbett trans., 1795) (1789).

238. See *id.*; see also HALL, *supra* note 211, § 210, at 508.

239. See HALL, *supra* note 211, § 210.

240. See, e.g., CASTO, *supra* note 3, at 92–93; 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 288, at 351 (3d ed., 1921) (1906); T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 479, 480–81, 488 (2d ed. 1899) (1895). Hall, citing the Italian proclamations, seems to be the only commentator who was uncertain as to whether this rule of international law had taken hold before 1793. See HALL, *supra* note 211, § 211, at 511.

241. See HALL, *supra* note 211, § 210.

served in foreign militaries would put the United States in breach of that obligation. This argument was probably not right. In one essay defending the Neutrality Proclamation, Hamilton said that lesser measures would suffice. Simply issuing the proclamation relieved the United States of its "responsibility . . . for secret and unknown violations of the rights of any of the warring parties by its citizens."<sup>242</sup> Additionally, the state responsibility argument would imply that a state could allow foreign recruitment without giving belligerents cause for war under the rules of neutrality, but this permission would give belligerents cause for war under the law of state responsibility. That would make no sense. If anything, neutrality law should impose a greater duty to prevent foreign enlistment because neutrals take on a duty of "impartiality" in war, whereas states have no such obligation in times of peace.<sup>243</sup>

### 3. *Prohibition on fitting out and arming foreign vessels*

Nor did the United States have a neutral duty to prohibit the fitting out and arming of belligerent vessels. Beginning in the seventeenth century, there may have been some duty to stop belligerents from selling prizes in neutral ports. But this duty only became widely accepted after the United States passed the Neutrality Act. Sir Leoline Jenkins, an English admiralty judge cited by Hamilton in an essay, claimed in one case that neutrals had such a duty but said the opposite in another.<sup>244</sup> Not even Hamilton was sure on this point. After the House of Representatives struck Section 7 of the draft Neutrality Act, which would have prohibited belligerents from selling prizes in U.S. ports, he wrote to Jay asking him "to collect and communicate exact information with regard to the usage of Europe as to permitting the sale of prizes in neutral countries."<sup>245</sup>

---

242. Alexander Hamilton, *Pacificus No. I*, GAZETTE OF THE U.S., June 29, 1793, reprinted in 15 HAMILTON'S PAPERS, *supra* note 108, at 33, 40–41.

243. See HALL, *supra* note 211, § 210.

244. See 2 WILLIAM WYNNE, THE LIFE OF SIR LEOLINE JENKINS 732 (1724) (denying that such a duty exists); *id.* at 734 (claiming that it does); Alexander Hamilton, *No Jacobin No. IV*, DAILY AM. ADVERTISER, Aug. 10, 1793, reprinted in 15 HAMILTON'S PAPERS, *supra* note 108, at 224, 226; see also 10 VERZIJL, *supra* note 149, at 77 ("In actual practice neutral Powers often gave captors permission to enter their ports, but there are many examples of treaty provisions directed against this practice.").

245. Letter from Alexander Hamilton to John Jay (June 4, 1794), in 16 HAMILTON'S PAPERS, *supra* note 108, at 456, 457.

But prohibiting belligerents from bringing prizes into U.S. ports is not the same thing as prohibiting belligerents from fitting out and arming their vessels. And the U.S. government only banned the latter. Some treaties, but not all, prohibited outfitting and arming vessels in neutral ports.<sup>246</sup> Apart from the 1778–80 neutrality proclamations, no state suggested that all neutrals have an obligation to prohibit belligerents from fitting out their vessels.<sup>247</sup> We have already seen that those proclamations did not expand neutral duties under the law of nations: Washington’s Cabinet either did not know of them or did not find them relevant.<sup>248</sup> Treatise writers did not say that neutrals could not outfit, equip, and arm belligerent ships either.

The administration nevertheless claimed that this rule was a “deduction[] from the laws of neutrality,”<sup>249</sup> for two reasons. First, as mentioned earlier, a neutral must prohibit the fitting out of vessels to disengage itself from any conflict.<sup>250</sup> Nobody ever cited any authority for this proposition other than treatise writers’ general insistence that neutrals remain impartial. But it is not obvious why a neutral would violate this duty if it opened its ports to both sides. Further, neutrals could in some cases help belligerents during war. In an exhaustive 1790 study, Hamilton had concluded that the United States could, consistent with the law of neutrality, allow Britain to march through U.S. territory to attack Spanish colonies.<sup>251</sup> If a neutral

---

246. See HALL, *supra* note 211, § 212, at 511–12.

247. See *id.* at 512–13; see also 10 VERZIJL, *supra* note 149, at 60, 73 (noting that there were no disputes over belligerents supplying or arming vessels in neutral harbors before 1800).

248. See *supra* notes 227–32 and accompanying text.

249. Alexander Hamilton, Treasury Department Circular to the Collectors of Customs (Aug. 4, 1793), reprinted in 15 HAMILTON’S PAPERS, *supra* note 108, at 178, 178–79; see also John Jay, Charge to the Grand Jury (Mary 22, 1793), *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 49, 57 (“What private acts “amount[ed] to committing, or aiding, or abetting hostilities” is not obvious and “must be determined by the laws and approved practice of nations, and by the treaties and other laws of the United States relative to such cases.”).

250. See *supra* notes 174–75 and accompanying text; see also Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 697, 700; Letter from Thomas Jefferson to Edmond Charles Genêt (June 5, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 195, 195; Memorandum from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON’S PAPERS, *supra* note 108, at 454, 456.

251. See Alexander Hamilton, Answers to Questions proposed by the President of the United States to the Secretary of the Treasury (Sept. 15, 1790), in 6 WASHINGTON’S PAPERS, *supra* note 146, at 440, 443–44. For Washington’s original set of

could allow *one* belligerent to march through its territory to attack another, would it not be more impartial to allow *both* belligerents to equip their vessels in its port?

Second, the administration pointed to its treaty obligations. Article 22 of the France-U.S. Treaty of Amity and Commerce required that the United States prevent France's enemies from outfitting vessels in U.S. ports. The United States was not bound by treaty to permit France to outfit its vessels. Because the United States must deny Britain that privilege and could deny it to France, failure to treat France like Britain would violate the United States' duty of neutrality.<sup>252</sup>

This was a bad argument. As a matter of usage, if a state had a treaty pledging military assistance to a belligerent, fulfilling that obligation would not compromise the first state's neutrality.<sup>253</sup> Vattel agreed.<sup>254</sup> Allowing a belligerent to outfit ships in neutral ports seems much less offensive than sending that belligerent a division. Madison even made this argument, albeit in a different context. The draft neutrality bill prohibited all belligerents from selling prizes in American harbors. Madison convinced the House to delete this section:

A neutral nation might treat belligerent nations unequally, where it was in consequence of a stipulation prior to the war, and having no particular reference to it. It was laid down expressly, by all the best writers, that to furnish a military force to one of the parties, in pursuance of such a stipulation, without a like aid to the other, was no breach of neutrality; and it amounted to the same thing whether the equilibrium were destroyed by putting an advantage in one scale, or taking a privilege from the other. The executive had expounded the law of nations, and our treaties, in this sense, by leaving the sale of French prizes free, and forbidding the sale of British prizes. For the legislature to decide, that we were bound by the laws of neutrality to forbid the sale of

---

questions, see Letter from George Washington to John Adams (Aug. 27, 1790), in 6 WASHINGTON'S PAPERS, *supra* note 146, at 343, 343-44.

