

**QUELLING THE URGE TO GO ABROAD “IN SEARCH OF  
MONSTERS TO DESTROY”: REVISING THE  
NEUTRALITY ACT OF 1794 TO MEET THE TWENTY-  
FIRST CENTURY CHALLENGE OF PRIVATIZED  
WARFARE**

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## INTRODUCTION

In the previous three years, the United States has been a launchpad for a series of troubling private military expeditions.<sup>1</sup> The U.S. has an affirmative duty, under international law, to prevent its territory from being used as a springboard for private military expeditions launched against foreign governments.<sup>2</sup> Unfortunately, the only law in the U.S. Code that criminalizes this specific behavior, the Neutrality Act of 1794, is an outdated relic of the nineteenth century and desperately needs to be updated to meet the challenges of the twenty-first century.<sup>3</sup>

Congress needs to seriously consider amending the Neutrality Act to reflect the realities of the twenty-first century. However, Congress should not make amendments to the Neutrality Act in a contextual void. Two fellow common law countries, the Republic of South Africa (RSA) and the United Kingdom, have grappled with the challenges of private military expeditions; the lessons that can be gleaned from their triumphs and failures can provide instructive guidance for Congress.<sup>4</sup> Specifically, studying the experiences of these two countries can provide Congress with resources for avoiding definitional and jurisdictional pitfalls that render the U.S. neutrality act impotent.<sup>5</sup> This Comment will argue that the time has come for Congress to produce a Neutrality Act that meets the U.S.'s

<sup>1</sup> See generally Simon Frankel Pratt, *What Should We Make of Elite American Mercenaries in Yemen?*, WAR ON THE ROCKS (Oct. 23, 2018), <https://warontherocks.com/2018/10/what-should-we-make-of-elite-american-mercenaries-in-yemen/> [<https://perma.cc/TD3B-J8NT>] (discussing revelations that American military veterans were found to be working as mercenaries in Yemen); Sean McFate, *Venezuela Shows How Mercenaries Have Become a Global Security Threat*, WASH. POST (May 14, 2020), <https://www.washingtonpost.com/opinions/2020/05/14/venezuela-shows-how-mercenaries-have-become-global-security-threat/> [<https://perma.cc/4425-HUJ6>] (explaining the proliferation of mercenaries worldwide); Matthew Cole & Kim Ives, *U.S. Mercenaries Arrested in Haiti Were Part of Half-baked Scheme to Move \$80 Million for Embattled President*, THE INTERCEPT (Mar. 20, 2019), <https://theintercept.com/2019/03/20/haiti-president-mercenary-operation/> [<https://perma.cc/2LCD-4X7R>] (detailing an attempt by Americans to act as mercenaries in Haiti).

<sup>2</sup> See Manuel R. Garcia-Mora, *International Law and the Law of Hostile Military Expeditions*, 27 FORDHAM L. REV. 309, 309 (1958). See also *United States v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (noting that the U.S. had a duty to prevent the Irish Republican Army from using the country as a staging ground for attacks).

<sup>3</sup> 18 U.S.C. § 960.

<sup>4</sup> See Regulation of Foreign Military Assistance Act 15 of 1998 (S. Afr.); Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 (S. Afr.); The Foreign Enlistment Act 1870, 33 & 34 Vict., c. 90 (Gr. Brit.).

<sup>5</sup> See, e.g., *United States v. Chhun*, 513 F. Supp. 2d 1179, 1183 (C.D. Cal. 2007); *United States v. Chhun*, 744 F.3d 1110, 1119–20 (9th Cir. 2014); *United States v. Terrell*, 731 F. Supp. 2d 473, 476–77 (S.D. Fla. 1989); *United States v. Jack*, 257 F.R.D. 221, 230 (C.D. Cal. 2009) (all debating the meaning of the phrase “at peace”).

international obligation, while also recognizing the realities of the twenty-first century's complex international environment.

In Part I, this Comment will explore the international legal obligation to prevent private military expeditions against non-hostile states, while also examining the history of specific legislative attempts to meet this obligation in the U.S., the U.K., and the RSA. Part II will argue that the U.S. must clearly define: (1) what constitutes a hostile expedition; (2) when the U.S. is "at peace" with a country; and (3) the extent of the neutrality law's jurisdictional reach. This analysis will draw heavily on the comparative examples provided by the U.K. and the RSA. Finally, Part III will conclude that it is possible to craft a well-defined Neutrality Act that is adapted to the twenty-first century.

## I. BACKGROUND

Part I of this article will discuss (A) the customary international law governing private military expeditions and (B) the history of neutrality laws in the U.S., the U.K., and the RSA.

### A. CUSTOMARY INTERNATIONAL LAW AND PRIVATE MILITARY EXPEDITIONS

Customary international law did not recognize an affirmative obligation to prevent hostile military expeditions against sovereign states until the late nineteenth century.<sup>6</sup> Indeed, for much of human history, private military expeditions were the veritable norm.<sup>7</sup> However, during the nineteenth century, the acceptability of private military actions diminished, as the power to make war became tied to the sovereignty of emerging nation states.<sup>8</sup>

The American Civil War was the catalyst for the establishment of an international norm barring private military expeditions. Great Britain was nearly drawn into the American Civil War because of the devastating impact of British-equipped commerce raiding vessels, supplied to the Confederacy, on the American merchant fleet.<sup>9</sup> The diplomatic

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<sup>6</sup> See Garcia-Mora, *supra* note 2, at 314.

<sup>7</sup> See Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1, 8 (1983).

<sup>8</sup> *Id.*

<sup>9</sup> See generally *The Alabama Claims*, 4 AM. L. REV. 31 (1869) (discussing the C.S.S. Alabama, which was the most famous of the Confederate commerce raiders).

negotiations to resolve the so-called “Alabama Claims” produced the Treaty of Washington, which, for the first time, established that neutral nations owed a duty of due diligence to prevent their territory from being used to launch hostile military expeditions against friendly states.<sup>10</sup> The duty of “due diligence,” or its close cousin, the duty to “use all means at [the state’s] disposal”<sup>11</sup> to prevent hostile expeditions, is now a widely accepted principle of international law.<sup>12</sup>

The duty to use due diligence to suppress hostile military expeditions is not limited to the context of formal neutrality and belligerency. The duty is alive at all times because it is a fundamental “obligation to protect within the territory [of the state] the rights of other states, in particular their right to integrity and inviolability in peace and in war.”<sup>13</sup> Inherent in every state’s sovereignty is an obligation to prevent harm to the sovereignty of another state; fundamentally, this is an international norm against intervention in the internal affairs of another sovereign.<sup>14</sup> Furthermore, if a state shirks its duty, and a foreign state is harmed because of that failure, the state that has failed to meet its international obligation runs the risk of being held liable.<sup>15</sup> In the context of private military expeditions, liability can mean war.<sup>16</sup> Thus,

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<sup>10</sup> Treaty of Washington, U.K.-U.S., May 8, 1871, 17 Stat. 863, 865 (1871) (establishing three principles of neutrality law to guide the special arbitration to resolve the “Alabama Claims”). See also Garcia-Mora, *supra* note 2, 321–22 (emphasizing that the three rules of the Treaty of Washington have become widely accepted international law).

<sup>11</sup> Rights and Duties of Neutral Powers in Naval War (Hague XIII), art. 8, Oct. 18, 1907, 36 Stat. 2415 (this treaty was the first to frame the obligation as “all means at its [the state’s] disposal”).

<sup>12</sup> See, e.g., Declaration on the Inadmissibility of Intervention in the Internal Affairs of States, U.N. GAOR, 36th Sess., 91st plen. mtg. at 78, U.N. Doc. A/Res/36/103 (Dec. 9, 1981). See also Steven Corliss, *Asylum State Responsibility for the Hostile Acts of Foreign Exiles*, 2 INT’L J. REFUGEE L. 181, 185 (1990) (noting that the “due diligence” and “all means” standards are practically indistinguishable).

<sup>13</sup> Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (1928).

<sup>14</sup> Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 91–96 (June 27) (discussing whether the U.S. violated this duty by sponsoring Nicaraguan rebels and, covertly, mining Nicaraguan waters).

<sup>15</sup> See generally Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT’L L. 83 (2003) (noting that these principles played a significant role in legally justifying the U.S. invasion of Afghanistan after 9/11).

<sup>16</sup> See Garcia-Mora, *supra* note 2, at 311 (“State tolerance raises a presumption of governmental complicity which amounts to an international delinquency.”). See generally Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1 (1972) (illustrating how the tit-for-tat nature of reprisal raids can lead to further armed conflict).

international law demands that states formulate domestic legislation to meet this serious affirmative obligation.<sup>17</sup>

## B. THE STRUGGLE TO PRESERVE NEUTRALITY: THE AMERICAN, BRITISH, AND SOUTH AFRICAN EXPERIENCE

Section B will assess the history of global neutrality laws through the lens of the (1) American, (2) British, and (3) South African experience.

### 1. *The Long-Lived American Neutrality Act of 1794*

The United States was the first country to adopt a “municipal statute to criminalize certain activities as violations of the country’s neutrality.”<sup>18</sup> Indeed, it is not an exaggeration to say that the modern conception of a duty of “due diligence,” referenced above, was created by the U.S. Congress when the first Neutrality Act was passed.<sup>19</sup> The original act, passed in response to the outbreak of war between revolutionary France and the U.K., criminalized five activities: (1) accepting a commission in a foreign military, (2) enlisting in a foreign military, (3) fitting out a vessel to serve any belligerent, (4) “augmenting” a vessel to serve any belligerent, and (5) private military expeditions.<sup>20</sup> The fifth provision, criminalizing private military expeditions, and now found at 18 U.S.C. § 960, is interpreted as meeting the U.S.’s obligation of “due diligence” under international law.<sup>21</sup> Additionally, Section 960 has been the most utilized provision of the act.<sup>22</sup> This section reads:

within the United States, [whoever] knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes

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<sup>17</sup> See, e.g., Robert E. Cesner & John W. Brant, *Law of the Mercenary: An International Dilemma*, 6 CAP. U.L. REV. 339, 354 (1977) (noting that the Angolan regime justified the execution of an American citizen, alleged to be a mercenary, at least in part based on the U.S. failure to prevent the recruitment of mercenaries).

