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## Executive Power and the Law of Nations in the Washington Administration

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## EXECUTIVE POWER AND THE LAW OF NATIONS IN THE WASHINGTON ADMINISTRATION

Robert J. Reinstein \*

*In this issue's lead article, Professor Reinstein continues his examination of the development of executive power over foreign affairs during the early history of the Republic. Recently, both legal scholars and the courts are looking to the actions of the first administration as a potential precedent on how to construe the scope and source of the President's authority to determine and conduct the United States' foreign policy. Last year, in an article published in this journal, Professor Reinstein concluded that no originalist justification exists for a plenary executive recognition power. In this article, Professor Reinstein expands this discussion through an original historical and jurisprudential account of the Neutrality Crisis of 1792–1794 to draw three revisionist conclusions. First, he concludes that the Washington administration's most plausible source of constitutional authority was the Executive's duty, under the Take Care Clause, to obey the law of nations as expounded in the natural law treatises. Second, the Washington administration set a key precedent for the Executive's duty to obey the constraints of international law. And third, since profound changes in the United States have shown that the founders' way of thinking can be incompatible with our own, Professor Reinstein concludes that originalism is limited as a constitutional methodology and that theories of expansive executive powers must find foundations outside of the first President's decisions.*

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## I. INTRODUCTION

The Washington administration has attracted increased attention in the ongoing debate over the power of the President to determine and conduct the nation's foreign policy.<sup>1</sup> The actions of the first President are being seen as important precedents on the scope of executive power, much as the statutes of the first Congress are recognized as being important precedents on the scope of legislative power.

This article provides revisionist answers to three key questions concerning the Washington administration's assumption of authority in foreign policy: What constitutional source of power did the administration actually rely upon? How did its jurisprudential understanding of the law of nations affect the exercise of executive power? And does the experience of the Washington administration demonstrate the limits of originalism as a constitutional methodology?

Washington's most important and dramatic exercise of control over the nation's foreign policy—and the one that has attracted the most scholarly attention—occurred during the Neutrality Crisis of 1792–1794, when the United States was threatened with being engulfed into the European wars. Washington's decisions during that crisis were remarkable as unilateral exercises of executive power. Without statutory authority or obvious support from the Constitution's text, Washington did the following: (1) recognized the new French revolutionary government, (2) received its controversial foreign minister and requested his recall, (3) issued a Neutrality Proclamation (also the "Proclamation") declaring that the United States was "impartial" in France's war against Great Britain and its allies, (4) announced and implemented a policy of strict neutrality towards the belligerents, (5)

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1. See, e.g., WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 61–66, 164–91 (2006) [hereinafter CASTO, *FOREIGN AFFAIRS*]; H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* 37–61, 118–19 (2002); MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 76–88 (2007); JOHN YOO, *CRISIS AND COMMAND* 53–97 (2009); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 636–88 (2004); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1019–39 (2010); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 295–355 (2001); John Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J.L. & PUB. POLY 1 (2010).

determined that the revolutionary-era treaties with France were still in effect, (6) interpreted those treaties to comply with strict neutrality, (7) issued Rules on Neutrality that declared specific conduct by the belligerents within the United States to be lawful or unlawful, and (8) initiated nonstatutory prosecutions against American citizens for committing acts of hostility against a belligerent.

A number of theories have been advanced to justify Washington's actions, ranging from the expansive theory that the Article II Vesting Clause provides the President with residual plenary powers over foreign affairs<sup>2</sup> to more modest theories that retrospectively ascribe or stretch individual textual clauses in the Constitution.<sup>3</sup> This paper presents a different historical and jurisprudential account of the most plausible actual source of the administration's power. As a devoted believer in the rule of law, George Washington acted decisively, but only after he was convinced that there was firm constitutional support for his actions. The President's duty to take care that the laws are faithfully executed, and the consensus during the founding era that the law of nations was part of the law of the land, provided that support. In other words, rather than exercising discretionary power, Washington acted on the authority of the Take Care Clause, and the specific law he sought to execute was the law of nations.

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2. RAMSEY, *supra* note 1, at 76–88; Prakash & Ramsey, *supra* note 1, at 295–355. Other scholars rely on the Washington administration to present variations of this argument—that the Vesting Clause gives the President an initiating but concurrent power over foreign affairs with Congress, see CASTO, *FOREIGN AFFAIRS*, *supra* note 1, at 61–66, or that post-ratification constitutionalists applied a pragmatic approach to foreign policy that recognizes the institutional superiority of the executive branch, see POWELL, *supra* note 1, at 37–61, 118–19.

3. Bradley & Flaherty, *supra* note 1, at 636–88 (asserting that individual actions of the administration could each be explained hypothetically by applying or stretching various textual sources). Scholars who advocate greater constitutional authority for Congress in foreign affairs (particularly in the use of military force) tend either to focus on selected actions of the Washington administration or to ignore them altogether by relying on the constitutional text as elaborated in the drafting and ratification debates. *E.g.*, David Gray Adler, *The President's Recognition Power*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 133, 137–38 (David Gray Adler & Larry George eds. 1996); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 249–86 (5th rev. ed. 2007); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 1–16 (2d ed., rev. 2004); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 67–100 (1990); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers and the Constitution Historically Examined*, 55 *WASH. L. REV.* 1, 30–46 (1979); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 *SETON HALL L. REV.* 527, 660–65 (1974).

The declarations of the Washington administration invariably relied on its duty to execute the law of nations. Nevertheless, for over one-hundred years, historians and legal scholars have uniformly rejected the administration's explanations for its exercise of executive power. Inasmuch as no uniform practice among European countries was present that would have required the strict neutrality decisions made by the Washington administration, commentators have concluded that those decisions were discretionary executive choices. This paper demonstrates that these academics mistakenly projected their own method of thinking about law onto the founding generation by assuming that legal positivism was the correct method for determining the content of international law in the eighteenth century. That method is not how the administration thought about the law of nations. Those in the founding generation who were educated in the law were natural lawyers, and they regarded as authoritative the continental publicists who shared their jurisprudence of natural law and their fundamental values. Washington was in fact an extremely cautious constitutionalist, and his compliance with the law of nations as expounded by the continental publicists figured much more heavily in his decisions than abstract theories of executive power. Moreover, the duty to comply with the law of nations as expounded by the continental publicists appears to be the only theory that explains and justifies the administration's actions (and refusals to take action) during the Neutrality Crisis.

This thesis has other implications regarding executive power and international law. Washington's actions were based on the principle that the Executive has the duty and the resulting power to comply with the obligations of the law of nations. To the extent that international law remains part of national law, the actions of the Washington administration appear to provide an important precedent for the duty of the Executive to obey the constraints of international law.

But to what extent can Washington's actions during the Neutrality Crisis be used as precedents for the scope of executive power over foreign affairs beyond the duty to comply with international law? The foreign policy decisions of the Washington administration are important, but its actions cannot be considered as artificially distinct precedents for modern general constitutional theories of executive power. Evaluating the administration's decisions requires an understanding of the reasons for its actions, and

particularly its reasons for believing that those actions were constitutionally legitimate. Those reasons were founded on a natural law jurisprudence of the law of nations that was a product of its time. One of the profound changes that has occurred in the United States is that the founders' way of thinking about law can be incompatible with our own. Such is the case for the Washington administration, and it places an intrinsic limit on the use of originalism in developing or supporting any modern general theory of executive power. This result does not ultimately confirm or reject any such theories. It does mean, however, that all such theories must rest on a foundation other than the actions of our first President.

This article is organized as follows. Part I presents an overview of the thesis that Washington's actions were based on the duties of neutrality imposed by the law of nations and the longstanding criticism of that thesis by historians and legal scholars. The fulcrum of that criticism is that Washington's decision to adopt strict neutrality, as opposed to a benevolent neutrality favoring France, was not required by international law, but was a discretionary choice of policy. Responding to this criticism, Part II begins by examining these differences in European neutrality practices and the significance of the administration's choice of strict neutrality. This part then shows that the critics erred in missing important precedents of strict neutrality that were well known to the administration, in projecting onto the founding generation their own theory that legal positivism is the basis of international law, and in not understanding why the continental publicists, rather than European practice, were the administration's principal authorities on the law of nations.

To those of us educated on Anglo-American principles of law, it may be counterintuitive that the founding generation would rely on philosophers from non-common law nations as the authorities of the law of nations. Part III reviews the enormous influence of the continental publicists—and the reasons for that influence—in their jurisprudential principles, legal doctrines, and moral values. A particular focus is on the treatise of Emmerich de Vattel, which served as the administration's principal source for determining the content of the law of nations.

But did the administration really consider the law of nations in determining the nation's foreign policies? That issue is explored in Part IV, which examines the internal Cabinet debate on the validity of the French treaties (that wound up turning largely on the meaning of a single passage in Vattel's treatise), the request for a legal opinion from the Supreme Court, and the development of executive Rules of Neutrality.

As a related matter, Part V examines the extent to which the administration really followed the law of nations as expounded by the continental publicists during the Neutrality Crisis. This part illuminates the intersection of executive power and the law of nations in decisive actions of the administration (recognizing the revolutionary French governments, receiving and requesting the recall of Genet, issuing the Neutrality Proclamation, and prosecuting American citizens for acts of hostility against a belligerent) as well as in its refusals to take certain actions (prohibiting the French sales of prizes and demanding that "free ships make free goods"). Part VI analyses whether an alternative theory of executive power, which was originally advanced separately by Thomas Jefferson and Alexander Hamilton while members of the Washington administration, explains and justifies the administration's decisions.

Finally, the conclusion discusses how this study of history and jurisprudence relates to the three questions examined in this paper: the constitutional source of authority used by the Washington administration, the duty of the Executive to comply with the constraints of international law, and the limits of originalism as a constitutional methodology.

## II. THE LAW OF NATIONS THESIS

The thesis of this paper is that the source of executive power upon which Washington relied—and the only one that appears to explain and justify all of his decisions during the Neutrality Crisis—is the President's duty to execute the law of nations as incorporated into the laws of the United States.

Article II, Section 3 of the Constitution imposes a duty on the President to "take Care that the Laws be faithfully executed."<sup>4</sup> If

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4. U.S. CONST. art. II, § 3.



the term “laws” refers only to positive laws, this thesis could not be correct.<sup>5</sup> No federal statute authorized any of the Executive’s unilateral decisions during the Neutrality Crisis, which arose when Congress was not in session; and Washington declined to call Congress into session in order to obtain statutory authority.<sup>6</sup> However, a strong consensus existed in the founding era (and no recorded dissent) that the law of nations was part of the law of the land.<sup>7</sup> During the entire Neutrality Crisis, the Washington administration repeatedly told the French and British governments that its decisions were required by, and consistent with, the duties of strict neutrality imposed on the United States by the law of nations, and the administration gave as its authorities the line of continental publicists<sup>8</sup> from Grotius through Vattel<sup>9</sup> whose treatises expounded the law of nations.<sup>10</sup>

5. The term “laws,” as used in the Constitution, is surprisingly ambiguous. Consider, for example, the Supremacy Clause:

This Constitution, and the *Laws* of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme *Law* of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or *Laws* of any state to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added).

The first use of “Laws” in the Supremacy Clause certainly refers to congressional statutes, but why not to federal court judge-made law as well? The third reference to “Laws” necessarily includes the judge-made common laws of the states. If it did not, then the state judges could hold that the common law was superior to the Constitution. And if the first use of “Laws” meant only statutes, and that definition were applied to the Take Care Clause, the President would not be obligated to enforce the Constitution and treaties, a reading that would make that clause impotent and the Supremacy Clause self-contradictory (because the second reference to “Law” in the Supremacy Clause specifically includes the Constitution and treaties). It is beyond the scope of this paper to attempt to reconcile these ambiguities. I point them out to illustrate the possible indeterminacy of that term when used in the Take Care Clause.

6. See CASTO, *FOREIGN AFFAIRS*, *supra* note 1, at 29–30; CHARLES MARION THOMAS, *AMERICAN NEUTRALITY IN 1793*, at 66–68 (1967).

7. See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States—Part I*, 101 U. PA. L. REV. 26 (1953); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 251–58 (1990); RAMSEY, *supra* note 1, at 342–61; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 839–42 (1989); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 231–40 (2008); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 401–08 (1997).

8. They are referred to as publicists because their treatises purported to state what the law is, as deduced from principles of natural law. See Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT’L L. 239, 259 (1932) [hereinafter Dickinson, *Changing Concepts*].

9. See *infra* notes 70–73 and accompanying text.

10. See Letter from Thomas Jefferson to British Minister George Hammond (May 15,

If, as this paper concludes, Washington's power to insure strict neutrality derived from a duty to comply with the obligations of the law of nations, and if his decisions were consistent with those obligations, then his actions during the Neutrality Crisis would be

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1793), in 26 THE PAPERS OF THOMAS JEFFERSON 38, 38–40 (John Catanzariti et al. eds., 1995) (stating that the fitting of French privateers in U.S. ports to prey on British shipping, recruiting Americans to perform military service against Britain, establishing admiralty courts operated by French consuls, and seizing the British ship *Grange* in neutral territory violate the law of nations, but that the private trade in contraband does not); Letter from Thomas Jefferson to French Minister Jean Baptiste Ternant (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 42, 42–44 (same); Letter from Thomas Jefferson to French Minister Edmond Charles Genet (June 17, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 297, 298–99 (protesting and declaring unlawful, based on Vattel and Wolff, Genet's actions in arming a vessel in port of New York for the purpose of committing hostilities against a nation with which the United States is at peace); Letter from Thomas Jefferson to Edmond Charles Genet (July 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 510, 510–12 (relying on Grotius, Puffendorf, Bynkershoek, Wolff, and Vattel, warning Genet that the establishment of admiralty courts in the United States by French consuls is not required by treaty and violates the law of nations); Letter from Thomas Jefferson to Edmond Charles Genet (July 24, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 557, 557–58 (stating that the principle of “free ships makes free goods” is not recognized by the law of nations); *Id.* at 557–59 (invoking the law of nations to answer Genet's question concerning the seizure of an American vessel on the high seas by Great Britain); Letter from Thomas Jefferson to Edmond Charles Genet (Aug. 7, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 633, 633–64 (defending Washington's decision to give restoration or restitution to Great Britain for illegally seized vessels because the President considered himself bound “to positive assurances, given in conformity to the laws of neutrality”); Letter from Thomas Jefferson to U.S. Minister to France Gouverneur Morris (Aug. 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 697, 699 (requesting recall of Genet and accusing him of violating American neutrality according to law of nations as expounded by “the most enlightened and approved writers on the subject”); Letter from Thomas Jefferson to George Hammond (Sept. 5, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 35, 36–37 (1997) (stating that the United States will provide restitution for British ships seized in violation of the law of nations); Letter from Thomas Jefferson to George Hammond and Netherlands Minister F. P. Van Berckel (Sept. 9, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 70, 70–71 (stating that, under the treaties and law of nations, British and Dutch privateers could not enter U.S. ports but that the public armed vessels of Britain and the Netherlands will have an exact equality of access as provided to France); Circular to French Consuls and Vice-Consuls (Sept. 7, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 51, 51 (declaring that the establishment of foreign admiralty courts in the United States and enlistment of American citizens to commit acts of hostilities against a country with which the United States was at peace are illegal, and threatening to revoke the exequatur and prosecute any consul who commits either act); Letter from Thomas Jefferson to Edmond Charles Genet (Nov. 30, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 458, 458–59 (stating that, pursuant to the law of nations, the United States will not protect any of its citizens who engage in the contraband trade); Letter from Secretary of State Edmund Randolph to George Hammond (June 2, 1794), in 1 AMERICAN STATE PAPERS 464, 465 (Walter Lowrie eds., 1833) (explaining that the administration did not prohibit the direct sale of prizes by French-commissioned privateers because there was insufficient authority in the treatises of the continental publicists).

For the sake of brevity, subsequent citations to volumes of *The Papers of Thomas Jefferson* edited by John Catanzariti et al. omit editor and publication information. The lone exception is volume sixteen edited by Julian P. Boyd et al. See note 373.

authorized by the Take Care Clause. This conclusion would provide a straightforward explanation for Washington's constitutional authority and would also shed new light on the early understandings of both executive power and the incorporation of international law into the law of the United States.

This thesis has been rejected by legal scholars and historians for over one-hundred years. During the latter part of the nineteenth and early part of the twentieth centuries, leading international law scholars studied the Neutrality Crisis and reached two conclusions. First, they decided that the Washington administration acted well beyond the obligations of international law, because, in their view, no clearly established laws of neutrality yet existed.<sup>11</sup> Second, they commended Washington for developing rules that eventually became recognized laws of neutrality through widespread emulation and acceptance by other nations.<sup>12</sup>

Drawing on this scholarship as well as his own independent investigations, the distinguished legal historian Charles Hyneman presented the most influential rejection of the law of nations thesis in 1934.<sup>13</sup> He made a strong case that international law did not impose upon the United States a duty of strict neutrality, that Washington's decision to apply strict neutrality towards France and Great Britain was a wise but discretionary policy choice, and that the administration's professed reliance on the law of nations was a diplomatic artifice to support that policy choice.<sup>14</sup>

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11. See CHARLES G. FENWICK, *THE NEUTRALITY LAWS OF THE UNITED STATES* 27–28 (1913); WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 540–50 (2d ed. 1884); AMOS S. HERSHEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW* 452–54 (1912); PHILIP JESSUP, *AMERICAN NEUTRALITY AND INTERNATIONAL POLICE* 7–11 (1928).

12. See GEOFFREY BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 229–41 (1928); FENWICK, *supra* note 11, at 15–28; HALL, *supra* note 11, at 540–50; HERSHEY, *supra* note 11, at 452–54; JESSUP, *supra* note 11, at 7–12; LASSA OPPENHEIM, *INTERNATIONAL LAW* 350–58 (2d ed. 1912).

13. See generally CHARLES S. HYNEMAN, *THE FIRST AMERICAN NEUTRALITY*, (1934) [hereinafter HYNEMAN, *AMERICAN NEUTRALITY*]. Hyneman's book is based on his earlier article, *Neutrality During the European Wars of 1792–1815: America's Understanding of Her Obligations*, 34 AM. J. INT'L L. 279 (1930) [hereinafter Hyneman, *America's Understanding*]. Hyneman's principal area of expertise was the founding era. One of his major works is still a standard contemporary reference. See *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805* (Charles S. Hyneman & Donald S. Lutz eds., 1983) (reprint 1983). A Westlaw search shows that Hyneman's works were cited in 149 law review articles published between 1992 and 2010.

14. See HYNEMAN, *AMERICAN NEUTRALITY*, *supra* note 13, at 13–16; Hyneman, *America's Understanding*, *supra* note 13, at 281–82, 284.

Although, as a careful historian, Hyneman cautiously qualified his conclusions,<sup>15</sup> his study has entered the canon of conventional wisdom as definitive. Modern historians and legal scholars of the Neutrality Crisis, including the leading authorities on the federalist period, uniformly rely on Hyneman's work and maintain that, contrary to its public declarations, considerations of policy and not of law determined the Washington administration's actions during the Neutrality Crisis.<sup>16</sup> From my review of the literature, it appears that no one has challenged his study or conclusions.<sup>17</sup> This paper analyzes the evidence and conclusions of Hyneman, and those who agree with him, and asserts that they are wrong.

This position of Hyneman and other scholars hinges on the proposition that Washington was free under international law to have chosen a "benevolent" neutrality favoring one of the belligerents (presumably France) rather than strict neutrality.<sup>18</sup> In short, no established "law" existed that the President was executing. To analyze this position, it is necessary to understand the historical context in which the Neutrality Crisis arose, the different forms of neutrality then in practice, and the choice that Washington made in setting the nation's course.

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15. See HYNEMAN, *AMERICAN NEUTRALITY*, *supra* note 13, at 16 ("[O]ne remains in doubt . . ."); Hyneman, *America's Understanding*, *supra* note 13, at 285 ("One must, of course, be cautious . . . . The discussion in the foregoing paragraphs may justify nothing more than a query . . .").

16. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC 1788-1800*, at 336, 816 n.100 (1993). For others who rely on Hyneman, see, for example, ALEXANDER DECONDE, *ENTANGLING ALLIANCE* 195 & n.85 (1958); STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 121, 263 nn.26-27 (1997) [hereinafter JAY, *HUMBLE SERVANTS*]; RAMSEY, *supra* note 1, at 79-80, 408 n.33; William R. Casto, *Foreign Affairs Crises and the Constitution's Case or Controversy Limitation: Notes from the Founding Era*, 46 *AM. J. LEGAL HIST.* 237, 255-56 & n.118 (2004); Prakash & Ramsey, *supra* note 1, at 333-34 & n.447. See also CASTO, *FOREIGN AFFAIRS*, *supra* note 1, at 22 (stating that Washington's position of strict neutrality "was essentially a matter of real politik"); JERALD A. COMBS, *THE JAY TREATY* 107 (1970) (stating the same position but without citing authority).

17. A recent article asserts that the law of nations provides a constitutional basis for the Neutrality Proclamation and other actions by the Washington administration during the Neutrality Crisis, but it does not address or refute Hyneman's position, nor does it deal with the authorities of the law of nations upon which the administration relied. See Golove & Hulsebosch, *supra* note 1, at 1020-22; see also Bradley & Flaherty, *supra* note 1, at 680-83 (making the same assertion and omissions concerning the Neutrality Proclamation).

18. See HYNEMAN, *AMERICAN NEUTRALITY*, *supra* note 13, at 15-16.

### III. NEUTRALITY AND THE LAW OF NATIONS

When France declared war on Great Britain and the Netherlands on February 1, 1793, the United States had treaties with the belligerents that dated from the War of Independence. Reciprocal pledges of perpetual peace were in place with Britain,<sup>19</sup> France,<sup>20</sup> and the Netherlands.<sup>21</sup> The United States also had a limited "defensive" alliance with France.<sup>22</sup> In return for France's pledge to guarantee American independence, the United States guaranteed French possessions in the West Indies.<sup>23</sup> No statute or declaration of Congress authorized military action against any nation. Congress adjourned (without knowing that the war had started) leaving the United States in a legal state of peace. The United States was therefore a neutral in the war. Moreover, the administration would have violated the nation's treaty obligations by engaging in military action against any of the belligerents.<sup>24</sup> Thus, the question confronting the Washington administration was not whether the United States was in a neutral position in respect to the wars between the European powers. The issue was what *kind* of neutrality the United States should adopt. Two choices existed: "strict" neutrality or "benevolent" neutrality.

#### A. *Strict and Benevolent Neutrality*

The classic formulation of strict neutrality was provided by the continental publicist Emmerich de Vattel in his influential treatise, *The Law of Nations*:

Neutral Nations are those which take no part in a war, and remain friends of both parties, without favoring either side to the prejudice of the other.

. . . .

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19. Definitive Treaty of Peace, U.S.—Gr. Brit., Sept. 3, 1783, art. VII, 8 Stat. 80, 83.

20. Treaty of Amity and Commerce, U.S.—Fr., Feb. 6, 1778, art. I, 8 Stat. 12, 14.

21. Treaty of Amity and Commerce, U.S.—Neth., Oct. 8, 1782, art. I, 8 Stat. 32, 32.

22. Treaty of Alliance, U.S.—Fr., Feb. 6, 1778, art. I—II, 8 Stat. 6, 6, 8.

23. *Id.* at art. XI, 8 Stat. at 10.

24. That is, unless Britain attacked France's West Indies possessions and France demanded that the United States execute the guarantee in the Treaty of Alliance (which it did not). Spain became a member of the First Coalition against France. JOHN D. HABRON, TRAFALGAR AND THE SPANISH NAVY: THE SPANISH EXPERIENCE OF SEA POWER 116–17 (1988). Although the United States did not have a treaty with Spain, the countries were at peace. Hostilities against Spain were not authorized by any congressional legislation and would likely have precipitated a war with its ally Great Britain.

