Saint Louis University Law Journal

Volume 53
Number 1 *The Use and Misuse of History in U.S. Foreign Relations Law (Fall 2008)*

Article 14

2008

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THE FOUNDERS' FOREIGN AFFAIRS CONSTITUTION: IMPROVISING AMONG EMPIRES

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David Sloss's paper recovers an important episode in early American history—the neutrality controversy—and suggests some of its implications for the constitutional law of federal court jurisdiction.[1] It is a fascinating analysis from which lawyers and historians can learn much. My only major comment is that Sloss could consider viewing the controversy as, foremost, a diplomatic crisis for a newly postcolonial nation rather than a domestic problem of constitutional interpretation. He could then consider how the United States' precarious international situation influenced the way that the founding generation constructed their new Constitution. The special features of their domestic constitutionalism, in turn, allowed the founders-turned-administrators to innovate upon the doctrine of neutrality under the law of nations. The neutrality controversy, therefore, left its marks on both international and domestic law.

Sloss views the neutrality controversy through the lens of the separation of powers and tries to find an original pattern for determining which branch has the preeminent power to interpret international law, especially treaties.[2] Important ideas about the relationship between the Executive and Judicial Branches when interpreting the law of nations did emerge at that time, but this intramural problem was not atop the agenda in the 1790s. Instead the goal, as Sloss recognizes, was to keep the United States out of the imperial war that surrounded it.[3] That can be put stronger: the agenda was to keep the project of American independence afloat. For a generation after the Revolution, the United States remained a provisional and peripheral actor in the Atlantic world. In that world, Western Europe was center stage. The European empires were also important audiences for the American experiment and were curious about whether it would work. Consequently, many in the founding

* Professor of Law & History, NYU School of Law. Comment on David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

1. *See* David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 146–47 (2008).

2. *See id.* at 148–51, 153

3. *Id.* at 147–48.

generation knew that they had to keep earning independence by navigating through hazards like the neutrality controversy. Sloss rightly argues that the neutrality crisis affected constitutional interpretation, and the episode supports his argument that "the exclusive political control thesis is inconsistent with the Founders' understanding of the constitutional separation of powers in foreign affairs."[4] The controversy demonstrates the interrelation of the three branches of the federal government, as all three participated in formulating the U.S. response.[5] Together, they also contributed to the development of the international law of neutral rights.

Diplomatic historians view the neutrality controversy as testing the delicate, triangulated relationship between the fledgling United States and the large British and French Empires surrounding it in on land and sea.[6] Political historians also find the episode fascinating because it began to expose ideological differences within the Washington Administration.[7] On the one hand were those, like Thomas Jefferson, who sympathized with the French Revolution and, at least in part, with Citizen Genet's claim that the United States and France were leading a republican reformation of government that would remake the globe.[8] On the other hand were those, like Alexander Hamilton, who believed that the American future lay in a rapprochement with the British Empire.[9] It was master of the Atlantic (one reason why the French had to resort to American ports) and held the keys to familiar trade routes.[10] Beyond this lay the emotional attachment of many in the founding generation to the British Empire, especially those who had lived outside the thirteen colonies before the Revolution. Hamilton, for example, had been born in the West Indies,[11] and South Carolina's Judge Thomas Bee was an Oxford graduate who spent time in the Inns of Court.[12] To them, Citizen Genet's mission looked like an assault on American independence and risked igniting a war with Britain that, this time, the Americans might not be able to win.[13] This

4. *Id.* at 194.

5. *Id.* at 194–95.

6. *See, e.g.*, CHARLES M. THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 17 (AMS Press, Inc. 1967) (1931).

7. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 336 (1993).

8. THOMAS, *supra* note 6, at 14–16.

9. *Id.* at 20.

10. Sloss, *supra* note 1, at 152.

11. *See* FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 7 (1979).

12. *See* GEORGE C. ROGERS, EVOLUTION OF A FEDERALIST 181 (1962); Thomas M. Stubbs, *South Carolina's Federal Justices and Judges*, 8 S.C. L. Q. 403, 407 (1956).