<sup>18</sup> Lobel, *supra* note 7, at 16.

<sup>19</sup> See Alex H. Loomis, *The Power to Define and Punish Offenses Against the Law of Nations*, 40 HARV. J.L. & PUB. POL’Y 417, 452–62 (2017) (arguing that Congress enacted the law under its power to “Define and Punish Offenses Against the Law of Nations,” but that Congress basically made up a new area of international law). Lobel, *supra* note 7, at 2 (noting that Congress created a new international norm); Garcia-Mora, *supra* note 2, at 13–14 (tracing the development of international law, on this subject, back to 1794).

<sup>20</sup> See Loomis, *supra* note 19, at 448–49. These provisions are now codified at 18 U.S.C. §§ 958–62.

<sup>21</sup> 21 Op. Att’y Gen. U.S. 267, 271 (1895).

<sup>22</sup> See Lobel, *supra* note 7, at 43 (noting that thirty-four prosecutions were made under this provision between 1795 and 1925).

part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.<sup>23</sup>

At the time that Section 960 was enacted the law went far beyond any possible international obligation.<sup>24</sup>

Section 960 was passed for two reasons. First, in the foreign relations context, the law reflected the weakness of the U.S. in 1794.<sup>25</sup> The young republic could not afford to be dragged into a European war, and thus, was determined to act with extreme impartiality.<sup>26</sup> Second, in the domestic context, the law was an assertion of the federal government's sovereign ability to control when and where the state would go to war.<sup>27</sup> Therefore, "a violation of the act is not merely a crime, it is an usurpation of Congressional power."<sup>28</sup>

For the first one hundred years of this country's existence, federal courts and the executive branch aggressively utilized the statute in light of its twin goals—preserving peace and securing federal sovereignty. For example, in *United States v. Smith*, a federal circuit court found that the President himself was bound by the provisions of the Act.<sup>29</sup> In the court's view, the Act was an affirmative assertion of Congress's prerogative and an express limit on an American citizen's ability to initiate private, or secretive, wars, even if the citizen happens to be the President.<sup>30</sup> Similarly, the executive branch's application of the act aimed to preserve the U.S.'s "strict neutrality."<sup>31</sup> This sense of strict impartiality often enraged U.S. based supporters of Latin American revolutionaries; to these partisans, the

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<sup>23</sup> 18 U.S.C. § 960.

<sup>24</sup> Lobel, *supra* note 7, at 16.

<sup>25</sup> See CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 14–17 (1931).

<sup>26</sup> See generally AMERICAN STATE TRIALS: A COLLECTION OF THE IMPORTANT AND INTERESTING CRIMINAL TRIALS WHICH HAVE TAKEN PLACE IN THE UNITED STATES FROM THE BEGINNING OF OUR GOVERNMENT TO THE PRESENT DAY 600 (John D. Lawson ed., 1915) (examining the role of the French Ambassador, Edmond Genet, in the legal controversy surrounding the trial of Gideon Henfield for privateering. The failure of the Henfield prosecution caused President Washington to seek passage of the first Neutrality Act).

<sup>27</sup> Lobel, *supra* note 7, at 24.

<sup>28</sup> *Id.* at 62.

<sup>29</sup> *United States v. Smith*, 27 F. Cas. 1192, 1229–31 (C.C.D.N.Y. 1806).

<sup>30</sup> *Id.*

<sup>31</sup> 5 Op. Att'y Gen. U.S. 92 (1849) (condemning the sale of a ship to the Prussian government, when that government was engaged in a war with Denmark, while also reiterating the "strict neutrality" position of the U.S.).

act was an inflexible tool that only served to aid European colonial powers seeking to maintain a toehold in the Americas.<sup>32</sup>

The federal courts interpreted the provisions of the Neutrality Act broadly to aid the suppression of private military expeditions.<sup>33</sup> Fundamentally, the U.S. Supreme Court viewed the act as an expression of the principle that “no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their [hostile acts] prevention.”<sup>34</sup> Thus, courts held that the act could apply even in the absence of a formal state of war,<sup>35</sup> that the term “military enterprise” encompassed any “martial undertaking, involving, the idea of a bold, arduous, and hazardous attempt,”<sup>36</sup> and that the defendant’s activities did not have to “reach the dignity of a military expedition or enterprise . . . [as long as] the conception, the thing they intended, amounted to a military expedition or enterprise.”<sup>37</sup> However, judicial interpretation limited the federal government’s ability to prosecute violations of the Act in two ways. First, the courts established a jurisdictional nexus requirement. One overt act must have occurred in the U.S. for the prosecution to occur.<sup>38</sup> Second, the federal courts read a “volunteer exception” into the statute that barred the government from prosecuting individuals who went abroad, not as part of an organized group, but rather to voluntarily fight for a foreign cause.<sup>39</sup>

The Neutrality Act, despite its active early history, began to slip into irrelevance in the years after World War I. This drift toward obsolescence appears tied to the declining justification for the policy rationales that undergirded the passage of the law in 1794. First, the U.S. that emerged from the crucible of the First and Second World Wars was

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<sup>32</sup> See Lobel, *supra* note 7, at 34–35. William Walker is the most famous Central American “filibuster;” for the complete record of his arrest, under the Neutrality Act, see H.R. Doc. No. 24, 35th Cong., 1st Sess. (1857–58). See MATTHEW MASON, *SLAVERY AND POLITICS IN THE EARLY REPUBLIC* 227 (1st ed. 2006).

<sup>33</sup> See Grant E. Courtney, *American Mercenaries and the Neutrality Act: Shortening the Leash on the Dogs of War*, 12 J. LEGIS. 175, 187 (1985).

<sup>34</sup> *United States v. The Three Friends*, 166 U.S. 1, 52 (1897).

<sup>35</sup> *Wiborg v. United States*, 163 U.S. 632, 647 (1896).

<sup>36</sup> *Id.* at 650. See also *United States v. Murphy*, 84 F. 609, 614 (D. Del. 1898) (exhaustively defining a “military enterprise”).

<sup>37</sup> *Jacobson v. United States*, 272 F. 399, 402 (7th Cir. 1920).

<sup>38</sup> See Courtney, *supra* note 33, at 187. See also *Breach of Neutrality*, 1 Op. Att’y Gen. U.S. 57, 58–59 (1794) (finding that U.S. citizens, who joined a French assault on the British colony of Sierra Leone, did not violate the act because all of the preparations for the assault occurred outside the U.S.).

<sup>39</sup> See Overview of the Neutrality Act, 8 Op. O.L.C. 209, 211–12 (1984).

incomprehensibly stronger than the fledgling republic of 1794.<sup>40</sup> Second, the dynamics of the Cold War, and its intense system of proxy war combined with virulent anti-communism, produced an environment where private military expeditions often began to align with official U.S. interests.<sup>41</sup> Additionally, the executive branch repudiated the holding of *United States v. Smith* and, consistently, refused to apply the Act to government officers engaging in covert action on behalf of the U.S.<sup>42</sup> Naturally, this led to decreased interest in prosecuting violators of the Act. Regardless of the underlying reasons, the decline in prosecutions since 1950 has been marked.<sup>43</sup>

## 2. *The Foreign Enlistment Act of 1870 and Its Failures*

The U.K.'s version of the Neutrality Act, the Foreign Enlistment Act of 1870, bears a striking textual resemblance to its American cousin.<sup>44</sup>

<sup>40</sup> See Lobel, *supra* note 7, at 45–46.

<sup>41</sup> Attorney General Robert Kennedy appears to have adopted this view in 1961, when addressing questions related to the Bay of Pigs invasion. See Overview of the Neutrality Act, 8 Op. O.L.C. 209, 218 (1984). See generally John Hart Ely, *The American War in Indochina, Part II The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990) (providing a thorough legal analysis of the U.S. proxy wars in Lao in Cambodia, waged, in part, by private corporations, like Air America, that served as fronts for the Central Intelligence Agency).

<sup>42</sup> See generally Application of the Neutrality Act to Official Government Activities, 8 Op. O.L.C. 58 (1984) (laying out the executive branch's legal reasoning). See also *Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986) (holding that private parties lack standing to challenge the government's policy to not prosecute the executive branch under the Neutrality Act).

<sup>43</sup> See Lobel, *supra* note 7, at 45–46. See also Robert M. Twiss, *National Security The Impact on U.S. Foreign Policy Arising from Private Actions Initiated Against Foreign Nations from Within the United States*, 3 CREIGHTON INT'L & COMP. L.J. 47 (2012) (providing an overview of prosecutions under the various provisions of the Neutrality Act, the Material Support for Terrorism Statute, and various Arms Control Statutes). For an idea of the sporadic nature of recent prosecutions under the Neutrality Act see, e.g., *United States v. Jack*, 263 F.R.D. 640 (E.D. Cal. 2010) (Laos); *United States v. Chhun*, 513 F. Supp. 2d 1179 (C.D. Cal. 2007) (Cambodia); *United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004) (Kashmir); *United States v. Terrell*, 731 F. Supp. 473 (S.D. Fla. 1989) (Nicaragua); *United States v. Leon*, 441 F.2d 175 (5th Cir. 1971) (Haiti); *Casey v. United States*, 413 F.2d 1303 (5th Cir. 1969) (Haiti). These cases appear to be the extent of the prosecutions brought, under Section 960 of the Act, since 1950.