252. See Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 697, 700-01.

253. See HALL, *supra* note 211, § 211, at 509; 2 HYDE, *supra* note 222, § 844, at 692; LAWRENCE, *supra* note 240, § 244, at 478; 2 OPPENHEIM, *supra* note 240, § 291, at 358; TAYLOR, *supra* note 215, § 601, at 626; 10 VERZIIL, *supra* note 149, at 86.

254. See 3 VATTEL, *supra* note 66, § 105.

French prizes also, would be to make themselves the expositor of the law of nations . . . .<sup>255</sup>

He never seems to have made the connection, but by this same logic, forbidding belligerents from fitting out vessels would also “make [Congress] the expositor of the law of nations.”

4. *How much did the United States care about the law of nations?*

So far, we have seen that Congress passed the Neutrality Act pursuant to the Define and Punish Clause and that the Act went further than international law required. This subsection argues that the administration probably knew that its legal arguments were thin at best. But nobody seems to have suggested, either during the 1790s or the decades after, that American neutrality legislation would be constitutionally deficient if it prohibited more than was necessary. Some even said that Congress had the power to punish what the law of nations did not proscribe.

The administration seemed to believe that it was merely complying with its neutral duties. In private letters, for instance, Jefferson and Hamilton made the same arguments as they did in public documents.<sup>256</sup> But the administration must have realized that its legal position was weak. As mentioned earlier, Washington’s Cabinet considered “usage” (state practice) to be an important source of the law of nations.<sup>257</sup> The

---

255. 4 ANNALS OF CONG. 754 (1794).

256. Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 501, 501–02. Compare Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON’S PAPERS, *supra* note 108, at 454, 454–60, with Alexander Hamilton, *No Jacobin No. IV*, DAILY AM. ADVERTISER, Aug. 10, 1793, reprinted in 15 HAMILTON’S PAPERS, *supra* note 108, at 224, 224–28.

257. See *supra* note 95 and accompanying text. For a sample of the administration’s references to “usage” on questions of the law of nations, see, for example, Thomas Jefferson, Opinion on the Treaties with France (Apr. 28, 1793), in 25 JEFFERSON’S PAPERS, *supra* note 95, at 608, 609 (“The Law of Nations, by which this question is to be determined, is composed of three branches. 1. the Moral law of our nature. 2. the Usages of nations. 3. their special Conventions.”); *id.* at 612 (“But I deny that the reception of a minister has any thing to do with the treaties. There is not a word, in either of them, about sending ministers. This has been done between us under the common usage of nations, and can have no effect either to continue or annul the treaties.”); Questions for the Supreme Court (July 18, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 534, 535 (“10. Do the laws and usages of nations authorize her, as of right, to erect such courts for such purpose?”); *id.* at 536 (“20. To what distance, by the laws and usages of nations, may the US. exercise the right of prohibiting the hostilities of foreign powers at war with each oth-

Neutrality Proclamation pegs the definition of “contraband” to “the modern usage of nations.”<sup>258</sup> The administration also appealed to usage when arguing about neutrals’ commercial rights and determining the extent of United States’ territorial waters.<sup>259</sup> Yet the only precedent that *anyone* mentioned for the ban on outfitting and arming belligerent ships was a 1792 Swedish proclamation forbidding foreign privateers from outfitting in its ports.<sup>260</sup> Hamilton referenced this decree in a his essay *No Jacobin No. IV*. He was content with the one example because “[t]he governments of Europe know, by long experience, the usages of war, and without consulting the authorities or precedents, are able to pronounce with facility, on what is lawful, what unlawful.”<sup>261</sup> Put another way, Hamilton did not know of any other precedents, but he assumed Sweden did. And nobody cited any case in which a neutral had banned its citizens from serving in foreign armies, navies, or privateers.

---

er, within rivers, bays, and arms of the sea, and upon the sea along the coasts of the US?”); Alexander Hamilton, *Pacificus No. II*, GAZETTE OF THE U.S., July 3, 1793, reprinted in 15 HAMILTON’S PAPERS, *supra* note 108, at 55, 59 (“France committed an aggression upon Holland in declaring free the navigation of the Scheldt and acting upon that declaration; contrary to Treaties in which she had explicitly acknowledged [sic] and even guaranteed the exclusive right of Holland to the navigation of that River and contrary to the doctrines of the best Writers and established usages of Nations, in such cases.” (footnotes omitted)); Letter from Thomas Jefferson to Thomas Pinckney (Sept. 7, 1793), 27 JEFFERSON’S PAPERS, *supra* note 95, at 55, 56 (“This article is so manifestly contrary to the law of nations, that nothing more would seem necessary than to observe that it is so. Reason and usage have established that when two nations go to war, those who chuse [sic] to live in peace retain their natural right to pursue their agriculture, manufactures and other ordinary vocations, to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual, to go and come freely without injury or molestation, and in short, that the war among others shall be for them as if it did not exist.”); Letter from Thomas Jefferson to George Washington (Oct. 9, 1793), in 27 JEFFERSON’S PAPERS, *supra* note 95, at 224, 224–25 (“The memorialists seem to expect that an indemnification may be made them by this government out of the monies due from us to France. But this would be an act of reprisal, which the usage of nations would not justify until justice has been required from France, and formally denied.”).

258. The Proclamation of Neutrality (Apr. 22, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 140, 140.

259. See Thomas Jefferson, Notes on the Proclamation of Neutrality and the Law of Nations (Dec. 20, 1793), in 27 JEFFERSON’S PAPERS, *supra* note 95, at 598, 598–600; Letter from Thomas Jefferson to Certain Foreign Ministers in the United States (Nov. 8, 1793), in 27 JEFFERSON’S PAPERS, *supra* note 95, at 328, 328.

260. See Alexander Hamilton, *No Jacobin No. IV*, DAILY AM. ADVERTISER, Aug. 10, 1793, reprinted in 15 HAMILTON’S PAPERS, *supra* note 108, at 224, 227.

261. *Id.*

Some outside the administration even expressed doubts about the administration's legal position. At trial, Henfield's counsel seems to have pointed out that Bynkershoek said that belligerents may levy soldiers in neutral territory.<sup>262</sup> In a letter to Jefferson, then-Senator James Monroe also rejected the argument that belligerents can hold neutrals responsible for their citizens' voluntarily enlisting with foreign militaries: "If we had hired him to France or Britain, as the Swiss in particular do, we could not be [held responsible]."<sup>263</sup> And as mentioned earlier, Madison may have understood that the United States was not obliged to prohibit the fitting out and arming of French vessels in U.S. ports.<sup>264</sup> American political leaders, therefore, must have known that the international legal foundation for U.S. neutrality policy was wanting.<sup>265</sup>

Yet nobody suggested that Congress lacked the constitutional power to prohibit more than it was required to under international law. When Madison argued that the United States would make itself "the expositor of the law of nations" if it

---

262. Henfield's counsel at least cited the relevant portions of Bynkershoek; there are no records of counsel's actual arguments. See Peter Duponceau et al., *Defense, Henfield's Case*, reprinted in WHARTON, *supra* note 144, at 83, 83.

263. Letter from James Monroe to Thomas Jefferson (June 27, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 381, 383.