13. THOMAS, *supra* note 6, at 17.

threat helped dampen political differences and generated a consensus within the Administration that it should avoid war—especially with Britain.[14]

Sloss shows that the neutrality controversy had legal repercussions beyond these familiar narratives.[15] Perhaps the biggest news for those interested in federal court history is the overwhelming dominance of the federal docket by admiralty cases.[16] The manuscript bench notes and reports recently published in the *Documentary History of the Supreme Court* make this dominance more apparent.[17] Sloss uses this wonderful resource to great effect.[18] The first federal courts were essentially admiralty courts. It is often forgotten that the Continental Congress did have a Confederation-wide court between 1778 and 1789: the Court of Appeals, which heard admiralty appeals from state trial courts.[19] Article III and the Judiciary Act of 1789 built upon this precedent and gave the federal trial courts exclusive jurisdiction over admiralty cases.[20]

Consequently, the early federal courts spent much of their time interpreting a central branch of the law of nations and exploring its intersection with federal law and the Constitution. The federal judiciary was from the outset—or at least at the outset—a necessarily cosmopolitan tribunal and cited treaties, law of nations treatises, and admiralty decisions from Europe. Federal judges were fully enmeshed in the Atlantic world, though their orientation was certainly not global.[21] Unlike the old Court of Appeals and most European admiralty courts at the time, however, the federal courts had other jurisdictional grants, too.[22] This close connection between admiralty and other dimensions of federal court jurisdiction helped blur the distinction within the federal courts between ordinary civil and prize jurisdictions, which in turn facilitated the novel extension or at least judicialization of neutral rights during the controversy.[23]

14. *Id.* at 21; *see also* WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF SAIL 109 (2006); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).

15. *See* Sloss, *supra* note 1, at 164–67.

16. *See* HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775–1787 (unpaginated preface by author) (1977); Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 865, 877–78 (2005).

17. THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, 8 vols. (Maeva Marcus ed., 1985–2007).

18. *See* Sloss, *supra* note 1.

19. BOURGUIGNON, *supra* note 16, at preface.

20. *Id.* at 339–40.

21. The Founders' intellectual world, at least, was not that large. Query, though, whether modern American international law scholars typically range wider for sources than judges did in the early republic.

22. BOURGUIGNON, *supra* note 16, at 332.

23. *See generally* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990) (describing the judicialization of rights in the early republic); DANIEL J.

This history of judicial cosmopolitanism informs Sloss's positive conclusions, which he suggests ought to have normative consequences in the twenty-first century.[24] First, in contrast to the claims made today, the founding federal judges were not judicial minimalists. Second, the judiciary had a prominent role in interpreting and applying the law of nations under the federal Constitution. Both points are sound. The first point, however, raises the normative question of how much argumentative weight this tale of three years of judicial action in the 1790s should have today. The second and more historical point raises the nature of that judicial action. Sloss concludes that the Founders believed that the Judicial Branch had the primary responsibility for resolving foreign affairs controversies affecting private rights that require the application of law to fact.[25] This seems like a large abstraction of this episode's lesson, not least because it is difficult to delineate the outer boundaries of "cases involving the rights of private parties that required the application of law to fact."[26]

The controversy did give rise to influential thoughts about how the *federal courts'* jurisdiction was limited to actual cases or controversies, as opposed to the giving of advisory opinions. The case or controversy principle was not, however, consistently applied. For example, the Supreme Court went out of its way in some cases to issue obiter dicta that were, in effect, advisory opinions, as when it stated in *Glass v. The Sloop Betsey* that the French had no right to establish consular prize courts in the United States without a treaty giving them such a right.[27] Similarly, after initial hesitation in the district courts, the federal judiciary aggressively interpreted its jurisdiction to reach British restitution cases that were novel under the law of nations, even though the courts ended up dismissing most British claims for restitution on the merits.[28] In short, the early Court exercised international influence *beyond* actual cases and controversies.

Yet the judiciary did not hold a monopoly on cases or controversies. Sloss's fascinating tale demonstrates that not all cases and controversies involving the application of the law of nations to fact situations were resolved in the courts. Instead, all three branches participated.[29] Because it is difficult

HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 237–58 (2005); LARRY D. KRAMER, THE PEOPLE THEMSELVES 93–127 (2004).