<sup>44</sup> The Foreign Enlistment Act 1870, 33 & 34 Vict., c. 90 (Gr. Brit.). For an example of the similarity, compare Section 960 of the U.S. Neutrality Act with the language of Section 11 of the British Act, which states:

If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

That is, no doubt, the result of its adoption during the heat of the “Alabama Claims” dispute mentioned in Section A.<sup>45</sup> However, that is the extent of the similarity between the two laws. In fact, the Foreign Enlistment Act of 1870 must rank among the least utilized of all British criminal laws.<sup>46</sup>

The British government brought charges under the Foreign Enlistment Act on two occasions, both in the late nineteenth century. First, in *Regina v. Sandoval*, the Court of Queen’s Bench affirmed the conviction of a Colonel Sandoval, who participated in a naval raid on Venezuela that originated in the U.K.<sup>47</sup> Second, in *Regina v. Jameson*, the government of the U.K. indicted, and convicted, several British subjects for launching a raid on the Boer Republic of the Transvaal in South Africa.<sup>48</sup> The subsequent paucity of prosecutions cannot be explained by a lack of private military activity undertaken by British citizens; indeed, British subjects were heavily involved in the Spanish Civil War, in Middle Eastern conflicts, and in post-colonial African wars.<sup>49</sup> Instead, the British government has simply given up prosecuting the Foreign Enlistment Act.

The decision to abandon the Foreign Enlistment Act was made in 1976, after publication of the Diplock Report; the report was commissioned following a mercenary debacle in Angola, a debacle that left several British subjects dead.<sup>50</sup> The Diplock Report criticized the

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- (1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted;
  - (2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

*Id.* § 11.

<sup>45</sup> See Anthony Chase, *Decriminalization of Foreign Enlistment*, 1 CRIM. JUST. J. 15, 19 (1978).

<sup>46</sup> REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO INQUIRE INTO THE RECRUITMENT OF MERCENARIES [hereinafter THE DIPLOCK REPORT], 1976, cmnd. 6569, at 10 (UK) (noting only 2 prosecutions occurred pursuant to this provision).

<sup>47</sup> [1886-1887] 16 QB 207 at 209-12 (U.K.).

<sup>48</sup> See James Ruddell, *Deceit in the Transvaal? The Case of Burrows v. Rhodes and Jameson*, 19 AUCKLAND U. L. REV. 99, 102-04 (2013). See also Note, *The Trial of Dr. Jameson in its Legal Aspects*, 8 GREEN BAG 397, 398 (1896).

<sup>49</sup> See Ignacio de la Rasilla del Moral, *In the General Interest of Peace? British International Lawyers and the Spanish Civil War*, 18 J. HIST. INT’L L. 197, 207-08 (2016) (Spanish Civil War); Niall Canny, *A Mercenary World A Legal Analysis of the International Problem of Mercenarism*, 3 U. C. DUBLIN. L. REV. 33, 50 (2003) (Oman); FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2002, Cm. 577, at 28-38 (UK) (including a lengthy list of private military operations in post-colonial Africa).

<sup>50</sup> THE DIPLOCK REPORT, *supra* note 46, at 1 (noting that 160 British subjects, mainly ex-servicemen, fought in Angola).

Foreign Enlistment Act on three principal grounds. First, the Report argued that prohibiting individuals from going abroad to fight was a serious restriction on individual liberty, a restriction, perhaps, not justified by necessity.<sup>51</sup> Second, the difficulty of gathering evidence abroad, sufficient to ensure a conviction, made prosecution exceptionally difficult.<sup>52</sup> Third, the antiquated language of the Act made it extremely hard to tell if twentieth century circumstances were covered; basically, the Privy Counsellors felt that the Foreign Enlistment Act might only apply to hostilities involving states or other officially recognized belligerents.<sup>53</sup> Notably, the Report said nothing about the U.K.'s affirmative obligation to prevent hostile military expeditions against other sovereign states.<sup>54</sup>

The Diplock Report suggested that the U.K. establish a regulatory framework to manage private warfare. Specifically, the report called for a new law that would give the government the power to designate certain conflicts off limits, but that would not otherwise criminalize the conduct covered within the Foreign Enlistment Act.<sup>55</sup> The British government, however, never acted upon the Report's recommendations. Not even a series of diplomatic incidents in the late 1990s, involving British ex-military officers planning military expeditions to Papua New Guinea and Sierra Leone, in contravention of several UN arms embargos, could spur a change.<sup>56</sup> Parliament, once again, appointed a commission to study the topic, a commission that, once again, noted the inadequacy of the Foreign Enlistment Act; however, nothing was done to remedy the issue.<sup>57</sup> Thus, the U.K. remains in limbo, with a statute on the books that is nearly identical to its U.S. counterpart, but without a viable means of utilizing the statute because the government took it upon itself to demolish the prosecutorial legitimacy of the Foreign Enlistment Act.

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<sup>51</sup> *Id.* at 2–3.

<sup>52</sup> *Id.* at 7, 9–10.

<sup>53</sup> *Id.* at 7–9. *See generally* Anthony Chase, *Decriminalization of Foreign Enlistment*, 1 CRIM. JUST. J. 15 (1978) (seriously criticizing the report).

<sup>54</sup> THE DIPLOCK REPORT, *supra* note 46, at 16.

<sup>55</sup> *Id.* at 11–14.

<sup>56</sup> *See generally* Sir Thomas Legg & Sir Robin Ibbs, REPORT OF THE SIERRA LEONE ARMS INVESTIGATION, 1998, cm. 1016 (summarizing findings of the incident).

<sup>57</sup> *See* FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2002, Cm. 577 at 20–23 (UK).

### 3. *The RSA and the Modern Experience, the “Anti-Mercenary” Laws of 1998 and 2006*

The South African government’s view on private warfare is inextricably linked to the struggle to end apartheid, the system of white supremacist political control that dominated South Africa for much of the twentieth century.<sup>58</sup> The collapse of apartheid in the early 1990s brought about a drastic cut in the size of the South African security forces.<sup>59</sup> The South African security forces had engaged in nearly three decades of constant warfare, in an attempt to maintain the apartheid regime; thus, a huge “pool of highly skilled, white, Afrikaner, ex-military personnel” found themselves without a job, but in great demand throughout Africa.<sup>60</sup> South African ex-military personnel made headlines fighting in Angola and Sierra Leone, for a company called Executive Outcomes, and the South African government felt compelled to respond legislatively.<sup>61</sup>

South Africa’s first attempt to crack down on the activities of former security personnel culminated in the Regulation of Foreign Military Assistance Act of 1998 (FMAA).<sup>62</sup> The FMAA prohibits South African citizens from providing “military assistance” to any group abroad, without the permission of the South African government.<sup>63</sup> Military assistance is comprehensively defined as:

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<sup>58</sup> See Sarah Franklin, Note, *South African and International Attempts to Regulate Mercenaries and Private Military Companies*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 239, 246 (2008).

<sup>59</sup> *Id.*

<sup>60</sup> Shannon Bosch & Matthew Kimble, *A New Way Forward for the Regulation of the Private Military and Security Industry*, 48 COMP. & INT’L L.J.S. AFR. 431, 444 (2015).

<sup>61</sup> See Christo Botha, *From Mercenaries to Private Military Companies’ The Collapse of the African State and the Outsourcing of State Security*, 24 S. AFR. Y.B. INT’L L. 133, 134–35 (1999) (Angola); Roni A. Elias, *The Rise of the Private Military Firm in International Conflicts A Problem of Legal Authority and Extraterritorial Jurisdiction*, 31 CONN. J. INT’L L. 93, 95 (2015) (Sierra Leone).

<sup>62</sup> Regulation of Foreign Military Assistance Act 15 of 1998 (S. Afr.).

<sup>63</sup> Regulation of Foreign Military Assistance Act 15 of 1998 §3 (S. Afr.). It reads, in relevant part:

3. No person may within the Republic or elsewhere—

(a) offer to render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless he or she has been granted authorization to offer such assistance in terms of section 4;

(b) render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in terms of section 5.

*Id.*

(iii) “foreign military assistance” means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of—

(a) military assistance to a party to the armed conflict by means of—

(i) advice or training; (ii) personnel, financial, logistical, intelligence or operational support; (iii) personnel recruitment; (iv) medical or para-medical services; or (v) procurement of equipment;

(b) security services for the protection of individuals involved in armed conflict or their property;

(c) any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state;

(d) any other action that has the result of furthering the military interests of a party to the armed conflict<sup>64</sup>

Despite the clear and comprehensive language, and seemingly broad scope, the FMAA has proved ineffectual.<sup>65</sup>

South Africa’s inability to crack down on military expeditions conceived on its soil, was highlighted by the “Wonga Plot” of 2004. South African former special forces officers attempted to overthrow the government of Equatorial Guinea; however, the plot ended in total failure and resulted in the arrests of scores of South African ex-military men in Equatorial Guinea, Zimbabwe, and South Africa.<sup>66</sup> In an embarrassing twist, the charges against the eight men arrested in South Africa were all dropped because of the, alleged, involvement of South African officials in the coup plot.<sup>67</sup> Similarly, in 2013, the South African government failed to convict twenty individuals for plotting to overthrow the government of the Congo.<sup>68</sup> In both cases, serious doubts were raised about the extraterritorial

<sup>64</sup> *Id.* at § 1(iii).

<sup>65</sup> See Shannon Bosch, *South Africans Offering Foreign Military Assistance Abroad: How Real is the Risk of Domestic Prosecution?*, 21 POTCHEFSTROOM ELEC. L.J. 1, 4–5 (2018).

<sup>66</sup> See Christo Botha, *If You Can’t be with the One You Love, Love the One You’re with’ Critical Analysis of the Latest South African Anti-Mercenary Legislation*, 31 S. AFR. Y.B. INT’L L. 224, 225 (2006). See also *Kaunda v. President of the RSA* 2004 (10) BCLR 1009 (CC) (S. Afr.); *Thatcher v. The Minister of Justice and Constitutional Development* 2005 (4) BCLR 388 (C) (discussing the factual background of the plot, and the ramifications for South African constitutional law) (S. Afr.).

<sup>67</sup> See Franklin, *supra* note 58, at 248.

