No. 12-158

IN THE
Supreme Court of the United States

CAROL ANNE BOND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PROFESSORS SARAH H. CLEVELAND AND WILLIAM S. DODGE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR PROFESSORS SARAH H. CLEVELAND AND WILLIAM S. DODGE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of Professors Sarah H. Cleveland and William S. Dodge.[1]

INTEREST OF AMICI CURIAE

Professor Cleveland is the Louis Henkin Professor of Human and Constitutional Rights at Columbia Law School.[2] From 2009 to 2011, she served as the Counselor on International Law to the Legal Adviser at the U.S. Department of State. She is Co-Coordinating Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law of the United States*, the U.S. expert Member on the Council of Europe's Venice Commission for Democracy Through Law, and a member of the Secretary of State's Advisory Committee on International Law. She has testified before Congress on a range of issues concerning international and foreign affairs law. She is co-author of Louis Henkin's casebook *Human Rights* (2d ed. 2009), and *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006), among other publications.

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[1] All parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person other than amici or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

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nia, Hastings College of the Law. From 2011 to 2012, he served as the Counselor on International Law to the Legal Adviser at the U.S. Department of State. He is Co-Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law of the United States* and a member of the Secretary of State's Advisory Committee on International Law. He is co-editor of *International Law in the U.S. Supreme Court: Continuity and Change* (2011), co-author of the casebook *Transnational Business Problems* (4th ed. 2008), and author of many articles on the place of international law in the U.S. legal system.

Amici have academic expertise and a strong interest in the proper interpretation of the scope of Congress's authority to assure compliance with the United States' international legal obligations. They are the co-authors of a current draft article entitled *Defining and Punishing Offenses Under Treaties*,[3] which argues, consistent with this brief, that legislation securing individual compliance with U.S. treaty obligations—like the Chemical Weapons Convention Implementation Act—is authorized by Congress's authority to "define and punish … Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner was convicted of violating the Chemical Weapons Convention Implementation Act (the Act), which implements the United States' obliga-

[3] *Available at* http://ssrn.com/abstract=2310779.

tions under the Chemical Weapons Convention (the Convention). Petitioner contends that the Act is unconstitutional as applied, because Congress lacked Article I power to pass it, and because implementation of the admittedly valid treaty under these circumstances had to be left to the States. That argument is mistaken because, as the government correctly explains, the Commerce Clause, and the Treaty Power coupled with the Necessary & Proper Clause, fully authorized Congress to adopt the Act. U.S. Br. 17-55. Thus, the Court need not rely on any other constitutional authority to affirm the decision below.

But for the reasons explained below, the Act also falls within Congress's Article I authority as an exercise of Congress's power to "define and punish … Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, as petitioner herself appears to acknowledge, Pet. Br. 60. Like the Treaty Power, the history and purpose of the Offenses Clause confirms that the Framers' design was specifically intended to preclude the result that petitioner seeks—*viz.*, that the States be left responsible for implementing the United States' international commitments.

While some commentators have suggested that the Offenses Clause applies only to customary international law, and not to treaties, that Clause is in fact part of an overlapping and comprehensive constitutional scheme to ensure that the United States can comply at the national level with *all* its international obligations, both treaties and custom. The Offenses Clause was a direct response to one of the

significant deficiencies of the Articles of Confederation—the States' unwillingness to discharge the Nation's international commitments, and in particular to punish individual conduct that international law condemned. Such obligations arose under both the generally recognized unwritten law of the time, and under treaties the United States had entered. In 1781, the Continental Congress accordingly adopted a resolution recommending that the States provide "punishment" for "offences against the law of nations," including specifically "infractions of treaties." In response, most States did nothing. The Offenses Clause was the Framers' answer to that fundamental failing in the prior government. Indeed, the Clause was based on the 1781 Resolution, and the Clause's history demonstrates that its purpose was to ensure that the United States could prohibit and punish *all* conduct condemned by international law. So important was this goal that the Clause is one of the only constitutional provisions that expressly authorizes Congress to impose punishment.