264. There are not many other instances in which people challenged the administration's interpretation of the law of nations. But that should not be too surprising. The British government had little reason to object to excessively zealous neutrality regulations. Genêt was either incapable of understanding or uninterested in international law. He dismissed Jefferson's justifications as "aphorisms of Vattel," which, while true, is not much of an argument. Letter from Edmond Charles Genêt to Thomas Jefferson (June 22, 1793), in 1 AM. STATE PAPERS, *supra* note 145, at 155, 155. Many inside and outside the administration, including even Monroe, wanted to stay out of war at all costs and thus had little reason to question U.S. policy too much. See CASTO, *supra* note 3, at 22, 163. As for public opinion, some wanted to help France for ideological reasons. Others thought the President lacked the constitutional power to implement neutrality rules without Congress's consent. But subtleties of neutrality law were less salient. See, e.g., *Veritas* (May 30, 1793), reprinted in 12 WASHINGTON'S PAPERS, *supra* note 146, at 647, 647-48; *Veritas No. II* (June 3, 1793), reprinted in 13 WASHINGTON'S PAPERS, *supra* note 146, at 17, 17-19; *Veritas No. III* (June 6, 1793), reprinted in 13 WASHINGTON'S PAPERS, *supra* note 146, at 34, 34-36.

265. Rawle, Henfield's prosecutor, and Judge Peters, who presided over Henfield's trial, were hesitant about the government's case, but we do not know what their concerns were. See Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 501, 502. Because of these doubts, Rawle requested Hamilton and Randolph's help when writing his indictment. See THOMAS, *supra* note 145, at 172.

prohibited the selling of prizes, he just said that this would be bad policy: It would “arm Britain with a charge against the United States, of having violated their neutrality” and “give extreme disgust to the French Republic.”<sup>266</sup> But the Constitution never came up. Nor did anyone raise constitutional objections three years later when Congress voted to extend the Neutrality Act through 1800 (the original Act was set to expire in March 1797).<sup>267</sup> Initially, Federalist Congressman William Smith moved to make the Act permanent.<sup>268</sup> But Albert Gallatin, by then a leader of the Democratic-Republican party, argued that the Act should only be extended another two years because the law went further than the law of nations required: “In no other nation, he said, was it considered as a high misdemeanor to enter into the service of a foreign Power.”<sup>269</sup> Gallatin did not think that the law was unconstitutional, just that it was “a kind of novelty” that should only last “until the expiration of the present European war.”<sup>270</sup> Many others entered the debate, but nobody argued that Congress was constitutionally limited to incorporating the law of nations.

In fact, both before and after the Neutrality Act’s passage, many indicated that Congress could, pursuant to the Define and Punish Clause, punish many acts that did not violate the law of nations. In 1792, Randolph wrote that Congress could punish acts of hostility by Americans against Spanish Florida because this conduct was “injurious to our harmony with foreign nations,” even if not “absolutely offenses against the law of nations.”<sup>271</sup> Randolph also told Jefferson six months earlier that Congress could “regulate” the law of nations “to be binding upon the departments of their own government in *any form whatsoever*.” Making “change[s]” was permissible, but “every change is at the peril of the nation, which makes it.”<sup>272</sup> In 1793, Washington suggested that Congress had sig-

---

266. 4 ANNALS OF CONG. 754 (1794).

267. Neutrality Act of 1794, ch. 50, § 10, 1 Stat. 381, 384.

268. See 6 ANNALS OF CONG. 2227 (1797).

269. *Id.* at 2228.

270. *Id.*

271. Edmund Randolph, Opinion on Offenses against the Law of Nations (Dec. 5, 1792), in 24 JEFFERSON’S PAPERS, *supra* note 95, at 702, 703.

272. Letter from Edmund Randolph to Thomas Jefferson (June 26, 1792), in 24 JEFFERSON’S PAPERS, *supra* note 95, at 127, 127 (emphasis added) (discussing a possible infringement of an ambassador’s rights).

nificant ability to innovate upon his neutrality rules. In part, he wanted Congress to codify penalties. But he also thought Congress should “correct [and] improve” his regime.<sup>273</sup> Madison’s 1798 letter to Jefferson criticizing Adams’s neutrality regulation, mentioned earlier, also implied that Congress could go further than international law. Neutrality regulations “were in pursuance of the law of Nations, & consequently in execution of the law of the land.” The President could not argue “that the law of Nations leaves this point undecided, & that every nation is free to decide it for itself” either. If that were so, “the regulation . . . comes expressly within [Congress’s] power to ‘define the law of Nations.’”<sup>274</sup> Finally, a few decades later, the Supreme Court recognized that the Neutrality Act banned more than the law of nations required. As the Court explained in *The Brig Alerta & Cargo v. Blas Moran*,<sup>275</sup> neutrals must either allow all belligerents to fit out their vessels or deny that privilege to all belligerents.<sup>276</sup> The United States took the stricter course, prohibiting states from arming and fitting out vessels. But the Court never suggested that this posed a constitutional problem.<sup>277</sup>

#### D. Lessons from the Neutrality Act

We can draw two lessons from the Neutrality Act about the scope of the Define and Punish Clause. First, “offenses against the law of nations” was a broad term. The American government did not accuse Americans who violated neutrality rules of having committed universally condemned crimes like piracy. Rather, as discussed earlier, they argued that any such person violated treaties of peace. But this obligation to preserve peace was binding upon the United States as a country, not upon its citizens. These acts were offenses against the law of nations because states must suppress acts of hostility by their

---

273. See Speech of President Washington (Dec. 3, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 21, 21.

274. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 30 JEFFERSON’S PAPERS, *supra* note 95, at 238, 239.

275. 13 U.S. (9 Cranch) 359 (1815).

276. *Id.* at 365.

277. *Id.*; see also *The Estrella*, 17 U.S. 298, 309 (1819) (same); Violation of Neutrality and Act of Congress of 1818, 3 Op. Att’y Gen. 741, 745–46 (1842) (“[T]he Supreme Court, in the case of the *Estrella*, declare[d] that the statute of 1818 has gone further than the law of nations.”).

citizens against other countries.<sup>278</sup> Likewise, the government justified its ban on equipping and arming foreign vessels on the grounds that the United States was obliged to suppress such acts under the law of neutrality. The government, accordingly, understood “offenses against the law of nations” to mean any acts that the United States had an obligation to suppress under the law of nations.<sup>279</sup>

Second, international law is not much of a constraint on Congress’s exercise of the Define and Punish Clause. Congress adopted an idiosyncratic understanding of the law of nations when it enacted the Neutrality Act. The executive and legislative branches both seemed to believe that the United States had a legal obligation to ban the outfitting of belligerent ships and foreign enlistment. But there was no good precedent for these policies. The fact that nobody suggested that U.S. neutrality legislation might be unconstitutional suggests that Congress’s power to define gives it significant creative powers. The only law-of-nations predicate for Congressional action was a broad duty to remain impartial and an even vaguer duty of state responsibility.