<sup>68</sup> See Bosch, *supra* note 65, at 5 (noting the trial judge’s concerns about the breadth of the law, although, it appears that at least fifteen of the defendants’ cases were dismissed due to police misconduct).

application of the FMAA, and it appears those doubts limited the application of the law and constrained judicial attitudes towards the law.<sup>69</sup>

Naturally, the South African government reacted to the embarrassment surrounding the “Wonga Plot” by passing a new piece of legislation. The Prohibition of Mercenary Activities Act of 2006 (PMA),<sup>70</sup> kept much of the broad definitional language of the FMAA but sought to improve the government’s prosecutorial hand, in two respects.<sup>71</sup> First, the PMA bans any South African from, “directly or indirectly recruit[ing], use[ing], train[ing], support[ing] or finance[ing] a combatant for private gain in an armed conflict.”<sup>72</sup> This appears to cover a significant amount of conduct that was arguably not covered by the original FMAA.<sup>73</sup> Second, the PMA left no doubt about its jurisdictional scope: it explicitly grants South Africa extraterritorial jurisdiction over the offenses contained in the act.<sup>74</sup>

<sup>69</sup> See Franklin, *supra* note 58, at 253. One individual, Sir Mark Thatcher (Son of the former British Prime Minister), did plead guilty to violating the FMAA; however, he received an extremely light sentence. See *Thatcher v. The Minister of Justice and Constitutional Development* 2005 (4) BCLR 388 (C) (S. Afr.).

<sup>70</sup> Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 (S. Afr.).

<sup>71</sup> See Bosch, *supra* note 65, at 7.

<sup>72</sup> Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 § 2(1)(b) (S. Afr.).

<sup>73</sup> See Bosch, *supra* note 65, at 7.

<sup>74</sup>

(1) Any act constituting an offence under this Act and that is committed outside the Republic by—

- (a) a citizen of the Republic;
- (b) a person ordinarily resident in the Republic;
- (c) a company incorporated or registered as such under any law, in the Republic; or
- (d) any body of persons, corporate or unincorporated, in the Republic, must be regarded as having been committed in the Republic and the person who committed it may be tried in a court in the Republic which has jurisdiction in respect of that offence.

(2)

(a) Any act that constitutes an offence under section 2 of this Act and that is committed outside the Republic by a person, other than a person contemplated in subsection (1), against the Republic, its citizens or residents must be regarded as having been committed in the Republic if that person is found in the Republic.

(b) A person contemplated in paragraph (a) may be tried for such an offence by a South African court if there is no application for the extradition of the person or if such an application has been refused.

The FMAA and the PMA, read together, represent a modern codification of the principles contained in the Neutrality Act of 1794 and the Foreign Enlistment Act of 1870. However, the two South African statutes remain imperfect; indeed, the PMA has not, in 2021, yet received the formal Presidential Proclamation needed to enter the act into force.<sup>75</sup> This is partly attributable to its sweeping scope; the PMA has faced opposition from human rights groups for its refusal to distinguish between combat and humanitarian work.<sup>76</sup> Nevertheless, the modernity of the two South African statutes makes them particularly fertile territory for legislators hoping to update outdated neutrality laws.

## II. ANALYSIS

Part II will address the four core challenges that U.S. courts face when attempting to apply the Neutrality Act. First, the inadequate definition of “hostile military expedition.” Second, the volunteer exception loophole. Third, the definition of peace. Fourth and finally, the jurisdictional scope of the U.S. Neutrality Act.

### A. DEFINING A “HOSTILE MILITARY EXPEDITION” IN THE TWENTY-FIRST CENTURY

Warfare has changed dramatically since the passage of the American Neutrality Act in 1794. The “military expeditions” and “enterprises” that the American Neutrality Act originally sought to punish have been replaced by drones, cyberwarfare, and other weapons of a

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(3) Any offence contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, regarded as having been committed at—

- (a) the place where the accused is ordinarily resident;
- (b) the accused’s principal place of business; or
- (c) the place where the accused was arrested.

(4) Where a person is charged with conspiracy or incitement to commit an offence or as an accessory after the fact, the offence is regarded as having been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or in the case of an omission, should have acted.

Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 § 11 (S. Afr.)

<sup>75</sup> See Bosch, *supra* note 65, at 6.

<sup>76</sup> See generally Botha, *supra* note 66 (critiquing the legislation).

destructive capacity that is barely comprehensible.<sup>77</sup> Despite this evolution, the American Neutrality Act's definition of "military expedition" and "enterprise," as set forth by case law, remains couched in the language of the Age of Sail.<sup>78</sup>

As noted in Part I, a "military expedition is a journey or voyage by a company or a body of persons having the position or character of soldiers."<sup>79</sup> This definition made sense before the twentieth century, however, given the nature of modern warfare and the proliferation of drones, electronic warfare capabilities, and cyber warfare, the definition seems to exclude a great deal of conduct that would constitute launching an attack against a sovereign state.<sup>80</sup> U.S. courts have long focused on the "military character" of an expedition; this assessment looked for objective indicia of that character, such as organization into regiments or companies, the appointment of officers, and the issuance of uniforms.<sup>81</sup> However, these objective indicia are increasingly obsolete, especially in the context of cyber warfare.<sup>82</sup> The U.S. courts have not yet confronted a Neutrality Act case that was not tied to an actual "kinetic" military expedition.

<sup>77</sup> See, e.g., Robyn Dixon, *Azerbaijan's Drones Owned the Battlefield in Nagorno-Karabakh—and Showed the Future of Warfare*, WASH. POST (Nov. 11, 2020, 4:06 PM), [https://www.washingtonpost.com/world/europe/nagorno-karabakh-drones-azerbaijan-aremenia/2020/11/11/441bcbd2-193d-11eb-8bda-814ca56e138b\\_story.html](https://www.washingtonpost.com/world/europe/nagorno-karabakh-drones-azerbaijan-aremenia/2020/11/11/441bcbd2-193d-11eb-8bda-814ca56e138b_story.html) [<https://perma.cc/8RBM-JRB3>] (the full cost of this war is still being counted, but it appears clear it was extraordinarily destructive).

<sup>78</sup> The period of time from roughly the sixteenth to the nineteenth centuries, where wind driven ships were the primary method of global maritime transportation. *Age of Sail*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/age-of-sail> [[perma.cc/RJ8X-7S66](https://perma.cc/RJ8X-7S66)] (last visited Sept. 26, 2021).

<sup>79</sup> *Wiborg v. United States*, 163 U.S. 632, 650 (1896).

<sup>80</sup> See generally Christopher J. Fallon, Comment, *Can Google Bomb China? Private Sector Self-Help and the Neutrality Act*, 22 J. TRANSNAT'L L. & POL'Y 123 (2013) (exploring whether military aggression by corporate actors would be prohibited under the Neutrality Act).

<sup>81</sup>

Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition, or enterprise, was some military service, some attack, or invasion of another people or country, state, or colony, as a military force. The engagement of men to invade or attack any other people or country, by force and strong hand—the designation of officers—the classification and arrangement of men into regiments, squadrons, battalions, or companies; the divisions of the men into infantry, cavalry, artillery, or riflemen; the purchase of vessels or steamboats—military stores—such as powder or ball—for an expedition, give character to the expedition itself.

*United States v. O'Sullivan*, 27 F. Cas. 380, 381 (S.D.N.Y. 1851) (statement of District Judge Judson in his charge to the jury).

<sup>82</sup> See Fallon, *supra* note 80, at 124.

However, the time is fast approaching and when it does arrive the central question will be how “to hold that this [essentially] corporate conduct is the same as picking up a gun, going to Cuba, and fighting the Spanish.”<sup>83</sup>

The answer might, theoretically, be found in the definition of “military enterprise” that developed over the years. A “military enterprise” is “a martial undertaking involving the idea of a bold, arduous, and hazardous attempt.”<sup>84</sup> Thus, the military enterprise has a wider scope than a military expedition; indeed, it touches any act “so intimately connected with them [military operations] that it forms a natural, if not inevitable, part of such operations.”<sup>85</sup> This appears to sweep a broader range of activity, such as launching a cyber-attack, into the net of the Neutrality Act, but it still leaves issues. For example, is knocking out a nation’s power grid, from the comfort of one’s own basement, really the sort of “bold, arduous, and hazardous attempt” envisioned by earlier courts?<sup>86</sup> Relatedly, at what point does a cyber-attack cross the line from mere criminality and enter the realm of usurpation of the U.S.’s sovereign war power?<sup>87</sup> The U.S. Neutrality Act is not intended to punish ordinary criminal conduct and any definition of “expedition” or “enterprise” must reflect the fact that it punishes a unique evil.

Unfortunately, the U.K.’s interpretation of the Foreign Enlistment Act does not provide any assistance to Congressional drafters looking to cohesively define what constitutes a military expedition, or a military enterprise. In fact, the U.K. Government’s position on the act, set forth in the Diplock Report, provides plenty of fodder for American defense attorney’s looking to pick apart a prosecution under the U.S. Neutrality Act.<sup>88</sup> For example, the Diplock Commission argued that the phrase “journey or voyage,” as applied to a military expedition, meant that, to

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<sup>83</sup> *Id.* at 137.

<sup>84</sup> *Wiborg*, 163 U.S. at 650.

<sup>85</sup> *United States v. Sander*, 241 F. 417, 420 (S.D.N.Y. 1917) (finding that traveling to the U.K. to spy for Germany qualified as a “military enterprise”).

<sup>86</sup> Curiously, the only scholar to really assess the Neutrality Act and cyberwarfare chose not to examine the distinction between an expedition and an enterprise. See Fallon, *supra* note 80, at 126 n.16. For an example of an attack on another country’s infrastructure violating the principles of the Neutrality Act. See *United States v. Elliott*, 266 F. Supp. 318, 323 (S.D.N.Y. 1967) (involving a plot to attack the Zambian railway system; this prosecution was under 18 U.S.C. § 956, a sister statute of § 960, but the court addresses the foreign affairs implications of allowing hostile acts to emanate from the U.S.).