The only plausible counterargument to this original understanding is that members of the Founding Generation sometimes spoke of the "law of nations" as distinct from treaties. But that argument does not overcome the overwhelming evidence that the Clause was understood to apply to treaties as well as to unwritten law. Moreover, the predominant view of influential treatise writers (including Blackstone and Vattel), members of the Founding Generation, and this Court's early opinions was that the "law of nations" as a legal concept referred to *all* international law.

This Court has confirmed that the purpose of the Offenses Clause is to further the United States' "vital national interest in complying with international law," *Boos v. Barry*, 485 U.S. 312, 323 (1988), and has recognized that the Clause authorizes Congress not only to prohibit conduct that itself violates international law, but also conduct that the United States has an international obligation to prohibit, *United States v. Arjona*, 120 U.S. 479, 488 (1887). This purpose applies to "*all* violations by the United States of their international obligations." *Id.* at 483 (emphasis added). Moreover, several of this Court's cases have expressly recognized that Offenses Clause legislation can include enforcement of treaties. Indeed, there is no plausible reason why the Offenses Clause should bestow plenary authority to punish violations of customary international law, but not treaties. And while treaties have always been an important source of international law, their significance—and thus the need for the United States to ensure compliance—has only increased over time.

Congress has historically relied on the Offenses Clause to authorize legislation implementing treaties. The Act at issue here did not cite the Offenses Clause as authority, but express reliance is not required to uphold the constitutionality of a statute. Because the Act prohibits conduct that the Convention obligates the United States to punish, it falls squarely within Congress's Offenses Clause authority.

The legislation in this case is fully supported by the Commerce Clause and the Treaty and Necessary

& Proper Clauses. These powers were similarly intended to ensure that the United States could secure compliance with treaties at the national level. The Offenses Clause confirms this core purpose of the constitutional design. Petitioner argues that the "federal government may step into the State's traditional criminal realm only when it targets conduct that implicates matters of national or international, not just local, concern." Pet. Br. 22. But the history of the Offenses Clause shows that fulfilling the United States' international obligations is *always* a matter of national concern. Indeed, if the Offenses Clause did *not* authorize the Act, that would be all the more reason for the Court to conclude that the Treaty Power and Necessary & Proper Clause must authorize it, for the constitutional design makes clear that the National Government must be responsible for implementing our treaty commitments. Adopting petitioner's argument, by contrast, would return responsibility for ensuring U.S. compliance with some international obligations to the States—and thus undo one of the principal accomplishments of the Summer of 1787.

ARGUMENT

I. THE OFFENSES CLAUSE IS PART OF A COMPREHENSIVE CONSTITUTIONAL SCHEME TO ENSURE THAT THE UNITED STATES CAN COMPLY WITH ITS INTERNATIONAL OBLIGATIONS, INCLUDING TREATIES

Through various provisions, including the Offenses Clause, the United States "are vested by the Constitution with the entire control of international

relations, and with all the powers of government necessary to maintain that control, and to make it effective." *Fong Yue Ting v. United States*, 149 U.S. 698, 711-12 (1893); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). "Every part of that instrument shows that our whole foreign intercourse was intended to be committed to the hands of the general government." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840).

Thus, for example, the Constitution gives Congress the power, among other things, "[t]o regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States," *id.* art. I, § 8, cl. 18. It gives the President the "Power ... to make Treaties, provided two thirds of the Senators present concur," *id.* art. II, § 2, cl. 2, and the duty to "take Care that the Laws be faithfully executed," *id.* art. II, § 3. It grants the federal judiciary jurisdiction over all cases arising under treaties, as well as an array of specific controversies likely to raise foreign relations concerns. *Id.* art. III, § 2. It provides that "all Treaties ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." *Id.* art. VI, § 2. And it expressly forbids the States from exercising a range of foreign relations powers, including to "enter into any Treaty." *Id.* art. I, § 10, cl. 1.