. . . So long as a neutral Nation desires to be secure in the enjoyment of its neutrality, it must show itself in all respects strictly impartial towards the belligerents; for if it favors one to the prejudice of the other, it can not complain if the latter treats it as an adherent and ally of the enemy. Its neutrality would be a hypocritical neutrality, of which no State would consent to be the dupe. A sovereign sometimes submits to such conduct because he is not in a position to resent it . . . . But we are here seeking to determine what may be done of right, . . . what are the elements of this impartiality which a neutral Nation must observe.

It relates solely to what may be done in time of war, and includes two things: (1) To give no help, when we are not under obligation to do so, nor voluntarily to furnish either troops, arms, or munitions, or anything that can be directly made use of in the war. I say "to give no help," and not "to give equal help"; for it would be absurd for a State to assist at the same time both enemies, and besides it would be impossible to assist them both equally, . . . (2) In all that does not bear upon the war a neutral and impartial Nation must not refuse to one of the parties, because of his present quarrel, what it grants to the other. This does not deprive it of the right to keep in view the best interests of the State when establishing relations of friendship or of commerce. . . . But if it should refuse any of those things to one of the parties merely because he was at war with the other, and because it desired to favor his opponent, it would be departing from the line of strict neutrality.<sup>25</sup>

According to Vattel, the only exception to the prohibition of military-related aid to any of the belligerents was that a nation could fulfill its obligations under a preexisting treaty, including providing moderate assistance pursuant to a defensive alliance, while still maintaining neutrality.<sup>26</sup>

In contrast to strict neutrality, a nation practicing "benevolent" neutrality would give military-related support and other preferences to a belligerent short of engaging in military action.<sup>27</sup> This form of neutrality, although denounced as "hypocritical" by Vattel,<sup>28</sup> was frequently practiced in Europe and was precisely what France wanted and expected from the United States.<sup>29</sup>

The revolutionary Girondin government instructed its new minister to the United States, Edmond Genet, not to invoke the guar-

25. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* bk. III, §§ 103–04, at 268 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

26. *Id.* § 105, at 268.

27. HYNEMAN, *AMERICAN NEUTRALITY*, *supra* note 13, at 15–16.

28. VATTEL, *supra* note 25, bk. III, § 104, at 268.

29. HYNEMAN, *AMERICAN NEUTRALITY*, *supra* note 13, at 153–54.

antee of the French West Indies possessions in the Treaty of Alliance because, if honored, that could draw the United States into the war.<sup>30</sup> Instead, Genet should, if possible, use a neutral United States as a base for French military operations against Great Britain and its allies.<sup>31</sup> Genet brought about three-hundred blank commissions for privateers to operate out of American ports and prey on British shipping.<sup>32</sup> The privateers, as well as the regular French navy, would bring their prizes into American ports and sell them, with title established by admiralty courts operated by French consuls in the United States.<sup>33</sup> For a fleet of this magnitude, Genet would recruit politically sympathetic and entrepreneurial Americans.<sup>34</sup> To inflict more damage, Genet was to negotiate a new treaty of commerce with the United States, which in return for French concessions would discriminate against Britain.<sup>35</sup> Finally, Genet's most ambitious plan was to incite revolutions in Canada, Louisiana, and Florida with secret agents, propagandists, and American "volunteers."<sup>36</sup> He intended to fund these audacious projects through the sales of prizes and the receipt of advance payments by the United States on its debt to France.<sup>37</sup>

The Girondin government understood that these plans were dependent upon cooperation by the United States. It cautioned Genet to proceed only to the extent that the United States government was willing, and it warned him that "at least for some time the Americans will observe an absolute neutrality."<sup>38</sup> But

30. See HARRY AMMON, *THE GENET MISSION* 28 (1973); ELKINS & MCKITRICK, *supra* note 16, at 334. France's decision to abstain from invoking the guarantee was fortunate for the United States, because Great Britain invaded the French West Indies. See THOMAS O. OTT, *THE HAITIAN REVOLUTION 1789-1804*, at 76-77 (1973). The first British campaign resulted in the quick seizure of Tobago in April 1793. *Id.* at 77. Britain invaded St. Domingue (now Haiti) in September 1793. *Id.* at 77-78. That invasion began a five-year war which ultimately resulted in British defeat and withdrawal. *Id.* at 76-120.

31. See ELKINS & MCKITRICK, *supra* note 16, at 335.

32. *Id.* at 333; Letter from Minister of the Marine to Citizen Genet (Feb. 8, 1793), reprinted in *AUTHENTIC COPIES OF THE CORRESPONDENCE OF THOMAS JEFFERSON AND GEORGE HAMMOND: PART II* 9, 9 (London, J. Debrett 1794).

33. ELKINS & MCKITRICK, *supra* note 16, at 334, 353.

34. See *id.* at 333. Privateering was a legalized form of piracy. Under the then-prevailing rules, the prize (the captured ship and/or its cargo) would be condemned by the captor's admiralty court and sold, with a portion of the proceeds going to the master and crew of the privateer. See VATTEL, *supra* note 25, bk. III, § 229, at 319.

35. See AMMON, *supra* note 30, at 26; ELKINS & MCKITRICK, *supra* note 16, at 333.

36. On Genet's instructions and plans, see AMMON, *supra* note 30, at 27; ELKINS & MCKITRICK, *supra* note 16, at 333.

37. See ELKINS & MCKITRICK, *supra* note 16, at 334.

38. *Id.* at 333 (quoting instructions) (internal quotation marks omitted).

Genet, who already had earned the reputation of a controversial and impetuous diplomat,<sup>39</sup> arrived in Charleston (instead of Philadelphia) on April 8, 1793, and he promptly commissioned four French privateers manned largely with American sailors, established an admiralty court to be operated by the French consul, and began planning an expedition into Florida—all without seeking permission from, or even consulting, the Washington administration.<sup>40</sup> He seemed certain that the United States would support his plans by adopting a “benevolent” neutrality in favor of France.<sup>41</sup>

Genet’s expectations may look fanciful in hindsight, but he had reasons to believe that the Washington administration would cooperate. Public opinion in the United States was heavily pro-French, because many Americans viewed the French Revolution as an image of their own, felt gratitude for France’s support of the United States during the War of Independence, and harbored continued hostility towards and distrust of their former colonial masters.<sup>42</sup> It was also not unreasonable for Genet to expect reciprocity for the position that France had taken during the American Revolution. Until the February 1778 treaties with the United States, France maintained a public stance of neutrality while providing the Americans with huge loans, equipping Washington’s army by shipping contraband through a “private” firm, allowing American privateers to use French ports as bases for preying on British shipping (in violation of its treaty with Britain), and collaborating in building three vessels of war for the American navy.<sup>43</sup>

Moreover, the Franco-American treaties did not explicitly prohibit the United States from giving this kind of support to France. Genet had a plausible argument that his position on privateering

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39. Genet had been the French ambassador to Russia but was expelled from that country because of his public advocacy of revolutionary principles. *See id.* at 331. Morris told Washington that Genet was a person of genius but that he had exceeded his instructions in Russia, had an explosive temper, and reacted petulantly when criticized. Letter from Gouverneur Morris to George Washington (Dec. 28, 1792), in 11 *THE PAPERS OF GEORGE WASHINGTON*, 559, 561–62 (Christine Sternberg Patrick ed., 2002).

40. *ELKINS & MCKITRICK*, *supra* note 16, at 335.

41. *See id.* at 346.

42. *See id.* at 346, 364.

43. SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES 20–25* (4th ed. 1955) [hereinafter *BEMIS, DIPLOMATIC HISTORY*]; SAMUEL FLAGG BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION 53–55* (1957). The harassment of British shipping in the English Channel by American privateers was so successful that insurance rates were increased by more than twenty percent. *Id.* at 54–55.



was at least consistent with, and arguably required by, the Treaty of Amity and Commerce.<sup>44</sup> Article XVII of the treaty authorized French ships of war and privateers to freely bring captured prizes into United States ports, while denying the same privilege to Britain.<sup>45</sup> Other provisions of the treaty were subject to interpretation. Article XXII prohibited Britain from fitting out privateers in the United States but was silent on whether France could engage in those activities.<sup>46</sup> Article XIX allowed French ships of war to obtain asylum in American ports but was silent about whether that privilege applied to British ships.<sup>47</sup> These articles could have been interpreted as providing for benevolent neutrality—that by negative implication, the treaty allowed France to fit out privateers to prey on British shipping and denied asylum to British ships of war.<sup>48</sup>

Finally, Genet had some reason to believe that he could secure a large advance payment against the French debt to fund his ambitious operations. The Washington administration had made such payments to France before the war with Britain.<sup>49</sup> In August 1791, a great slave revolt erupted in the French colony of St. Domingue (now Haiti).<sup>50</sup> The colonial planters' regime requested support from the United States, and the Washington administration provided it with \$726,000 for the purchase of arms, ammunition, and other supplies between September 1791 and January 1793.<sup>51</sup> The payments were made to Genet's predecessor, Ternant, and were deemed advances against the French revolutionary war debt.<sup>52</sup>

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44. ELKINS & MCKITRICK, *supra* note 16, at 346.

45. Treaty of Amity & Commerce, *supra* note 20, at art. XVII, 8 Stat. at 22. This Article, as well as the two that follow in the text, applied to all enemies of France. For simplicity, I use Britain as shorthand.

46. *See id.* at art. XXII, 8 Stat. at 24.

47. *Id.* at art. XIX, 8 Stat. at 22, 24.

48. AMMON, *supra* note 30, at 75–76; CASTO, FOREIGN AFFAIRS, *supra* note 1, at 17.

49. *See* OTT, *supra* note 30, at 54.

50. *Id.* at 42.

51. Timothy M. Matthewson, *George Washington's Policy Toward the Haitian Revolution*, in 3 DIPLOMATIC HISTORY 321, 326–33 (1970).

52. *Id.* American support was insufficient, and the colonial regime collapsed in June 1793. *Id.* at 334; *see also* DECONDE, *supra* note 16, at 272–74; OTT, *supra* note 30, at 65–72.

### B. *The Choice of Strict Neutrality*

Washington and his Cabinet chose strict neutrality. When Thomas Jefferson, the Secretary of State, determined that war had indeed broken out between France and Britain and the Netherlands, he wrote to Washington, who was at Mount Vernon, that it was “necessary in my opinion that we take every justifiable measure for preserving our neutrality.”<sup>53</sup> From Paris, the American minister Gouverneur Morris sent the administration an urgent warning that, while he expected the United States to “strictly observe the Laws of Nations and rigidly adhere to their Neutrality,” Genet’s commissions for privateers “might expose us to Suspicion and finally involve us in War.”<sup>54</sup> Washington sent the following directive to the Cabinet:

War having actually commenced between France and Great Britain, it behoves the Government of this Country to use every means in it's power to prevent the citizens thereof from embroiling us with either of those powers, by endeavouring to maintain a *strict neutrality*. I therefore require that you will give the subject mature consideration, that such measures as shall be deemed most likely to effect this desirable purpose may be adopted without delay; for I have understood that vessels are already designated as Privateers, and preparing accordingly.<sup>55</sup>

The administration then implemented the policy of strict neutrality by denying to all of the belligerents, including France, any military-related support, except as explicitly obligated by treaty.<sup>56</sup> The administration adhered to the treaty requirement that France, but not her enemies, could bring prizes into United States ports.<sup>57</sup> But it thwarted all of Genet’s designs. The administration interpreted the treaty as not authorizing France to fit out privateers in United States ports and, to achieve a strict impartiality,

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53. Letter from Thomas Jefferson to George Washington (Apr. 7, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 518, 518. Although France declared war on Britain and the Netherlands on February 1, 1793, it took over two months for Americans to receive definite confirmation that the war had begun because of particularly bad weather in the Atlantic. CASTO, FOREIGN AFFAIRS, *supra* note 1, at 19.

54. Letter from Gouverneur Morris to Thomas Jefferson (Mar. 7, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 333, 333.

55. Letter to George Washington to Cabinet (Apr. 12, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 541, 541 (emphasis added).

56. See AMMON, *supra* note 30, at 67.

57. See *id.*

prohibited France from doing so.<sup>58</sup> Similarly, the administration read the treaty as not prohibiting British ships of war from obtaining asylum in United States ports and, to achieve equality of treatment, held that the British warships would enjoy the same privileges as the French.<sup>59</sup> The administration prohibited all of the belligerents from recruiting Americans for military service and held that the establishment of French consular courts in the United States for adjudicating title to prizes was illegal—a “mere nullity.”<sup>60</sup> And the administration refused to make a new commercial treaty with France that would discriminate against Britain.<sup>61</sup>

The administration’s position of strict neutrality was succinctly stated by Jefferson to Genet on June 5, 1793 in response to Genet’s strenuous complaints of how the United States was interpreting the treaties:

The respect due to whatever comes from you, friendship for the [F]rench nation and justice to all, have induced [the President] to re-examine the subject, and particularly to give your representations thereon, the consideration they deservedly claim. After fully weighing again however all the principles and circumstances of the case, the result appears still to be that it is the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits; and the *duty* of a neutral nation to prohibit such as would injure one of the warring powers . . . .<sup>62</sup>

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58. Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 38, 38–40; Letter from Thomas Jefferson to Jean Baptiste Ternant (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 42, 42–44; Cabinet Memorandum on French Privateers (June 1, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 155, 155; Letter from Thomas Jefferson to Edmond Charles Genet (June 17, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 297, 297–300; Cabinet Opinion on Prizes and Privateers (Aug. 3, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 603, 603–04.

59. Letter from Thomas Jefferson to George Hammond and F. P. Van Berckel (Sept. 9, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 70, 70–71.

60. Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 38, 38–40; Letter from Thomas Jefferson to Jean Baptiste Ternant (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 42, 42–44; Letter from Thomas Jefferson to Edmond Charles Genet (June 5, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 195, 195–96; Letter from Thomas Jefferson to Edmond Charles Genet (July 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 510, 511–13.

61. See ELKINS & MCKITRICK, *supra* note 16, at 333–34.

62. Letter from Thomas Jefferson to Edmond Charles Genet (June 5, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 195.

Six days later, the administration refused Genet's request for advanced payments on the debt.<sup>63</sup>

Genet and France "had expected a benevolent American neutrality, under which French actions, while exacerbating, would not have been construed as violations of American neutrality. This kind of neutrality Genet did not get."<sup>64</sup>

### C. *The Critique of the Law of Nations Thesis*

The claim that Washington was not executing the law of nations is that his choice of strict neutrality, instead of benevolent neutrality, was wise policy but was not required by international law. Strict neutrality was surely the safest means of keeping the United States out of the war.<sup>65</sup> Had the administration supported Genet's plan for using United States ports as bases for preying on British ships, the result could have been a calamitous war with Great Britain.<sup>66</sup> The policy of strict neutrality was embraced by the entire Cabinet—both by Alexander Hamilton, the Secretary of the Treasury, who was alarmed by the French reign of terror and wished above all to avoid war with Great Britain, and by Jefferson, an Anglophobe whose every moral and political instinct favored revolutionary France.<sup>67</sup> The Washington administration un-

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63. Letter from Thomas Jefferson to Edmond Charles Genet (June 11, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 252, 252. When the administration decided on strict neutrality, it ceased providing financial or other support to suppress the slave revolt in St. Domingue. See Matthewson, *supra* note 51, at 335.

64. DECONDE, *supra* note 16, at 233.

65. See HYNEMAN, AMERICAN NEUTRALITY, *supra* note 13, at 19.

66. See ELKINS & MCKITRICK, *supra* note 16, at 334.

67. Some authors claim that Jefferson advocated a benevolent neutrality in favor of France. *E.g.*, AMMON, *supra* note 30, at 51; COMBS, *supra* note 16, at 109–13; DECONDE, *supra* note 16, at 109–13. From his earliest decisions during the Neutrality Crisis, Jefferson adopted the position of strict neutrality. In his official and private opinions to Washington, Jefferson interpreted the French treaties according to strict neutrality. On the key question of arming privateers, Jefferson examined whether a danger to the United States existed because Article XXII of the commercial treaty with France prohibited the enemies of France from fitting out privateers in U.S. ports. Opinion on Treaties with France (Apr. 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 608, 611. He concluded that no danger was present: "But we are free to refuse the same thing to France, there being no stipulation to the contrary, and we ought to refuse it on principles of fair neutrality." *Id.* In another early official and private opinion to Washington, Jefferson emphasized the same need to interpret the treaties according to strict neutrality, which he called "a fair and secure neutrality." Opinion on the Restoration of Prizes (May 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 50, 50. Jefferson made the same point to his closest ally and friend, James Madison, and to his teacher, George Wythe. Letter from Thomas Jefferson to James Madison (Apr. 28, 1793), in 25 THE PAPERS

questionably adopted the policy that it thought was in the best interest of the United States. Moreover, a clear political advantage was evident in placing diplomatic reliance on the law of nations. The United States was a weak nation caught in the crosswinds of two powerful and rapacious countries. It is a truism that weak nations tend to embrace international law when it can be empowering, while strong nations tend to disdain international law when it is restraining.

This article does not take issue with any of the foregoing points. A policy of strict neutrality relying on the obligations of international law was almost certainly the best means of keeping the United States out of the war. There is no reason to doubt that Washington *wanted* to adopt strict neutrality. But, in the absence of any authorizing congressional legislation, that does not answer the question of how the Executive had the *power* to adopt that policy. Did the law of nations provide the legal authority for the administration's neutrality policy, and did the law of nations also place restraints on the administration's discretion?

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OF THOMAS JEFFERSON, *supra* note 10, at 619, 619 ("I fear that a fair neutrality will prove a disagreeable pill to our friends, tho' necessary to keep us out of the calamities of a war."); Letter from Thomas Jefferson to George Wythe (Apr. 27, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 597, 597 ("We shall be a little embarrassed occasionally till we feel ourselves firmly seated in the saddle of neutrality.").

With one exception (the continued validity of the French treaties), substantial agreement existed in the Cabinet on how the policy of strict neutrality should be implemented. HYNEMAN, AMERICAN NEUTRALITY, *supra* note 13, at 21-23. To be sure, the political and personal animosity and distrust between Hamilton and Jefferson were so toxic that "relatively minor" differences were exaggerated into matters of principle. ELKINS & MCKITRICK, *supra* note 16, at 336. ("There was thus an inordinate amount of quibbling and hair-splitting. But at any point of clear choice between the national interest and something else, despite private grumblings nobody really hesitated; there were few doubts as to what the national interest was."). "Nor did [Jefferson] seriously advocate—as some writers have carelessly claimed—a 'benevolent' neutrality toward France, being fully aware of the dangers such a course would invite." *Id.* at 338; *see also* CASTO, FOREIGN AFFAIRS, *supra* note 1, at 162-63; CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793, at 35, 51, 56-62 (1967).

As for Hamilton, given the Franco-American treaties and the widespread public support for France, the most that he could realistically do to favor Britain was to challenge the continued validity of the treaties but otherwise advocate strict neutrality, which he did with his usual energy and passion. *See, e.g.*, Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON 454, 454-55 (Harold C. Syrett ed., 1969) (quoting Vattel to the effect that recruiting soldiers in a foreign country without the consent of the host is a violation of the law of nations and that the offender (Genet?) should be hanged). For the sake of brevity, subsequent citations to the volumes of *The Papers of Alexander Hamilton* edited by Harold C. Syrett omit editor and publication information.

Historians and other scholars who reject the law of nations thesis are certain that it did neither, on the following grounds. Precedents of strict neutrality existed in Europe, but these declarations “were beyond doubt entirely unknown to members of the American government in 1793,” because they made no references to them during the Neutrality Crisis.<sup>68</sup> Moreover, for every instance that one could cite of a European country adopting strict neutrality, at least as many instances prevailed in which European countries practiced benevolent neutrality. In the practice of nations, no consensus was in place on the actual requirements of neutrality, and hence no generally accepted principle of international law existed upon which Washington could have relied.<sup>69</sup> Strict impartiality was the doctrine expressed by continental publicists such as Grotius,<sup>70</sup> Bynkershoek,<sup>71</sup> Wolff,<sup>72</sup> and Vattel,<sup>73</sup>

68. HYNEMAN, *AMERICAN NEUTRALITY*, *supra* note 13, at 16.

69. *Id.* at 15–16; *see supra* note 11 and accompanying text.

70. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* bk. III, ch. XVII, II, at 377–78 (A.C. Campbell trans., 1901) (1625).

71. CORNELIUS VAN BYNKERSHOEK, *2 QUAESTIONUM JURIS PUBLICI LIBRI DUO* bk I, ch. IX, at 61–63 (Tenney Frank trans., 1930) (1737).

72. CHRISTIAN WOLFF, *2 JUS GENTIUM METHODO SCIENTIFA PERTRACTATUM*, ch. VI, §§ 672–75, 683–84, at 346–48, 352–53 (Joseph H. Drake trans. 1934) (1764).

73. VATTEL, *supra* note 25, bk. III, §§ 103–04, at 268. Prakash and Ramsey assert that Vattel also endorsed the alternative of benevolent neutrality, relying on the following quotes from his treatise:

Vattel, writing in the eighteenth century, observed that nonbelligerent nations often “furnish[ed] a determined succour, allow[ed] some troops to be raised, or advance[d] money” to one side without provoking retaliation and commented that “this prudent caution in not always coming to an open break with those who give such help to an enemy . . . has gradually given rise to the custom of not regarding such assistance . . . as an act of hostility.”

Prakash & Ramsey, *supra* note 1, at 333 n.447 (alteration in original) (quoting VATTEL, *supra* note 25, bk. III, § 97, at 265). These quotes are selectively taken out of context and misstate Vattel’s position on neutrality. They are taken from a chapter of *The Law of Nations*, entitled “The Enemy’s Allies; Leagues of War; Auxiliaries; Subsidies,” that deals with the *opposite* of neutrality. In the very paragraph containing the excerpts quoted by Prakash and Ramsey, Vattel states: “I account as *allies of my enemy* those who aid him in his war without being under treaty obligation to do so.” VATTEL, *supra* note 25, bk. III, § 97, at 265 (emphasis added). Vattel then observes that for reasons of prudence, “I may overlook that ground of complaint, but I should be justified in calling them to account for it,” and “while prudence may make a Nation refrain from exerting its full right, the right is not thereby lost.” *Id.* Vattel’s position quite clearly was that a nation providing such support to a belligerent was in fact its ally, and not a neutral, but that the offended nation might not declare war on the ally because of military and political realities—“in order not to force them [the allies] to support him [the enemy] with all their strength.” *Id.* The error in enlisting Vattel as endorsing benevolent neutrality should have been obvious because his doctrines on neutrality are in the chapter that follows, “Neutrality, and the Passage of Troops Through a Neutral Country.” *Id.* §§ 103–35, at 268–78. There, Vattel states unequivocally that a nation engaging in the conduct described by Prakash and Ramsey would

whom the Washington administration frequently cited.<sup>74</sup> But the authoritativeness of these writers “will hardly be convincing when it is noted that their opinions . . . were based more on considerations of natural law than on observations of the practice of nations.”<sup>75</sup> Thus, the administration’s official statements to the belligerents may have been rationalizations for the Cabinet’s policy choices. “The law made me do it” is an effective diplomatic tool that a weak nation can use as a cover for predetermined foreign policy decisions.<sup>76</sup>

A careful examination of the relevant historical sources shows that each of these premises is incorrect. The Washington administration was keenly aware of the precedents of strict neutrality; convincing reasons existed for the administration to reject European practice as prescribing the law of nations and instead to regard the continental publicists as authoritative; and no disjunction subsists between the official announcements and the Cabinet deliberations. The intersection of international and domestic constitutional law in the Take Care Clause provided the administration with the legal authority that it needed.