#### IV. SUPREME COURT PRECEDENT ANALYZING THE DEFINE AND PUNISH CLAUSE

Four Supreme Court cases have addressed the scope of the power to define offenses against the law of nations. We have already seen that in the first case, *United States v. Smith*, the Court said that this power is quite broad.<sup>280</sup> The second case, *United States v. Arjona*,<sup>281</sup> concerned Congress’s power to criminalize the counterfeiting of foreign currencies, and the other two, *Ex parte Quirin*<sup>282</sup> and *Hamdan v. United States*,<sup>283</sup> related to Congress’s power to try law of war offenses in military tribu-

---

278. See *supra* note 165 and accompanying text.

279. As discussed earlier, the government also argued that enlistment by a foreign government agent violated the United States’ sovereignty. See *supra* notes 164–69 and accompanying text. But the Neutrality Act barred *everyone*, not just foreign governments, from enlisting Americans to fight in foreign armies. This broader prohibition was predicated on neutrality law.

280. See 18 U.S. (5 Wheat.) 71, 73–74 (1820); see also *supra* notes 22–23, 56–57 and accompanying text.

281. 120 U.S. 479 (1887).

282. 317 U.S. 1 (1942).

283. 548 U.S. 557 (2006).

nals. On each occasion, the Court has suggested that Congress may depart from preexisting definitions of offenses against the law of nations.

#### A. Arjona

*United States v. Arjona* contains the Court's most extensive analysis of the Define and Punish Clause and establishes that Congress may punish any criminal conduct if doing so helps the United States comply with its international legal obligations.<sup>284</sup> A federal statute criminalized the counterfeiting of foreign money.<sup>285</sup> The defendant faced charges under Sections 3 and 6 of the relevant statute.<sup>286</sup> Section 3 made it criminal to "[f]alsely mak[e], forg[e], or counterfeit[]" foreign banknotes, and Section 6 punished mere possession of counterfeit foreign bank notes.<sup>287</sup> *Arjona* upheld Sections 3 and 6 as constitutional on the grounds that international law "requires every . . . government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation," including those who "counterfeit the money of another nation."<sup>288</sup> The Court cited Vattel for the proposition that countries may not "allow[] and protect[] false coiners" and to argue that this protection extended more broadly to all types of commercial exchange, including publicly and privately issued securities, even though Vattel did not discuss either.<sup>289</sup> Notably, the Court did not examine whether any other states prohibited the counterfeiting of foreign banknotes.

The Court next wrote that the United States had a strong interest in enshrining this principle of international law because U.S. currency was "practically composed" of government and bank securities, notes, and certificates.<sup>290</sup> If other countries did not punish the forging and counterfeiting of these securities abroad, "a great wrong will be done to the United States," as "uncertainty about the genuineness of the security necessarily depreciates its value . . . and against this international comity

---

284. See *Arjona*, 120 U.S. at 479.

285. *Id.* at 480.

286. *Id.* at 482.

287. *Id.* at 481–82.

288. *Id.* at 484.

289. *Id.* at 485–86.

290. *Id.* at 486.

requires that national protection shall, as far as possible, be afforded.”<sup>291</sup> Because the United States could call on other governments to punish counterfeiting of U.S. securities, they could ask the same of the United States; “international obligations are of necessity reciprocal in their nature.”<sup>292</sup> The federal government has the power to punish these offenses against the law of nations because it is “necessary and proper . . . to carry into execution a power conferred by the constitution on the government of the United States exclusively.”<sup>293</sup> Thus, Congress may punish offenses against the law of nations if doing so is “necessary and proper” for the United States to comply with its own international legal obligations.<sup>294</sup>

Two final points bear mentioning. First, the Court did not claim that failure to punish these offenses might lead to war, Merely “disturb[ing] that harmony between the governments” was enough to give it pause.<sup>295</sup> Second, it did not matter that the statute itself did not “declare[] [counterfeiting] . . . to be ‘an offense against the law of nations’” because “[w]hether the offense as defined is an offense against the law of nations *depends on the thing done, not on any declaration to that effect by congress.*”<sup>296</sup> The D.C. and Eleventh Circuits have pointed to the emphasized text as evidence that *Arjona* limits Congress’s power to define.<sup>297</sup> But in doing so they have ignored the language’s context. The Court just meant that the government does not waive its power to punish offenses against the law of nations by failing to reference the clause in a statute.<sup>298</sup>

---

291. *Id.*

292. *Id.* at 487.

293. *Id.* The use of the word “exclusively” does not mean that states cannot punish the same offenses. *See id.* (“This, however, does not prevent a state from providing for the punishment of the same thing, for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States.”).

294. *See id.* at 487.

295. *Id.*

296. *Id.* at 488 (emphasis added).

297. *See* *Al Bahlul v. United States*, 792 F.3d 1, 15 (D.C. Cir. 2015), *rev’d on other grounds* 840 F.3d 757 (en banc); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012).

298. *See Arjona*, 120 U.S. at 488.

B. *Quirin and Hamdan*

When weighing in on military commissions cases, the Supreme Court has stated that Congress is not limited to punishing offenses that are clearly established under international law. America's views on the international law of war matter more than the international community's.

*Ex parte Quirin* upheld a military commission's conviction of several belligerents for espionage pursuant to the Articles of War. Article 15 granted military commissions jurisdiction over "offenders or offenses that by statute or by the law of war may be triable by such military commissions or other military tribunals."<sup>299</sup> The Court held that the Define and Punish Clause permitted Congress, through the Articles of War, to "sanction[] . . . the jurisdiction of military commissions to try persons for offenses which, according to . . . the law of war, are cognizable by such tribunals."<sup>300</sup>

The Court implied that Congress's power to define is not completely limited by international law. "Congress," the Court said, "had the choice of crystallizing in permanent form and in minute detail every offense against the law of war."<sup>301</sup> But Congress would have no such choice if a single departure from a "minute detail" of an offense could invalidate an offense. Suppose, for example, that the law of war required at least a knowledge *mens rea*, but Congress permitted conviction upon a showing of mere recklessness. If preexisting international law limits Congress's power, that statute would be unconstitutional. Additionally, the law of war evolves. Other states may change their interpretation of international law, and countries may codify and alter vague areas of international law. That must have occurred to the Court. The law of war had transformed from a series of hazy offenses to an international set of codified rules between the Civil War and the Second World War.<sup>302</sup> Foreign developments could thus render the same minutely defined statute constitutional today but unconstitutional tomorrow. The Court likely would not have considered that

---

299. *Ex parte Quirin*, 317 U.S. 1, 27 (1942).

300. *Id.* at 18.

301. *Id.* at 30.

302. *See supra* note 44 and accompanying text.

outcome acceptable because the statutory scheme would then no longer have “permanent form.”

*Quirin* also noted that other countries’ list of “offenses against the law of war” might not overlap completely with the offenses “recognized by our courts as violations of the law of war.”<sup>303</sup> This quotation does not answer whether the Court thought that it or Congress was to decide whether a crime was an offense against the law of war. But a sentence earlier in the opinion suggests that Congress gets the last word. After amassing evidence that Congress believed that spies could be tried by military commissions, the Court wrote, “It must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.”<sup>304</sup> Congress’s understanding of the law of war, accordingly, is dispositive.<sup>305</sup>

*Hamdan v. Rumsfeld* also establishes that Congress has the power to define and punish offenses against the law of nations that other countries do not recognize. Part V of Justice Stevens’s opinion (joined by Justices Souter, Ginsburg, and Breyer) set aside a conspiracy conviction in a military commission because Congress had not “positively identified ‘conspiracy’ as a war crime.”<sup>306</sup> But Congress may grant military commissions jurisdiction over law of war offenses “defined by statute,” and the plurality did not say that offenses “defined by statute” must be pegged to international law.<sup>307</sup> Though his opinion did not “address the validity of the conspiracy charge,” Justice Kennedy’s concurrence also indicated that Congress need not tie offenses to extant international law: “Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the ‘sensitive task of establishing a principle not inconsistent with the national interest or with international justice.’”<sup>308</sup>

---

303. 317 U.S. at 29.