24. Sloss, *supra* note 1, at 195–96.

25. *Id*. at 195.

26. *Id.*

27. Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 16 (1794); *see* 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, 241–43 (2004).

28. *See* Sloss, *supra* note 1, at 165, 170–71, 182.

29. *See id.* at 150–51, 161–71.

to imagine law of nations controversies that do not involve its application to facts, and in which there are no private rights at stake, Sloss's formulation would seem to require the judicialization of most international law controversies.

Instead of judicial monopoly, the first years of the federal government were characterized by uncertainty and experimentation. A range of government actors—state as well as federal; executive, legislative, and judicial—struggled with the central foreign policy problem of the 1790s: how to avoid war with either of the two empires that dominated the Atlantic world around them and that were at war with each other for most of the decade.[30] Those two empires had used the United States before as a vehicle for their own conflict.[31] The American Revolution is a good example. The Franco-American Treaty of 1778, a key source of law in the neutrality controversy, was a lifeline for the Revolutionaries.[32] Without it, they might have been remembered in history as rebels rather than revolutionaries. But that Treaty was also one of many strategic gambits played by the French against their long-time nemesis, Britain. American diplomats like John Jay were aware of France's mixed motivations in supporting their cause.[33] Therefore, suspicion of European diplomacy ran through the early American republic. Some feared that the surrounding empires might carve up the United States among themselves, a fear expressed in Federalist literature supporting the Constitution.[34] The point of the Constitution, however, was not to isolate the Union but rather to enable it to deal with neighboring empires on the basis of equality.

Therefore, instead of settling the distribution of powers of the foreign affairs Constitution, the neutrality controversy looks like an extended improvisation. Federal officials used the institutional complexity of their Constitution to distribute and diffuse responsibility for addressing the international threat. The separation of powers became a device for spreading authority among federal actors while seeking resolutions, or at least an ongoing process, that would pacify France and Britain. The situation demanded that the Administration both act like a unitary sovereign state that would be respected

30. THOMAS, *supra* note 6, at 21.

31. *See, e.g.*, JAMES B. PERKINS, FRANCE IN THE AMERICAN REVOLUTION 236 (2007) (noting France's motivation to "humble a rival and avenge past defeats" in assisting the colonies during the American Revolution).

32. Frances Fitzgerald, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 896 (2001).

33. *See* SAMUEL F. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 53–57 (5th ed. 1965).

34. *See, e.g.*, THE FEDERALIST NO. 2 (John Jay); *see also* BEMIS, *supra* note 33, at 46–84; FELIX GILBERT, TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY (1961).

on the international stage and figure out how the institutional pluralism of the federal Constitution worked in practice. It turned out that domestic constitutional pluralism could be exploited for international advantage.

As soon as French privateers began arriving in U.S. ports, British representatives complained that the captures were illegal for one reason or another. The claims fitted into one of two categories: some ships were supposedly seized in neutral American waters; others were seized on the high seas, but by French privateers outfitted in U.S. ports.[35] The Cabinet debated how to respond to the British petitions and then distinguished between the two kinds of claims.[36] It decided to let Attorney General Edmund Randolph resolve the issue in the case of ships allegedly captured in U.S. waters.[37] This process was consistent with international custom: although only courts of the captor's nation had the power to adjudge a vessel prize or not prize, executive officials of a third-party nation could investigate restitution claims and recommend a decision.[38] When Randolph found that a British vessel had been in neutral waters, he advised the French that it should be returned, and they complied.[39] However, in the related claim that the French had enlisted American seamen and outfitted their privateers in American ports, the Cabinet split, two against two, on whether it had the power to demand reparations from France.[40] Alexander Hamilton argued that the Executive should decide these cases also, adding that the courts were *not* "competent" to hear such cases.[41] Apparently, the Cabinet then did nothing in those cases. The British then fired off many similar petitions, which set off a return volley from the French side reminding the Administration of the provision in the 1778 Treaty of Amity, requiring admittance of French prize.[42] But the French had not yet adjudged the captures to be prize.[43] Blocked from many of their Caribbean ports, French captors brought the captured ships to the United States either to try to condemn them in their own new consular prize courts or to warehouse them for an

35. Sloss, *supra* note 1, at 171.

36. *See id.* at 160–62.