Congress's authority to "define and punish … Offences against the Law of Nations" is an integral part of this constitutional scheme. U.S. Const. art. I,

§ 8, cl. 10. As explained in detail below, the purpose of the Offenses Clause is to ensure that the United States can comply with its international obligations by prohibiting individual conduct condemned by international law. While commentators have disagreed about whether the Clause applies to treaties,[4] the history and purpose of the Clause demonstrate that it authorizes Congress to implement *all* U.S. international law obligations.

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[4] Louis Henkin concluded that the Offenses Clause applies to treaties and "enable[s] Congress to enforce by criminal penalties any new international obligation the United States might accept." *Foreign Affairs and the United States Constitution* 69-70 (2d ed. 1996). *But see*, *e.g.*, Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 Nw. U. L. Rev. 1675, 1689 n.58 (2012) ("The Treaty and Offenses Clauses separately address the two primary sources of international law. This dichotomy suggests that the Offenses Clause becomes relevant only when the United States is not party to a treaty that would authorize the relevant legislation."); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish ... Offenses Against the Law of Nations*, 42 Wm. & Mary L. Rev. 447, 482 (2000) ("Given that treaties are otherwise covered by the Constitution, it is likely that the Offenses Clause primarily addresses violations of customary international law.").

A. The History And Original Understanding Of The Offenses Clause Demonstrates That It Was Intended To Authorize Congress To Enforce All U.S. International Obligations Against Individuals

The purpose of the Offenses Clause is fully evident in the detailed history described below. But a short description of the context in which it was adopted demonstrates that purpose and why it applies to *all* U.S. international obligations, both customary and treaty-based.

The Framers had lived through a decade under the Articles of Confederation. They realized that the United States could not live up to its international obligations under the Articles, which left enforcement of those obligations to unwilling States. Individual infractions of U.S. international law obligations, including treaties, and the inability of the United States to punish those infractions at the national level, were a source of acute concern. Indeed, so important was this concern that in addition to creating the general Treaty Power, the Framers established a complementary power to punish international law offenses—one of the only explicit powers to punish that appears in the Constitution. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416-17 (1819). The Offenses Clause thus was part of the solution to the precise problem that petitioner would now resurrect: requiring the Nation to rely on the individual States to comply with international law.

That is how Justice Story, in his seminal treatise, understood the Offenses Clause:

> As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens in regard to foreign nationals, congress ought to possess the power to define and punish all such offenses, which may interrupt our intercourse and harmony with, and our duties to them.

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1160 (1833); *see also Boos v. Barry*, 485 U.S. 312, 323 (1988) (Offenses Clause furthers the "vital national interest in complying with international law"); *United States v. Arjona*, 120 U.S. 479, 483 (1887) (Constitution gives Congress authority under the Offenses Clause because the National Government is "responsible to foreign nations for all violations by the United States of their international obligations"). As the Framers understood, that purpose applies equally to unwritten and treaty-based obligations.

1. a. The rights and duties of the newly independent United States under the law of nations were a major preoccupation under the Articles of Confederation. The first treaties the United States entered after independence were with France: a Treaty of Alliance (8 Stat. 6 (1778)) and a Treaty of Amity and Commerce (8 Stat. 12 (1778)). Over the next decade, the United States entered similar treaties with other nations. *See* 8 Stat. 32 (1782) (Netherlands); 8 Stat. 60 (1783) (Sweden); 8 Stat. 84 (1785) (Prussia); 8 Stat. 100 (1787) (Morocco). And in 1783, the United

States ratified the Definitive Treaty of Peace with Great Britain, in which Britain acknowledged U.S. independence. 8 Stat. 80 (1783). The Continental Congress was very concerned about the States' repeated violation of these treaty obligations, and in 1786, John Jay prepared a report for Congress detailing such violations. 31 *Journals of the Continental Congress 1774-1779*, at 781-874 (Gaillard Hunt ed., 1912).