#### D. *The Strict Neutrality Precedents*

Benjamin Franklin and John Adams were the accredited ministers to the court of France following that country’s recognition of American independence in 1778.<sup>77</sup> On April 10, 1780, Adams excitedly reported to Congress that Catherine II of Russia had taken an action that “is of too much importance to the United States of America and their allies to be omitted to be sent to Congress.”<sup>78</sup> He forwarded the Empress’s declaration that Russia would continue “to maintain during the present war the strictest neutrality” while inviting other countries to join with Russia in forming the League

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be practicing “a hypocritical neutrality. . . . A sovereign sometimes submits to such conduct because he is not in a position to resent it . . . . But we are here seeking to determine what may be done of right, not what prudence may suggest under the circumstances.” *Id.* § 104, at 268.

74. HYNEMAN, AMERICAN NEUTRALITY, *supra* note 13, at 13–14.

75. *Id.* at 15.

76. *Id.* at 17–19; *see also, e.g.*, Jay, *supra* note 7, at 838–46.

77. ANDREW STOCKLEY, BRITAIN AND FRANCE AT THE BIRTH OF AMERICA 3, 12 (2001).

78. Letter from John Adams to the President of Congress (Apr. 10, 1780), *in* 3 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 606, 606 (Francis Wharton ed., 1889) [hereinafter REVOLUTIONARY DIPLOMATIC CORRESPONDENCE].

of Armed Neutrality.<sup>79</sup> This group would be a coalition of neutrals that would practice “perfect neutrality” towards belligerents on the condition that the belligerents would respect a principle of neutral rights that went beyond what was then required by the law of nations—that all goods except contraband belonging to the subjects of the belligerent powers shall be immune from seizure in neutral ships (the principle that “free ships make free goods”).<sup>80</sup> Adams subsequently transmitted to Congress the declarations of the Netherlands, Sweden, Denmark, and Austria that they would maintain strict neutrality during the war and had joined the League of Armed Neutrality.<sup>81</sup>

Portugal was a special case. It practiced “benevolent” neutrality in favor of Great Britain by allowing armed vessels commissioned by Britain to use its ports while denying that privilege to France, Spain, and America.<sup>82</sup> Adams complained bitterly to Congress of Portugal’s position: “If she is neutral, let her be neutral; not say she is neutral, and be otherwise.”<sup>83</sup> Portugal would change its position, and Adams reported with satisfaction when Portugal declared “exact neutrality” and banned all privateers and prizes from entering or remaining in its ports.<sup>84</sup>

Franklin and Adams immediately understood the importance of the declarations of strict neutrality and the formation of the League of Armed Neutrality.<sup>85</sup> Not only would the League guaran-

79. *Id.* at 606–07.

80. *Id.* at 606–08.

81. Letter from John Adams to the President of Congress (Apr. 28, 1780), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 635, 635–39 (declaration of Holland of “scrupulous neutrality”); Letter from John Adams to the President of Congress (Aug. 14, 1780), in 4 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 29, 29–32 (declaration of Sweden of “perfect neutrality,” and declaration of Denmark of “neutrality the most exact and most perfect”); Letter from John Adams to the President of Congress (Jan. 15, 1781), in 4 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 234, 234 (declaration of the States General of the Netherlands of “the most strict and most perfect neutrality”); Letter from John Adams to the President of Congress (Dec. 29, 1781), in 5 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 77, 77–79 (declaration of Austria of the “most strict neutrality and the most exact impartiality”).

82. See Letter from John Adams to John Jay (May 15, 1780), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 678, 678; see also James W. Garner, *The Violation of Neutral Territory*, 9 AM. J. INT’L L. 72, 82 (1915).

83. Letter from John Adams to John Jay (May 15, 1780), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 678, 678–79.

84. Letter from John Adams to the President of Congress (Oct. 6, 1780), in 4 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 83, 83–84.

85. See Letter from Benjamin Franklin to the President of Congress (May 31, 1780), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 742, 745; Letter from



tee that the Royal Navy would be unable to intercept commerce (except contraband) from neutral countries to the United States, France, and Spain, but Britain was now in a hot war with France and Spain and in a cold war with practically the rest of Europe.<sup>86</sup> As the League began to develop, Franklin, on his own initiative, ordered American privateers operating out of France to cease intercepting neutral ships carrying British goods and prophetically told Congress: "In truth, that country [Great Britain] seems to have no friends on this side of the water; no other nation wishes it success in its present war, but rather desires to see it effectually humbled; no one, not even their old friends the Dutch, will afford them any assistance."<sup>87</sup> And Adams sent a message to the same effect after the League was formed:

I think it can be no longer doubted that Russia will never take part with England, and that while she is determined upon a neutrality, every other maritime power of Europe must do the same or join against England. It is equally plain that England must come into the system of rights preparing for neutrals or go to war with all the maritime powers of the world. This is too decisively and obviously advantageous to North America to need any comments.<sup>88</sup>

Congress readily joined France and Spain in agreeing to the League's conditions.<sup>89</sup>

Hyneman and other critics are therefore plainly incorrect in asserting that the Washington administration was unaware of the European declarations of strict neutrality. These declarations were momentous events that the nation's leadership could hardly

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John Adams to the President of Congress (July 15, 1780), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 859, 860.

86. BRENDAN SIMMS, THREE VICTORIES AND A DEFEAT: THE RISE AND FALL OF THE FIRST BRITISH EMPIRE, 1714–1783, at 642–45 (2007); *see also* GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 23 (2008).

87. Letter from Benjamin Franklin to the President of Congress (May 31, 1780), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 742, 745.

88. Letter from John Adams to the President of Congress (July 15, 1780), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 859, 860.

89. 18 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 865–67, 905 (Gailiard Hunt ed., 1910). Congress had sent Francis Dana to Russia as a "minister-designate" to seek recognition of the United States, which Catherine II refused. When Congress learned of Catherine II's actions with the other neutral states, Dana was instructed to pursue recognition with great patience, because, having created the League of Armed Neutrality, Catherine II must maintain the "strictest impartiality" and that "[a]t this critical moment it could hardly be expected that she would publicly entertain a minister from the United States." Letter from Robert Livingston to Dana (May 10, 1782), in 5 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 411, 411 (Actually, Russia would not recognize the United States until 1809).

have forgotten, and they were reported to the country by the person who would be the Vice President in Washington's administration.

These precedents would appear strongly to support Washington's choice of strict neutrality, yet the administration did not rely on them during the Neutrality Crisis. Perhaps this was because these events were so well known that they did not have to be cited. Or perhaps the administration did not rely on them because those precedents would have been negated by the number of contrary instances of benevolent neutrality by European nations. The central point of Hyneman and other critics is that there was no consensus in the practices of nations from which a binding law of neutrality could be derived and the recitation of strict neutrality declarations by European nations during the War of Independence would not have refuted that point.

This critique necessarily assumes that the Washington administration should have drawn its doctrines of international law from the practices of European nations. But, for good reasons, American lawyers, judges, and statesmen did not regard European practice as the source of the law of nations.

During the eighteenth century, European ministries professed that a law of nations was in place containing rules that governed international behavior, but violation of, and not adherence to, those rules was the norm. Even for rules of international law that were said to be universally accepted,

the whole diplomacy of the time aimed to evade or to violate them as much as was consistent with political safety, with the result that there existed a regime of policies rather than of laws, and one which pretended an observance of forms rather than the spirit of international equity.<sup>90</sup>

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90. JULIUS GOEBEL, JR., *THE RECOGNITION POLICY OF THE UNITED STATES* 73 (1915); see also, e.g., BEMIS, *DIPLOMATIC HISTORY*, *supra* note 43, at 15 (European states in the eighteenth century conducted their foreign policies "according to the naked principles of Machiavelli, holding that a good object of state justified the employment of any means. A good end meant the advancement of one's own nation at the expense of others."). The European monarchies were not restrained by elementary legal doctrines. See *id.* at 15-16 (stating that despite time-honored principles, even the dispatches of ambassadors were not safe; and ministries did not hesitate to employ secret practices including "dissimulation, deception, espionage, bribery, treachery, robbery and even assassination" to advance their nations' interests); HERRING, *supra* note 86, at 69 (treaties were regularly violated when ministries thought necessary); FRANCIS STEPHEN RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT: THE BACKGROUND OF EMMERICH DE VATTTEL'S LE DROIT DES GENS* 38-43

This norm was not a model that would be naturally adopted by a new republic that professed a devotion to the rule of law<sup>91</sup>—one that, in the words of Chief Justice Marshall, who idolized Washington, had established “a government of laws, and not of men.”<sup>92</sup>

Instead of using European practices as the bases of the law of nations, the founding generation relied on the natural law doctrines propounded by the continental publicists. An early incident during the Neutrality Crisis provides a good example. Britain’s minister to the United States, George Hammond, complained that the seizure of the British ship *Grange* by a French frigate in the Delaware Bay violated the law of nations because it occurred in the territorial waters of the United States and not on the high seas.<sup>93</sup> Attorney General Edmund Randolph consulted the continental publicists (particularly his favorite, Vattel) and found that they were unanimous that a bay such as the Delaware was within a nation’s territorial jurisdiction.<sup>94</sup> This support was enough for Randolph to issue a formal opinion that the *Grange* was seized in neutral waters and that “the duty arising from the illegal act, is restitution.”<sup>95</sup> As for the relative importance of Vattel and European practice, Randolph stated:

If, as Vattel inclines to think in the 294th. Section of his first book, the Romans were free to appropriate the mediterranean, merely because they secured by one single stroke the immense range of their coast; how much stronger must the vindication of the U.S. be, should they adopt maxims for prohibiting foreigners from gaining, without permission, access into the heart of their country.

This inquiry might be enlarged by a minute discussion of the practice of foreign nations in such circumstances. But I pass it by; because the U.S. in the commencement of their career ought not to be precipitate in declaring their approbation of any usages, (the precise facts concerning which we may not thoroughly understand) until those usages shall have grown into principles, and are incorporated into the

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(1975) (stating that in the maelstrom of political anarchy that characterized European politics in the eighteenth century, “nothing was sacred, no principle inviolable. . . . [and] [n]ot even the most explicit treaty arrangements need be honored”).

91. On the importance to the founding generation of complying with the law of nations, see Golove & Hulsebosch, *supra* note 1, at 1018–19.

92. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

93. Memorial from George Hammond (May 2, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 637, 637–38.

94. Edmund Randolph’s Opinion on the *Grange* (May 14, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 31, 32–35.

95. *Id.* at 35.

law of nations; and because no usage has ever been accepted, which shakes the foregoing principles.<sup>96</sup>

This approach to the law of nations was typical for the Washington administration<sup>97</sup> and also explains why it did not consider the United States bound to provide France with the same benevolent neutrality that France had practiced before formally entering the American War of Independence. Even before the Declaration of Independence was issued, Louis XVI had accepted his foreign minister's plan to provide huge secret support for the American Revolution while maintaining a public posture of neutrality.<sup>98</sup> The other critical element in the plan was to build up the French navy for outright military intervention in the war.<sup>99</sup> France's monarchical government was hardly motivated by ideological sympathy with the Americans. Its goals were to obtain revenge for the disastrous Seven Years War and to dramatically reduce British power.<sup>100</sup> Great Britain protested the French actions but tolerated them because it did not want France to enter the war.<sup>101</sup> More than in the case of Portugal, France's benevolent neutrality was neither benevolent nor neutral. It was an outstanding example of Jefferson's statement to the French government in the Neutrality Crisis that "favors to one [nation] to the prejudice of the other would import a fraudulent neutrality, of which no nation would be the dupe."<sup>102</sup>

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96. *Id.* Jefferson forwarded Randolph's opinion to the British minister and to the outgoing French minister, with demands that the *Grange* and its cargo be restored to Britain and its crew freed. Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 38, 39; Letter from Thomas Jefferson to Jean Baptiste Ternant (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 42, 43-44. These demands were then presented to Genet, the new French minister. ELKINS & MCKITRICKS, *supra* note 16, at 343. Genet agreed to these demands (the only time he would do so willingly), but this incident foreshadowed the ensuing conflict between the United States and France over the meaning of American neutrality. *Id.*

97. See *supra* notes 8-10 and accompanying text.

98. See JONATHAN R. DULL, A DIPLOMATIC HISTORY OF THE AMERICAN REVOLUTION 60-61 (1985).

99. *Id.* at 90; HERRING, *supra* note 86, at 17-20.

100. STOCKLEY, *supra* note 77, at 132 (The French foreign minister Vergennes, who was the architect of this policy, frankly explained France's rationale: it "was the significant weakening of England caused by taking away a third of her empire.") (internal quotation marks omitted).

101. See SIMMS, *supra* note 86, at 598-99.

102. Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 697, 699 (letter to French government requesting recall of Genet).

The Washington administration did not look to European practice as the source of the law of nations. When members of the administration referred to common usages of nations, it was to those practices that conformed with their authorities—the treatises on the law of nations written by the continental publicists.

This reliance on philosophers from non-common law European countries may seem anomalous. It is explained by the remarkable correspondence of the jurisprudence, legal doctrines, and moral values of the continental publicists with those of the founding generation in America.

#### IV. THE CONTINENTAL PUBLICISTS

Critics of the law of nations thesis dismiss the Washington administration's reliance on the continental publicists, because "their opinions . . . were based more on considerations of natural law than on observations of the practice of nations."<sup>103</sup> This criticism assumes that legal positivism, with its emphasis on the practice of nations as evidence of state consent, is the foundation of international law. That assumption was certainly true when Hyneman and others wrote in the latter part of the nineteenth and the early part of the twentieth centuries. The natural law basis of international law had been thoroughly rejected by then:

Such 'naturalistic' evidence, however, hardly sufficed for the nineteenth-century international legal positivists who seemed to need to see the 'hard' stuff of state practice to demonstrate to themselves and others that international law was 'real' law. In Wharton's groundbreaking work [published in 1886], to be followed by dozens of others in the nineteenth and twentieth centuries, the 'scientific' positivists would enwrap themselves in the reassuring detail of state practice.<sup>104</sup>

Or, as Edwin D. Dickinson observed in 1932: "At the beginning of the 20th century, to speak contemptuously of the naturalists, while avoiding the particulars of the indictment, was to court favor with the profession. Positivism was indisputably triumphant."<sup>105</sup>

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103. HYNEMAN, *AMERICAN NEUTRALITY*, *supra* note 13, at 15.

104. MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914*, at 124 (2004).

105. Dickinson, *Changing Concepts*, *supra* note 8, at 253. The definitive treatise on international law in the twentieth century was Lassa Oppenheim's *International Law*. Oppenheim was a pure legal positivist who determined the content of international law

### A. *The Founders' Natural Law Jurisprudence*

Projecting the jurisprudence of legal positivism onto the founding generation is a fundamental error. American judges, attorneys, and others learned in the law during the late eighteenth century had studied and been indoctrinated with the natural law doctrines of Coke and Blackstone.<sup>106</sup> Blackstone, whose *Commentaries* was the first legal text read by almost all American lawyers,<sup>107</sup> held that positive law that violated natural law was invalid as a matter of conscience; that even judicial decisions are not the law, but only evidence of what the law is; and that those decisions should be overruled when unjust.<sup>108</sup>

In the founding generation, virtually all American attorneys were natural lawyers, and their approach towards law cannot be circumscribed retrospectively by later accepted doctrines of legal positivism.<sup>109</sup> As William R. Casto warned, it is essential to understand the drastic differences between the fundamental principles of jurisprudence in the twentieth century as compared with those in the founding era:

When the [Supreme] Court was created, virtually all American attorneys were natural lawyers who believed that . . . law was a comprehensive and systematic body of principles based upon divine wisdom and the perfection of human reason. . . .

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solely on state practice and consent. OPPENHEIM, *supra* note 12, at 3–4; see JANIS, *supra* note 104, at 128–31.

106. Julius Goebel, Jr., *The Common Law and the Constitution*, in CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL 101, 108–09 (W. Melville Jones ed., 1956).

107. See 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 78–79 (1965); Roscoe Pound, *The Development of Constitutional Guarantees of Liberty*, in 20 NOTRE DAME LAWYER 347, 352–53 (1945).

108. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*69–71. See also Lord Mansfield's famous declaration in *Jones v. Randall*, Lofft 383, 385, 98 Eng. Rep. 706, 707 (K.B. 1774) ("There is no positive law, nor any case in the books; but Mr. Dunning argues rightly, and I think very conclusively, that if it is bad upon principle this is sufficient. The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of Rich. 1 to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of the law.").

109. See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 34–35 (1995) [hereinafter CASTO, *SUPREME COURT*]; see also Pound, *supra* note 107, at 347, 352–53, 363–64. Julius Goebel astutely observed that the natural law dichotomy between judicial decisions and the common law allowed American state courts following the Revolution to cite English decisions while claiming to apply a general common law, and not the law of England. Goebel, *supra* note 106, at 109–10.

The difference between legal positivism and natural law is so vast that many of the Founding Generation's thoughts and actions cannot be understood without setting positivism aside and studying those earlier thoughts and actions in their original natural-law context.<sup>110</sup>

These fundamental differences in jurisprudential principles are particularly salient in the contrast between the eighteenth century's law of nations, which was a product of natural law, and the subsequent customary international law that emerged from legal positivism. These differences are reflected in divergent processes of incorporation into domestic law:

The law of nations was necessarily and literally part of national law in the 18th century, since the two systems were assumed to rest in their respective spheres upon the same immutable principles of natural justice. In the 19th century, with changing concepts of law and of the limitations of the judicial method, the doctrine of incorporation assumed more modest proportions . . . [T]he national law governing matters of international concern is to be derived, in the absence of a controlling statute, executive decision, or judicial precedent, from such relevant principles of the law of nations as can be shown to have received the nation's implied or express assent.<sup>111</sup>

The continental publicists were apostles of the natural law and the law of nations, which they expounded was obligatory regardless of state practice or consent.<sup>112</sup> As summarized by Roscoe Pound, the continental publicists held to four fundamental propositions:

(1) There are natural rights demonstrable by reason. They are eternal and absolute. They are valid for all men in all times and all places. (2) Natural law is a body of rules, ascertainable by reason, which perfectly secures all these natural rights. (3) The state exists only to secure men in these natural rights. (4) Positive law, the law applied and enforced in the courts, is a means by which the state performs this function and is morally binding only so far as it conforms to natural law.<sup>113</sup>

These principles, and their foundation in natural law, fit squarely with how the founding generation thought about law, and the continental publicists thereby influenced America in the lead-up to

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110. CASTO, SUPREME COURT, *supra* note 109, at 2.

111. Dickinson, *Changing Concepts*, *supra* note 8, at 259–60.

112. The natural lawyers in Great Britain took a similar approach. Lord Mansfield held that the law of nations was part of the common law of England and referred to the continental publicists as authorities, as no British writer on the law of nations of similar distinction existed. *Triquet v. Bath*, 3 Burrow 1478, 1481, 97 Eng. Rep. 936, 938 (K.B. 1764).

113. Pound, *supra* note 107, at 364.

the Revolution.<sup>114</sup> After the Revolution began, in the first cases tried before the first federal court (established by the Confederated Congress):

The lawyers turned to these philosophical writers as legal sources in the way that they would have relied on reported prize cases, if such had been available. The Court of Appeals clearly thought such reliance was appropriate, that the principles of the law of nations should be the rule of decision in prize cases. The underlying natural law philosophy on which the law of nations was based struck a resonant chord with the American bench and bar. Incorporation of the law of nations, therefore, must have seemed so obvious to eighteenth century lawyers that there was no reason to question its propriety.<sup>115</sup>

During the founding era, judicial understanding of the law of nations was based on natural law, and the treatises of the continental publicists were the principal sources of law. As noted by Edwin D. Dickinson: "It was chiefly in their treatises that the law of nature and of nations received an authoritative exposition."<sup>116</sup>

This reliance did not mean that the continental publicists were infallible. Their treatises on the law of nations were considered precedents in much the same way that Blackstone regarded judicial decisions as precedents expounding the common law—they were strong evidence of what the law is. As Jefferson stated in an opinion to Washington:

Those who write treatises of natural law, can only declare what their own moral sense and reason dictate in the several cases they state. Such of them as happen to have feelings and a reason coincident with those of the wise and honest part of mankind, are respected and quoted as witnesses of what is morally right or wrong in particular cases. Grotius, Puffendorf, Wolf, and Vattel are of this number. Where they agree their authority is strong: but where they differ, and they often differ, we must appeal to our own feelings and reason to decide between them.<sup>117</sup>

Or, as Jefferson told Genet, the eminent writers on the law of nations were not incontrovertible, but when they agreed, the burden was on those who disagreed to provide sounder reasons.<sup>118</sup>

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114. *Id.* at 363–64.

115. Henry J. Bourguignon, *Incorporation of the Law of Nations during the American Revolution: The Case of the San Antonio*, 71 AM. J. INT'L L. 270, 294 (1977).

116. Dickinson, *Changing Concepts*, *supra* note 8, at 259.

117. Opinion on the Treaties with France (Apr. 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 608, 613.

118. Letter from Thomas Jefferson to Edmond Charles Genet (July 16, 1793), in 26 THE



## B. *The Influence of Vattel*

Emmerich de Vattel was by far the most influential of the continental publicists. The impact of his treatise in Europe and the United States was extraordinary: "Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in the decrees and correspondence of executive officials. It was the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration."<sup>119</sup>

*The Law of Nations* was published in 1758 and translated into English in London within two years.<sup>120</sup> It quickly made its way across the Atlantic;<sup>121</sup> and, from the beginning of the United States through well after the founding period, Vattel was the pre-eminent authority on the law of nations.<sup>122</sup> His treatise was considered authoritative by the bar and the courts, as is evidenced by it being cited by counsel or the court in about fifty reported decisions of state and federal courts (including the United States Supreme Court) between 1780 and 1800<sup>123</sup>—which almost certainly

PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 510, 512.

119. Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395, 395 (1913).

120. Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 AM. J. INT'L L. 547, 550 (1909).

121. When Benjamin Franklin received three copies of the book from a Dutch friend in 1775, he responded memorably that "[i]t came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations . . . [and] has been continually in the hands of the members of our Congress, now sitting . . ." Letter from Benjamin Franklin to Charles William Frederic Dumas (Dec. 9, 1775), in 2 LETTERS OF DELEGATES TO CONGRESS 1774-1789, at 465 (Paul H. Smith et al. eds., 1977).

122. RUDDY, *supra* note 90, at 281-310; Adler, *supra* note 3, at 137-38; *see also, e.g.*, U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n. 12 (1978) ("The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel." (citations omitted)); GERHERD VON GLAHN, LAW AMONG NATIONS 44 (2d ed. 1970) ("[N]o single writer has exercised as much direct and lasting influence on the men engaged in the conduct of international affairs in the legal sphere, at least, until very modern times, as did Vattel."); PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD 11 (1993) (noting that *The Law of Nations* "was unrivaled among such treatises in its influence on the American founders"); Dickinson, *Changing Concepts*, *supra* note 8, at 250 ("[T]here is probably no one of the classical treatises which has been more widely read or more frequently cited the world over. It was only with the triumph of the positivist or historical conception of the law of nations in the 19th century that Vattel's influence waned."). Between 1796 and 1872, eighteen translations, or reprints of translations, of this treatise were published in the United States. RUDDY, *supra* note 90, at 283.