<sup>87</sup> See generally Oona A. Hathway, Rebecca Crootof, Philp Levitz, Haley Nix, Aileen Nowlan, William Perdue & Julia Spiegel, *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817 (2012) (comprehensively assessing cyber-attacks and the Laws of War).

<sup>88</sup> See Chase, *supra* note 45, at 27–28.

constitute an offense, the illegal military expedition had to literally depart by ship.<sup>89</sup> This is a rather extreme position,<sup>90</sup> but it illustrates an important flaw inherent in relying upon vague statutes and outdated case law: the criminal law needs to be written with clarity to provide notice and to ensure that judicial interpretation reaches consistent results in similar cases.<sup>91</sup> Absent clarity, the crucial elements of notice and consistent judicial interpretation are lacking.

South Africa's FMAA and PMA, however, provide the definitional clarity necessary to make a U.S. Neutrality Act a viable twenty-first century legal tool. First, the FMAA provides a useful definition of foreign military assistance: "Military services . . . in the form of—any action aimed at overthrowing a government or undermining the constitutional order, sovereignty, or territorial integrity of a state."<sup>92</sup> This definition engulfs the definition of a hostile military expedition developed by U.S. case law; for example, it would still criminalize an obvious violation, such as a uniformed, armed band, with quasi-military structure attempting to assault a foreign nation. Furthermore, this definition properly focuses a court's attention on why the conduct is criminalized and lessens the possible temptation to focus exclusively on the objective indicia mentioned above.<sup>93</sup> However, the definition, without the qualifying "military services" nexus, would be overinclusive and could sweep legitimate political activity under its umbrella.<sup>94</sup>

The military services nexus remains important because it is the feature that makes this law a unique form of wrongdoing; by attempting to act in a military manner, the wrongdoer is usurping the power of the

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<sup>89</sup> See THE DIPLOCK REPORT, *supra* note 46, at 8 (the Diplock Commission appears to have been applying an aggressive version of the rule of lenity). For more on the rule of lenity and its common law origins, see David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 526–27 (2018) ("The rule of lenity has its roots in the proclivity of British kings to hang their subjects.").

<sup>90</sup> See Chase, *supra* note 88, at 27–28 (finding this portion of the Diplock Report to be a bit absurd).

<sup>91</sup> See Frank J. Remington, *The Future of the Substantive Criminal Law Codification Movement—Theoretical and Practical Concerns*, 19 RUTGERS L.J. 867, 868 (1988). See also Walter Dickey, David Schultz & James L. Fullin, Jr., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1325 (1989) ("In a free society, there must be clarity about what behavior is subject to criminal sanction.").

<sup>92</sup> Regulation of Foreign Military Assistance Act 15 of 1998 § 1(iii)(c) (S. Afr.).

<sup>93</sup> See Garcia-Mora, *supra* note 2, at 311 (discussing why states must affirmatively prevent hostile expeditions).

<sup>94</sup> See generally Manuel R. Garcia-Mora, *International Responsibility for Subversive Activities and Hostile Propaganda by Private Persons against Foreign States*, 35 IND. L.J. 306 (1960) (discussing the question of political subversion, which, as opposed to military action, is beyond the scope of this Comment).

state. Thus, it is important to clearly define what constitutes a military service. The South African PMA, again, provides a useful analog. The PMA criminalizes overt military activity, such as serving as a combatant, but of course it is not disputed that serving as an active combatant violates any form of the Neutrality Act.<sup>95</sup> However, South Africa goes farther and outlaws “any form of assistance or service to a party to an armed conflict by means of— advice or training; personnel, financial, logistical, intelligence, or operational support; personnel recruitment; medical or para-medical services; procurement of equipment; or security services.”<sup>96</sup> This explicit definition is a start, but it is imperfect in the American context.

First, the inclusion of “medical or para-medical services” is unnecessary. Indeed, the decision to include medical services was extremely controversial in South Africa.<sup>97</sup> The purpose underlying the Neutrality Act does not demand that medical services be included. Furthermore, international law considers medical personnel a “protected class” during armed conflict, so it is entirely unnecessary to criminalize an activity that is widely considered beneficial to all parties.<sup>98</sup> Second, the inclusion of “security services” was a uniquely South African choice and it does not need replication in the American statute.<sup>99</sup> That section appears to be aimed at the provision of, otherwise legitimate, private security services.<sup>100</sup> The U.S. has a thriving private security industry.<sup>101</sup> Additionally, the private security industry is already regulated by other statutes and, for the most part, the industry provides services to the U.S. government itself.<sup>102</sup> As noted in Part I, the U.S. government does not believe that the Neutrality Act applies to itself; therefore, these “official”

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<sup>95</sup> Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006 § 2(a) (S. Afr.).

<sup>96</sup> *Id.* §§ (1)(b)–(c).

<sup>97</sup> See generally Botha, *supra* note 66, at 226 (analyzing and critiquing the legislation).

<sup>98</sup> See generally Bruce T. Smith, *Air Force Medical Personnel and the Law of Armed Conflict*, 37 A.F.L. REV. 239 (1994) (discussing the relationship between medical personnel and the Laws of War).

<sup>99</sup> Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 § (1)(c) (S. Afr.).

<sup>100</sup> See Franklin, *supra* note 58, at 246 (noting that about twenty thousand South Africans are believed to have worked for Private Military Companies (PMC) in Iraq, Afghanistan, and Nigeria).

<sup>101</sup> See Sarah Percy, *Regulating the Private Security Industry: A Story of Regulating the Last War*, 94 INT’L REV. RED CROSS 941, 951–52 (2012) (discussing the development of the U.S. private security industry). See also Elias, *supra* note 61, at 101–02.

<sup>102</sup> See also Elias, *supra* note 61, at 101–02 (noting that the Department of Defense and the Department of State rely heavily on Private Security Companies).

private security companies fall within the governmental umbrella, at least when they are providing services to the Department of Defense and the Department of State.<sup>103</sup> This squares with the fundamental aim of the Neutrality Act: limiting the ability of private parties to wage war without the backing of the state.<sup>104</sup>

Therefore, a revised U.S. Neutrality Act should criminalize “providing military services” to “any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.” Furthermore, “providing military services” would be defined as: (1) serving as an overt combatant, (2) providing advice or training, (3) personnel, financial, logistical, intelligence or operational support, (4) recruiting personnel, and (5) procuring military equipment to aid the illegal action.<sup>105</sup> Finally, the law would explicitly state that the U.S. Government and its designated agencies are not subject to the provisions of the act, nor are private companies, operating under a U.S. government contract, liable to prosecution. This amendment would remove the distinction between a military expedition and a military enterprise. It would provide the courts clear guidance without the need to draw strained analogies to nineteenth century case law. Finally, the amendment would clarify that the U.S. government is not bound by the Act.

## B. CLOSING THE “VOLUNTEER EXCEPTION” LOOPHOLE

U.S. courts have long held that the Neutrality Act cannot be used to prosecute individuals who go abroad to fight for a foreign cause.<sup>106</sup> This “volunteer exception” was premised on a belief that the phrase “military expeditions” necessarily required the participation of multiple individuals.<sup>107</sup> The question of whether a “military enterprise” could

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<sup>103</sup> See generally Theodore B. Olson, Application of the Neutrality Act to Official Government Activities, 8 Op. O.L.C. 209 (1984) (discussing the Neutrality Act).

<sup>104</sup> Lobel, *supra* note 7, at 24.

<sup>105</sup> This amendment would cover the full range of conduct carried out by American mercenaries in support of the United Arab Emirates in Yemen. For more on this disturbing case see Deborah Avant, *Former U.S. Special Forces Were Reportedly Hired to Kill Yemen's Leaders. Did the Government Know?*, WASH. POST (Oct. 19, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/19/former-u-s-special-forces-were-reportedly-hired-to-kill-yemens-leaders-did-the-government-know/> [https://perma.cc/V7GC-DEBY].

<sup>106</sup> See e.g., *Wiborg v. United States*, 163 U.S. 632, 652–53 (1896).

<sup>107</sup> See *id.*

constitute a single individual was never conclusively answered; however, it appears that some courts considered it technically possible.<sup>108</sup> Nevertheless, the “volunteer exception” represents an outdated understanding of states’ responsibilities under international law and should be conclusively eliminated.<sup>109</sup>

Adopting the phraseology proposed above in Part II, Section A, would eliminate the textual justification for the volunteer exception by replacing “expedition” with “any military services.” Presumably, a service can be rendered by one individual. Beyond the textual reasoning, the *laissez-faire* nineteenth century attitude toward volunteers has no strong policy justification.<sup>110</sup> The United Kingdom holds the position that a “blanket ban [presumably, on going abroad to fight,] would be an unwarranted interference with liberty.”<sup>111</sup> This notion was likely a result of the generally liberal attitude, prevalent in the nineteenth century, toward going abroad to volunteer for “righteous causes.”<sup>112</sup> In a similar vein, the U.S. Department of State consistently informed Mexico that it was powerless to prevent the trickle of volunteers across the southwestern border during the Mexican Civil Wars of the early twentieth century.<sup>113</sup> Additionally, during both the First and Second World Wars, American volunteers traveled to Europe and Asia and created fully formed American fighting units, before the U.S. formally entered the war.<sup>114</sup> Apparently, the volunteer exception was justified by the “unorganized” nature of the departure;<sup>115</sup> however, it appears more likely that the executive branch made a subjective decision that the cause, for which the volunteers were going to fight, was in the best interests of the U.S.<sup>116</sup>

As a separation of powers matter, the executive may decide when to bring charges under the Neutrality Act, and thus the executive may

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<sup>108</sup> See generally *United States v. Sander*, 241 F. 417, 420 (1917) (holding that a military enterprise could include undertakings by single individuals or a number of persons).