But while violations of treaties by the States were important—and ultimately led to the establishment of a comprehensive national power to enforce treaties vis-à-vis the States, *e.g.*, U.S. Const. art. II, § 2, cl. 2; art. VI, § 2—so too was the States' unwillingness to punish individual infractions of international law, including treaties. A number of U.S. treaties proscribed individual conduct. For example, the 1778 Treaty of Amity with France included limitations on fishing (8 Stat. at 16), on the conduct of privateers (*id.* at 22),[5] and on taking of commissions or letters of marque to act as privateers against the other side (*id.* at 24),[6] as well as a provision requiring safe conduct for merchants of the other party in the event of war (*id.*).[7] Early U.S. treaties also pledged peace not just between the United States and the other state, but between their respec-

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[5] *See also* 8 Stat. at 40 (Netherlands); 8 Stat. at 68-70 (Sweden).

[6] *See also* 8 Stat. at 44 (Netherlands); 8 Stat. at 74 (Sweden); 8 Stat. at 94 (Prussia).

[7] *See also* 8 Stat. at 42 (Netherlands); 8 Stat. at 72-74 (Sweden); 8 Stat. 94-96 (Prussia).

tive inhabitants. *See*, *e.g.*, Definitive Treaty of Peace with Great Britain, *supra*, art. VII. During the 1790s, individuals would be prosecuted by the Washington Administration for violating these neutrality provisions. *See*, *e.g.*, *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793); *see infra* at 29-30.

b. Violations of international law by individuals soon became a serious concern, but the Continental Congress only had authority to deal with piracy. Articles of Confederation art. IX, § 1, cl. 6. The nation otherwise depended upon the States to punish individual infractions of treaties and unwritten international law. In 1781, a committee reported to Congress "[t]hat the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations." 21 *Journals of the Continental Congress*, *supra*, at 1136. Congress then adopted a resolution recommending "to the legislatures of the several states to provide expeditious, exemplary and adequate punishment" for violations of safe-conducts "expressly granted under the authority of Congress," the neutrality of states "in amity, league, or truce with the United States," "the immunities of ambassadors ... authorized ... by the United States," and "infractions of treaties and conventions to which the United States are a party." *Id.* at 1136-37[8]; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 716, 721-23 (2004) (discussing 1781 Resolution).

[8] The full text of the 1781 Resolution is reproduced in an appendix to this brief.

This 1781 Resolution and the committee report on which it was based are especially important here for two reasons. *First*, these documents demonstrate an important textual point: in this context—when the question was what conduct should be proscribed consistent with the United States' international obligations—the "law of nations" was understood to include treaties. The committee report believed that the States did not adequately punish "offences against the law of nations." Congress responded by recommending that the States punish not just specified violations,[9] but also "infractions of treaties and conventions to which the United States are a party." 21 *Journals of the Continental Congress*, *supra*, at 1136-37. The next two sentences of the Resolution confirm the point. The first describes "*[t]he preceding*" offenses—i.e., violations of safe-conducts, breaches of neutrality, infractions of the rights of ambassadors, *and violations of treaties*—as "being only those offences against the law of nations which are most obvious." *Id.* at 1137 (emphasis added). The second sentence recommends that the States appoint tribunals "to decide on offences against the law of nations, not contained in the foregoing enumeration." *Id.* "[I]nfractions of treaties," in other words, were understood to be "offences against the

[9] At least two of the Resolution's references to specific violations of the law of nations would also have incorporated existing treaties. The 1778 Treaty of Amity with France pledged peace between the parties and their inhabitants, 8 Stat. at 14 (art. 1), and promised safe-conducts for merchants in the event of war, 8 Stat. at 24 (art. 20).

law of nations" that were "contained in the foregoing enumeration."

Second, the 1781 Resolution is crucial to understanding the Offenses Clause because the Clause originated in, and was intended to address the failings identified by, the Resolution. The 1781 Resolution discussed the need "to provide ... punishment" for "offences against the law of nations," and is thus generally acknowledged as the forerunner of the Offenses Clause. *See*, *e.g.*, Kontorovich, *supra*, at 1694 (2012); Stephens, *supra*, at 469. Edmund Randolph, who would play a key role in drafting the Offenses Clause, authored the 1781 Resolution. *See* 21 *Journals of the Continental Congress*, *supra*, at 1137 n.1. That the Resolution identified the States' failure to prohibit violations of both unwritten international law and treaties as a problem, and expressly contemplated punishing violations of treaties as "offences against the law of nations," strongly suggests that the Offenses Clause of the Constitution should be understood to do the same.