123. Grotius is cited in twenty reported cases, Pufendorf in seventeen, and Bynkershoek in twelve during this period. A listing of these citations is on file with the author and with the Temple University Law Library. In a much earlier survey for the period of 1789-1820, Edwin D. Dickinson, who did not have the benefit of computer-based research, found nine-

understates the record of its authority inasmuch as modern law reports did not exist during this era.<sup>124</sup>

Significantly for the thesis of this article, Hamilton and Jefferson each considered Vattel as authoritative and inspirational. According to Forrest McDonald, Vattel was one of the three philosophers/statesmen who had the greatest effect on Hamilton's thinking.<sup>125</sup> In his opinions to Washington, Hamilton called Vattel "perhaps the most accurate and approved of the writers on the laws of Nations,"<sup>126</sup> and "the most systematic of the writers on the laws of nations."<sup>127</sup> Jefferson helped create the first chair in natural law at the College of William & Mary in 1780 (to be held by his teacher, George Wythe), and the prescribed text was Vattel's treatise.<sup>128</sup> In an opinion to Washington, Jefferson stated: "We may appeal too to Vattel himself, in those parts of his book where he cannot be misunderstood, and to his known character, as one of the most zealous and constant advocates for the preservation of good faith in all our dealings."<sup>129</sup> Similarly, Jefferson would tell Genet: "But we will not assume the exclusive right of saying what the law and usage is. Let us appeal to enlightened and disinterested Judges. None is more so than Vattel."<sup>130</sup>

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ty-two citations to Vattel, as compared to sixteen to Grotius, nine to Pufendorf, and twenty-five to Bynkershoek. Dickinson, *Changing Concepts*, *supra* note 8, at 259 n.132, *reprinted* in ARTHUR NAUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 162 (rev. ed. 1962).

124. The first printed American law report, which was a selective retrospective compilation, was EPHRAIM KIRBY, *REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FROM THE YEAR 1785, TO MAY, 1788* (Dennis & Co., Inc. 1952) (1898). The first modern law report—"one in which the decisions of a court, and the reasons for the decisions, are published on a regular and timely basis, so as to be generally available to all courts, the legal profession, and the public"—was the *United States Reports*, published in 1804 by the reporter William Cranch. WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 46-47 (Wythe Holt & L. H. LaRue eds., 1990). Of the original thirteen states, none had modern law reports before 1804 and only five by 1810. *See id.* at 47.

125. *See* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 188 (1985).

126. Letter from Alexander Hamilton to George Washington (Sept. 15, 1790), in 7 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 67, at 36, 40.

127. Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 67, at 367, 382.

128. *See* Ira Bernard Dworkin, *America's First Law School: The College of William and Mary*, 37 *A.B.A. J.* 348, 348 (1951); Reeves, *supra* note 120, at 551. It was also the principal text in international law at Dartmouth, Yale, Harvard, Columbia, Amherst, and Williams. Adler, *supra* note 3, at 138; Reeves, *supra* note 120, at 551.

129. Opinion on the Treaties with France (Apr. 28, 1793), in 25 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 10, at 608, 615.

130. Letter from Thomas Jefferson to Edmond Charles Genet (June 17, 1793), in 26

Vattel recognized that a consistent practice of international relations could lead to a new doctrine that was binding on the nations that consent to it, provided that it did not violate principles of natural law.<sup>131</sup> But a customary law of nations based on practice and consent was insignificant to *The Law of Nations*.<sup>132</sup> With very few exceptions—and none that relate to issues in the Neutrality Crisis—the doctrines in his treatise derived from natural law and were obligatory for all nations.<sup>133</sup>

*The Law of Nations* was of seminal importance to the leaders of the American Revolution because it animated pre-revolutionary thought that is at the core of the Declaration of Independence.<sup>134</sup>

THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 297, 299.

131. VATTEL, *supra* note 25, Introduction, bk. I, §§ 25–26, at 8–9 (stating that a custom or usage that was generally established among “civilized countries” becomes binding on all nations that consent to it). “But if there be anything unjust or unlawful in such a custom, it is of no force, . . . since there can be neither obligation nor authorization to violate the Law of Nature.” *Id.* Introduction, bk. I, § 26, at 9. To the same effect, see Opinion on the Treaties with France (Apr. 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 608, 609; Letter from Thomas Jefferson to Edmond Charles Genet (July 24, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10 at 557, 557–58.

132. VATTEL, *supra* note 25, Preface, at 11a (noting that the treatise expounds mandatory laws, while “[d]etails of the different treaties and customs of Nations belong rather to history than to a systematic treatise on the Law of Nations”).

133. *Id.* bk. III, § 192, at 306 (“In this work we are laying down the natural principles of the Law of Nations; we deduce them from nature itself; and what we call the voluntary Law of Nations consists in the rules of conduct, of external law, to which the natural law obliges Nations to consent; so that we rightly presume their consent, without seeking any record of it; for even if they had not given their consent, the Law of Nature supplies it, and gives it for them. Nations are not free in this matter to consent or not; the Nation which would refuse to consent would violate the common rights of all Nations.”); see William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169, 171–75 (2010).

One reason for Vattel’s general popularity was his accessibility. He wrote in French (then the international language of law and diplomacy), with clear and affecting prose, and he sometimes used contemporary examples of European practice to illustrate or support his doctrines. Stéphane Beaulac, *Emer de Vattel and the Externalization of Sovereignty*, 5 J. HIST. INT’L L. 237, 287–90 (2003). Despite his own denials, a debate exists on the extent to which Vattel introduced an element of legal positivism into the law of nations by placing some reliance on contemporary practice. VATTEL, *supra* note 25, Preface, at 13a; see RUDDY, *supra* note 90, at 76; Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT’L L. 20, 27 (1948); Reeves, *supra* note 120, at 550. Perhaps the best analysis is by Edwin D. Dickinson, *Changing Concepts*, *supra* note 8, at 249–50 (noting that positivism was of “relatively little importance” to Vattel and Wolff, from whom Vattel borrowed many ideas). “While they [Vattel and Wolff] gave reluctant recognition to positive elements in the law of nations, which the school of the naturalists had consistently refused to do, their system was constructed fundamentally upon concepts of the state of nature and natural law.” *Id.* at 250.

134. No other treatise on international law came close to being as widely read or as heavily relied upon by the Revolution’s leaders. See DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 38–44 (2007).

Vattel posited the legitimacy of a perpetual confederated republic consisting of a number of states that retained their internal sovereignty.<sup>135</sup> This legitimacy was used with effect as an antidote to Blackstone's dogma that there could be only one sovereign—Parliament—in the British empire.<sup>136</sup> Moreover, every nation, according to Vattel, has the sovereign right to determine its own form of government, and the aim of government is to maximize the happiness of its citizens and “to secure to each the peaceful enjoyment of his property and a sure means of obtaining justice.”<sup>137</sup> He also insisted, contrary to Blackstone, that “there can be no such thing as a fully absolute sovereign.”<sup>138</sup> The Prince is “strictly bound” to uphold the nation's constitution and fundamental laws; if he does not, the nation is not bound to obey him and may resist him as a usurper—and in extreme cases, with force.<sup>139</sup>

Vattel's doctrines also influenced the principles under which American government was established. His proposition that a multiplicity of sovereign states could be perpetually bound together in a confederated republic was instrumental to early American ideas about federalism.<sup>140</sup> And Vattel was a constitutionalist. He maintained that the constitution is itself the fundamental law; thus, the legislature does not have the authority to enact laws that violate the constitution.<sup>141</sup>

Finally, Vattel was an advocate of weak states in international relations. A central theorem of *The Law of Nations* is that all states are equal and have the same rights and obligations:

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.<sup>142</sup>

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135. See VATTEL, *supra* note 25, bk. I, § 10, at 12.

136. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 79–80 (2010).

137. VATTEL, *supra* note 25, bk. I, §§ 15, 31, at 13, 18.

138. *Id.* § 51, at 24.

139. *Id.* §§ 46–49, 51, 53–54, at 22–23, 25–26.

140. See LACROIX, *supra* note 136, at 124–26; ONUF & ONUF, *supra* note 122, at 5–7.

141. VATTEL, *supra* note 25, bk. I, § 27, 34, at 17, 19.

142. *Id.* Introduction, § 18, at 7.

As a corollary, each nation has an equal right to independently establish its own form of government without outside interference.<sup>143</sup> No nation may question how another nation is ruled, nor judge its internal conduct, nor force it to follow a wiser and more just course.<sup>144</sup>

In light of the natural law jurisprudence of the continental publicists and the doctrines of internal and external sovereign rights and moral values that they expounded, it is not surprising that the founding generation would look to them—and especially to Vattel—as authoritative guides for determining the content of the law of nations.

Many changes have occurred since the founding. One of the most important changes is that the founding generation thought differently about law and about the sources of law. The influence of Vattel and the other naturalist publicists faded almost to the point of obscurity by the end of the nineteenth century,<sup>145</sup> but their

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143. *Id.* bk. I, § 31, at 18.

144. *Id.* bk. II, §§ 54–55, at 131.

145. When international law was captured by legal positivism's emphasis on practice and consent, the British and American courts continued to hold that international law is part of the law of the land but repudiated reliance on the natural law doctrines of the continental publicists. *See* West Rand Cent. Gold Mining Co. v. The King, [1905] 2 K.B. 391, 407–08 (“But the expressions used by Lord Mansfield . . . ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented . . .”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law. . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, *resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*” (emphasis added) (citing *Hilton v. Guyot*, 159 U.S. 113, 163–64, 214–15 (1895))).

The death sentence on the naturalists was pronounced by the then-leading authority on international law: “The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. . . . We know nowadays that a Law of Nature does not exist. . . . Only a positive Law of Nations can be a branch of the science of law.” OPPENHEIM, *supra* note 12, at 80, 92. Yet, although both naturalists and positivists insisted that an airtight categorical wall existed between these two schools of thought, they necessarily overlap to some extent. The naturalists were certainly cognizant of state practice and took that into account in developing their doctrines. This awareness was particularly true of Vattel, who had the greatest influence on the founding generation. *See supra* notes 110–12, 124–29 and accompanying text. And, at least for countries that adhere to the rule of law and respect for human rights, underlying values of justice will necessarily affect the use of positivism. Yet, despite this inevitable overlap, the difference between naturalism and positivism is at least a huge matter of degree, if not of kind, because these two forms of jurisprudence represent different ways of thinking about the law that begin with different premises and frequently lead to different

authoritativeness to the founding generation is critical in assessing Washington's actions as executing duties under the law of nations and the Take Care Clause. And this influence provides a foundation for the next question to be examined—whether the administration's public declarations that its decisions were obligatory under the law of nations were consistent with its internal deliberations.

## V. CABINET DELIBERATIONS

In its letter to the French government requesting Genet's recall, the administration's first charge was as follows:

Mr: Genet asserts his right of arming in our ports, and of enlisting our citizens, and that we have no right to restrain him or punish them. Examining this question under the law of nations, founded on the general sense and usage of mankind, we have produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in all things relating to the war, observe an exact impartiality towards the parties; that favors to one to the prejudice of the other would import a fraudulent neutrality, of which no nation would be the dupe; . . . that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments.<sup>146</sup>

Genet was incredulous that the Washington administration was honestly attempting to follow the law of nations as expounded by the continental publicists. After being lectured by Jefferson about strict neutrality, with lengthy quotations from Vattel,<sup>147</sup> Genet exploded: "You oppose my complaints, to my just reclamations . . . [by] bring[ing] forward the aphorisms of Vattel, to justify or excuse infractions committed on positive treaties."<sup>148</sup> Jefferson did not back down and continued to invoke the authority of Vattel and

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conclusions.

146. Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 697, 699. Note how this language ("exact impartiality" and "favors to one to the prejudice of the other would import a fraudulent neutrality, of which no nation would be the dupe") is borrowed from Vattel ("strictly impartial" and "favors [to] one to the prejudice of the other . . . would be a hypocritical neutrality, of which no State would consent to be the dupe"). VATTEL, *supra* note 25, bk. III, § 104, at 268.

147. Letter from Thomas Jefferson to Edmond Charles Genet (June 17, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 297, 297–300.

148. Letter from Edmond Charles Genet to Thomas Jefferson (June 22, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 339, 339.

the other continental publicists to Genet and the French government.<sup>149</sup> Genet responded with contempt: "I do not recollect what the worm eating writings of Grotius, Puffendorf and Vattel say. . . . I thank God I have forgot what those hired jurisprudents have written on the rights of nations, at a period when they were all enchained."<sup>150</sup>

Could the administration's insistence that it was following the continental publicists' strict neutrality doctrines as a matter of legal principle have been an elaborate charade? That question can be tested by examining the administration's internal deliberations and decisions during the period that began with the Cabinet meeting of April 19, 1793, when the administration first started to develop its neutrality policies, through August 4, 1793, when Washington issued the Rules on Neutrality.

#### A. *The Validity of the French Treaties*

At its April 19, 1793 meeting, the Cabinet was to consider thirteen questions whose answers would shape American policy as a neutral in the war between France and Great Britain.<sup>151</sup> The Cabinet decided that the President should issue what became known as the Neutrality Proclamation and that Washington should receive Genet, the new minister from France.<sup>152</sup> Each of these decisions was unanimous and will be explored below.<sup>153</sup> But the critical issue for the administration, that split the Cabinet, was the third question—whether Genet should be received with or without

149. Letter from Thomas Jefferson to Edmond Charles Genet (July 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 510, 512; Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 697, 699; Letter from Thomas Jefferson to Edmond Charles Genet (Nov. 15–22, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 378, 379. See also Jefferson's complaint to Madison that Genet was ignorant and disdainful of Vattel and other continental publicists, Letter from Thomas Jefferson to James Madison (Aug. 3, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 606, 606.

150. Letter from Edmond Charles Genet to Thomas Jefferson (Oct 27, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 272, 272–73.

151. Letter from George Washington to the Cabinet (Apr. 18, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 568, 568–69.

152. Cabinet Opinion on Washington's Questions on Neutrality and the Alliance with France (Apr. 19, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 570, 570.

153. *Id.*; see discussion *infra* Part VI A–C. (discussing Jefferson's initial opposition to issuing the proclamation and Hamilton's initial opposition to receiving Genet).

qualification.<sup>154</sup> Hamilton insisted on a qualification—that the President should declare that the treaties with France were not binding on the United States.<sup>155</sup> Hamilton read a long prepared statement that was constructed around a passage from Vattel, which, Hamilton maintained, made the French treaties either void or suspended.<sup>156</sup> Jefferson argued that the treaties were still binding.<sup>157</sup> Then it was Randolph's turn, and he brought the meeting to an abrupt end.<sup>158</sup> The Attorney General said that he had thought that the treaties were still legally binding but that he would change his position if Hamilton was correct about Vattel.<sup>159</sup> However, no one had thought to bring *The Law of Nations* to the Cabinet, so a frustrated President adjourned the meeting and directed the members to submit written opinions.<sup>160</sup>

The written opinions of Hamilton, Jefferson, and Randolph are juridical compositions that read like modern briefs to the Supreme Court, except that they were written to persuade not a group of judges but one person, the President.<sup>161</sup> Each Cabinet member agreed that the validity of treaties, which are contracts between nations, is determined by the law of nations, just as the validity of contracts between individuals is determined by the common law.<sup>162</sup>

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154. See Editor's Note to Cabinet Opinion on Washington's Questions on Neutrality and the Alliance with France (Apr. 19, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 570, 571.

155. Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 367, 368.

156. Notes on Washington's Questions on Neutrality and the Alliance with France (May 6, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 665, 666.

157. *Id.*

158. *Id.*

159. *Id.*

160. *See id.*

161. These opinions were private official opinions, which Washington would not have wanted to be made public because they would have revealed a split in his administration.

162. See THE FEDERALIST NO. 64, at 393–94 (John Jay) (Clinton Rossiter ed., 2003). Jay denied the possibility of a treaty being infected by the corruption of the President and two-thirds of the Senate, but added: “[I]n such a case, if it should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the laws of nations.” *Id.*

No one asserted that the law of nations was superior to positive law as contained in a federal treaty or statute. The approach that was used later became known as the *Charming Betsy* rule, that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).



In his lengthy written opinion to Washington,<sup>163</sup> Hamilton stated the dispositive issue as follows:

Are the United States bound, by the principles of the laws of nations, to consider the Treaties heretofore made with France, as in present force and operation between them and the actual Governing powers of the French Nation? or may they elect to consider their operation as suspended, reserving also the right to judge finally, whether any such changes have happened in the political affairs of France as may justify a renunciation of those Treaties?<sup>164</sup>

Hamilton acknowledged that the treaties with France were real treaties (i.e., treaties with the French nation and not just personal to Louis XVI), that France had the right to change its government, and that real treaties ordinarily remained binding following changes in government.<sup>165</sup> But Hamilton seized on a passage in Vattel and argued that an exception applied to this general doctrine.<sup>166</sup> The Vattel passage states:

If the Nation has formally deposed its King, if the people of a Republic have driven out their public officers and set themselves at liberty, or if they have expressly or impliedly acknowledged the authority of an usurper, to oppose these domestic arrangements, or to dispute their justice or validity, would be to interfere in the government of the Nation and to do it an injury . . . . The sovereign remains the ally of the State in spite of the changes which have taken place within it. However, if these such changes are such as to render the alliance *useless, dangerous, or disagreeable* to him, he is at liberty to disclaim it; for he can say with good reason that he would not have entered into an alliance with that Nation if it had been under its present form of government.<sup>167</sup>

Hamilton then argued that the present government of France was unstable and that the form of its permanent government was uncertain.<sup>168</sup> It might be a republic but also could be a despotism

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163. See Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 367, 367–96 (Knox, the Secretary of War, almost invariably followed Hamilton); Letter from Alexander Hamilton to George Washington (May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 398, 398–408.

164. Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 367, 371–72.

165. *Id.* at 372–74, 372 nn.10–11.

166. *Id.* at 382–83.

167. VATTEL, *supra* note 25, bk. II, § 197, at 175 (emphasis added). Fenwick's translation uses the word "unsatisfactory" instead of "disagreeable." I use the latter word to be consistent with Hamilton, Jefferson, and Randolph and maintain this consistency in other parts of this article.

168. Letter from Alexander Hamilton and Henry Knox to George Washington (May 2,

(which, as Hamilton feared, it became), in which case an alliance with France would be highly “disagreeable.”<sup>169</sup> The prudent course would be to declare the treaties in suspense until a permanent government emerged in France.<sup>170</sup>

Hamilton also argued that the treaties were dangerous to the United States. Recognizing their continued validity compromised American neutrality because the treaties contained preferences for France and restrictions on Great Britain.<sup>171</sup> Most significantly, the guarantee of the French West Indies in the Treaty of Alliance could lead the United States into a shooting war with Great Britain.<sup>172</sup> Given American military weakness, the United States could not effectively protect those West Indies possessions in any way; honoring the guarantee would therefore plunge the United States into a catastrophic and useless war.<sup>173</sup> Moreover, if the United States refused to honor the guarantee, France could regard that violation of the treaty as a *causus belli*.<sup>174</sup> Again, the prudent course was to follow Vattel and disclaim the alliance before the guarantee was invoked.<sup>175</sup> Finally, relying on statements of the continental publicists Burlamaqui, Barbeyrac, and Pufendorf, Hamilton argued that France was conducting an offensive war and that the United States was not bound to honor the guarantee because it was in a “defensive” alliance.<sup>176</sup>

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1793), in *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 67, at 367, 385.

169. *Id.*, at 377–78, 383 (explaining that two nations may enter into a treaty, but a change of the government of one of them into a despotism may destroy the inducement and main link of common interest).

170. *Id.* at 367, 385.

171. *Id.* at 367, 387, 387 n.22, 391 (explaining that the treaty’s military stipulations would force departure from America’s neutrality in “the quarrels of Europe”).

172. Treaty of Alliance, *supra* note 22, at art. XI, 8 Stat. at 10; Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 67, at 391, 391–92 (explaining that America’s status as a French ally would authorize the powers at war with France to treat it as an enemy).

173. Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 67, at 367, 387, 387–88 n.22 (explaining that war would prove an immeasurable calamity for the United States).

174. *Id.* at 387–91.

175. *Id.* at 393.

176. Letter from Alexander Hamilton to George Washington (May 2, 1793), in 14 *HAMILTON PAPERS*, *supra* note 67, at 398, 398–99. Vattel also stated that a nation was not bound to honor a preexisting defensive alliance when the ally who was attacked had started an unjust war, but he significantly qualified this principle. See *VATTEL*, *supra* note 25, bk. III, §§ 86, 87, at 262–63. See Randolph’s response, *infra* notes 188–93 and accompanying text.

In his own lengthy response,<sup>177</sup> Jefferson tried to disentangle the reception of France's foreign minister from the validity of the treaties:

I deny that the reception of a minister has anything 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.<sup>178</sup>

But most of Jefferson's opinion dealt with the continuing validity of the treaties. He agreed with Hamilton that the validity of the French treaties was determined by the law of nations:

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. The first of these only concerns this question, that is to say the Moral law to which Man has been subjected by his creator, and of which his feelings, or Conscience as it is sometimes called, are the evidence with which his creator has furnished him. . . . Compacts then between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts. There are circumstances however which sometimes excuse the non-performance of contracts between man and man: so are there also between nation and nation. When performance, for instance, becomes *impossible*, non-performance is not immoral. So if performance becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation to others.<sup>179</sup>

Jefferson adamantly denied that a treaty could be renounced because a nation considered it useless or disagreeable, and he maintained that if the ground were danger, it must be grave and imminent.<sup>180</sup> He then argued that the treaties did not present such danger, reasoning that the preferences to France and the restraints on Britain in the Treaty of Amity and Commerce could be minimized by interpreting the provisions according to strict neutrality.<sup>181</sup> As for the guarantee in the Treaty of Alliance, that danger was speculative because it was contingent on a number of un-

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177. Opinion on the Treaties with France (Apr. 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 608–18. Jefferson's written opinion was actually submitted before Hamilton's, but Jefferson drafted it as a response to Hamilton, because he knew the latter's argument from the Cabinet presentation.

178. *Id.* at 612.

179. *Id.* at 609.

180. *Id.* at 608–09 (relying on Vattel, *supra* note 25, bk. III, § 92, at 263) (“[W]e are speaking here of an imminent danger and one which threatens the very life of the State.”).

181. *Id.* at 610–13.

predictable events, the most notable of which was whether France would actually invoke it.<sup>182</sup>

Jefferson then quoted at length from Grotius, Pufendorf, and Wolff, all of whom held that treaties remain binding despite changes of government unless the preservation of a particular form of government was the object of the treaty.<sup>183</sup> He then addressed the passage from Vattel, arguing first that Hamilton's construction contradicted Vattel's entire approach to honoring treaties—the obligatory nature of which was considered sacred, and the breach of which was a grievous violation of the law of nations.<sup>184</sup> And this passage did not say that a nation could disclaim a treaty because a change of government made it useless, disagreeable, or dangerous. The explanatory end of the passage was critical. It meant that: "For the party may say with truth that it would not have allied itself with this nation, if it had been under the present form of it's [sic] government."<sup>185</sup> That conclusion clearly was not the case with the Revolutionary War treaties. Fighting for its very existence, the United States would have entered into those treaties with France regardless of its form of government. As for the suggestion that it would be "disagreeable" for the Unit-

182. *Id.* at 610–11. Jefferson's hope/prediction that France would not invoke the guarantee in order to preserve American neutrality (which was expected to be "benevolent" in France's favor) proved correct. However, the administration did not then know France's position on the guarantee, and Jefferson offered the following alternatives short of the use of American military force in the event that France invoked it:

If [France] can save them themselves, have they a right to call on us?

Are we obliged to go to war at once, without trying peaceable negotiations with their enemy?

If all these questions be against us, there are still others behind.

Are we in a condition to go to war?

Can we be expected to begin before we are in condition?

Will the islands be lost if we do not save them?

Have we the means of saving them?

If we cannot save them, are we bound to go to war for a desperate object?

Will not a 10. years forbearance in us to call them into the guarantee of our posts [the forbearance being that the United States did not invoke its guarantee for France to help evict Britain from the western posts, which it held in violation of the Treaty of Peace], entitle us to some indulgence?

Many, if not most of these questions offer grounds of doubt whether the clause of guarantee will draw us into the war. Consequently if this be the danger apprehended, it is not yet certain enough to authorize us in sound morality to declare, at this moment, the treaties null.