37. *See id.* at 161–62.

38. *See* BOURGUIGNON, *supra* note 16, at 3–36.

39. Edmund Randolph's Opinion on the *Grange* (May 14, 1973), *in* 26 THE PAPERS OF THOMAS JEFFERSON 31–35 (John Catanzariti ed., 1995).

40. *See* Editor's Introductory Note to Letter from Alexander Hamilton to George Washington (May 15, 1793), *in* 14 THE PAPERS OF ALEXANDER HAMILTON 454 (Harold C. Syrett ed., 1969) (noting that the Cabinet split 2-2 on the issue of recommending restitution in the illegal outfitting cases).

41. Letter from Alexander Hamilton to George Washington (May 15, 1793), *in* 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 40, at 459.

42. *See* Sloss, *supra* note 1, at 162–63, 173–76.

43. ELKINS & MCKITRICK, *supra* note 7, at 343.

extended period.[44] Neither was probably contemplated under the 1778 treaty provision.

Faced with numerous petitions, the Cabinet asked the state governors and federal attorneys general in June 1793 to press these claims in federal court.[45] If the courts denied the federal attorneys' requests, then the governors were to hold vessels in question "until the further orders of the General government [could] be had."[46] It is difficult to say with certainty, at least without considerable research, why the Administration chose to renounce diplomatic resolution in favor of judicial process. In part, it was *not* the Administration's decision: British ship owners and diplomatic officials initiated the court cases after the Administration failed to act on their restitution petitions to recover losses inflicted by privateers outfitted in American ports.[47] This effort began as a British gambit that, as Professor Sloss observes, looked something like today's "lawfare,"[48] except that the British were using a third party's courts rather than their opponent's courts to influence the course of their war. It was also a punt that extricated the Cabinet from a difficult situation in which it would have had to make a series of decisions against the interests of either France or Britain. In addition, turning the business over to the courts was administratively convenient. On his own, the Attorney General lacked a full department or bureaucracy to help him make the decisions.[49] At least the judges had a court system: marshals and district attorneys, and the assistance of customs collectors.[50] Finally, a judicial resolution furthered the argument that the United States was a lawful nation that operated as a government of laws and not men. That helps explain Thomas Jefferson's draft letter in June 1793 to Genet stating that the judiciary alone was "competent" to decide questions of property between individuals.[51] If Britain was leveraging its claims on the American extension of their shared principle of judicial independence, Americans welcomed the gambit. For the Washington Administration, it was useful to begin to see individual cases as committed to another branch once that branch accepted jurisdiction over them, even though it was clear that the

44. *See* Sloss, *supra* note 1, at 152-53.

45. Cabinet Opinions on the *Republican* and the *Catharine* (June 12, 1973), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 259–60.

46. *Id.* at 260.

47. *See* Sloss, *supra* note 1, at 162–63.

48. *Id.* at 173–74.

49. *See* List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending Oct. 1, 1792 (Feb. 27, 1973), *in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 57, 59 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834), *available at* http://memory.loc.gov/ammem/amlaw/lwsplink.html.

50. *See id.* at 59–61.

51. Draft Letter from Thomas Jefferson to Edmond Charles Genet (June 17, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 301.