304. *Id.* at 35–36 (emphasis added).

305. The possibility that Congress could take away defendants’ right to jury trial might seem frightening, but this does not necessarily follow from *Quirin*. The Court also said in this same passage that some law of war violations are “constitutionally triable only by a jury,” thus implying that there is an Article III limit on military commissions’ jurisdiction separate from the Article I limit. *Id.* at 29.

306. *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (plurality opinion).

307. *Id.*

308. *See id.* at 636 (Kennedy, J., concurring in part) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

Implicit in both *Ex parte Quirin* and *Hamdan* is the notion that Congress has the power to punish “offenses against the law of war” committed by other countries’ combatants against the United States. This provides a new ground for punishing private conduct separate from the *Arjona* theory that Congress can punish private conduct it has a duty to suppress.

Finally, it is worth noting that the Court in *Hamdan* and *Quirin* did not use the term “violation against the law of war” in the same way. The *Hamdan* Court seemed to understand “violation against the law of war” as synonymous with the modern definition of a “war crime”: “a serious violation of the laws and customs of international humanitarian law [that] has been criminalized by international treaty or customary law.”<sup>309</sup> But the *Quirin* Court assumed that “espionage” was an “offense against the law of war,” even though no treaty or rule of customary international law criminalized it. Spies just lost the privilege of belligerency and could therefore be punished if captured.<sup>310</sup> Judge Rogers speculated in *Bahlul* that the *Quirin* Court made a basic legal error.<sup>311</sup>

But the *Quirin* Court never claimed that international law required that the defendants be punished, just that they were unlawful belligerents and could therefore, under the law of war, be punished.<sup>312</sup> For that reason, the indictment against the *Quirin* defendants “plainly allege[d] [a] violation of the law of war.”<sup>313</sup> Thus, the term “violation of the law of war” meant something different in *Quirin* than “war crime” does today.<sup>314</sup>

---

309. Alexander Schwarz, *War Crimes*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Sept. 2014), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690e431?rskey=EnfR3i&result=10&prd=EPIL> [<https://perma.cc/HXE2-FQNY>].

310. See, e.g., U.S. WAR DEP’T, FIELD MANUAL 27-10: RULES OF LAND WARFARE 58, ¶ 2013 (1940).

311. See *Al Bahlul v. United States*, 840 F.3d 757, 817–18 (D.C. Cir. 2016) (en banc) (Rogers, J., dissenting), *reh’g denied* (Nov. 28, 2016).

312. See *Ex parte Quirin*, 317 U.S. 1, 36 (1942).

313. *Id.* at 36.

314. See also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2133 n.374 (2005) (“In addition to war crimes, such as purposeful targeting of civilians, the jurisdiction of military commissions has always extended more generally to actions on the battlefield by unlawful combatants. There is a debate about whether such actions are best construed as war crimes, or as crimes that, because they are committed by unlawful combatants, are not shielded from prosecution by combatant immunity.” (citations omitted)).

At that time, international lawyers referred to both “unprivileged” and “illegal” acts of belligerency as “violations of the laws of war.”<sup>315</sup> Hence, in 1865, Attorney General James Speed described unprivileged acts, like espionage, blockade running, and sabotage, as “offenses against the laws of war,” even though they were “not crimes” in an ordinary sense of the word.<sup>316</sup> The 1886 and 1920 editions of William Winthrop’s treatise on military law likewise described acts lacking the privileges of belligerency, including “espionage,” as “violations of the laws of war.”<sup>317</sup> Henry Halleck’s 1861 international law treatise likewise referred to guerrillas, who did not commit war crimes but lacked combatants’ privilege, as having committed “violations of the laws of war.”<sup>318</sup> Every edition of Lassa Oppenheim’s treatise on the law of war published before *Quirin* declared that “persons committing acts of espionage or treason are . . . considered war criminals,” even though “the employment of spies and traitors is considered lawful on the part of

---

315. Charles Cheney Hyde, *Aspects of the Saboteur Cases*, 37 AM. J. INT’L L. 88, 91 n.10 (1943) (“The proof that it is unlawful is found in the fact that its commission is penalized. All acts for the commission of which international law prescribes a penalty are in the sense of that law unlawful.” (quoting John Bassett Moore, *Contraband of War*, 51 PROC. AM. PHIL. SOC’Y 18, 20 (1912))). Moore was admittedly talking about contraband, not espionage, but the principle is the same: selling contraband is not a war crime, but international law allows belligerents to punish it. For another explanation of this broader formulation, see Schwarz, *supra* note 309 (“A wider approach defines war crimes as all acts constituting a violation of the laws or customs of war, irrespective of whether the conduct is criminal.”). This Article’s account, that “violations of the law of war” included both unprivileged belligerent acts and what we would now call war crimes, is thus broadly consistent with the Government’s position in *Bahlul*. See Respondent’s Brief at 45–46, *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015) (No. 11-1324), 2015 WL 6689466 (“Instead, *Quirin* interpreted the category of ‘offense[s] against the law of war’ to include offenses that were traditionally triable by military commission under domestic precedents but that were not viewed as violations of international law.”).

316. Military Commissions, 11 U.S. Op. Atty. Gen. 297, 312–13 (1865).

317. 2 WILLIAM WINTHROP, *MILITARY LAW* 69 (1886); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 838 (2d ed. 1920).

318. HENRY WAGNER HALLECK, *INTERNATIONAL LAW* 386 (1861) (States do not “recognize [guerrillas’] acts nor attempt to save them from the punishment due for their violations of the laws of wars. . . . The perpetrators of such acts, under such circumstances, are not enemies, legitimately in arms, who can plead the laws of war in their justification, but they are robbers and murderers, and as such, may be punished.”).

belligerents.”<sup>319</sup> U.S. courts and commentators continued this usage from the second half of the nineteenth through the early twentieth centuries.<sup>320</sup> Britain did so too during the First World War.<sup>321</sup> To be sure, at the time of *Quirin*, plenty of legal opinions, treaties, and U.S. government publications, including some that the Court cited, noted that international law did not per se prohibit espionage.<sup>322</sup> But plenty of contemporary commentary referred to unprivileged acts of belligerency as “violations of the law of war.”<sup>323</sup> Situating *Quirin* in this tradition avoids the awkward and implausible conclusion that, as Judge Kavanaugh put it, “Justices such as Harlan Fiske Stone, Felix Frankfurter, Robert Jackson, and Hugo Black— [were] ignorant of the content of international law.”<sup>324</sup>

---

319. 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 288, at 337 (5th ed. 1935); 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 288, at 287 (4th ed. 1926); 2 OPPENHEIM, *supra* note 240, § 288, at 223 (edition published in 1921); 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 288, at 197 (2d ed. 1912); 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 288, at 160 (1st ed. 1906).