All states but Connecticut and South Carolina ignored the Resolution. *See* J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 Tex. L. Rev. 843, 881 n.180 (2007). In 1785, after the Marbois incident in which a French diplomat was assaulted in Philadelphia, the Continental Congress reiterated the concern, directing the U.S. Secretary for Foreign Affairs John Jay to draft "an act to be recommended to the legislatures of the respective states, for punishing the infractions of the laws of nations, and more especially for securing the privi-

leges and immunities of public ministers from foreign powers," 29 *Journals of the Continental Congress*, *supra*, at 655.

2. The drafting history of the Offenses Clause confirms that the Framers understood the Clause to encompass treaties. The Nation's ability to punish offenses against the law of nations, including treaties, was very much on the delegates' minds at the Constitutional Convention. Edmund Randolph, drafter of the 1781 Resolution, opened the Convention by complaining that under the Articles, Congress "could not cause infractions of treaties or of the law of nations, to be punished." 2 *The Records of the Federal Convention of 1787*, at 19 (Max Farrand ed., 1911) ("*Farrand's Records*").[10]

It was also Randolph who proposed the provision that eventually became the Offenses Clause in an outline of the Constitution for the Committee of Detail. Under "legislative powers," he proposed:

> 6. To provide tribunals and punishments for mere offences against the law of nations.
>
> 7. To declare the law of piracy, felonies and captures on the high seas, and captures on land.

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[10] As here, some contemporaries at times referenced the "law of nations" as distinct from "treaties." While that occasional textual distinction is the principal argument against including treaties within the scope of the Offenses Clause, the overwhelming evidence is that the Founding Generation understood the law of nations to include treaties, and that the Offenses Clause embodies that understanding. *See infra* at 18-23.

Id. at 142-43. Punishment for offenses against the law of nations, including "treaties," of course, was precisely what the 1781 Resolution had unsuccessfully requested from the States. The Committee of Detail's August 6, 1787, draft gave Congress authority "[t]o declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations." *Id.* at 182. After several amendments on August 17, the delegates agreed to grant Congress the authority "to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and coin of the U. States, and offences agst. the law of Nations." *Id.* at 316. The Committee of Style moved counterfeiting to a different clause, thus proposing the Offenses Clause as follows: "To define and punish piracies and felonies committed on the high seas, and punish offences against the law of nations." *Id.* at 595.

The Offenses Clause was debated again on September 14, when Gouverneur "Morris moved to strike out 'punish' before the words 'offences agst. the law of nations' so as to let these be *definable* as well as punishable." *Id.* at 614. James Wilson objected, arguing that "[t]o pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance. [T]hat would make us ridiculous." *Id.* at 615. Wilson's objection failed, and the Offenses Clause took its present form.

Nothing in this exchange suggests that the delegates understood "the Law of Nations" in the Offens-

es Clause to exclude treaties. To be sure, Wilson appeared to refer in the above brief passage to the unwritten law of nations, but elsewhere Wilson repeatedly made it clear that he understood the "law of nations" to include treaties. *See infra* 21-22. That Wilson thought it could look arrogant to define one form of international law does not mean he believed the Offenses Clause was limited to that part. Nor does Morris's response that the law of nations was often vague suggest that the Clause is limited to the unwritten law of nations, as opposed to treaties. Ensuring that conduct subject to punishment should be stated clearly was a general concern of this provision's drafters. *See* 2 *Farrand's Records*, *supra*, at 315 (James Wilson) ("Strictness was not necessary in giving authority to enact penal laws; though necessary in enacting & expounding them."). But there was no necessary correspondence between treaties and clarity, or unwritten law and vagueness. On the one hand, the prohibition against piracy was part of the unwritten law of nations but was acknowledged not to require further definition by the legislature. *See The Federalist* No. 42, at 281 (Jacob E. Cooke ed., 1961) (Madison) ("The definition of piracies might, perhaps, without inconveniency, be left to the law of nations...."); *see also United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (Story, J.). On the other hand, some treaty provisions could require further definition. Thus, after Gideon Henfield's acquittal of violating neutrality provisions in several U.S. treaties in the most prominent neutrality prosecution, Congress passed the 1794 Neutrality Act specifying the kinds of acts that would be punishable. *See* 1 Stat. 381 (1794); *infra* at 29-30.