Executive Branch could also decide such cases—and had. Later, Congress also got involved in defining and preserving U.S. neutrality, in part by placing federal court jurisdiction on a firm statutory basis.[52]

At the outset, however, most federal district judges demurred. In *Glass v. The Sloop Betsey*, for example, District Court Judge Richard Peters held that he had no jurisdiction because of the venerable law of nations rule that the question of prize or no prize was reserved to the courts of the captor's nation.[53] But he also expected that the Supreme Court would review his decision.[54] The Court—led by Chief Justice John Jay, who had as much diplomatic experience as any American—decided that the federal courts had jurisdiction to review whether a particular capture violated neutral rights or did not, while implicitly claiming that this power did not violate the venerable rule that only courts of the captor's nation had jurisdiction to decide prize or no prize.[55]

Professor Sloss is correct to highlight the turn to the courts and the Supreme Court's embrace of jurisdiction.[56] Neither was predictable. In fact, both were unorthodox under the law of nations. The standard procedure was for a complaining nation to work through diplomatic channels. Again, third-nation courts were not supposed to interfere in the prize/no prize decision-making process.[57] Sloss then concludes that the Cabinet realized that the issue, which involved the application of international law to specific facts, was essentially judicial and confined to the courts.[58]

Something more specific was going on than a general commitment to leaving factual determinations under the law of nations to the judiciary. Administration officials were trying to add flesh to the principle of neutrality. To do that, they gradually framed both types of neutrality cases—those involving French prizes brought to U.S. ports without condemnation or for condemnation in consular courts and those arising from the activities of privateers that the French fitted out in the United States—as raising a single issue: the violation of American neutrality. That neutrality entailed both duties and rights. The United States had the duty to avoid favoring one side or another in a war between nations; it also had the right to preserve its internal integrity and penalize those who tried to drag it into war unwillingly. This was the key conceptual innovation behind the federal cases and the Supreme Court's decision in *Sloop Betsey*.[59] Neutral nations did not just have rights.

52. Act of June 5, 1794, ch. 50, 1 Stat 381.

53. Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 9 (1794); *see also* Sloss, *supra* note 1, at 166, 169 & n.129.

54. *Sloop Betsey*, 3 U.S. at 16.

55. *Id.*

56. *See* Sloss, *supra* note 1, at 170–71, 172–83.

57. *Id.* at 169.

58. *Id.* at 162–64.

59. *See id.* at 194–95.

They also had a duty not to favor one side in a war more than the other, a duty that required a concrete remedial scheme. The involvement of the judiciary also furthered the argument that the United States was a nation-state of laws rather than men, and that in the United States, the law of nations was taken seriously as a special kind of law that could not be reduced to negotiated politics. Seen in this light, the Court's goal seems to have been to vindicate neutrality with creative remedies rather than to interfere with the established practices of international prize law. Judicialization of the international grievance procedure helped diffuse responsibility within the United States and defuse an international crisis.

In sum, Professor Sloss's paper lets us see how the Executive actually operated and how it sought and welcomed the participation of the other branches. There was no unitary foreign affairs power.[60] The foreign affairs Constitution, like the rest of the Constitution, was shot through with concurrent powers. The Washington Administration made use of this concurrency. It reached out to other branches to coordinate policy, generate efficient decision making, and also diffuse responsibility. The diffusion, in turn, was presented to foreign nations as evidence of the United States' lawful behavior and fitness for participation in the community of nations. This has proved to be one of the main functions of modern constitutions, which do not simply structure governments for internal purposes, but also integrate new states into the larger world. A constitution represents a claim by new states to negotiate on the world stage on an equal footing, to get respect, and to earn recognition.[61] In the 1790s, the United States was still a precarious experiment that had perhaps defeasible acceptance from the empires of the Atlantic world. Americans kept performing their independence in a context that demanded that they harness a variety of domestic institutions for the resolution of international claims.

In a world in which international recognition was a process rather than a moment, David Sloss has illuminated how American officials—the President, Cabinet, federal judges, federal attorneys, customs collectors, state governors, and state militias and marshals—participated in a multi-act drama of American independence that lasted a generation. The neutrality controversy sheds light on formative moves that helped construct the meaning of the Constitution. The immediate goal was recognition and peace—true independence—rather than to delineate separate zones of constitutional authority among the three branches. The founding generation realized that in a dangerous world, it was best as a

60. *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

61. *See* David M. Golove & Daniel J. Hulsebosch, On an Equal Footing: Constitution-Making and the Law of Nations in the Early American Republic (Jan. 2009) (unpublished manuscript, on file with author).

matter of foreign and domestic policy to get all branches involved in making decisions that had international repercussions. It is a lesson worth re-learning.