<sup>109</sup> See Garcia-Mora, *supra* note 2, at 315.

<sup>110</sup> See Courtney, *supra* note 33, at 177, 179.

<sup>111</sup> PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2002, Cm. 577, at 23 (UK).

<sup>112</sup> See generally Ian Brownlie, *Volunteers and the Law of War and Neutrality*, 5 INT’L & COMP. L.Q. 570 (1956) (discussing the laws and practices around volunteering to fight in other countries’ disputes).

<sup>113</sup> See *id.* at 570–71. See generally *De Orozco v. United States*, 237 F. 1008, 1012 (5th Cir. 1916) (indicating that the law was enforced in regards to expeditions, but not against individuals).

<sup>114</sup> See Brownlie, *supra* note 112, at 573.

<sup>115</sup> *Id.*

<sup>116</sup> See Application of the Neutrality Act to Official Government Activities, 8 Op. O.L.C. 209, 216–18 (1984) (illustrating the lengths the executive branch went to avoid the application of the Neutrality Act during World War One, World War Two, and the Bay of Pigs Crisis).

determine that it is not in the interests of the U.S. to prosecute certain individuals for going abroad to fight.<sup>117</sup> However, the volunteer exception should not be available as a defense to an individual who the executive has decided to prosecute.<sup>118</sup> The conduct of that individual is, after all, still in violation of the core principles underlying the U.S. Neutrality Act.<sup>119</sup>

South Africa took the opposite approach and drafted a so-called “liberation movement exclusion” into the PMA.<sup>120</sup> This provision, grounded in the South African struggle against apartheid, exempts conduct carried out in the name of self-determination, ending colonialism, and resisting aggression.<sup>121</sup> Again, this provision is understandable in light of South African history, but it has no place in an American Neutrality Act.

U.S. courts would struggle to apply a “liberation movement” exception for reasons primarily related to the long history of the separation of powers in U.S. law. The judicial branch is not the proper forum to determine the legitimacy of the cause that an individual has volunteered to serve. Judges do not have the expertise, the time, nor the desire to parse through myriad conflicts and determine who is on the “right side” of a particular conflict.<sup>122</sup> That determination is better left to the political branches, particularly to the executive branch.<sup>123</sup> The danger of foreign policy disaster is particularly acute when dealing with insurgencies; the decision to recognize and support an insurgent group is among the most sensitive decisions that the U.S. government can face and it should not be

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<sup>117</sup> See Henry L. Chambers, Jr., *The President, Prosecutorial Discretion, Obstruction of Justice, and Congress*, 52 U. RICH. L. REV. 609, 612 (2018) (discussing the executive branch’s power of prosecutorial discretion). See also David J. Ryan, *National Security Leak, the Espionage Act, and Prosecutorial Discretion*, 6 HOMELAND & NAT’L SEC. L. REV. 59 (2018) (discussing prosecutorial discretion in the national security context).

<sup>118</sup> See *Wiborg v. United States*, 163 U.S. 632, 652–53 (1896) (noting that individual volunteers would not be covered). See also *United States v. Hart*, 78 F. 868, 870 (E.D. Pa. 1897), *aff’d sub nom. Hart v. United States*, 84 F. 799, 800, 804 (3d. Cir. 1898) (referencing and agreeing with *Wiborg*, where the trial judge instructed the jury that an unorganized band, going abroad to volunteer, does not constitute a military expedition).

<sup>119</sup> See Garcia-Mora, *supra* note 2, at 325.

<sup>120</sup> See Botha, *supra* note 66, at 226.

<sup>121</sup> Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 § (1)(2)(a) (S. Afr.). See also Botha, *supra* note 120, at 226.

<sup>122</sup> See *People’s Mojahedin Org. of Iran v. Dept. of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (citing *Chicago & S. Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)) (holding that foreign policy judgments of the executive branch are nonjusticiable).

<sup>123</sup> *Id.* at 23.

in the hands of a court.<sup>124</sup> Therefore, the South African “liberation movement exception,” while created with pure intentions, is not viable in any U.S. legislation.

The volunteer exception is a relic of the twentieth century and should be explicitly eliminated as a defense from a revised twenty-first century Neutrality Act. Removing the exception squares with the aims of the 1794 Neutrality Act by ensuring that the sovereign war power cannot be usurped by private citizens, without the consent of the executive or legislative branches. If the exception is removed, the courts will not be bogged down in an assessment of whether the individual, or group of individuals, went abroad in an unorganized manner. Instead, the courts can presume that the government’s decision to prosecute indicates a belief that the actions of the defendants violated the policies underlying the Neutrality Act. The textual amendments advocated in Section A could be enough, on their own, to end the volunteer exception; however, to aid the twin goals of clarity, notice and consistent interpretation, Congress should make it explicit that the volunteer exception is not a defense to a Neutrality Act violation.

#### C. EFFECTIVELY DEFINING WHEN THE U.S. IS “AT PEACE” WITH ANOTHER COUNTRY

The Neutrality Act of 1794 only criminalizes expeditions or enterprises carried out against states with whom the U.S. is “[a]t Peace.”<sup>125</sup> The U.S. Constitution granted Congress the power “to declare war.”<sup>126</sup> Therefore, a close reading of the Neutrality Act of 1794 could lead to the conclusion that the U.S. is at peace with any country that Congress has not declared war on. Such a conclusion would, however, be overly formalistic and inappropriate in the modern context.

Congress must clarify when the U.S. is “at peace” to aid judicial enforcement of the revised twenty-first century Neutrality Act. The U.S. engages in armed conflict with states that it has not formally declared war

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<sup>124</sup> See Benjamin P. Dean, *Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model*, 122 MIL. L. REV. 149, 149–50 (1988). See also M.E. Bowman, *Secrets in Plain View: Covert Action the U.S. Way*, 72 INT’L L. STUD. SER. U.S. NAVAL WAR COLL. 1, 4 (1998).

<sup>125</sup> 18 U.S.C. § 960.

<sup>126</sup> U.S. CONST. art. I, § 8. See generally Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means By Declare War*, 93 CORNELL L. REV. 45 (2007) (assessing the Founders’ understanding of the war power).

on; this trend has grown exponentially in the past fifty years.<sup>127</sup> U.S. district courts have recognized that the absence of a formal declaration of war is not definitive proof that the U.S. is at peace with a state.<sup>128</sup> Thus, instead of dwelling on the mere presence or absence of a formal declaration, district courts have assessed the U.S. relationship with the state at issue in light of the Neutrality Act of 1794's fundamental aim: "peace with all nations—national amity . . . in short, to prevent war, with all its sad and desolating consequences."<sup>129</sup> Despite this common understanding that the U.S. is not at peace with every nation it has not formally declared war on, the district courts have reached widely varying conclusions on just what constitutes undeclared hostilities between the U.S. and another nation.<sup>130</sup> Three strands have emerged: (1) a formalistic belief that the U.S. is at peace with any country that it has not formally declared war on;<sup>131</sup> (2) a broad belief that the U.S. is not at peace with any country that it is overtly or covertly acting against;<sup>132</sup> and (3) a middle ground that rejects the formalistic approach, but limits armed conflict to overt military conflict and rejects consideration of U.S. covert action policy.<sup>133</sup>

In light of this definitional inconsistency, any twenty-first century revisions to the Neutrality Act should explicitly define when the U.S. is "at peace" for purposes of a prosecution under the Act. The South African PMA, through its definition of "armed conflict," provides a useful example of a criminal neutrality statute, drafted to conform with the realities of twenty-first century diplomacy.<sup>134</sup> The PMA defines an armed

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<sup>127</sup> See generally Monroe Yale Mann, *Undeclared Wars, Congress and the President*, 63 N.Y. ST. B.J. 16 (1991) (surveying the history of undeclared American wars).

<sup>128</sup> See, e.g., *United States v. Terrell*, 731 F. Supp. 2d 473, 476–77 (S.D. Fla. 1989).

<sup>129</sup> *United States v. O'Sullivan*, 27 F. Cas. 380, 381 (S.D.N.Y. 1851). See also *Hamilton v. McClaghry*, 136 F. 445, 449 (D. Kan. 1905) (citing *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666–67 (1862)) (noting that a state of war can exist without a formal declaration).

<sup>130</sup> See, e.g., *United States v. Chhun (Chhun I)*, 513 F. Supp. 2d 1179, 1183 (C.D. Cal. 2007); *United States v. Chhun (Chhun II)*, 744 F.3d 1110, 1119–20 (9th Cir. 2014); *United States v. Terrell*, 731 F. Supp. 2d at 476–77; *United States v. Jack*, 257 F.R.D. 221, 230 (C.D. Cal. 2009).

<sup>131</sup> This was the position adopted by the Government in *Chhun I*, 513 F. Supp. 2d at 1183 (relying on *United States v. Burr*, 25 F. Cas. 201 (C.C.D. Va. 1807) (Marshall, C.J.)).

<sup>132</sup> *United States v. Terrell*, 731 F. Supp. 2d at 476–77.

<sup>133</sup> *United States v. Chhun*, No. 05-00519ADDP, 2008 U.S. Dist. LEXIS 25374, at \*2 (C.D. Cal. Mar. 20, 2008), *aff'd*, *Chhun II*, 744 F.3d at 1119–21.