320. *See, e.g.*, Thompson v. Wharton, 70 Ky. 563, 566 (1871) (espionage is a “violation of the laws of war”); Dillard v. Alexander, 56 Tenn. 719, 720–21 (1872) (trading with the enemy is a “violation of the *Laws of War*”); JAMES REGAN, THE JUDGE ADVOCATE AND RECORDER’S GUIDE 47 (1877) (stating that guerrilla warfare is an offense against the law of war); AUSTIN WAKEMAN SCOTT, HANDBOOK OF MILITARY LAW § 44, at 60 (1918) (stating that selling abandoned or captured property is an offense against the law of war); *id.* § 46, at 61 (same for spying); Trial of Spies by Military Tribunals, 31 U.S. Op. Atty. Gen. 356, 364–65 (1918) (listing espionage as a war crime).

321. *See* JAMES M. LOWRY, MARTIAL LAW WITHIN THE REALM OF ENGLAND 48 (1914) (espionage can be tried as a “war crime”); MANUAL OF EMERGENCY LEGISLATION 519 (Alexander Pulling ed., 1914) (same); MANUAL OF MILITARY LAW 302 (6th ed. 1917) (“The term ‘War Crime’ is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders.”).

322. *See* Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 329–33 (1951). But even if international law had, before *Quirin*, narrowed the meaning of “law of war violation” to no longer include unprivileged acts of belligerency, then that would not demonstrate that the Court was confused. Rather, it would show that the constitutional meaning of “violation against the law of war” is not tied to current international law.

323. *But see* Marty S. Lederman, *If George Washington Did It, Does that Make It Constitutional?: History’s Lessons for Wartime Military Tribunals*, 105 GEO. L.J. (forthcoming August 2017) (manuscript at 53–54), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2813&context=facpub> [<https://perma.cc/6HJD-9FXX>] (arguing that *Quirin* mistakenly assumed that “unprivileged” belligerency automatically violates the law of war”).

324. *Al Bahlul v. United States*, 840 F.3d 757, 764 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring). Judge Kavanaugh, by contrast, argued that Congress’s war powers give it the power to punish these offenses in military commissions

## C. Lessons

From these cases, we can draw seven lessons about the scope of the Define and Punish Clause. First, as *Arjona* makes clear, Congress may define and punish offenses that did not exist at the time of the Framing.<sup>325</sup> International law, after all, did not prohibit the counterfeiting of securities in the 1700s. Second, in all three cases, state practice was not constitutionally relevant to Congress's power to define. *Arjona* did not examine other countries' views on counterfeiting, and both *Quirin* and *Hamdan* implied that Congress did not need to peg its statutes to extant international law. Third, *Arjona* held that Congress, through some combination of the Necessary and Proper and Define and Punish Clauses, had the power to punish any conduct if doing so would help the United States comply with its international legal obligations.<sup>326</sup> Congress thus can do more than punish what international law already forbids. Fourth, *Quirin* and *Hamdan* also permitted the United States to punish other offenses against the law of war committed by nationals of other countries. Fifth, "violation of the law of war" may include unprivileged acts of belligerency. Sixth, when deciding if the U.S. had an obligation to punish the conduct, the *Arjona* Court considered U.S. national interests relevant to its analysis. Seventh, Congress did not need to specify in its statute that the

---

even though they were not violations of the law of war. *See id.* at 761. This approach would not force the courts to clarify the scope of the Define and Punish Clause, *see id.*, but therein lies the rub: as we saw earlier, the Court in *Quirin* explicitly tied the scope of military commissions' jurisdiction in part to that Clause. Judge Kavanaugh cited two other historic sources for this claim, William Winthrop and Joseph Story's treatises, but Winthrop, on the page Judge Kavanaugh cited, explicitly mentioned the Define and Punish Clause as a basis for military commissions' jurisdictions. *See* WINTHROP, MILITARY LAW AND PRECEDENTS, *supra* note 317, at 831. And the Story passage never actually mentioned "military commissions." 3 STORY, *supra* note 112, § 1192.

325. *See* Note, *The Offenses Clause After Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378, 2386 (2005) ("*Arjona* established that an exercise of Offenses Clause power must be measured against international law as it exists at the time when Congress acts, not as it existed at the time of the founding.>").

326. *See also id.* at 2386–87 ("[T]he Offenses Clause not only allows Congress to act against direct violations of the law of nations, but also allows Congress to criminalize acts a step removed from the demands of international law."); Fredman, *supra* note 58, at 297–98 (same).

crime was an offense against the law of nations for the executive to raise that argument in court.<sup>327</sup>

## V. WHAT CAN CONGRESS PUNISH?

Generally, international law binds states, not individuals. Until the twentieth century, international law treated very few private acts as criminal offenses. So what exactly may Congress punish under the Define and Punish Clause? The previous Sections establish that this clause gives Congress an expansive power, but all powers have limits. This Section describes those limits.

This Article categorizes the different types of offenses that Congress might try to punish as *type one* through *type five* offenses. *Type one* offenses are offenses against the law of war<sup>328</sup> or universally punishable private criminal acts, like attacks on ambassadors, violations of safe conduct, and piracy. *Type two* offenses cover private conduct that, though not illegal under international law itself, the United States has an obligation to punish.<sup>329</sup> The *Arjona* prohibition on making and possessing counterfeit foreign currency is a good example of a *type two* offense: Those specific acts were not international crimes, but the United States had an obligation to suppress them. *Type three* offenses are like *type two* offenses, but it may be ambiguous whether international law requires that states condemn the conduct in question. Preexisting international law does not require states to punish *type four* offenses. Congress must believe that the United States is legally obliged to ban such conduct, but no other country agrees. *Type five* offenses tick off none of these boxes: There is no connection between punishing a *type five* offense and complying with an existent or developing rule of customary international law. Table 1 summarizes each offense.

---

327. See Note, *supra* note 325, at 2386 (“[A]s is the case with Congress’s other legislative powers, Congress can exercise the power without formally invoking it.”).

328. See *supra* Section IV.B. Here, this Article uses the modern, narrower understanding of “violations of the law of war,” not *Quirin*’s broader understanding of the term, to emphasize that *type one* offenses are currently illegal under international law whereas unprivileged belligerent acts are probably not illegal in present day.

329. See *supra* Section IV.A. (explaining the Court’s reasoning in *Arjona*).

Table 1

	Type one	Type two	Type three	Type four	Type five
Universally proscribed?	Yes.	No.	No.	No.	No.
State obliged to prevent it, or law of war permits states to punish it?	N/A	Yes.	Unclear.	No.	No.
Logical nexus for punishment?	N/A	Yes.	Yes.	Yes.	No.
Constitutional to punish?	Yes.	Yes.	Yes.	Probably.	No.

Congress obviously can punish *type one* offenses, including ones that did not exist at the time of the Framing.<sup>330</sup> And it obviously cannot punish *type five* offenses because there is no nexus to international law at all. *Type two*, *type three*, and *type four* offenses present harder cases. The subsections below argue that Congress may constitutionally proscribe each of those three categories. But *type four* offenses are a closer call.

#### A. Type two offenses

Congress punishes a *type two* offense if it proscribes private conduct that, while not an international crime like piracy, the United States has an international legal obligation to suppress. The crime at issue in *Bahlul*, conspiracy to commit offenses against the law of war, probably falls under this category: Penalizing conspiracy to commit those crimes makes it easier to punish law of war violations.<sup>331</sup>

Congress can punish *type two* offenses because it has discretion in deciding how to comply with its international duties.