3. The Offenses Clause received little attention during the ratification debates, but the few discussions of the Clause support its application to treaties. Madison explained the need for the Clause in terms that applied equally to unwritten law and treaties, noting that the Articles of Confederation "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." *The Federalist* No. 42, *supra*, at 280-81 (Madison); *see also The Federalist* No. 3, at 15-16 (Jay) (giving violations of the treaty of peace with Britain as the example of the kind of "wrong" the National Government would have the power to "punish").

Moreover, a Massachusetts essayist understood, with specific reference to the Offenses Clause, that "[a] violation of such articles [of treaties] is properly defined as an offence against the law of nations." Anti-Cincinnatus, Hampshire (Mass.) Gazette, Dec. 19, 1787, *reprinted in* 5 *The Documentary History of the Ratification of the Constitution* 487, 489-90 (John P. Kaminski & Gaspare J. Saladino eds., 1998). Thus, "[o]ne of the few explicit discussions of the meaning of the Law of Nations Clause during ratification was an essay which argued that the Clause allowed Congress to punish violations of treaties." Kent, *supra*, at 929.

4. The principal argument for limiting the Offenses Clause to customary international law is that the "law of nations" was sometimes used in distinction to treaties. Randolph's opening statement at the Convention, quoted above, is one example. The

First Congress also referred to the law of nations and treaties separately in the Alien Tort Statute (ATS). *See infra* at 28-29. But such examples do not remotely overcome the history and purpose of the Offenses Clause, which demonstrates unequivocally that the Clause authorizes Congress to punish individual conduct to meet U.S. unwritten *and* treaty-based international obligations.

a. For one thing, the examples are more equivocal than they appear. For example, while Randolph's Convention speech referenced the "law of nations" as distinct from treaties, he also drafted the 1781 Resolution of the Continental Congress recommending that the States provide "punishment" for "offences against the law of nations." As discussed earlier, this Resolution was the forerunner of the Offenses Clause, and it expressly identified "infractions of treaties and conventions to which the United States are a party" as "offences against the law of nations." 21 *Journals of the Continental Congress*, *supra*, at 1136-37. As for the ATS, that statute was *itself* an exercise of Congress's Offenses Clause authority. *See infra* at 28-29. The ATS thus *confirms* the broad scope of the Offenses Clause by referring not only to the unwritten law of nations but also, expressly, to "a treaty of the United States."

b. Moreover, the overwhelming understanding of the "law of nations" in the Founding Era included *all* of international law, unwritten and treaty-based.

Both Blackstone (the most influential treatise writer of the period, *see Washington v. Glucksberg*, 521 U.S. 702, 712 (1997)) and Vattel (the most influ-

ential writer on international law, *see U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462 n.12 (1978)) clearly understood the "law of nations" to encompass all of international law, including treaties. According to Vattel, the law of nations had several categories. The unwritten law of nations included norms derived from the law of nature and norms based on state practice. E. de Vattel, The Law of Nations, Intro. §§ 7-9, 21, 25-26, 28 (1758) (Charles G. Fenwick trans., 1916). But Vattel also recognized that the term included what he called the "conventional law of nations," based on consent in the form of treaties: "The various agreements which Nations may enter into give rise to a new division of the Law of Nations which is called conventional, or the law of treaties." *Id.* Intro § 24; *see also id.*, Preface, at 11a; Book I, § 93; Book III, § 192; *accord* Jean-Jacques Burlamaqui, *The Principles of Natural and Politic Law*, Part IV, Ch. 9, § I (1747) (Thomas Nugent trans. 1763) ("The subject of public treaties constitutes a considerable part of the law of nations.").