*Id.* at 611 (footnotes omitted).

183. *Id.* at 613–15.

184. *Id.* at 615–17 (citing VATTEL, *supra* note 25, at bk. II, §§ 219–20, at 188).

185. *Id.* at 617 (internal quotation marks omitted).

ed States to ally itself with a despotic government, that exactly described France's absolute monarchy in 1778.<sup>186</sup> Jefferson concluded "[t]hat the treaties are still binding, notwithstanding the change of government in France."<sup>187</sup>

The decisive opinion was delivered by the Attorney General, a member of the Cabinet who has been overshadowed historically by his colleagues but who had great influence with Washington.<sup>188</sup> Quoting extensively from Vattel, Randolph first concluded that the United States was legally required to receive Genet without qualification.<sup>189</sup> Randolph's arguments on the treaties were similar to Jefferson's (and Randolph quoted large portions of Vattel's chapter on the interpretation and binding nature of treaties), with two additions. First, Randolph did not have a problem with the assertion that the treaties with France compromised United States neutrality, because he adopted Vattel's doctrine that a nation may comply with the obligations of preexisting treaties without forfeiting its neutrality.<sup>190</sup> Nor was Randolph impressed with the argument that the "defensive" alliance had been voided by French aggression, because it was impossible for any American objectively to determine which country was to blame for the war.<sup>191</sup> The Attorney General thereupon concluded that "Mr. Genest [sic] ought to be received absolutely, and without qualifications," and that "the U.S. are *bound* to admit them [the treaties] to be applicable to the present situation of the parties."<sup>192</sup> Randolph's opinion was delivered to Washington on May 6, 1793, and the President

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186. *Id.*

187. *Id.*

188. Letter from Edmund Randolph to George Washington (May 6, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 534, 534-48. On Jefferson's resentment of Randolph's influence, see, for example, Letter from Thomas Jefferson to James Madison (May 13, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 25-26; Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 651, 653.

189. Letter from Edmund Randolph to George Washington (May 6, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 534, 537-38.

190. *Id.* at 538-42.

191. *Id.* at 545. Here, Randolph was again following Vattel. Although Vattel had stated that a defensive alliance was not binding on behalf of an ally who conducted an unjust war, he emphasized, consistently with other continental publicists, that "this principle must not be so interpreted as to reduce treaties of alliance to mere empty formalities. The implied reservation only holds where the war is evidently unjust; otherwise a pretext could always be found for invalidating treaties." VATTEL, *supra* note 25, bk. III, §§ 86-87, at 262-63.

192. Letter from Edmund Randolph to George Washington (May 6, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 534, 546-47.

stated the same day that the treaties with France were still legally in force.<sup>193</sup>

### B. *The Referral to the Supreme Court*

The administration dealt with allegations of law of nations violations by the belligerents on an ad hoc basis. This procedure was inefficient, time consuming, and logistically difficult. The administration needed a set of rules governing the belligerents that would be enforced by executive officials and judges throughout the country. With regular (and threatening) protests coming from the British and French ministers, Washington decided to refer the disputed issues to the Supreme Court for legal determinations.<sup>194</sup> Twenty-nine questions were drafted—the first nine of which requested interpretations of the treaties with France (all assumed that the treaties were still in effect), and the remainder sought rulings on the obligations of the United States under the law of nations.<sup>195</sup> The Cabinet had yet to resolve some of these issues, but others were major issues that had already been decided by the administration and declared publicly to the belligerents.<sup>196</sup> Jefferson advised the Court:

These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land; and are often presented under circumstances which do not give

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193. See BEMIS, *DIPLOMATIC HISTORY*, *supra* note 43, at 96; ELKINS & MCKITRICK, *supra* note 16, at 340; HERRING, *supra* note 86, at 70, *see also* Notes on Washington's Questions on Neutrality and the Alliance with France (May 6, 1793), in 25 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 10, at 665, 665–66 (noting that Washington said that he had never doubted the continuing validity of the treaties but wanted to give each member of the Cabinet an opportunity for argument).

194. Cabinet Opinion on Consulting the Supreme Court (July 12, 1793), in 26 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 10, at 484, 484–85. The vote was unanimous. *See id.* (containing signatures of Cabinet members). Perhaps because he lost the legal argument on the validity of the French treaties, Hamilton had initially objected to referring such issues to the courts, because “[t]he whole is an affair between the Governments of the parties concerned—to be settled by reasons of state, not rules of law.” Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 67, at 451, 459.

195. Questions for the Supreme Court (July 18, 1793), *reprinted in* 26 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 10, at 534, 534–36.

196. The latter category included whether France could arm privateers in U.S. ports, recruit Americans to serve in the French military, erect consular courts to condemn prizes and/or sell their prizes in the United States; whether British vessels (except privateers) could use U.S. ports, including for purposes of trade; and whether the United States, in default of the captor nation, was obligated to make restitution if a prize was captured within U.S. territorial waters or by a privateer outfitted in a U.S. port. *See supra* note 10.

a cognisance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the Executive, as to occasion much embarrassment and difficulty to them.<sup>197</sup>

The Supreme Court's initial response was to stall<sup>198</sup> and then to decline to answer on the ground that it could not give advisory opinions.<sup>199</sup>

The Supreme Court's refusal to issue a legal opinion at the request of the President has been an interesting subject of scholarship.<sup>200</sup> But one also should examine why Washington would make such a request to the Supreme Court. If Washington believed that he was exercising discretionary executive power, the referral to the Supreme Court seems incomprehensible. It would be ceding control over foreign affairs to the branch of government that was least suited to perform that function. Moreover, the referral to the Court was not risk-free. The Supreme Court could have given a legal opinion with "wrong" answers—including to major questions that the administration had already decided and implemented. Such an outcome might seem unlikely given the political disruption (and danger) that this decision could cause and the close relationship between Washington and Chief Justice John Jay. Yet no guarantee was in place of what the full Court would do. Thus far, the lower courts had shown a distinct lack of cooperation with administration policy.<sup>201</sup> The administration wanted the district courts, acting as admiralty courts, to assume jurisdiction over disputed captures and to order restitution when prizes were seized illegally.<sup>202</sup> But several district court judges held that, under the law of nations, they had no jurisdiction over foreign captures.<sup>203</sup>

197. Letter from Thomas Jefferson to the Justices of the Supreme Court (July 18, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 520, 520.

198. See Letter from the Justices of the Supreme Court to George Washington (July 20, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 543, 543–44.

199. See Editor's Note to Draft of Questions to Be Submitted to Justices of the Supreme Court (July 18, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 17, at 111, 111–12 n.1 (detailing the Court's later response on August 8, 1793).

200. *E.g.*, CASTO, SUPREME COURT, *supra* note 109, at 78–82; JAY, HUMBLE SERVANTS, *supra* note 16, 149–70.

201. See CASTO, SUPREME COURT, *supra* note 109, at 82–84.

202. See *id.* at 82–83.

203. See, *e.g.*, *Moxon v. The Fanny*, 17 F. Cas. 942, 948 (D. Pa. 1793) (No. 9, 895); *Findlay v. The William*, 9 F. Cas. 57, 57, 61–62 (D. Pa. 1793) (No. 4,790); *Glass v. The Sloop Betsy* (D. Md. 1793), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 304, 324–25 (Maeva Marcus et al. eds., 1998) [hereinafter THE DOCUMENTARY HISTORY], *rev'd*, 3 U.S. (3 Dall.) 6, 16 (1794). For discussions of these decisions, see generally CASTO, FOREIGN AFFAIRS, *supra* note 1, at 86–90. For the

These decisions were overruled by the Supreme Court in the following year, with the Court holding that Congress had vested the entire admiralty jurisdiction in the district courts, which included authority over foreign captures and the power to order restitution for illegally seized prizes, and that the establishment of French consular courts in the United States was illegal.<sup>204</sup> But that decision was in the future, and no one could predict with certainty what the Supreme Court would do at that point in time.

Aside from settling the law, a favorable decision by the Supreme Court would have produced minimal benefits. It might have sparked more public support for the administration's policies, although Henfield's and other cases suggest that the opposition would not have been impressed by the views of Federalist judges.<sup>205</sup> The notion that an opinion of American judges would have affected Genet is wishful thinking.<sup>206</sup> On the other hand, if the Court's opinions were adverse to the administration's positions, Washington would have had little choice but to follow them, whether legally bound or not, because they had been requested by the administration with the explanation that the Court had superior expertise over the issues presented and the United States was the only party to the case. Throughout his tenure as President, Washington was exceptionally conscious that his actions would be precedents for the country's future. Presidential defiance of a ruling by the Supreme Court was not a precedent that George Washington likely would have set.

It is possible that Washington's referral to the Supreme Court was an attempt to obtain legal cover for discretionary executive decisions. But it is more likely that the referral was for the reason that Washington gave—he wanted definitive legal rulings on the

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sake of brevity, subsequent citations to volumes of *The Documentary History*, edited by Maeva Marcus omit editor and publication information.

204. *Glass*, 3 U.S. at 16.

205. See *infra* notes 280–90, 315–27 and accompanying text.

206. Genet's views were fixed, and judges were not in any event held in high regard in revolutionary France. The organic laws of the new French Republic provided that each branch of the government had the authority to decide on the legality of its own acts. See JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 20–21 (1992). The famous 1790 statute that restructured the judiciary prohibited the courts from interpreting legislation and required the courts to apply to the legislature for such interpretation. See James Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189, 192 (1975) (citing Law of 16–24 Aug. 1790, Title II, III, Art. 10, 12, in J.B. DUVERGIER, *COLLECTION COMPLETE DES LOIS* 310 (1860)).



duties and scope of his authority under the treaties and the law of nations.

### C. *The Rules on Neutrality*

Having been rebuffed by the Supreme Court, Washington directed the Cabinet “[t]o fix rules on substantial and impartial ground, conformably to treaties and the Laws of Nations.”<sup>207</sup> The Cabinet’s rules carefully tracked Vattel’s duality between military and nonmilitary aid in his laws of strict neutrality.<sup>208</sup> Equipping vessels for military purposes was generally “deemed unlawful,” while equipping merchant ships for commercial purposes was generally “deemed lawful.”<sup>209</sup> Equipments for merchant ships that were “of a doubtful nature, as being applicable either to commerce or war, [were] deemed lawful.”<sup>210</sup> Washington approved those rules only after being “satisfied that they are not repugnant to treaties, or to the Laws of Nations; and moreover, are the best we can adopt to maintain Neutrality.”<sup>211</sup>

Although each of the Rules on Neutrality deemed the belligerents’ conduct either “lawful” or “unlawful,” they did not purport to be executive legislation. They were executive interpretations of the laws of neutrality pending definitive judicial decisions.<sup>212</sup>

Thus, from the time that the Washington administration learned of France’s war with Britain and its allies, through the issuance of the Rules on Neutrality, its official declarations were consistent with its private deliberations. Major decisions by the administration—validating and interpreting the treaties with France according to principles of strict neutrality, referring disputed legal issues to the Supreme Court, and establishing Rules

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207. Letter from George Washington to the Cabinet (Aug. 3, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 611, 611. Washington’s directive actually predated the Court’s refusal to grant the advisory opinion, and it seems clear from the chronology that the Cabinet was working on the rules while seeking the opinion. Jay may have privately advised Washington that the Supreme Court might not consider it proper to honor the request. See CASTO, SUPREME COURT, *supra* note 109, at 79.

208. See Rules on Neutrality (Aug. 3, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 608, 608–09; *supra* notes 25–27, 53–64 and accompanying text.

209. Rules on Neutrality (Aug. 3, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 608, 608–09.

210. *Id.* at 608.

211. Letter from George Washington to Thomas Jefferson (Aug. 4, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 618, 618.

212. BEMIS, DIPLOMATIC HISTORY, *supra* note 43, at 98.

on Neutrality that were conformable to the treaties and the law of nations—were based on the principle that the Executive was duty-bound to execute the law of nations.

The following section examines whether the other unilateral actions of the administration, and its refusal to act on desirable policy choices, were also consistent with its understanding of the law of nations as expounded by the continental publicists.

## VI. EXECUTING THE LAW OF NATIONS

This section will demonstrate that the administration followed Vattel to a remarkable extent. This result would not seem possible if the Washington administration had been guided solely by real politik, given both the magnitude and unprecedented nature of the issues that the administration faced and the fact that the law of nations did not always produce results that the administration desired. But if the source of the administration's authority was the law of nations, its consistent reliance on Vattel is readily understandable. Recall that upon deciding on strict neutrality, the administration declared to France and Britain that its policies were determined by the law of nations as expressed by the continental publicists.<sup>213</sup> The credibility of subsequent decisions—and the credibility of the administration itself—would have been seriously undermined if those decisions were inconsistent with the originally expressed authorities.

This section first considers the unilateral positive decisions of the administration: recognizing the French revolutionary government, receiving and then requesting that its controversial foreign minister be recalled, issuing the Neutrality Proclamation, and instituting nonstatutory prosecutions against Americans who committed hostile military actions against Britain. This section next examines negative decisions by the administration—its refusals to prohibit the sales of French prizes and to assert diplomatically to the belligerents that “free ships make free goods”—which would likely have been decided differently as matters of policy rather than law.

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213. See *supra* note 10 and accompanying text.

### A. *Recognizing the Revolutionary Governments*

In August 1792, Gouverneur Morris reported to Jefferson that King Louis XVI had been suspended and that a new government was being formed.<sup>214</sup> All other foreign ambassadors and ministers were leaving France and Gouverneur Morris told Jefferson, "if I stay I shall be alone."<sup>215</sup> Morris was concerned for his safety but also needed instructions on whether the new government would be recognized by the United States.<sup>216</sup> Morris was no friend of France and was notoriously hostile to the French Revolution.<sup>217</sup> Nonetheless, Morris suggested that American policy should be as follows:

[I]f the great Majority of the Nation adhere to the new Form [of government] the United States will approve thereof because in the first Place we have no Right to prescribe to this Country the Government they shall adopt and next because the Basis of our own Constitution is the indefeasible Right of the People to establish it.<sup>218</sup>

In a subsequent exchange of correspondence, Morris reported that he told French officials that he had no authority to deal with them and was awaiting instructions, which provoked an angry response from those officials.<sup>219</sup> Jefferson told Morris that the debt payments to France were suspended until a new government was formed,<sup>220</sup> to which Morris reported that the National Convention was meeting and that the majority of the French people favored a republic.<sup>221</sup>

On December 27, 1792, Washington told Jefferson that he wanted to reestablish close relations with France.<sup>222</sup> Jefferson said

214. See Letter from Gouverneur Morris to Thomas Jefferson (Aug. 1, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 275, 276.

215. Letter from Gouverneur Morris to Thomas Jefferson (Aug. 22, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 313, 314.

216. See Letter from Gouverneur Morris to Thomas Jefferson (Aug. 16, 1792), in THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 301, 301, 305.

217. DECONDE, *supra* note 16, at 326, 331–32.

218. Letter from Gouverneur Morris to Thomas Jefferson (Aug. 22, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 313, 314.

219. Letter from Gouverneur Morris to Thomas Jefferson (Aug. 30, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 331, 331–32.

220. Letter from Thomas Jefferson to Gouverneur Morris (Oct. 15, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 484, 484–85.

221. Letter from Gouverneur Morris to Thomas Jefferson (Oct. 23, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 524, 528–29.

222. Notes of a Conversation with George Washington on French Affairs (Dec. 27,

that the National Convention had become the legitimate governing body of France.<sup>223</sup> Three days after receiving Washington's approval, Jefferson wrote to Morris that—because the National Convention was assembled with full powers to transact the affairs of the nation—Morris was to remove the suspension of the debt payments and consider “the Convention, or the government they shall have established as the lawful representatives of the nation, and authorised to act for them.”<sup>224</sup> The United States thus became the first country to recognize the revolutionary government of France.<sup>225</sup>

The recognition question arose even more starkly when Louis XVI was executed and France declared war on Britain and Holland. On March 12, 1793, Jefferson wrote to Morris:

We surely cannot deny to any nation that right whereon our own government is founded, that every one may govern itself according to whatever form it pleases, and change these forms at it's own will: and that it may transact it's business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president or any thing else it may chuse. The will of the nation is the only thing essential to be regarded.<sup>226</sup>

Jefferson restated his previous direction that Morris suspend the debt payments to France in the interim until a government was established.<sup>227</sup> That objective was accomplished when the National Convention assembled and assumed governmental power.<sup>228</sup>

1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 793, 793.

223. *Id.*

224. Letter from Thomas Jefferson to Gouverneur Morris (Dec. 30, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 800, 800.

225. Compare DECONDE, *supra* note 16, at 191, with 1 EDWARD BAINES, HISTORY OF THE WARS OF THE FRENCH REVOLUTION 136, 158 (1817) (discussing Tuscan and Prussian recognition in 1795 and British refusal of recognition in 1796).

226. Letter from Thomas Jefferson to Gouverneur Morris (Mar. 12, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 367, 367. Jefferson used virtually identical language explaining the earlier recognition in a letter to Pinckney approved by Washington. Compare *id.*, with Letter from Thomas Jefferson to Thomas Pinckney (Dec. 30, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 802, 803. For Washington's pre-approval, see Letter from George Washington to Thomas Jefferson (Dec. 30, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 804, 804. Jefferson drafted a similar letter to Morris, but that letter may not have been sent or received. See Letter from Thomas Jefferson to Gouverneur Morris (Nov. 7, 1792), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 592, 592–93.

227. Letter from Thomas Jefferson to Gouverneur Morris (Mar. 12, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 367, 367–68.

228. *Id.* at 368.

The Constitution does not contain any provision that authorizes the President to recognize a foreign government, and nothing in the drafting or ratification debates supports such an executive power.<sup>229</sup> In recognizing the French revolutionary governments, the Washington administration executed the law of nations by following Vattel's doctrine of de facto recognition—if a government is in “actual possession” of the instruments of national power, it is entitled to be recognized by other states.<sup>230</sup> This doctrine was based on the principles that each nation has the right to govern itself as it thinks proper and the right to change its government pursuant to its own laws or the express or implied will of its people,<sup>231</sup> that no foreign state may set itself up as the judge of how another sovereign rules,<sup>232</sup> and that a state does not lose its rights or privileges as a result of changes in its government.<sup>233</sup> Accordingly, any government (including even the government of a usurper) that has actual possession of the instruments of power must be recognized by foreign sovereigns.<sup>234</sup> A state's refusal to recognize a foreign government because it disapproves of its form of government is therefore a violation of the law of nations and may be a *causus belli*.<sup>235</sup>

### B. *Receiving Genet and Requesting His Recall*

The Constitution provides that the President “shall receive Ambassadors and other public Ministers.”<sup>236</sup> This clause requires the President, as head of state, to perform a ministerial duty. It was not intended or understood as a source of discretionary execu-

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229. See Robert J. Reinstein, *Recognition: A Case Study in the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 860–61 (2011).

230. GOEBEL, *supra* note 90, at 41; Adler, *supra* note 3, at 138–39.

231. See VATTEL, *supra* note 25, bk. I, §§ 66–67, at 30–32.

232. *Id.* bk. II, §§ 54–55, at 131.

233. *Id.* bk. I, § 69, at 33–34.

234. See *id.* bk. IV, § 68, at 365–66.

235. See *id.* at 366. Prakash and Ramsey assert that Washington assumed discretionary executive power over recognition, because Congress never tried to tell the President which nations or governments to recognize. Prakash & Ramsey, *supra* note 1, at 312–13. This argument was recently adopted in *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1232 (D.C. Cir. 2009), *reh'g en banc denied*, 610 F.3d 84 (D.C. Cir. 2010), *cert. granted sub nom.*, M.B.Z. *ex rel.* Zivotofsky v. Clinton, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2897 (2011). But the Washington administration did not recognize any nations, and the only new governments it recognized were those of France. The challenge for the United States was to be recognized by the European community of nations. See Reinstein, *supra* note 229, at 860.

236. U.S. CONST. art. II, § 3.

tive power.<sup>237</sup> The receipt of Genet was mandated by the Take Care Clause because, when Washington recognized the French revolutionary government, the reception of its foreign minister followed as a matter of course under the law of nations.<sup>238</sup>

Vattel addressed the exchange of foreign diplomats between recognized governments by emphasizing that “Nations must necessarily treat and have intercourse with one another in order to advance their interests, to avoid injuring one another, and to adjust and terminate their disputes.”<sup>239</sup> Inasmuch as nations cannot deal directly with one another as corporate entities, they “have no other means of communicating and treating with one another than . . . through the mediation of *public ministers*.”<sup>240</sup> His resulting doctrine was as follows:

Every sovereign State has, therefore, the right to send and to receive public ministers. For they are necessary agents in the negotiation of the affairs which sovereigns have with one another, and in the maintenance of the intercourse which sovereigns have the right to keep up.

. . . .

Such being the rights of Nations, the sovereign who undertakes to prevent another sovereign from sending and receiving public ministers does him an injury and violates the Law of Nations; for in doing so he attacks the Nation in one of its most valuable rights. . . ; he breaks the bonds which unite Nations together, and thereby does an injury to all of them.<sup>241</sup>

And Vattel declared unequivocally that this right applies to all states—the small and weak as well as the large and powerful.<sup>242</sup> Vattel noted that “[t]o dispute that right is to do a great injury to the prince or State—it is equivalent to an attack upon the sovereignty of the prince or State in question.”<sup>243</sup>

These principles provide an understanding of why Washington’s Cabinet had decided unanimously on March 30, 1793 to receive Genet.<sup>244</sup> It was a hard pill for Hamilton, who was concerned that

237. See Reinstein, *supra* note 229, at 812–16, 842–51.

238. See *id.* at 840.

239. VATTEL, *supra* note 25, bk. IV, § 55, at 362.

240. *Id.* § 56, at 362.

241. *Id.* §§ 57, 63, at 362, 364.

242. See *id.* § 78, at 369.

243. *Id.*

244. See Notes on the Reception of Edmond Charles Genet (Mar. 30, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 469, 469–70; see also *supra* notes 188–89

the reception of Genet would imply the legitimacy of the revolutionary government.<sup>245</sup> Before the critical Cabinet meeting of April 19, 1793, Hamilton consulted Jay and floated a clever argument to circumvent Vattel.<sup>246</sup> Hamilton also asked Jay to draft a neutrality proclamation.<sup>247</sup>

Jay helpfully drafted a proposed proclamation for Hamilton's (and presumably Washington's) consideration.<sup>248</sup> But Jay threw cold water on Hamilton's argument for not receiving Genet. The United States was bound under the law of nations to recognize the revolutionary government of France and to receive its designated minister.<sup>249</sup> Hamilton acquiesced and focused (unsuccessfully) on his principal objective—declaring the treaties with France void or suspended.

Genet's repeated violations of American neutrality and defiance of Washington's decisions, culminating in the *Little Sarah* incident,<sup>250</sup> caused his mission to implode and led the Cabinet, on Au-

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and accompanying text (discussing Randolph's opinion to Washington in which he quoted at length from Vattel in concluding that Genet must be received unconditionally).

245. See Letter from Alexander Hamilton to John Jay (Apr. 9, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 297, 297–98.

246. See *id.* The argument was that France might be defeated by its European enemies, who would then establish the *Dauphin* (presently in exile) as Regent and recognize him as the country's legitimate ruler; and as Regent he would send a foreign minister. *Id.* at 297. Given this uncertainty over who would be in actual possession of governmental power, Hamilton asked: Should not the United States refuse to receive Genet? *Id.* at 298.

247. Letter from Alexander Hamilton to John Jay (Apr. 9, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 299, 299–300.

248. Letter from John Jay to Alexander Hamilton (Apr. 11, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 307, 308–10.