330. See *supra* note 325 and accompanying text.

331. It makes more sense to view conspiracy to violate the law of war as a *type two* offense, an alternative means of punishing clearly illegal acts, because the United States has never claimed that conspiracy to violate the law of war was itself a war crime. Rather, the government has argued that the law should be sustained as a convenient means “for the United States to carry out its international obligation to prevent terrorism as a mode of warfare.” Respondent’s Brief at 57, *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015) (No. 11-1324), 2015 WL 6689466.

This is so for four reasons. First, the text and structure of the Constitution suggest that the power to define an offense against the law of nations is separate from the power to punish those offenses.<sup>332</sup> Congress should therefore, at minimum, have the power to define an offense that it is obliged to suppress slightly differently than other nations do. Otherwise, the power would amount to very little.

Second, early American political leaders probably thought the power to define included the power to create new offenses.<sup>333</sup> The idea that Congress could do no more than ape clearly defined offenses under international law may have never occurred to the Framers. They wanted Congress to be able to punish offenses against the law of nations that were indeterminate.<sup>334</sup> They also considered the clause to be a powerful tool to defuse one of the main national security threats of the day: private actions that could spark war.<sup>335</sup> That tool would not be very helpful if Congress could not act until it had significant international precedent on its side. Congress's expansive power to define piracies and felonies on the high seas further implies that it has a similarly broad power to define offenses against the law of nations.<sup>336</sup>

Third, early American neutrality legislation punished *type two* offenses. The administration never argued that neutrality violations themselves were like piracy. Rather, its argument was that the United States had a duty to suppress the conduct in question. That made the violations offenses against the law of nations.<sup>337</sup>

Fourth, *Arjona* upheld Congress's authority to punish a *type two* offense. Congress may criminalize the counterfeiting of foreign banknotes because the United States had an obligation under international law "to use due diligence to prevent any injury to an-

---

332. See *supra* Section I.

333. See *supra* Section II.A.

334. See *supra* Section II.B.

335. See *supra* Section II.C.

336. See *supra* Section II.D.

337. See *supra* Section III.B. It is probably more appropriate to characterize the Neutrality Act as punishing *type four* offenses because there was next to no precedent for this legislation. See *infra* Section V.C.1. The point here is that the Washington administration and Congress assumed that neutrality violations were offenses against the law of nations *because* the United States had an obligation to suppress them.

other nation or its people by counterfeiting its money or its public or *quasi* public securities.”<sup>338</sup> Suppressing conduct that could put the United States in breach of its international legal obligations is “a means to” international law compliance<sup>339</sup> and therefore a “necessary and proper” means of defining and punishing offenses against the law of nations.<sup>340</sup> For this reason, the statute at issue was constitutional even though the Court never pretended that international law requires countries to punish mere possession of counterfeited documents.<sup>341</sup> Congress’s discretion in choosing how to comply with international law accordingly empowers it to punish *type two* offenses.

### B. Type three offenses

*Type three* offenses are like *type two* offenses, but it is ambiguous whether international law requires that states condemn the conduct in question. The *type two* arguments also suggest that Congress has the power to define and punish *type three* offenses: Nothing in the preceding section depended on the international community agreeing with the United States’ interpretation of international law. In fact, the Framers wanted to give Congress the power to criminalize offenses against the law of nations where international law was ambiguous. They did not want foreign law to limit Congress’s powers.<sup>342</sup> And every time the Supreme Court has examined the Define and Punish Clause, it has implied that other countries’ views of international law are not constitutionally relevant.<sup>343</sup>

*Banco Nacional de Cuba v. Sabbatino*<sup>344</sup> provides an additional reason why Congress can punish *type three* offenses. The Court held that the judiciary should not decide on questions of customary international law unless there is a

---

338. *United States v. Arjona*, 120 U.S. 479, 488 (1887).

339. *Id.* at 488.

340. *See id.* at 487; *see also* *United States v. Comstock*, 560 U.S. 126, 135 (2010); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

341. *Arjona*, 120 U.S. at 485–86.

342. *See supra* Sections II.B & II.D.1.

343. *See supra* Section IV.

344. 376 U.S. 398 (1964).

“great[] . . . degree of codification or consensus concerning a particular area.”<sup>345</sup> This will help judges:

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. . . . [T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.<sup>346</sup>

Inversely, the more important an issue for U.S. foreign relations, the stronger the justification for exclusivity in the political branches.<sup>347</sup> This point echoes the *Arjona* Court, which looked to U.S. interests when deciding what international law forbade.<sup>348</sup> *Sabbatino* would thus caution against overriding a statute when customary international law lacks clarity or U.S. interests are at stake. And, in the Define and Punish context, consulting the *Statutes at Large* is probably the best way to determine U.S. interests on a question of international law.

### C. Type four offenses

The United States is alone in believing that, as a matter of international law, it has a duty to suppress *type four* conduct. Many of the same arguments for *type two* and *type three* apply to *type four*. The Framers thought the power to define entailed the power to invent, they did not want foreign law to constrain U.S. law, and they would not have wanted judges to hobble the political branches when they were protecting the United States from international controversy. This subsection shows why the Supreme Court’s foreign relations case law provides additional reasons to believe that the United States can punish *type four* offenses and explains the limits of Congress’s power under the Define and Punish Clause.

#### 1. Foreign relations deference

In his *Youngstown Sheet & Tube Co. v. Sawyer* concurrence, Justice Jackson wrote that a President acting pursuant to a

---

345. *Id.* at 428.

346. *Id.* (emphasis added).

347. See *supra* note 308 and accompanying text (citing *Sabbatino* when interpreting the Define and Punish Clause).

348. See *supra* notes 290–294 and accompanying text.

Congressional grant of authority, what Jackson called Category One, is at the height of his power.<sup>349</sup> To claim that it is unconstitutional to punish *type four* offenses is to say that “the Federal Government as an undivided whole” lacks the power to adopt its own understanding of customary international law with criminal legislation.<sup>350</sup> But the federal government probably *does* have that power.

The judiciary generally respects the political branches’ legal and factual judgments in foreign relations cases. *Abbott v. Abbott*,<sup>351</sup> for example, accepted the State Department’s treaty interpretation because State understood “the likely reaction of other contracting states and the impact on” its ability to accomplish the ends of the treaty.<sup>352</sup> *Sabbatino* likewise emphasized the propriety of deferring to the President on customary international law because the executive “speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.”<sup>353</sup> Granted, these cases concerned judicial deference to the *President*, not Congress. But it would be structurally odd if the President had more law-making power than the Legislature.<sup>354</sup>

Any contrary interpretation of the Define and Punish Clause would make a statute’s constitutionality change because other countries changed their laws.<sup>355</sup> Congress might punish an of-

---

349. 343 U.S. 579, 635 (1952) (Jackson, J., concurring). *Youngstown* is the appropriate framework to use here because this Article is ultimately addressing a separation of powers question: whether Congress or the Judiciary has the final say on what counts as an offense against the law of nations.

350. *Id.* at 636–37.

351. 560 U.S. 1 (2010).

352. *Id.* at 16.

353. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432–33 (1964); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 112, cmt. c (1987) (noting that (1) courts prefer that “the United States speak with one voice on such matters,” (2) U.S. views constitute “state practice, creating or modifying international law,” and (3) “the Executive Branch will have to answer to a foreign state for any alleged violation of international law resulting from the action of a court” (citations omitted)).