<sup>134</sup> Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 §§ (1)(b)(i)–(v) (S. Afr.).

conflict as any conflict where force is being utilized between any of the following groups:

the armed forces of such country and dissident or rebel armed forces or other armed groups, the armed forces of any states; armed groups; armed forces of any occupying power and dissident or rebel armed forces or any other armed group; or any other combination of the entities referred to [above].”<sup>135</sup>

This definition properly accounts for the proliferation of non-state actors, who frequently engage in conflict with states and with other non-state groups, while also leaving room for the more traditional state-versus-state conflict.<sup>136</sup>

Fundamentally, the South African PMA is not a perfect analog to the Neutrality Act of 1794 in terms of purpose, but it illustrates the advantages to be had by defining the term “at peace.” The PMA applies to all proclaimed conflict zones, at all times, not just when South Africa is at peace with a particular nation.<sup>137</sup> This broad application is necessary because the function of the PMA is primarily regulatory and seeks a total prohibition on *any* private military conduct.<sup>138</sup> Conversely, the U.S. Neutrality Act, as discussed in Section A, does not aim to eliminate all private security services. Indeed, the U.S. actively encourages the private security industry to protect diplomats and diplomatic installations abroad.<sup>139</sup> The U.S. Neutrality Act aims to prevent the usurpation of the sovereign power to decide on matters of war and peace, thus the U.S. Neutrality Act should retain a formal caveat that it does not apply to any nation that the U.S. is engaged in armed conflict with. Nevertheless, “at peace” must be defined to promote clarity and consistent application of the criminal law. The world has changed greatly since 1794, particularly

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<sup>135</sup> *Id.*

<sup>136</sup> See William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 *FORDHAM INT’L L.J.* 907, 907–09 (2003) (discussing the increasingly common application of international law to non-international armed conflicts).

<sup>137</sup> Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 §§ 2–3 (S. Afr.).

<sup>138</sup> See generally Sarah Franklin, Note, *South African and International Attempts to Regulate Mercenaries and Private Military Companies*, 17 *TRANSNAT’L L. & CONTEMP. PROBS.* 239 (examining the growth of private military companies and state attempts to regulate them).

<sup>139</sup> See Sarah Percy, *Regulating the Private Security Industry: A Story of Regulating the Last War*, 94 *INT’L REV. RED CROSS* 941, 951–52 (2012). See also Roni A. Elias, *The Rise of the Private Military Firm in International Conflict: A Problem of Legal Authority and Extraterritorial Jurisdiction*, 31 *CONN. J. INT’L L.* 93, 102 (2015).

conceptions of armed conflict,<sup>140</sup> the old, telltale indications of armed conflict can be difficult to spot.<sup>141</sup>

Any definition of “peace” potentially adopted by U.S. lawmakers must explicitly indicate that undeclared armed conflict does not constitute “peace.” This position is consistent with the U.S. Supreme Court’s decision in the famous Civil War *Prize Cases*.<sup>142</sup> In that case, the U.S. Supreme Court emphasized that the true indicator of belligerency is the state’s assertion of rights through force of arms, not a misguided focus on the formalities of a declaration of war.<sup>143</sup> However, this does not mean all government actions trigger belligerency, for purposes of the Neutrality Act.<sup>144</sup> Congress should expressly indicate that “at peace” means the absence of “open and notorious” *military* conflict between the U.S. and a foreign nation, or between the U.S. and an armed group within a foreign nation.<sup>145</sup> This definition rejects any attempt to claim diplomatic or intelligence activities as a basis for a finding that the U.S. is not at peace with a foreign nation.<sup>146</sup> The Neutrality Act aims to prevent the U.S. from being drawn into war with a nation by the acts of private parties; the diplomatic and intelligence activities of the U.S. government are outside the necessary scope of judicial consideration, they should have no bearing on a decision regarding the belligerent status of the U.S. vis-à-vis another state. Indeed, they are, by their very nature, invisible to the eyes of the common conspirator; thus, it is impossible to find that they played a role in a private citizen’s decision to attack a foreign state.<sup>147</sup>

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<sup>140</sup> See generally Alfred P. Rubin, *The Laws of War*, 76 AM. SOC’Y INT’L L. PROC. 139 (1982) (discussing examples of the evolution of the laws of war).

<sup>141</sup> See, e.g., William Oke Manning, COMMENTARIES ON THE LAW OF NATIONS 122–31 (London, S. Sweet 1839) (discussing the classic nineteenth century conception of armed conflict). But see James G. Stewart, *Toward a Single Definition of Armed Conflict in International Humanitarian Law A Critique of Internationalized Armed Conflict*, 85 INT’L REV. RED CROSS 313 (2003) (discussing a more modern understanding of armed conflict).

<sup>142</sup> 67 U.S. (2 Black) 635, 666–67 (1862) (assessing the legality of the federal government’s blockade of southern ports). See also Jeffrey L. Amestoy, *The Supreme Court Argument that Saved the Union Richard Henry Dana, Jr., and the Prize Cases*, 35 J. SUP. CT. HIST. 10 (2010) (discussing the history and background of the Prize Cases).

<sup>143</sup> The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 666–67 (1862).

<sup>144</sup> United States v. Terrell, 731 F. Supp. 2d 473, 475–76 (S.D. Fla. 1989).

<sup>145</sup> United States v. Chhun (*Chhun II*), 744 F.3d 1110, 1119–20 (9th Cir. 2014) (citing jury instructions given in *United States v. Chhun*, No. CR 05-00519ADDP, 2008 WL 793386, at \*2 (C.D. Cal. Mar. 20, 2008)).

<sup>146</sup> United States v. Chhun (*Chhun II*), 744 F.3d 1110, 1120–21 (9th Cir. 2014).

<sup>147</sup> United States v. Chhun, No. CR 05-00519ADDP, 2008 WL 793386, at \*1–2 (C.D. Cal. Mar. 20, 2008) (noting “Covert activities, by definition, are not open and notorious . . . the United States’

Finally, because the “at peace” question is an element of a federal crime, its determination must be made by the jury.<sup>148</sup> This furthers the demand for clarity.<sup>149</sup> A federal judge must be able to explicitly state that the U.S. is at peace with any country that it is not *overtly in a military conflict* with. This simplifies the jury’s task while also clearly indicating to the defendant what sort of evidence will be presented at trial.<sup>150</sup> A definition predicated on the U.S.’s formal declaration of war would greatly simplify the jury’s deliberative task, but given the essential obsolescence of such declarations,<sup>151</sup> the formalistic definition would render the Neutrality Act irrelevant. Alternatively, a definition broadened to include covert action would take the judicial branch into the uncomfortable realm of attempting to decide what constitutes an armed conflict involving the U.S.,<sup>152</sup> such rulings could have ramifications far beyond the immediate confines of the federal courthouse.<sup>153</sup> The political branches of the U.S. government determine when this country is at war; the judicial branch should not be forced to settle the thorny question of what constitutes war and what constitutes peace.<sup>154</sup>

Congress must clarify that the U.S. is presumed to be at peace with any state, unless the U.S. military is engaged in “open and notorious” overt

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involvement in covert activities within a foreign nation does not establish a state of war such that the United States’ was not ‘at peace’ with the foreign nation.”).

<sup>148</sup> See *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995).

<sup>149</sup> See Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1101–02 (2001) (discussing the need for plainly written jury instructions).

<sup>150</sup> See *United States v. Jack*, 257 F.R.D. 221, 232–33 (E.D. Cal. 2009) (providing an example of the massive discovery demands that these cases can present).

<sup>151</sup> See generally Jacob K. Javits, *War Powers Reconsidered*, 64 FOREIGN AFF. 130 (1985) (synthesizing the separation of powers concerns, while also conspicuously accepting that formal declarations of war may be a thing of the past). See also Saikrishna Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 135–40 (2008) (advocating for a return to formal declarations of war, but also noting that they are widely considered a thing of the past).

<sup>152</sup> *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (noting that policy determinations regarding matters of war and peace belong to the “political departments”).

<sup>153</sup> See *The Benito Estenger*, 176 U.S. 568 (1900) (discussing the various obligations to property triggered by the outbreak of hostilities, which cannot possibly be satisfied by the judicial branch). See also 78 AM. JUR. 2d WAR § 3 (2021).

<sup>154</sup> *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666 (1862). See also *Hamilton v. McClaughry*, 136 F. 445, 449 (D. Kan. 1905) (reiterating that the political branches must decide if the U.S. is “at war” for purposes of the Articles of War). *United States v. 129 Packages*, 27 F. Cas. 284, 288 (E.D. Mo. 1862) (noting “the judiciary, under the constitution, cannot declare war or make peace”).

warfare with the state or with a group that is resident within the state.<sup>155</sup> Adopting an alternate definition would either render the Neutrality Act irrelevant or bring the courts perilously close to violating the separation of powers. South Africa's PMA, while not a perfect definitional example, represents an effective attempt to cohesively synthesize traditional concepts of armed conflict with modern realities. The U.S. must attempt to follow suit and revise the definitional clarity of the Neutrality Act to assist juries and judges in carrying out core functions of the judicial branch, while also ensuring that they are not placed in a position of making a foreign policy determination that is better left to the political branches.

#### D. THE JURISDICTIONAL SCOPE OF A TWENTY-FIRST CENTURY NEUTRALITY ACT.

The Neutrality Act of 1794, by its own terms, requires the commission of at least one overt act "within the United States."<sup>156</sup> On the surface, this requirement seems to properly limit the scope of the act to conduct which could be attributed to the U.S. because of the territorial origins of the conspiracy.<sup>157</sup> However, by not extending the reach of the Act to American citizens who travel abroad to join these conspiracies, the jurisdictional nexus perpetuates the "volunteer exception" discussed above. Additionally, the increasingly connected modern world has rendered the distinction between plots hatched overseas and plots hatched at home meaningless;<sup>158</sup> an aggrieved foreign power is likely to attribute

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<sup>155</sup> The "group resident within the state" addition is consistent with case law that rejects the U.S.'s recognition or non-recognition of the sovereign of the foreign state as a defense to prosecution. See *De Orozco v. United States*, 237 F. 1008, 1012 (5th Cir. 1916). See also *United States v. Trumbull*, 48 F. 99, 103–04 (S.D. Cal. 1891) (rejecting an attempted prosecution under the Neutrality Act because the defendants had not engaged in an overt act inside the U.S.). But see *United States v. 214 Boxes of Arms, Ammunition, & Munitions of War*, 20 F. 50, 51, 57 (E.D. Va. 1884) (finding that the Neutrality laws had been violated, based on facts that were virtually indistinguishable from those in *Trumbull*).