249. See *id.* at 308–09. Jay's draft proclamation stated that the present government of France must be recognized as the lawful government and that foreign ministers must be exchanged for diplomatic intercourse. See *id.* (“[I]t is no less the Duty than the Interest of the United States, strictly to observe that conduct towards all nations, which the Laws of nations prescribe.”). Jay advised that a minister from the *Dauphin* should be received only if the coalition defeated France and made him the Regent. *Id.* at 308.

250. The *Little Sarah* was a British merchant ship that was taken as a prize by a French frigate and held at the port of Philadelphia. Editor's Note to Cabinet Opinions on the *Little Sarah* (July 8, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 446, 447. The ship, renamed the *Little Democrat*, was then armed with fourteen cannons and appeared ready to sail as a privateer. *Id.*; Cabinet Opinions on the *Little Sarah* (July 8, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 446, 446. That action would be in violation of Washington's prohibition on fitting privateers in U.S. ports and his direction that those that were fitted must remain in port. Editor's Note to Cabinet Opinions on the *Little Sarah* (July 8, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 446, 447; see Prakash & Ramsey, *supra* note 1, at 341. Washington was not in Philadelphia when Governor Mifflin asked for directions. See Editor's Note to Cabinet Opinions on the *Little Sarah* (July 8, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 446, 447. Hamilton and Knox wanted to set up a battery manned by a

gust 1, 1793, to decide to request his recall.<sup>251</sup> This request was done in a letter to Gouverneur Morris containing a bill of particulars against Genet,<sup>252</sup> which Morris would present to the French government.<sup>253</sup> In requesting Genet's recall, the administration was following Vattel's laws on diplomacy—a foreign minister is duty bound to comply with the laws of his host nation.<sup>254</sup> Although he is immune from punishment for violating those laws, that conduct is grounds for a request that he be recalled or, in extreme circumstances, expelled.<sup>255</sup>

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party of militia that would use force, if necessary, to prevent the ship from leaving. See Cabinet Opinions on the *Little Sarah* (July 8, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 446, 446–47. Jefferson objected to the use of force on the grounds that it might lead to a war with France and that no decision should be made in Washington's absence. See Dissenting Opinion on the *Little Sarah* (July 8, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 449, 449. Jefferson thought that Genet promised that the ship would not leave until the President returned. See Memorandum of a Conversation with Edmond Charles Genet (July 10, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 463, 466. But either Jefferson misunderstood or this promise was a ruse, as the *Little Democrat* sailed away. See Editor's Note to Cabinet Opinions on the *Little Sarah* (July 8, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 446, 449. When Washington returned, he was livid, and Genet's defiance of Washington made his recall inevitable. See ELKINS & MCKITTRICK, *supra* note 16, at 351–52.

Whether Washington would have authorized the use of force to contain the *Little Democrat* remains unknown. Several days later, after the dust settled, Washington told the Cabinet that he “took for granted” that the governors would stop the arming of privateers “in embryo” without force or by employing small parties of militia. Notes of a Cabinet Meeting (July 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 508, 508. He said that he had rejected the requests of four governors for cannons and that if they erected batteries, they would then ask for soldiers to man them, which the President did not believe was within the Executive's power. See *id.*

251. See Notes of Cabinet Meeting on Edmond Charles Genet (Aug. 1, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 598, 598. The vote was unanimous, with Jefferson by now regarding Genet as a huge albatross. *Id.*; see Letter from Thomas Jefferson to James Madison (July 7, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 443, 444.

252. Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 697, 697–711.

253. See Cabinet Opinions on Edmond Charles Genet (Aug. 23, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 745.

254. See VATTEL, *supra* note 25, bk. IV, § 95, at 377.

255. See *id.* at §§ 93–96, at 377–79. Similarly, Washington revoked the exequatur of a French consul, Duplaine, who had led an armed force to liberate a prize being held by a U.S. marshal pursuant to a court order. Letter from Thomas Jefferson to Antoine Charbonnet Duplaine (Oct. 3, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 184, 184–85. Jefferson justified the revocation of Duplaine's exequatur under the law of nations citing the continental publicists. Letter from Thomas Jefferson to Edmond Charles Genet (Nov. 15–22, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 378, 378–79. For the evidence against Duplaine, see Letter from Christopher Gore to Thomas Jefferson (Sept. 10, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 79, 79–80.



For months, the administration heard nothing from the French government.<sup>256</sup> By the end of the year, Washington decided that Genet's continued functioning as the French minister was intolerable.<sup>257</sup> Even then, Washington was reluctant to unilaterally take the provocative step of dismissing a foreign minister. In January 1794, Randolph, who succeeded Jefferson as Secretary of State, drafted a message for Washington to send to Congress, stating that the President would remove Genet's diplomatic authority unless either House objected.<sup>258</sup> But that message became moot when Washington received a message from Morris that the Jacobins, who had ousted the Girondins, had recalled Genet.<sup>259</sup>

### C. *The Neutrality Proclamation*

When Washington received confirmation that war had broken out between France and Great Britain and the Netherlands, his immediate concern was that overzealous Americans might enlist in Genet's privateers and embroil the United States in the war.<sup>260</sup> The first item on the agenda of the April 19, 1793 Cabinet meeting was whether to issue what became known as the Neutrality Proclamation.<sup>261</sup> Jefferson initially objected that only Congress had the constitutional authority to declare neutrality, because it had the exclusive power to declare war.<sup>262</sup> This objection must have surprised Washington, because, when Jefferson first con-

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256. Morris delivered the letter to the French government on October 8, 1793, and it decided to recall Genet on October 11, 1793; but the news did not cross the ocean until January. In the interim, the Cabinet debated whether to expel Genet but was unable to reach a decision. Notes of Cabinet Meetings on Edmond Charles Genet and the President's Address to Congress (Nov. 18, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 339, 399–401.

257. JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 410 (Robert Faulkner & Paul Carrese eds., 2000) [hereinafter MARSHALL, LIFE OF WASHINGTON].

258. *See id.* at 411.

259. *Id.*; see Editor's Note to Proposed Message to Congress Concerning Revocation of Edmond Charles Genet's Diplomatic Status (Jan. 6–13, 1794), in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 625, 625 n.2; see also ELKINS & MCKITRICK, *supra* note 16, at 365–72 (discussing Genet's relationship and correspondence with Paris).

260. *See supra* notes 53–55 and accompanying text.

261. *See* Cabinet Opinion on Washington's Questions on Neutrality and the Alliance with France (Apr. 19, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 570, 570.

262. *See* Letter from Thomas Jefferson to James Madison (June 29, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 401, 403; see also Notes on Washington's Questions on Neutrality and the Alliance with France (May 6, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 665, 666.

cluded that the war had broken out, he told the President that it is “necessary in my opinion that we take every justifiable measure for preserving our neutrality.”<sup>263</sup> Hamilton’s response effectively disposed of this objection—the United States had treaties of peace with each of the belligerents, and Congress had left the country in a state of peace that the Executive was duty-bound to preserve.<sup>264</sup> Jefferson acquiesced in the issuance of the Proclamation, and the Cabinet vote was unanimous.<sup>265</sup>

The Proclamation was drafted by Randolph and approved by the Cabinet.<sup>266</sup> The Proclamation’s text is provided below,<sup>267</sup> and it

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263. Letter from Thomas Jefferson to George Washington (Apr. 7, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 518, 518.

264. Hamilton would make the same argument in his *Pacificus* letters. Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 33, 43 [hereinafter *Pacificus No. 1*].

265. Cabinet Opinion on Washington’s Questions on Neutrality and the Alliance with France (Apr. 19, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 570, 570. Jefferson told Madison that he went along with the Proclamation so that his opposition would not “prejudice what was the next question, the boldest and greatest that ever was hazarded, and which would have called for extremities, had it prevailed.” Letter from Thomas Jefferson to James Madison (June 23, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 346, 346. This statement was clearly a reference to the validity of the treaties; the decision to receive Genet had been made on March 30, 1793.

In deference to Jefferson, the Cabinet agreed that the word “neutrality” would not appear in the Proclamation, even though Jefferson repeatedly used that word to describe the legal condition of the United States both before and after the Proclamation was issued. Letter from Thomas Jefferson to Jean Baptiste Ternant (Aug. 27, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 328, 328; Letter from Thomas Jefferson to C. W. F. Dumas (Mar. 24, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 439, 439; Letter from Thomas Jefferson to Gouverneur Morris (Apr. 20, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 575, 576; Letter from Thomas Jefferson to Thomas Pinckney (Apr. 20, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 577, 578; Letter from Thomas Jefferson to George Wythe (Apr. 27, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 597, 597; Letter from Thomas Jefferson to James Madison (Apr. 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 619, 619. Indeed, shortly after the Proclamation was issued, Jefferson told Randolph that “the occurrence of a foreign war has brought into activity the laws of neutrality, as a part of the law of the land.” Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON *supra* note 10, at 691, 692. Jefferson never explained why he objected to the use of the word “neutrality” in the Proclamation. Chief Justice Jay had also decided to omit the word “neutrality” in the draft Proclamation that he sent to Hamilton because, he said, that term was sometimes misunderstood in the country. Letter from John Jay to Alexander Hamilton (Apr. 11, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 307, 308.

266. When his followers attacked the Proclamation, Jefferson said that he did not pay close attention to its wording but only checked that the word “neutrality” did not appear. Letter from Thomas Jefferson to James Madison (June 23, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 346, 346; Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 649, 649–50; Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 26 THE PA-

will be seen that Randolph took the language directly out of Vattel.

The Proclamation begins by stating that the “duty and interest of the United States” requires it to “pursue a conduct friendly and impartial toward the belligerent powers.”<sup>268</sup> “Friendly” and “impartial” are Vattel’s keynote words for strict neutrality.<sup>269</sup> The Proclamation then declares that the United States and all citizens must carefully avoid “all acts and proceedings whatsoever” that would conflict with impartiality.<sup>270</sup> This phrasing echoes Vattel’s maxim that strict neutrality means “[t]o give no help” to any belligerent.<sup>271</sup>

Next, the Proclamation warns the citizens of the United States of the dangers in carrying contraband to a belligerent.<sup>272</sup> Vattel stated that the law of nations did not prohibit the *private* trade in contraband.<sup>273</sup> However, he urged that citizens should be warned that contraband shipped to a belligerent could be confiscated by

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PERS OF THOMAS JEFFERSON, *supra* note 10, at 651, 651.

267. WHEREAS it appears that a state of war exists between Austria, Prussia, Sardinia, Great-Britain, and the United Netherlands, of the one part, and France on the other, and the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

And I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the *modern* usage of nations, will not receive the protection of the United States, against such punishment or forfeiture: and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations, with respect to the powers at war, or any of them.

Neutrality Proclamation (Apr. 22, 1793), *reprinted in* 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 472, 472–73.

268. *Id.* at 472.

269. See VATTEL, *supra* note 25, bk. III, § 103, at 268.

270. Neutrality Proclamation (Apr. 22, 1793), *reprinted in* 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 472, 472–73.

271. VATTEL, *supra* note 25, bk. III, § 104, at 268.

272. Neutrality Proclamation (Apr. 22, 1793), *reprinted in* 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 472, 473.

273. VATTEL, *supra* note 25, bk. III, § 112, at 271.

its enemy and that their government would do nothing to protect them.<sup>274</sup> Otherwise, “[i]f their sovereign should undertake to protect them, the act would be equivalent to a desire on his part to furnish such help—an attitude certainly inconsistent with neutrality.”<sup>275</sup> This warning is the one that Washington gave in the Proclamation.<sup>276</sup>

Private military acts by citizens against a belligerent were particular threats to neutrality, because they could easily be blamed on the citizens’ government. To Vattel, an offending citizen’s nation that could have prevented such acts but did not was as responsible as if it had committed the acts itself.<sup>277</sup> He understood the realistic limits on the ability of any government to control its citizens.<sup>278</sup> But “[a] sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it.”<sup>279</sup> Hence Washington’s final warning in the Proclamation was that the government would prosecute any person within the jurisdiction of the United States who committed an act of hostility against any of the belligerents, in violation of the law of nations.<sup>280</sup>

Although Randolph carefully tracked Vattel in drafting the Neutrality Proclamation, he omitted any reference to the treaties with France, and this omission raised a firestorm among American supporters of France.<sup>281</sup> They did not believe that the United

274. *Id.* § 113, at 272.

275. *Id.*

276. When Hammond complained that American citizens were selling contraband to French agents, Jefferson responded that such private trades did not violate the law of nations. Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 38, 38–39. He said that the only duty of the United States was to warn its citizens that the contraband could be subject to confiscation and that they were not subject to the protection of the government, as the President had made clear in the Proclamation. See *id.* at 39; Neutrality Proclamation (Apr. 22, 1793), reprinted in 12 THE PAPERS OF GEORGE WASHINGTON PAPERS, *supra* note 39, at 472–73.

277. VATTEL, *supra* note 25, bk. II, § 72, at 136.

278. *Id.* § 73, at 136.

279. *Id.* § 77, at 137.

280. Neutrality Proclamation (Apr. 22, 1793), reprinted in 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 472, 473.

281. See, e.g., Letter from James Madison to Thomas Jefferson (May 8, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 688, 688–89; Letter from James Madison to Thomas Jefferson (June 19, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 323, 324.

States was or should be "impartial" between France and Britain.<sup>282</sup> Of course the United States had a Treaty of Peace with Great Britain.<sup>283</sup> But did not the United States have a Treaty of Amity and Commerce and a Treaty of Alliance with France?<sup>284</sup> Did the President unilaterally declare those treaties with France to be of no effect? What power did the Executive have to rescind a treaty? And if he meant to comply with the treaties, how could the United States be "impartial"?<sup>285</sup>

Randolph was well aware that under Vattel's laws of neutrality, compliance with the obligations of preexisting treaties, including providing moderate support under a defensive alliance, was not inconsistent with strict neutrality. He emphasized that very point in his opinion to Washington on the continued validity of the French treaties.<sup>286</sup> But Randolph could not state this point in the Proclamation because it was issued before Washington's decision that the treaties were still valid. The exclusion of the treaties from the Proclamation could certainly leave the (false) impression that Washington considered the treaties with France as no longer binding on the United States. And it provided an opening for Hamilton, who had lost that argument in the privacy of the Cabinet, to persuade the public that the Proclamation did nullify one

282. See, e.g., Letter from James Madison to Thomas Jefferson (May 8, 1793), 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 688, 688–89.

283. Definitive Treaty of Peace, *supra* note 19.

284. Treaty of Amity and Commerce, *supra* note 20; Treaty of Alliance, *supra* note 22.

285. See, e.g., Letter from James Madison to Thomas Jefferson (May 8, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 688, 688–89; Letter from James Madison to Thomas Jefferson (June 13, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 272, 272–73; Letter from James Madison to Thomas Jefferson (June 19, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 323, 324 (complaining about the omission of the treaties from the Proclamation and its possible effects on changing the United States' relations with France); Letter from James Monroe to Thomas Jefferson (June 27, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 381, 382–84. They also objected to the term "disposition," claiming that the President could not bind the nation's future course. Jefferson's typical response was that he supported the substance of the Proclamation but that it was badly drafted by Randolph. See Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 501, 501–02; Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 649, 649–50.

286. Letter from Edmund Randolph to George Washington (May 6, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 534, 546 ("This treaty was made many years ago without relation to the present war; and it is therefore no breach of neutrality to fulfil it . . ."); *id.* at 547 ("[A]ltho' it would be an infraction of neutrality to *elect*, (if we had the power of choosing) the operation of the treaties, the U.S. are *bound* to admit them to be applicable to the present situation . . .").

treaty provision (the guarantee) and left the remaining provisions in suspense.<sup>287</sup>

This error of omission was not repeated in the Rules on Neutrality that were issued on August 3, 1793.<sup>288</sup> These rules also tracked Vattel in distinguishing between equipping vessels for military purposes, which was prohibited, and equipping merchant ships for commercial purposes, which was allowed.<sup>289</sup> However, for each of these rules, exceptions were made for the benefit of France when required by the treaties.<sup>290</sup>

Even if the Proclamation had affirmed the continued validity of the treaties with France, as did the Rules on Neutrality, that probably would not have satisfied the ardently pro-French faction in the United States; but it would have removed a painful thorn. As events turned out, most of the country rallied behind Washington because Genet's repeated misconduct created an enormous backlash<sup>291</sup> and because, after all, Washington's adherence to the laws of neutrality had helped keep the country from being dragged into war.

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287. See *Pacificus No. 1*, *supra* note 264, at 33, 36 (“[T]he Proclamation is virtually a manifestation of the sense of the Government that the U[nited] States are, *under the circumstances of the case, not bound to execute the clause of the Guarantee.*”); Alexander Hamilton, *Pacificus No. 2* (July 3, 1793), *reprinted in* 15 THE PAPERS OF HAMILTON, *supra* note 67, at 55, 56–58 [hereinafter *Pacificus No. 2*] (stating that the treaty of alliance was a defensive treaty that should not apply because France is the aggressor in the present war).

The mistaken idea that the Neutrality Proclamation had the effect of renouncing the French treaties still has currency. See Anthony J. Bellia, Jr., & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 49 (2009). Washington not only stated that the treaties were still in effect but, following the issuance of the Proclamation, asked the Supreme Court to interpret nine of their provisions and then incorporated them into the Rules on Neutrality. See *supra* notes 193–94 and accompanying text.

288. See Rules on Neutrality (Aug. 3, 1793), *reprinted in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 608, 608–09.

289. *Id.* at 608.

290. *Id.* at 608–09.

291. See, e.g., Letter from Thomas Jefferson to James Madison (July 7, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 443, 444 (calling Genet's appointment “calamitous”); Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 651, 651–52 (stating that the public is strongly against Genet and in favor of Proclamation, that it is time to stop “little cavils” about whether the President or Congress should declare neutrality, and that he expects Congress to pass a neutrality law with an expression of friendship to France); Letter from Thomas Jefferson to James Madison (Aug. 18, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 720, 720 (complaining that addresses in support of the Proclamation are becoming “universal” because of the support for the President over Genet); Letter from James Madison to Thomas Jefferson (Sept. 2, 1793), *in* 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 16, 16 (expressing distress that Genet turned the public against France).

#### D. *Criminal Prosecutions and the Law of Nations*

Gideon Henfield was an American citizen who, in May 1793, enlisted in the French military service on board a privateer named (appropriately enough) the *Citizen Genet*.<sup>292</sup> The French privateer captured the British ship *William*.<sup>293</sup> Henfield was given the post of Prize Master of the *William* and sailed it as a prize into the port of Philadelphia.<sup>294</sup>

The Neutrality Proclamation had followed Vattel in warning Americans that they would be prosecuted for committing acts of military hostility against any of the belligerents in violation of the law of nations.<sup>295</sup> With Washington's approval, Jefferson instructed William Rawle, the United States Attorney, to prosecute such violators,<sup>296</sup> and Rawle instituted the prosecution of Henfield.<sup>297</sup>

This prosecution was the final straw for some members of the pro-French faction who had initially given Washington the benefit of the doubt. What law, James Monroe asked Jefferson, had Henfield violated? No statute existed that prohibited an American from enlisting in the military service of a foreign country; and, inasmuch as Britain and France were at war, Henfield's conduct could not be considered piracy.<sup>298</sup> Prosecuting an American for vio-

292. 2 THE DOCUMENTARY HISTORY, *supra* note 203, at 340.

293. *Id.*

294. *Id.*

295. Compare VATTEL, *supra* note 25, bk. II, § 71, at 136, with Neutrality Proclamation (Apr. 22, 1793), reprinted in 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 39, at 472, 473.

296. See Letter from Thomas Jefferson to William Rawle (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 40, 41 (directing the prosecution to be instituted); Letter from George Washington to Thomas Jefferson (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 45, 45 (approving instructions to Rawle). At that time, the United States Attorneys reported to the Secretary of State.

297. Editor's Note to Letter to William Rawle from Thomas Jefferson (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 40, 41.

298. Letter from James Monroe to Thomas Jefferson (June 27, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 381, 383-84. For Jefferson's reply, see Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 501, 502 (noting Henfield's prosecution was supported by an official opinion of the Attorney General which "coincided with all our private opinions"). See also Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 691, 692 (stating that "the occurrence of a foreign war has brought into activity the laws of neutrality, as a part of the law of the land," and that the judges will enforce this law through their charges to grand juries, which will be published).

Jefferson's support for law of nations prosecutions seems difficult to square with his

lating an executive proclamation was all too reminiscent of the constitutional disputes with the Stuart kings,<sup>299</sup> “which resonated still in eighteenth-century America.”<sup>300</sup>

However, Henfield was not prosecuted for violating the Neutrality Proclamation; he was prosecuted for violating the law of nations.<sup>301</sup> The Supreme Court had not yet eliminated common law crimes,<sup>302</sup> and precedents were in place upon which the Washington administration acted in prosecuting Henfield.

The first precedent was the famous *Longchamps* case,<sup>303</sup> which occurred during the Confederation period. Longchamps had threatened Marbois, the Consul General and Secretary of the French delegation, in the home of the French minister and then

strenuous opposition to federal common law prosecutions. Yet a major distinction is present between the two. Jefferson opposed federal common law prosecutions, because he saw them as a powerful instrument of a consolidated government—that is, federal prosecutions could be brought for conduct that was outside of Congress’s power to regulate. See Letter from Thomas Jefferson to Gideon Granger (Aug. 13, 1800), in 7 THE WRITINGS OF THOMAS JEFFERSON 450, 450–51 (Paul Leicester Ford ed., 1896). That problem was not present in law of nations prosecutions inasmuch as they were within the scope of an enumerated congressional power, and the Constitution gave the United States exclusive power over foreign affairs.

299. See, e.g., 1 HENRY HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 330–31, 411–12 (London, John Murray new ed. 1876); 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 296–97 (Little, Brown, and Co. 1924); 6 *id.* at 31.

300. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 245 (1996).

301. Compare Blackstone’s discussion of the proper uses of executive proclamations:

For, though the making of laws is entirely the work of a distinct part, the legislative branch, . . . [executive] proclamations, are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in being . . .

1 WILLIAM BLACKSTONE, COMMENTARIES, *supra* note 108, at \*270.

302. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). While United States courts “no doubt possess powers not immediately derived from statute,” the “exercise of criminal jurisdiction in common law cases . . . is not within their implied powers.” *Id.* at 34. Even after the *Hudson* decision, the validity of nonstatutory criminal prosecutions for violating the law of nations was unsettled. Justice Story, sitting on circuit, argued that law of nations prosecutions were still viable, at least if they fell within the admiralty jurisdiction. *United States v. Coolidge*, 25 F. Cas. 622, 623 (C.C. D. Mass. 1815) (No. 14,858). The case went to the Supreme Court on a certificate of division. *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 415 (1816). Justice Johnson announced that the Court was divided on the issue, but that the Attorney General declined to argue, and no counsel appeared for the defendant. *Id.* at 416. The Court therefore decided to instruct the circuit court to apply the *Hudson* decision. *Id.* at 416–17. This odd outcome brought to an end nonstatutory law of nations prosecutions.

303. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Phila. O. & T. 1784).



assaulted Marbois on a public street.<sup>304</sup> Congress passed a resolution declaring that Longchamps's actions violated the law of nations and called on the states to prosecute him "that he may be brought to justice for his said violation of the laws of nations and of the land."<sup>305</sup> Pennsylvania responded to this summons and prosecuted Longchamps.<sup>306</sup> Chief Justice McKean declared that the law of nations "form[s] a part of the municipal law of Pennsylvania,"<sup>307</sup> and "in its full extent, is part of the law of this State."<sup>308</sup> Longchamps was found guilty of violating the law of nations,<sup>309</sup> was fined, and was sentenced to two years imprisonment.<sup>310</sup>

In 1790, shortly after the federal judiciary was organized, the Justices travelled on circuit to charge grand juries. The first charge was given by Chief Justice Jay to a federal grand jury in New York.<sup>311</sup> He advised the grand jury that it had jurisdiction over violations of the law of nations, which was part of the law of the United States.<sup>312</sup> Justice James Wilson gave similar charges the following year to grand juries in Virginia<sup>313</sup> and Pennsylvania.<sup>314</sup>

The first federal nonstatutory law of nations prosecution was brought in 1792 against a Philadelphia constable named Meeker. Meeker had entered the home of Van Berckel, the Netherlands foreign minister, to serve process on one of his servants, who then paid the constable £5, the amount owed.<sup>315</sup> Van Berckel protested

304. *Id.* at 111.