354. Cf. *Youngstown*, 343 U.S. at 587–88 (majority opinion) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker . . . . The first section of the first article says that ‘All legislative Powers herein granted shall be vested in a Congress of the United States . . . .’”).

355. See *supra* Introduction.

fense pursuant to a well-established principle of international law at  $t_0$  that became unconstitutional at  $t_1$  if international law changed. It would also force Congress, as Judge Henderson put it, to play “Mother, may I?” with the international community.<sup>356</sup> Justice Douglas thought it wrong for the judiciary to serve as a mere “errand boy” of the executive branch when crafting federal common law.<sup>357</sup> But deferring to *international* definitions of the offenses against the law of nations in a *constitutional* context seems worse. The Court would instead be foreign nations’ “errand boy,” and Congress could not override its decisions. This deference would effectively delegate American constitutional law to foreign governments and international organizations.<sup>358</sup> That seems at odds with Madison’s preference that foreign law not limit the scope of the Define and Punish power.<sup>359</sup>

The Supreme Court’s decision in *Sosa v. Alvarez-Machain*<sup>360</sup> provides four other reasons to believe that judges should not second-guess Congress’s interpretation of international law.<sup>361</sup> First, “a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.”<sup>362</sup> Setting outward limits on Congress’s define and punish power would therefore be more an exercise in “creat[ing]” constitutional limits, not “discover[ing]” them.<sup>363</sup> That seems especially bad in *type four* cases because customary international law changes. Court decisions could shape international law’s future development around the world, possibly to the detriment of U.S. interests. Had courts struck down early neutrality legislation, for example, other countries might not have coalesced around American views of neutrality.<sup>364</sup> Second,

---

356. *Al Bahlul v. United States*, 792 F.3d 1, 49 (D.C. Cir. 2015) (Hendrickson, J., dissenting), *rev’d on other grounds* 840 F.3d. 757 (en banc).

357. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1971) (Douglas, J., concurring in the judgment).

358. *See Medellin v. Texas*, 552 U.S. 491, 517 (2008) (noting that any interpretation of a treaty that delegated to a foreign body the right to make binding legal judgments should “give pause”).

359. *See supra* notes 88–99 and accompanying text.

360. 542 U.S. 692 (2004).

361. *See Note, supra* note 325, at 2391 (“*Sosa* suggests that the limitations . . . flow from concerns about judicial overreaching, not from general concerns that would apply equally well to congressional action.”).

362. *Sosa*, 542 U.S. at 726.

363. *Id.* at 725.

364. *See DAVIS, supra* note 212, at 434.

the judiciary prefers “to look for legislative guidance before exercising innovative authority over substantive law,” especially when “exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.”<sup>365</sup> Because the Court has never curbed Congress’s power to define offenses against the law of nations before, it should tread carefully before doing so now. Third, limiting Congress’s power to develop rules of customary international law by punishing *type four* offenses might “imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs.”<sup>366</sup> Fourth, and applicable as much to the Define and Punish Clause as it is to the Alien Tort Statute, “[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”<sup>367</sup>

There may be greater reason for deference in military commission cases. Even when the President acts contrary to congressional will, Justice Jackson wrote that he would “indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”<sup>368</sup> In a *type four* situation, the President acts pursuant to congressional will, not against it, which might make Jackson’s “widest latitude” even wider.

Finally, early American neutrality legislation provides a significant precedent for punishing *type four* offenses. Congress used the Define and Punish Clause to invent new offenses against the law of nations, yet nobody suggested that this posed a constitutional problem.<sup>369</sup>

## 2. What can’t Congress punish?

Congress obviously cannot punish *type five* offenses with no connection to international law whatsoever. But *type four* offenses might seem indistinguishable from *type five* offenses considering

---

365. *Sosa*, 542 U.S. at 726; see also *supra* Section II.C.

366. *Sosa*, 542 U.S. at 727.

367. *Id.* at 728.

368. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

369. See *supra* Section IV.B.3–4.

*Arjona's* clarification that “[w]hether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect [in the statute].”<sup>370</sup> It seems like the government could belatedly defend statutes by asserting that Congress had an idiosyncratic view of international law. If so, then Congress could punish anything it wanted.

This objection is troubling. But courts could distinguish *type four* from *type five* offenses by requiring some predicate evidence, separate from the statute itself, that the political branches believe that the statute reflects U.S. obligations under international law. Congress can still pass resolutions expressing its opinions on international law, the executive can advocate changes at international conferences and vote for U.N. General Assembly resolutions, and the branches can foster piecemeal changes in customary international law by treaty. Forcing them to take these diplomatic steps would make it harder to opportunistically defend suspect statutes under the Define and Punish Clause. Congress might also constitutionally justify a law by pointing to a vague and broad international obligation to which it is trying to give teeth. The Neutrality Act’s prohibition on foreign enlistment was, after all, a much more specific instantiation of the international legal duty to prevent one’s subjects from harming another state.<sup>371</sup> *Arjona* sustained the foreign counterfeiting law on similar grounds.<sup>372</sup> If that sort of vague duty sufficed for Washington’s administration and *Arjona*, it should today. What matters is that there be some separate evidence that Congress really believes it is punishing an offense against the law of nations.

Foreign policy consequences would check congressional overreach. If Congress claimed it had an international legal obligation to punish a certain type of conduct, other countries might punish U.S. citizens for doing the same thing. For example, several lawyers in the Obama administration disfavored prosecuting a Guantanamo detainee for “conspiracy” in a military commission for fear of creating an international precedent that could harm U.S. interests.<sup>373</sup> Consider another part of the Define and Punish

---

370. *United States v. Arjona*, 120 U.S. 479, 488 (1887) (emphasis added).

371. See *supra* notes 241–43 and accompanying text.

372. See *supra* notes 288–89 and accompanying text.

373. See CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 499 (2015).

Clause: Congress's power to define and punish felonies committed "on the high Seas." The "high Seas" refers to waters not within any country's territory,<sup>374</sup> but courts defer to the political branches on territorial claims under the political question doctrine.<sup>375</sup> Congress and the President could thus expand Congress's jurisdiction by changing their views on territorial claims. But nobody worries about such an improbable scenario.<sup>376</sup>

## VI. CONCLUSION

This Article has defended a broad understanding of the Define and Punish Clause. Congress has a separate power to define offenses against the law of nations. This power to define gives it authority to punish universally recognized offenses against the law of nations (*type one*) and private conduct that the United States has (or may have) an international legal obligation to punish (*type two, type three*). Finally, Congress probably may punish private conduct under an idiosyncratic theory of international law to which only the United States subscribes (*type four*).

---

374. See, e.g., *United States v. Louisiana*, 394 U.S. 11, 23 (1969) ("Outside the territorial sea are the high seas.").

375. See *Jones v. United States*, 137 U.S. 202 (1890).

376. Additionally, if Congress has the power to define and punish offenses against treaties, which it most likely does, see generally Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015), the same risk of overreach exists. "[T]he President and the Senate [might] find in some foreign state a ready accomplice" to enact a treaty designed to expand congressional power. *Bond v. United States*, 134 S. Ct. 2077, 2102 (2014) (Scalia, J., concurring in the judgment). Ratifying a new treaty with a client state might carry fewer foreign policy consequences and thus face fewer domestic obstacles than adopting a new understanding of customary international law, which powerful nations might enforce against the United States.