<sup>156</sup> 18 U.S.C. § 960. See also *United States v. Lumsden*, 26 F. Cas. 1013, 1014 (C.C.S.D. Ohio 1856) (noting the "overt act" requirement).

<sup>157</sup> See Robert M. Twiss, *National Security: The Impact on U.S. Foreign Policy Arising from Private Actions Initiated Against Foreign Nations from Within the United States*, 3 CREIGHTON INT'L & COMP. L.J. 47 (2012) (examining the potential for private actions to affect U.S. foreign policy). See also *Jacobsen v. United States*, 272 F. 399, 402 (7th Cir. 1920) (noting that not every act needs to occur within the U.S.).

<sup>158</sup> For an example of this principle in the context of terrorism, see *United States v. Abu Khatallah*, 151 F. Supp. 3d 116 (D.D.C. 2015) (prosecuting a terrorist conspiracy that occurred entirely in Libya).

an unauthorized attack, perpetrated by American citizens, to the U.S., regardless of where the “overt acts” took place.

The U.S. government should be able to prosecute any American citizen who travels abroad to join a conspiracy that, if initiated in America, would have violated the Neutrality Act of 1794. South Africa has explicitly adopted this position and codified the extraterritorially jurisdiction of South African courts in both the FMAA and the PMA.<sup>159</sup> The distinction between a conspiracy solely organized in the U.S. and one organized abroad, but including American citizens, is a leftover relic of the eighteenth century.<sup>160</sup> Advances in travel and communications technology, not imaginable at the founding, have made the distinction artificial.

Nevertheless, important arguments caution against expanding the Neutrality Act to give the U.S. “universal jurisdiction” over violations of the law.<sup>161</sup> The U.S. should only be concerned with the activities of its *citizens* abroad when it comes to this statute. After all, the great fear is that the actions of private citizens will be attributed to the sovereign, thus drawing the U.S. into a confrontation that it did not desire. Clearly, that concern is nonexistent when foreign nationals, on foreign soil, plot an attack that has nothing to do with the sovereignty of the U.S.<sup>162</sup> South Africa correctly struck this balance when drafting the FMAA by explicitly indicating that it did not apply to foreigners, whose conduct took place outside the bounds of South Africa.<sup>163</sup> The U.S. should adhere closely to the South African model.

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Any court of law in the Republic may try a person for an offence referred to in section 8 notwithstanding the fact that the act or omission to which the charge relates, was committed outside the Republic, except in the instance where a foreign citizen commits any offence in terms of section 8 wholly outside the borders of the Republic.

Regulation of Foreign Military Assistance Act 15 of 1998 § 9 (S. Afr.).

<sup>160</sup> See *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 58–59 (1789–1825) (discussing a raid on a British colony in Africa, assisted by Americans, but noting that the Americans never set foot in the jurisdiction of the U.S. before launching the raid). See also Overview of the Neutrality Act, 8 Op. O.L.C. 209, 213–14 (1984).

<sup>161</sup> See generally Reed Brody, *Justice and Sovereignty: Implications of the International Criminal Court*, 8 UCLA J. INT’L L. & FOREIGN AFF. 71, 72 (2003) (discussing universal jurisdiction as one potential tool international law may consider).

<sup>162</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 119–24 (2013) (differentiating the ability to punish violations of the Law of Nations from “universal jurisdiction” over all causes of action or crimes, in the context of the Alien Tort Statute). See also Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 327–34 (2001) (discussing the interaction between notions of universal jurisdiction and federal law).

<sup>163</sup> Regulation of Foreign Military Assistance Act 15 of 1998 § 9 (S. Afr.).

The British, particularly the Diplock Commission, however, rejected the notion of extraterritorial application, even when applied to British subjects.<sup>164</sup> The British decision came about for two reasons. First, the Diplock Commission believed that it was a deeply held principle of the common law that criminal statutes had to avoid extraterritorial application.<sup>165</sup> Second, the Commission feared the evidentiary difficulties inherent in prosecuting an offense committed abroad.<sup>166</sup> Neither reason is persuasive. The Diplock Commission was correct, the common law did, generally, adhere to strict principles of territoriality. However, the English courts did, on occasion, entertain prosecution for crimes by Englishmen committed abroad.<sup>167</sup> Similarly, the evidentiary concern does contain a grain of truth,<sup>168</sup> but, it is not generally the position of a government that a crime should be abolished solely because it is difficult to obtain evidence.<sup>169</sup>

In the U.S. context, neither British concern should overwhelm the need to include an extraterritorially application provision. Generally, the U.S. Supreme Court applies a presumption against extraterritoriality, but the Court has never suggested American common law tradition demands that extraterritoriality never be exercised.<sup>170</sup> Indeed, when a statute does clearly state that Congress intends extraterritorial application the presumption does not attach.<sup>171</sup> Furthermore, Congress routinely does provide for extraterritorial jurisdiction in the criminal law.<sup>172</sup> For example, the Hostage Taking Act and Maritime Drug Enforcement Act both include

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<sup>164</sup> THE DIPLOCK REPORT, *supra* note 46, at 3, 9–11.

<sup>165</sup> Anthony Chase, *Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice*, 11 INT'L LAW. 555, 556–57 (1977).

<sup>166</sup> *Id.* at 556. THE DIPLOCK REPORT, *supra* note 46, at 3, 9–11.

<sup>167</sup> Sir Edward Coke, 3 INSTITUTES OF THE LAWS OF ENGLAND 48 (London, M. Flesher 1644) (noting that the Court of Constable and Marshall had the power to hear these cases).

<sup>168</sup> See generally Jose A. Cabranes, *Our Imperial Criminal Procedure Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660 (2009) (developing a framework for evaluating whether a particular constitutional provision should have overseas application).

<sup>169</sup> Anthony Chase, *Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice*, 11 INT'L LAW. 555, 556 (1977) (implying that the evidentiary concern is a fig leaf for the jurisdictional issue). Curiously, the British Government seems to have had no problems, be they jurisdictional or evidentiary, when prosecuting the participants in the famous Jameson Expedition under the Foreign Enlistment Act. See Anthony Chase, *Decriminalization of Foreign Enlistment*, 2 CRIM. JUST. J. 15, 22 (1978).

<sup>170</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013).

<sup>171</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

<sup>172</sup> For an exhaustive study of the topic, see CHARLES DOYLE, CONG. RSCH. SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2012).

explicit statements of extraterritorial application; these explicit statements provide clear instructive guidance to federal courts applying the law.<sup>173</sup>

Congress has no reason to defer to a common law tradition of territoriality because, simply, no such tradition exists. As for the evidentiary concerns, in the post-9/11 world,<sup>174</sup> the federal government has become quite adept at gathering evidence abroad and utilizing that evidence in domestic prosecutions.<sup>175</sup> Furthermore, the primary policy goal of the Neutrality Act of 1794 would be served best through a jurisdictional nexus that focuses on citizenship and not simply geographical boundaries. Of course, the geographical nexus would not be totally removed. The geographical nexus would continue to hold citizens and noncitizens to account if they aim to breach the law with overt acts inside the U.S.<sup>176</sup>

### III. CONCLUSION

The U.S. has an affirmative obligation, under international law, to prevent its territory from serving as a staging ground for private hostile military expeditions. This obligation, now enshrined in international law, was originally a product of the U.S.'s own conception of neutrality, as set out in the Neutrality Act of 1794. The U.S. has long been at the forefront of efforts to prevent private military expeditions from impacting international politics; this leading role is best exemplified by the revolutionary Neutrality Act of 1794.

Despite this early, leading, role in the development of domestic neutrality laws, the U.S. has allowed the Neutrality Act of 1794 to slip toward obsolescence. Congress must redraft the Neutrality Act to meet the needs of the twenty-first century. This updated Act would adequately define what constitutes a "hostile military expedition" in the twenty-first

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<sup>173</sup> See *United States v. Ali*, 718 F.3d 929, 942–43 (D.C. Cir. 2013) (applying the Hostage Taking Act). See also *United States v. Ballestas*, 795 F.3d 138, 144 (D.C. Cir. 2015) (applying the Maritime Drug Enforcement Law).

<sup>174</sup> See generally Sara A. Solow, *Prosecuting Terrorists as Criminals and the Limits of Extraterritorial Jurisdiction*, 85 ST. JOHN'S L. REV. 1483 (2011) (discussing the explosion of post-9/11 extraterritorial prosecutions).

<sup>175</sup> Jose A. Cabranes, *Our Imperial Criminal Procedure Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1663 (2009) (illustrating this point with a series of realistic hypotheticals). See also CHARLES DOYLE, CONG. RSCH. SERV., 94-166, *EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW* 24–27 (2016) (discussing the gathering of evidence abroad).

<sup>176</sup> See *In re Charge to the Grand Jury*, 30 F. Cas. 1017, 1018 (C.C.N.D.N.Y. 1866) (noting that the Neutrality Act applies to citizens and noncitizens alike).

century; close the “volunteer exception loophole;” provide a legally cognizable definition of “at peace” for purposes of prosecutions under the act; and finally, eliminate the obsolete jurisdictional nexus requirements of the original act. Fortunately, Congressional drafters can look to the Republic of South Africa and the United Kingdom for examples of the pitfalls that can bedevil the drafting of a new neutrality law. The United Kingdom’s hands-off approach to foreign military expeditions should not be followed. South Africa provides useful definitional clarity for the modern American Neutrality Act; however, the South African experience also illustrates the danger of over inclusivity and should be tailored to fit the U.S. situation.

The U.S. must reassert itself in the realm of neutrality law. The venerable Neutrality Act of 1794, one of the oldest remaining criminal statutes in the U.S. Code, was groundbreaking when first passed. However, the twenty-first century has increased the likelihood of private parties waging war unmoored from the official workings of the state; the U.S. legal system must respond to this challenge. Congress must heed the call and ensure that the U.S. legal system upholds its lengthy tradition of serving as a leading driver of domestic law that impacts the international legal system.