305. Report of the Committee of Congress on a Note from the Minister of France respecting an Assault and Battery on Mr. Marbois (May 28, 1784), in 6 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 78, at 810-11 (adopted May 29, 1784).

306. *De Longchamps*, 1 U.S. at 118.

307. *Id.* at 114.

308. *Id.* at 116.

309. See VATTEL, *supra* note 25, bk. IV, § 117, at 394 (stating that minister's home is inviolable, and anyone who violates it commits "a crime against the State and against all Nations"); *id.* § 122, at 396 (stating that secretary of an embassy enjoys the same immunities and protections as foreign ministers).

310. *De Longchamps*, 1 U.S. at 118.

311. John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790), in 2 THE DOCUMENTARY HISTORY, *supra* note 203, at 25.

312. *Id.* at 29.

313. James Wilson's Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 23, 1791), in 2 THE DOCUMENTARY HISTORY, *supra* note 203, at 166, 179.

314. James Wilson's Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (Aug. 15, 1791), in 2 THE DOCUMENTARY HISTORY, *supra* note 203, at 197, 199.

315. See Letter from Edmund Randolph to Thomas Jefferson (June 21, 1792), in 24 THE

this invasion of his diplomatic residence.<sup>316</sup> Randolph issued an opinion that “[t]he law of nations, tho’ not specially adapted by the constitution, or any municipal act, is essentially a part of the law of the land.”<sup>317</sup> Randolph pointed out that a federal statute might cover this case, and, if it did, Congress would not intend that a separate prosecution be brought under the law of nations.<sup>318</sup> But if the statute did not cover Meeker’s actions, then he was subject to a law of nations prosecution.<sup>319</sup> Jefferson informed Van Berckel that the constable’s actions did not violate the federal statute (because the servant was not properly registered, as required by that law) and that a law of nations prosecution could be instituted against the constable.<sup>320</sup> Van Berckel agreed,<sup>321</sup> and Rawle, at Jefferson’s direction, instituted a law of nations prosecution.<sup>322</sup>

The next precedent involved Ravara, the consul from Genoa, who was indicted for sending threatening letters to the British minister, Hammond.<sup>323</sup> Ravara’s defense was that consuls should be afforded diplomatic immunity.<sup>324</sup> Rawle responded that under

PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 127, 127–28; Letter from William Rawle to Thomas Jefferson (Oct. 8, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 452, 452.

316. See Letter from Edmund Randolph to Thomas Jefferson (June 26, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 127, 127.

317. *Id.*

318. *Id.*

319. *Id.* at 128. Bellia and Clark claim that Randolph’s opinion concludes that a law of nations prosecution could not be brought because a federal statute existed on the subject. Bellia & Clark, *supra* note 287, at 48. But Randolph made clear that this result would follow only if the statute actually applied to Meeker; and, because it did not, he was subsequently indicted for violating the law of nations. See *infra* notes 321–23 and accompanying text.

320. Letter from Thomas Jefferson to F. P. Van Berckel (July 2, 1793), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 149, 149–50. In this letter, Jefferson told Van Berckel that the alternative was for the servant to file a lawsuit to recover the £5 that she had given the constable. See *id.*

321. Letter from F. P. Van Berckel to Thomas Jefferson (July 4, 1793), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 157, 157–58; see 2 THE DOCUMENTARY HISTORY, *supra* note 203, at 20 n.4.

322. Letter from William Rawle to Thomas Jefferson (Oct. 8, 1793), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 452, 452. Meeker’s prosecution was dropped because Van Berckel decided that the alderman who directed Meeker to serve process should have been prosecuted instead of Meeker. See 2 THE DOCUMENTARY HISTORY, *supra* note 203, at 320 n.4.

323. *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 297, 27 F. Cox 713 (C.C. D. Pa. 1793) (No. 16,122).

324. See *id.* at 299 n.1. He relied on Vattel, who stated that a consul was not a diplomatic agent but should be given some privileges, including a qualified exemption from domestic criminal laws “unless he commit a grievous offense against the Law of Nations.”

the law of nations, public ministers are entitled to high diplomatic privileges while consuls are not.<sup>325</sup> Ravara's defense was rejected by the court on the merits, and he was found guilty.<sup>326</sup>

These cases were the precedents on enforcement of the law of nations upon which the Washington administration prosecuted Henfield. After the Neutrality Proclamation was issued, Jay wrote a grand jury charge to justify prosecutions against Americans who committed hostile acts against a belligerent.<sup>327</sup> Jay stated that the laws of the United States fell under three classifications: treaties made under the authority of the United States, the law of nations, and the Constitution and statutes of the United States.<sup>328</sup> Quoting at length from Vattel, Jay said that Washington's Proclamation was declaratory of the laws of nations, including the duty of the government, as a neutral, to prevent American citizens from committing acts of hostility against any nation with which the United States was at peace.<sup>329</sup> It is not sufficient, Jay said, that a neutral should withdraw its protection from those who commit, aid, or abet hostilities against belligerents; to preserve its neutrality, the United States must also prosecute and punish them:

From the observations which have been made, this conclusion appears to result, viz.: That the United States are in a state of neutrality relative to all the powers at war, and that it is their duty, their interest, and their disposition to maintain it: that, therefore, they who commit, aid, or abet hostilities against these powers, or either of them, offend against the laws of the United States, and ought to be punished; and consequently, that it is your duty, gentlemen, to inquire into and present all such of these offences, as you shall find to have been committed . . . .<sup>330</sup>

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VATTEL, *supra* note 25, bk. II, § 34, at 124.

325. *Ravara*, 2 U.S. at 299 n.1. If the reporter is correct that Rawle argued against any immunity for consuls, this case is an instance in which the administration did not follow Vattel, who was an outlier on this issue.

326. *Id.* at 298, 299 n.1. The reporter describes Ravara's case as a common law prosecution. Whether it was that or a statutory prosecution, *see* CASTO, SUPREME COURT, *supra* note 109, at 140, the relevance of the case for this paper is that the defense was based on the law of nations, and the court considered that defense on the merits. Apparently, Ravara was later pardoned on the condition that he surrender his commission and exequatur. *Ravara*, 2 U.S. at 299 n.1.

327. John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793), *reprinted in* Henfield's Case, 11 F. Cas. 1099, 1102-03 (C.C. D. Pa. 1793) (No. 6,360).

328. *Id.* at 1100-01.

329. *Id.* at 1101-02.

330. *Id.* at 1103-04.

Justice Wilson gave a very similar charge to the grand jury considering Henfield's actions, emphasizing, as did Jay, that treaties and the law of nations were part of the laws of the United States.<sup>331</sup> The grand jury returned an indictment containing several counts against Henfield for violating the Treaty of Peace with Great Britain<sup>332</sup> and the law of nations.<sup>333</sup> The facts at trial were not disputed: Henfield was a United States citizen who committed military acts of hostility against a country with which the United States was at peace.<sup>334</sup> With the concurrence of Justice Iredell and Judge Peters, Justice Wilson then charged the jury:

It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. It has been asked by his counsel, in their address to you, against what law has he offended? . . . 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.<sup>335</sup>

It is noteworthy that Jay's and Wilson's charges were consistent with those that they had given to grand juries before the Neutrality Crisis occurred. But juries were arbiters of both law and fact, and Henfield's jury returned a verdict of not guilty.<sup>336</sup>

Henfield was not the only American who was prosecuted for serving on French privateers. The administration also obtained an indictment against Joseph Rivers and three others in Georgia, but they too were acquitted by a jury, "contrary to the opinion of the judges."<sup>337</sup> Other prosecutions for neutrality violations were likewise unsuccessful.<sup>338</sup>

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331. *See id.* at 1106–08.

332. *See* Definitive Treaty of Peace, *supra* note 19.

333. *Henfield's Case*, 11 F. Cas. at 1109–12.

334. *Id.* at 1117.

335. *Id.* at 1120.

336. *Id.* at 1122.

337. CASTO, FOREIGN AFFAIRS, *supra* note 1, at 100 (internal quotation marks omitted).

338. *See id.* at 100–02. The grand jury refused to indict the French consul Duplaine, who had "liberated" a prize from a U.S. marshal, because some grand jurors doubted the legality of the marshal's writ. Letter from Christopher Gore to Thomas Jefferson (Oct. 21, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 261, 261.

The Washington administration acted on the belief that by prosecuting Henfield and others it was fulfilling its duty to follow the obligations of the law of nations as expounded by Vattel, and the federal judges, including three Justices of the Supreme Court, validated the administration as a matter of law. But by applying the law of nations domestically to prosecute individual Americans, the administration was pushing the envelope towards the appearance of government by executive decree, a measure that was bound to produce strenuous opposition regardless of the opinions of the continental publicists or the federal judges. Jury nullification could signal public rejection of the proposition that the President can use his duty to comply with the law of nations to act coercively against American citizens in the United States.<sup>339</sup>

Washington was enough of a realist to understand that he needed congressional support. When Congress reconvened in December 1793, he asked for legislation that would enact into positive law the neutrality principles that the administration had adopted.<sup>340</sup> After a lengthy debate, Congress gave Washington practically all that he wanted in the Neutrality Act and, in effect, ratified his actions.<sup>341</sup>

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339. Several explanations were provided for Henfield's acquittal. John Marshall thought that the Republican Party attacks on the Proclamation in the press had helped make the public (and the jury) believe that they were being asked to give a proclamation the force of law, and to subject themselves to the will of the Executive. See MARSHALL, LIFE OF WASHINGTON, *supra* note 257, at 389–90. To Hamilton, it was a case of nullification by a pro-French jury. See Letter from Alexander Hamilton to George Washington (Aug. 5, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 194, 194. Jefferson, who had been in regular contact with Rawle, thought that Henfield was acquitted because it appeared at trial that he was ignorant of the unlawfulness of his actions and showed real contrition, that mitigating circumstances existed, and that the jury in effect pardoned him. See Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 697, 702.

340. See Speech of the President of the United States to Both Houses of Congress (Dec. 3, 1793), in 1 STATE PAPERS AND PUBLIC DOCUMENTS OF THE UNITED STATES, FROM THE ACCESSION OF GEORGE WASHINGTON TO THE PRESIDENCY, EXHIBITING A COMPLETE VIEW OF OUR FOREIGN RELATIONS SINCE THAT TIME 39, 39–40 (3d ed. 1819) [hereinafter STATE PAPERS AND PUBLIC DOCUMENTS]; David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U. CHI. L. REV. 1, 14–16 (1996).

341. See Act of June 5, 1794, ch. 50, 1 Stat. 381, 381–84. The statute prohibited American citizens from enlisting to serve in war in the armed forces of another country; prohibited any person within the jurisdiction of the United States from enlisting in or recruiting for foreign vessels of war or privateers; prohibited any person within U.S. jurisdiction from fitting out, arming, or augmenting any ship of war or privateer to commit hostilities against any nation with which the United States was at peace; prohibited any person within U.S. jurisdiction from conducting or preparing a military expedition against a nation with which the United States was at peace; gave the district courts jurisdiction over foreign

The law of nations empowered the Washington administration, through the Take Care Clause, to implement policies that it considered necessary to secure neutral obligations and rights. However, two important matters remained in which the law of nations did not authorize the administration to adopt policies that it considered necessary, and the administration complied with these restraints.

### E. *The Law of Nations as a Restraint on Executive Power*

#### 1. The Sale of Prizes

The sales of French captured prizes was one of the more difficult issues for the administration. Article XXII of the Treaty of Amity and Commerce with France prohibited the enemies of France from fitting out privateers in U.S. ports and from selling their prizes in the United States.<sup>342</sup> It did not explicitly authorize France to do either, and Jefferson's initial view was that, applying the principle of strict neutrality, France should be prohibited from doing both.<sup>343</sup> However, the administration decided that the two issues were different. It prohibited France from fitting out privateers to prey on British commerce and even ordered privateers that had been fitted before the prohibition was published to leave the United States;<sup>344</sup> but "as to the prizes taken by them, no power

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captures; and authorized the President to use force to ensure compliance with the prohibitions relating to ships of war and privateers. *Id.* The anti-privateering provisions of the act were extended in 1797 to U.S. citizens acting outside of U.S. jurisdiction. Act of June 14, 1797, ch. 1, Stat. 520, 520. Even after the Neutrality Act was passed, Justices Iredell and Paterson continued to defend the Neutrality Proclamation and nonstatutory law of nations prosecutions, viewing the Neutrality Act as declaratory of the law of nations. See James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Connecticut (Apr. 25, 1795), 3 THE DOCUMENTARY HISTORY, *supra* note 203, at 28, 30; William Paterson's Charge to the Grand Jury of the Circuit Court for the District of Delaware (June 8, 1795), *id.* at 57, 58–60; James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (Apr. 12, 1796), *id.* at 106, 109–12; James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (Apr. 11, 1797), *id.* at 163, 166–67.

342. Treaty of Amity and Commerce, *supra* note 20, at art. XXII, 8 Stat. at 24.

343. Opinion on the Treaties with France (Apr. 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 608, 611 ("[Article XXII] prohibits the enemies of France from fitting out privateers in our ports, or selling their prizes here. But we are free to refuse the same thing to France, there being no stipulation to the contrary, and we ought to refuse it on principles of fair neutrality.").

344. See Cabinet Memorandum on French Privateers (June 1, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 155, 155.

less than that of the legislature can prohibit their sale."<sup>345</sup> Randolph later explained that there was insufficient support among the continental publicists for prohibiting private sales, with Vattel and others stating that such prohibitions were not required by the laws of neutrality.<sup>346</sup>

The economic incentive for privateering had been reduced by the administration's decision that the operation of French consular courts in the United States was illegal.<sup>347</sup> With French consular courts being unable to conduct condemnation proceedings and the United States district judges disclaiming jurisdiction over foreign captures,<sup>348</sup> no realistic way existed for the captors to obtain title to their prizes. Direct sales of the prizes left purchasers vulnerable to suits by the original owners.<sup>349</sup> This risk reduced the value of the ships that were claimed as prizes but did not realistically affect the sales of fungible cargo.<sup>350</sup> Thus, the absence of legal condemnation made privateering less lucrative but did not eliminate it. The British wanted to end, and not merely reduce, privateering; and Hammond complained bitterly about the administration's refusal to prohibit sales.<sup>351</sup> But Hammond was preaching to the choir—the administration also wished to end this dangerous irritant. The problem was obtaining the necessary legal authority.

When Congress met in December 1793, Washington advised that the Executive lacked authority to stop the sales of prizes, and the administration's supporters sought remedial legislation.<sup>352</sup> The Senate included a provision in the neutrality bill that prohibited the sales, but this provision was struck by the House.<sup>353</sup> Jay was in London to negotiate a treaty that would avoid an otherwise imminent war with Great Britain.<sup>354</sup> Washington's instructions to Jay included a directive that the sale of French prizes should be pro-

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345. *Id.*

346. See Letter from Edmund Randolph to George Hammond (June 2, 1794), in 1 AMERICAN STATE PAPERS, *supra* note 10, at 464, 465.

347. See CASTO, FOREIGN AFFAIRS, *supra* note 1, at 39–40, 510–52.

348. See *id.* at 89.

349. See *id.* at 40, 80.

350. See *id.* at 80–81.

351. See Memorial from George Hammond to Thomas Jefferson (Sept. 4, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 30, 30–31.

352. Speech of the President of the United States to Both Houses of Congress (Dec. 3, 1793), in 1 STATE PAPERS AND PUBLIC DOCUMENTS, *supra* note 340, at 39, 39–40.

353. HYNEMAN, AMERICAN NEUTRALITY, *supra* note 13, at 122–23.

354. See ELKINS & MCKITRICK, *supra* note 16, at 395–97.

hibited in American ports.<sup>355</sup> Hamilton notified Jay that the Neutrality Act had passed but that the prohibition on the sale of prizes had been defeated in the House.<sup>356</sup> A provision was then inserted in the Jay Treaty that prohibited the sales of prizes in the United States by any enemy of Great Britain.<sup>357</sup> Thus, the Executive obtained authority through the treaty power to prohibit conduct that was beyond its authority under the law of nations and the Take Care Clause.<sup>358</sup>

## 2. "Free Ships Make Free Goods"

The second example of the law of nations being a restraint on executive policy relates to one of the principles of neutral rights held most dearly by Americans—that "free ships make free goods." Under this principle, noncontraband goods carried by a neutral vessel are immune from seizure. This policy was adopted by Congress in 1776, in its model treaty of friendship and commerce, and was incorporated in the treaties negotiated during the Confederation period,<sup>359</sup> including the Treaty of Amity and Commerce with France.<sup>360</sup> Moreover, the nations that joined in the League of Armed Neutrality during the American War of Independence adopted "free ships make free goods" and threatened to enforce it with their navies.<sup>361</sup> But Great Britain had not recognized the legitimacy of this principle and did not respect it during

355. *Id.* at 397.

356. Letter from Alexander Hamilton to John Jay (June 4, 1794), in 16 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 456, 456–57.

357. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, art. XXIV, 8 Stat. 116, 128; see CASTO, FOREIGN AFFAIRS, *supra* note 1 at 176.

358. That result left the problem of how to enforce the Jay Treaty's ban on the sale of French prizes. Inasmuch as Congress had refused to ban those sales in the Neutrality Act, seeking implementing legislation would appear to be a dead end. The courts provided the solution. The British vice-consul in Charleston petitioned Chief Justice Ellsworth to enjoin the sale of a prize ship that had been brought into port by a French cruiser. 3 THE DOCUMENTARY HISTORY, *supra* note 203, at 89. Ellsworth declared that Article XXIV of the Jay Treaty prohibited the sale of French prizes in the United States and issued the injunction. *Id.*

359. See BEMIS, DIPLOMATIC HISTORY, *supra* note 43, at 25–26; HERRING, *supra* note 86, at 16–17.

360. Treaty of Amity and Commerce, *supra* note 20, at art. XXIII, 8 Stat. at 24, 26. When the administration received information that France had decided to violate this principle, it decided provisionally to protest that action unless an exception was made for American shipping as required by the treaty. See Cabinet Opinions on the *Roland* and Relations with Great Britain, France, and the Creeks (Aug. 31, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 795, 796.

361. See *supra* notes 78–80 and accompanying text.



the Neutrality Crisis, repeatedly seizing noncontraband French goods on U.S. vessels while paying compensation to the masters of the vessels.<sup>362</sup>

When Genet complained that these British seizures violated the neutral rights of the United States, Jefferson reluctantly told him that, although this practice violated a policy to which the United States was devoted, no treaty was in place with Britain guaranteeing that policy, and it was not required by the law of nations.<sup>363</sup> According to continental publicists such as Vattel, the non-contraband goods of an enemy being carried on a neutral vessel could be seized as long as compensation was given to the master of the vessel.<sup>364</sup> Inasmuch as a uniform practice had not emerged that could have called this doctrine into question, free ships still did not make free goods under the law of nations.<sup>365</sup> To be sure, the United States lacked the military power to enforce such a position against Great Britain,<sup>366</sup> but that inability would not have prevented the administration from protesting diplomatically, as it did for British practices that it believed were prohibited by the law of nations.<sup>367</sup> This position was an issue about which the administra-

362. See, e.g., Letter from Thomas Jefferson to Edmond Charles Genet (July 24, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 557, 557–58.

363. *Id.*

364. VATTEL, *supra* note 25, bk. III, § 115, at 273 (“If property belonging to the enemy is found upon a neutral vessel, the law of war allows its seizure; but the freight should properly be paid to the master of the ship, who is not to suffer by the seizure.”).

365. And so the Supreme Court held when the issue finally reached it in the wake of the War of 1812. See *The Nereide Case*, 13 U.S. (9 Cranch) 388, 418–21 (1815).

366. Thomas Pinckney, the U.S. minister to Great Britain, sounded out Sweden and Denmark, two members of the 1780 League of Armed Neutrality, about the feasibility of recreating such a league that would defend neutral shipping under the principle of “free ships make free goods.” Pinckney reported that “[t]he opinions of both in short are, that the neutral powers are not strong enough to cause their rights to be respected.” Letter from Thomas Pinckney to Thomas Jefferson (Aug. 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 673, 673–74. However, a year later Sweden and Denmark did agree to an alliance of armed neutrality and invited the United States to join. BEMIS, DIPLOMATIC HISTORY, *supra* note 43, at 101. But this was after Jay had left for London, and Washington declined to enter into a new alliance that had little support in Europe and that could jeopardize peace with Britain. *Id.* The Swedish-Danish attempt to establish “free ships make free goods” through a league of armed neutrality could not succeed because the other members of the 1780 league had joined the coalition against France and adopted the British position on neutral rights. See *id.* at 99.

367. The administration’s refusal to protest the British violations of “free ships make free goods” should be compared with its strong protests to Great Britain for declaring as contraband corn and grain shipments to France. Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 674, 675–76; Cabinet Opinions on the *Roland* and Relations with Great Britain, France, and the Creeks (Aug. 31, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 795,

tion felt very strongly, yet it did not assert such a position on neutral rights, because it lacked authority under the law of nations.<sup>368</sup>

## VII. AN ALTERNATIVE THEORY OF "EXECUTIVE POWER"

While members of the administration, Jefferson and Hamilton each proposed a theory of executive power over foreign affairs that was based on the Vesting Clause of Article II.<sup>369</sup> Jefferson presented this theory to Washington in a private official opinion, and

796; Letter from Thomas Jefferson to Thomas Pinckney (Sept. 7, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 55, 55. For the British argument that this practice was consistent with Vattel, at least in the context of the present war, see Letter from Thomas Pinckney to Thomas Jefferson (July 5, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 439, 439–40; Letter from George Hammond to Thomas Jefferson (Sept. 12, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 100, 100–01.

368. Lacking support in the law of nations, the administration would again yield on "free ships make free goods" in the 1794 Jay Treaty. See Treaty of Amity, Commerce and Navigation, *supra* note 357, at art. XXV, 8 Stat. at 128. Jay had been instructed that this principle was desirable but not indispensable for the treaty—a practical recognition that there was no possibility that the British would accept expanded protections of neutral rights during the war with France. See ELKINS & MCKITRICK, *supra* note 16, at 398, 410. The Jay Treaty was silent on neutral rights, stating only that those issues would be discussed when the war with France ended. Treaty of Amity, Commerce and Navigation, *supra* note 357, at art. XII, 8 Stat. at 122–23. This meant that the United States acquiesced in the British practice of seizing (and paying for) French noncontraband goods on neutral American ships. BEMIS, DIPLOMATIC HISTORY, *supra* note 43, at 103. However, because the rule that "free ships make free goods" was in the 1778 treaty with France, this provision in the Jay Treaty also meant that the United States allowed Britain more power than France to seize the other's goods on American ships. This preference, combined with the elimination of the preferential right of France to sell prizes brought into American ports and other provisions of the Jay Treaty that were favorable to Britain, makes it easy to understand why the French government regarded that treaty as moving the United States from a condition of strict neutrality into one of "benevolent neutrality" in favor of Great Britain and against France. The French Directory retaliated by suspending diplomatic relations with the United States and announcing that it would treat American shipping exactly as did Britain—a repudiation of the 1778 treaty that became a prelude to the Quasi-War. See *id.* at 107–08, 113–14. During the naval hostilities with France, the United States omitted its long-standing advocacy of "free ships make free goods" in a new commercial treaty with Prussia in 1799, which was a clear signal that the Adams administration validated the British position in its (un-quasi) war with France. See *id.* at 118–19.

A postscript: "Free ships make free goods" was finally embedded into international law by the European powers in the 1856 Declaration of Paris. See *id.* at 170. Ironically, the United States, which had been the leading exponent of expanded neutral rights (albeit with occasional lapses, as in the treaty with Prussia), refused to sign this convention—on account of southern opposition to a provision that abolished privateering. While not ratified by the United States, the Declaration of Paris was just in time to help preserve the Union: the Confederacy was unable to mount a privateering campaign against the Union blockade or commerce during the Civil War as foreign nations, adhering to the Declaration of Paris, barred privateers from their ports. See *id.* at 368–69.

369. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

Hamilton presented it to the public in newspaper essays that were published under a pseudonym.<sup>370</sup>

### A. *Jefferson and Diplomatic Appointments*

In the spring of 1790, Washington followed with interest a funding debate in the House of Representatives on whether the President could be required to obtain the Senate's approval for the grade and destination of each nominee for a diplomatic position.<sup>371</sup> He asked his new Secretary of State for a written opinion on the extent of the Senate's advice and consent power over diplomatic and consular nominees.<sup>372</sup>

Jefferson's opinion asserted that the Article II Vesting Clause gave the entire "executive Power" to the President, subject only to limitations or restrictions stated elsewhere in the Constitution.<sup>373</sup> Jefferson stated, "The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly."<sup>374</sup> Jefferson then strictly construed the Appointments Clause and concluded that the Senate could consider only the fitness of the nominee but has no role in determining the nominee's grade or destination.<sup>375</sup> According to Jefferson, for the Senate to reject a diplomatic nominee because it disagreed with the President's choice of grade or destination would be an abuse of power.<sup>376</sup> Washington was pleased with this opinion and shared it with Madison and Jay, who agreed with Jefferson.<sup>377</sup> Thus, "four of the most im-

370. For strong modern assertions of this theory, relying heavily on the actions of Washington administration, see RAMSEY, *supra* note 1, at 76–88; Prakash & Ramsey, *supra* note 1, at 295–355. The leading rebuttal is Bradley & Flaherty, *supra* note 1, at 636–87.

371. See POWELL, *supra* note 1, at 41–47.

372. See *id.* at 43–44.

373. See Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 378, 378–80 (Julian P. Boyd et al. eds., 1961). The Article II Vesting Clause theory had originally been advanced by Madison in the removal debate. 1 ANNALS OF CONGRESS 516–21 (June 17, 1789) (Joseph Gales ed., 1834).

374. Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, *supra* note 373, at 378, 379.

375. *Id.*

376. *Id.*

377. See POWELL, *supra* note 1, at 44.

portant Founding-era constitutionalists . . . believed that the Constitution entrusted significant foreign affairs powers exclusively to the president, the substantive decisions about whether to send diplomatic representatives to a given state and at what level.<sup>378</sup>

Jefferson's attempt to place limitations on the Senate's advice and consent power is certainly debatable.<sup>379</sup> But the largest difficulty with relying on Jefferson's opinion as a constitutional doctrine is that neither Washington nor the Senate ever followed it.

Before the House funding debate, Washington had made two diplomatic nominations, subject to the Senate's advice and consent, both of which included grade and destination.<sup>380</sup> This practice continued while the funding debate was in progress. On June 4, 1790, Washington nominated fourteen persons to be consuls or vice-consuls to specified ports in eight countries or colonies; they were confirmed by June 17th.<sup>381</sup> One of those appointed was Thomas Auldjo as Vice-Consul to the port of Cowes in Great Brit-

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378. *Id.* at 47.

379. Jefferson's opinion is premised on executive dominance in foreign affairs. Under this premise, the Senate should not second-guess the President on where American diplomats should be stationed and what diplomatic grades they should hold. An alternative premise is that foreign affairs powers are shared between the President and Congress. See *infra* note 412. The appointment of diplomats may be seen as a prototypical example, with presidential nominations requiring the approval of the Senate. Under a premise of shared power, the issues of whether the United States has a permanent diplomatic representative in a certain country and the diplomat's grade (which is a determinant of diplomatic importance and compensation) are legitimate congressional interests over which the Senate need not give total deference to the President.

In a draft of this article, I stated that a "serious weakness" in Jefferson's opinion was that the advice and consent power of the Senate is written in unqualified terms; and, as with all other plenary powers, the Constitution does not limit the reasons for which a plenary power may be exercised. I was corrected by Professor Jefferson Powell, who pointed out that the concept of abuse of a constitutional power was a widespread idea during the founding era and in succeeding generations as well. For example, although the President's power to veto legislation appears absolute, and that is how it is now generally regarded, many in the founding and succeeding generations thought that the veto could be exercised only to prevent the enactment of unconstitutional (as opposed to bad) laws. Indeed, this principle became a central plank of Whig Party dogma following Andrew Jackson's perceived abuses in vetoing legislation. Ironically, my instinctive application of modern doctrine is contrary to a central point of this article—that we should not project our own ideas about law onto the founding generation. I am grateful to Professor Powell for bringing this error to my attention.

380. In 1789, Washington nominated William Short and William Carmichael as charge d'affaires to France and Spain, respectively; and both were confirmed for those positions. 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 6-7, 33-34 (1969 ed.) (1828) [hereinafter SENATE EXECUTIVE JOURNAL].

381. *Id.* at 47-52.

ain.<sup>382</sup> When Auldjo arrived in Britain, the Ministry said that it wanted him to serve in the nearby port of Poole.<sup>383</sup> If Washington believed that he had the exclusive power to determine the destinations of diplomats and consuls, it would have been a simple matter for him to issue a new commission. Instead, he renominated Auldjo to serve as Vice-Consul to Poole, and the Senate confirmed him for that position.<sup>384</sup>

In December 1791, a dispute over diplomatic appointments arose in the Senate when Washington made three nominations: Thomas Pinckney as Minister Plenipotentiary to Great Britain, Gouverneur Morris as Minister Plenipotentiary to France, and William Short as Minister Resident to the Netherlands.<sup>385</sup> The Senate passed a resolution that it did "not possess evidence sufficient to convince them that it will be for the interest of the U.S. to appoint M[iniste]rs Plen[inpotentiary] to reside permanently at Foreign Courts."<sup>386</sup> Jefferson prepared a statement for Washington to send to the Senate that repeated his constitutional opinion that the President has the sole power to determine where diplomats should serve and at what grade and that the Senate can advise and consent only on their fitness.<sup>387</sup>

Washington did not send this statement to the Senate; instead, he asked Jefferson to meet with the Senate committee charged with making recommendations on the nominations.<sup>388</sup> Jefferson emphasized the need for the three appointments but also told the committee that Congress could terminate them by refusing to fund the positions in two years.<sup>389</sup> His attempts at persuasion failed. A major Senate debate followed in which Washington's supporters argued that his prestige and the public appearance of

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382. *Id.* at 52.

383. Letter from Thomas Auldjo to Thomas Jefferson (Nov. 7, 1790), in 18 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 25, 25.

384. 1 SENATE EXECUTIVE JOURNAL, *supra* note 380, at 76.

385. *Id.* at 92.

386. Notes on Senate Debate (Jan. 3, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 11, 14.

387. Letter from George Washington to the Senate (Jefferson draft) (Jan. 4, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 18, 18.

388. See Editor's Note to Letter from George Washington to the Senate (Jan. 4, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 18, 18-19.

389. Memorandum on Meeting with Senate Committee (Jan. 4, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 19, 19-22.

unity between the President and the Senate were at risk.<sup>390</sup> The Senate then approved Pinckney and Morris (the latter by a close vote), but still no agreement existed on Short's appointment to the Netherlands.<sup>391</sup> A motion that the Senate advise that no need was present to appoint an envoy to the Netherlands resulted in a 13-13 tie; Short was then approved 15-11.<sup>392</sup>

The precedential value of Jefferson's opinion is ultimately inconclusive. On the one hand, Washington apparently agreed with it, as did Madison, a leader of the House of Representatives, and Jay, a Secretary of Foreign Affairs under the Confederation and then-current Chief Justice. Who was left out of this conversation? The branch of government whose powers were at issue. There is no evidence that the Senate was shown or considered Jefferson's opinion. For political reasons, Washington may not have wanted to provoke a dispute with the Senate over this matter; or he may have become uncomfortable with the persuasiveness of Jefferson's opinion. In either event, during Washington's entire presidency, Jefferson's opinion was not tested. Washington never followed that opinion in nominating diplomats and consuls—his nominations always included specified grades and destinations—and the Senate never waived its right to reject a nominee for any reason. Although a consensus in the government on the respective powers of the President and Senate would have precedential force, no such consensus was shown to exist on Jefferson's opinion.

### B. *The Pacificus Essays*

With the newspapers full of attacks and defenses of Washington's neutrality policy, Alexander Hamilton decided to enter the public opinion war with the publication of seven essays under the pseudonym *Pacificus*. The purpose of these essays, he said, was to demonstrate the President's authority to issue the Neutrality Proclamation.<sup>393</sup> This purpose he accomplished with the observation that it was not necessary to vindicate executive authority on any "broad and comprehensive ground" because "[t]hat clause of the constitution which makes it his duty to take care that the

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390. Editor's Note to Memorandum on Meeting with Senate Committee (Jan. 4, 1792), in 23 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 10, at 19, 23.

391. *Id.* Pinckney was approved unanimously; the vote on Morris was 16-11. *Id.*

392. 1 *SENATE EXECUTIVE JOURNAL*, *supra* note 380, at 97-98.

393. *Pacificus No. 1*, *supra* note 264, at 33, 33-34.

laws be faithfully executed might alone have been relied upon.<sup>394</sup> At the beginning and end of his first essay, Hamilton defended the Neutrality Proclamation as an exercise of the President's duty to enforce the law of nations:

The President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning. . . . [I]t was necessary for the President to judge for himself whether there was any thing in our treaties incompatible with an adherence to neutrality. Having judged that there was not, he had a right, and if in his opinion the interests of the Nation required it, it was his duty, as Executor of the laws, to proclaim the neutrality of the Nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its non observance.

The Proclamation has been represented as enacting some new law. This is a view of it entirely erroneous. It only proclaims a *fact* with regard to the *existing state* of the Nation, informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put in execution against the Infraction<sup>395</sup> of them.

But this argument bracketed a more "broad and comprehensive" one that Hamilton took from Jefferson's 1790 opinion on diplomatic appointments—under the Article II Vesting Clause, the Constitution gives the entire "executive Power" of the United States to the President, except as qualified by powers given to Congress or checks given to the Senate.<sup>396</sup>

Why was it necessary for Hamilton to assert the executive vesting clause theory? It was certainly an opportunity for Hamilton to publicly articulate a broad constitutional theory that would justify his long-held view of expansive executive powers. But reading the essays as a whole, and not just the first essay on constitutional power, shows that Hamilton had another agenda that was tailored to the immediate political controversy. The *Pacificus* essays did not defend the Neutrality Proclamation as it was intended by Washington—they interpreted the Proclamation as having the effect on the French treaties that Hamilton had argued unsuccessfully in the Cabinet. Large portions of those arguments are repro-

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394. *Id.* at 42–43.

395. *Id.* at 43; *see also id.* at 33–36. Madison had also relied on the Take Care Clause as a secondary argument in the removal debate. 1 ANNALS OF CONGRESS, *supra* note 373, at 516.

396. *Pacificus No. 1*, *supra* note 264, at 33, 38–42.

duced in the *Pacificus* essays: the alliance with France is defensive, but France has been the aggressor in the European wars;<sup>397</sup> the execution of the guarantee of the French West Indies is dangerous;<sup>398</sup> gratitude to France is not a basis for adhering to the alliance;<sup>399</sup> France was acting in its own self-interest in entering into the treaties;<sup>400</sup> and fundamental changes have taken place in the French government—all bad—since the treaties were signed.<sup>401</sup> These arguments made the alliance with France politically disagreeable and potentially dangerous, but an argument was still needed to establish that it could be invalidated. Hamilton probably realized, from Jefferson's and Randolph's rebuttals, that relying on the disputed passage from Vattel was not tenable; instead, he advanced an expansive theory of executive power.

Thus, Hamilton used the executive vesting clause theory to demonstrate that the President has the unilateral power to nullify or suspend treaties, because it is a foreign policy decision that was not given to Congress or made subject to a check by the Senate. As confirmation of this power, Hamilton reclaimed the seemingly innocuous clause in Section 3 of Article II that the President "shall receive Ambassadors and other public Ministers."<sup>402</sup> When writing as Publius in 1788, Hamilton had dismissed this clause as placing a ministerial duty on the President which "is more a matter of dignity than of authority" and "will be without consequence in the administration of the government."<sup>403</sup> Writing as *Pacificus* five years later, Hamilton asserted that this clause gave the President the power to recognize or to not recognize foreign governments and, in the latter situation, to declare preexisting treaties suspended.<sup>404</sup> Moreover, as *Pacificus*, he asserted that the President had in fact declared void the guarantee in the Treaty of Alliance, because the Proclamation "is virtually a manifestation of the

397. *Pacificus* No. 2, *supra* 287, at 55, 55–63.

398. Alexander Hamilton, *Pacificus* No. 3 (July 6, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 65, 65–69.

399. Alexander Hamilton, *Pacificus* No. 4 (July 10, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 82, 82–86.

400. Alexander Hamilton, *Pacificus* No. 5 (July 13–17, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 90, 90–95.

401. Alexander Hamilton, *Pacificus* No. 6 (July 17, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 67, at 100, 100–06; Alexander Hamilton, *Pacificus* No. 7 (July 21, 1793), *id.* at 130, 130–35.

402. U.S. CONST. art. II, § 3.

403. THE FEDERALIST NO. 69, *supra* note 162, at 419 (Alexander Hamilton).

404. *Pacificus* No. 1, *supra* note 264, at 33, 41.



sense of the Government that the U[nited] States are, *under the circumstances of the case, not bound to exercise the clause of Guarantee.*"<sup>405</sup>

It is important to appreciate that Hamilton's *Pacificus* essays were neither private opinions to the President nor public declarations by the administration. Instead, they were essays signed under a pseudonym in which Hamilton attempted to convince the public of a position that had failed to convince the President.<sup>406</sup> Washington evidently was not pleased, telling Jefferson that he was "certainly uneasy about those [doctrines] grasped at by *Pacificus*."<sup>407</sup> The question I wish to examine, however, is whether Hamilton's executive vesting theory explains or provides support for the actions of the Washington administration during the Neutrality Crisis.

The executive vesting theory posits that the President has a general power to determine the content of foreign affairs that is limited only by the specific powers granted to Congress and the checks given to the Senate. If the power to declare war is construed narrowly in limiting the Executive's power over foreign affairs, the executive vesting theory can support Washington's declaration that the country was at peace with the belligerents. However, Washington did much more. He declared strict neutrality, and he prohibited France from fitting out privateers in U.S. ports, seizing prizes within American territorial limits, and establishing consular courts to condemn prizes. Yet all of these decisions appear to be within a constitutional "exception" to executive power, namely the enumerated power in Congress "[t]o define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations."<sup>408</sup> No matter how narrowly one might try to construe this clause, it appears impossible to render it in-

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405. *Id.* at 36; see also *Pacificus No. 2*, *supra* note 287, at 55, 56.

406. See, e.g., STUART LIEBIGER, *FOUNDING FRIENDSHIP: GEORGE WASHINGTON, JAMES MADISON, AND THE CREATION OF THE AMERICAN REPUBLIC* 175 (1999); Golove & Hulsebosch, *supra* note 1, at 1020–21 & n.348 (explaining the debate over *Pacificus-Helvidius*).

407. Letter from Thomas Jefferson to James Madison (Aug. 3, 1793), in 26 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 10, at 606, 606. Hamilton himself may have had second thoughts. He responded to one critical letter-writer that *Pacificus* was being misunderstood—the treaties with France *could* have been voided or suspended but the Executive had decided that they were still in effect, which *Pacificus* necessarily accepted. Letter from Alexander Hamilton (as *Pacificus*) to Mr. Dunlap (Aug. 5, 1793), in 15 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 67, at 191–93.

408. U.S. CONST. art. I, § 8, cl. 10.

applicable to declarations of American neutrality,<sup>409</sup> including such enforcement provisions as prohibiting privateers from operating in U.S. ports and American citizens from committing acts of hostility against nations with which the United States is at peace—conduct that was made criminal in the Neutrality Act. These actions of the administration can be supported by the duty to enforce the law of nations as part of the law of the land, but they cannot be supported by the executive vesting theory.

Some scholars have interpreted Hamilton's theory more narrowly, believing it presupposes concurrent powers between the executive and legislative branches over foreign affairs, with the ultimate determinations in Congress.<sup>410</sup> This more limited interpretation of Hamilton's theory largely explains the positive actions taken by the Washington administration during the Neutrality Crisis and provides a framework for the Executive's initiative in foreign policy that continued to the modern era.<sup>411</sup> Nevertheless, this theory of executive power cannot fully explain the actions of the Washington administration, because it fails to account for decisions that the administration desired to make, but did not make, out of a perceived absence of authority. The administration refused both to prohibit the sales of French prizes in the United States (even though the treaties with France prohibited sales of British prizes) and to assert the historic American principle that "free ships make free goods." Applying the concurrent executive vesting theory, why could not the President have prohibited the sales of French prizes and asserted diplomatically, as the policy of the United States, that free ships make free goods? These actions are ones that the President wanted to take, and as discretionary exercises of executive power in foreign affairs, could have taken. But the administration decided it did not have the power to adopt these policies because they were not within the scope of neutral obligations and rights as recognized in the law of nations. Washington's decisions during the Neutrality Crisis cannot be explained by Hamilton's attempt to expand the discretionary scope of executive power.

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409. In fact, all future declarations of American neutrality were made by Congress. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 85 (1972).

410. See, e.g., CASTO, *FOREIGN AFFAIRS*, *supra* note 1, at 62–65; EDWARD S. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 7–32 (1917).

411. ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 127–29 (1976).

This conclusion does not mean that the executive vesting theory is incorrect; indeed, a theory of concurrent powers has particular appeal.<sup>412</sup> However, its support must come elsewhere than from a study of the Washington administration.

### VIII. CONCLUSION

This paper draws three principal conclusions about executive power and the law of nations in the Washington administration. First, the most plausible actual source of the Washington administration's constitutional authority to determine the content of foreign policy during the Neutrality Crisis was the duty of the Executive, under the Take Care Clause, to obey the law of nations as expounded by the continental publicists. This source of authority was: (1) repeatedly asserted in the administration's declarations, (2) the basis of its private deliberations, (3) consistent with the jurisprudence of the founding generation, and (4) explanatory of

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412. Such a theory can be derived independently of the executive vesting clause from the structure of the Constitution. At the time of the founding, the nation's foreign relations included four central elements: (1) the conduct of diplomacy through accredited ambassadors and foreign ministers, (2) the making of treaties, (3) the regulation of foreign commerce, and (4) the declaration of war. The initiative in foreign policy (and hopefully its successful conclusion) was conducted through the first two of these powers, while the latter two were coercive actions that were taken when ordinary diplomacy failed (at the time of the founding, the power to regulate foreign commerce was a means of applying economic pressure against unfriendly nations).

The way that these powers are shared in the Constitution between the President and Congress strongly suggests an initiating power in the Executive. The President has plenary powers to nominate ambassadors and foreign ministers and to "make" treaties, subject to the approval of the Senate. The executive powers to appoint diplomatic representatives and to make treaties necessarily imply authority to formulate and initiate the nation's foreign affairs. Without such an implied power, the enumerated powers in the Executive would be meaningless formalities—appointed ambassadors cannot conduct diplomacy and treaties cannot be negotiated in the absence of a pre-determined foreign policy. But under such a concurrent distribution of power, the ultimate determinations remain with Congress, which has plenary powers over foreign commerce and war, can block diplomatic appointments and treaties and has the residual power to make laws that it deems necessary to execute all powers of the government.

This theory of concurrent powers is also consistent with (and explanative of) prevailing doctrine—Justice Jackson's concurring opinion in the *Steel Seizure Case*. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring) (describing the extent of presidential authority as dependent on the degree of Congressional approval or disapproval). This framework has been adopted by the Supreme Court in *Medellin v. Texas*, 552 U.S. 491, 524–25 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); *id.* at 638–39 (Kennedy, J., concurring in part); and *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981). I have elaborated on this theory, using as the fulcrums the *McCulloch* doctrine of implied powers and the Framers' definitive responses to experiences within England and between the colonies and England. Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 260–65 (2009).

the actions that were taken (and not taken) by the administration. No other theory of executive power appears to satisfy these criteria.

Second, Washington established an important precedent that the Executive is duty-bound to obey the obligations of international law that are incorporated into national law. To be sure, customary international law based on legal positivism is not simply an updated version of the eighteenth-century law of nations. The gulf between the mandatory law of nations, based on natural law as expounded by the continental publicists, and customary international law, based on legal positivism's requirement of express consent or implied consent through practice, is so great as to affect their respective incorporations into domestic law. When the law of nations and national law were both based on natural law, incorporation was practically automatic. But when customary international law was based on legal positivism, the scope of incorporation became more modest and limiting than during the founding era.

We may be in another transitional phase in the jurisprudence of international law.<sup>413</sup> Although states themselves continue to support positivism, "soft law" has been making inroads; and on issues such as human rights and transitional justice, we may be returning full circle to principles based substantially on natural law. But whatever the future jurisprudence of international law may be,<sup>414</sup> a threshold question will be the extent to which it is incorporated into national law. To the extent that international law remains part of the law of the United States, the Washington administration set an important precedent that the Executive is duty-bound to obey it.

Third, apart from the precedential duty of the Executive to obey international law, the fact that the founding generation thought

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413. On the different contemporary approaches to international law, see 36 *STUDIES IN TRANSNATIONAL LEGAL POLICY, THE METHODS OF INTERNATIONAL LAW* (Steven R. Ratner & Anne-Marie Slaughter eds., 2004).

414. Vattel may be making a comeback as international law scholars appear to have renewed interest in his work and its relevance to contemporary issues. For a major set of essays exploring these matters, see *VATTEL'S INTERNATIONAL LAW IN A XXIIST CENTURY PERSPECTIVE* (Vincent Chetail & Peter Haggemacher eds., 2011). See also Anthony J. Bellia, Jr., & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 471–77 (2011) (relying heavily on Vattel and his influence on the founders for an original interpretation of the Alien Tort Statute).

so differently about law should give pause to those who view the actions of the Washington administration as establishing an original understanding that can be the basis of modern general theories of the scope of executive power over foreign affairs. Washington set an eternal example in his commitment to the rule of law. Throughout the Neutrality Crisis, he took dramatic actions, but only after being convinced that those actions had firm constitutional support. That support came from a jurisprudence of the law of nations that was a product of his time. On some specific issues, such as the duty of the Executive to obey the constraints of international law, differences in jurisprudence may not ultimately be determinative. These differences are dispositive, however, for general theories on the scope of executive power over foreign affairs. The decisions of the Washington administration that modern scholars view as demonstrating broad presidential discretion in foreign affairs appear instead to have been based on the President's responsibility to enforce the law of nations. This determination supports the principle that the President cannot unilaterally violate international law but otherwise has little relevance to the general scope of modern presidential power to determine and conduct the nation's foreign affairs.

Ultimately, this article illustrates the limits of originalism in determining the scope of executive power over foreign affairs. The profound changes that have occurred in the United States since the founding are not merely related to such matters as population, demography, culture, geography, technology, and national power. Another profound change is that the founders' way of thinking about law can be incompatible with our own. A general theory of presidential power over foreign affairs cannot be derived from actions of the Washington administration that were founded on and justified by doctrines expounded by continental publicists in treatises of natural law. The founders made history, but they did not end it.