Blackstone similarly understood the law of nations to include treaties. He explained that the "law of nations" "must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties between the respective communities." 4 William Blackstone, *Commentaries* * 66-67 (1769).

c. Influential individuals of the Founding Era, including the drafters of the Offenses Clause, shared this understanding, and repeatedly referenced the

law of nations as including treaties before and after the drafting of the Offenses Clause. In a 1791 memorandum commenting on Attorney General Randolph's report on the judiciary, Justice Iredell, relying on Vattel, explained that the "Conventional Law of Nations … is that part of the Law of Nations arising from Treaties; which when made according to the constitutional power of the respective Countries is undoubtedly binding on both." James Iredell's Memorandum on Attorney General Edmund Randolph's Report on the Judiciary (1791), *in* 4 *The Documentary History of the Supreme Court of the United States*, 1789-1800, at 542 (Maeva Marcus ed. 1992). Alexander Hamilton held the same view. In his 1784 representation of the British defendants in *Rutgers v. Waddington*, Hamilton relied on Vattel to argue that "[t]he positive or external law of nations [is] subdivided into the *voluntary*[,] the *conventional* and the *customary*." Alexander Hamilton, Brief No. 2 in *Rutgers v. Waddington* (N.Y. Mayor's Court 1784), *in* 1 *The Law Practice of Alexander Hamilton: Documents and Commentary* 341 (Julius Goebel, Jr. ed., 1964). And Thomas Jefferson explained that the "Law of nations … is composed of three branches. 1. The Moral law of our nature. 2. The Usages of nations. 3. Their special Conventions." Sec'y of State Thomas Jefferson, Opinion on French Treaties (Apr. 28, 1793), *in* 6 *The Writings of Thomas Jefferson* 219, 220 (Paul Leicester Ford ed., G.P. Putnam's Sons 1895).

James Wilson—who not only was a delegate to the Constitutional Convention but also was particularly involved in debates concerning the Offenses Clause, *see supra* at 16-17—explained in lectures

shortly after ratification that "[n]ational treaties are laws of nations, obligatory solely by consent." James Wilson, Lectures on Law Delivered in the College of Philadelphia in the Years 1790 and 1791, *in* 1 *The Works of James Wilson* 150 (Robert Green McCloskey ed., 1967); *see also id.* at 165 (consent-based norms are "one part of the law of nations"). While serving as a Justice of this Court, Wilson also instructed a grand jury that "there are laws of nations which are founded altogether on human consent; of this kind are national treaties." *Henfield's Case*, 11 F. Cas. at 1107.

d. Beginning soon after the Constitution's ratification, and continuing well into the nineteenth century, this Court consistently and repeatedly evinced the same understanding that the law of nations includes treaties.

Justice Chase's opinion in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), presented the first explanation from this Court of the scope of the "law of nations," including "conventional" law based on "express consent":

> The law of nations may be considered of three kinds, to wit, general, *conventional*, or customary. The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on *express consent*, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent; and is only obligatory on those nations, who have adopted it.

Id. at 227 (first and second emphases added).

Chief Justice Marshall and Justice Story exhibited the same understanding. *See*, *e.g.*, *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.) ("The law of nations is ... in part unwritten, and in part conventional."); *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C. Mass. 1822) (Story, J.) (noting that "the law of nations may be deduced" partly "from the conventional or positive law, that regulates the intercourse between states"). Other opinions of this Court were to the same effect. *See*, *e.g.*, *The Venus*, 12 U.S. (8 Cranch) 253, 283 (1814) (describing the "conventional law of nations"); *The Estrella*, 17 U.S. (4 Wheat.) 298, 307 (1819) (noting a jurisdictional rule "well established by the customary and conventional law of nations").

The predominant Eighteenth Century understanding, therefore, was that the term "law of nations" referred to the entire corpus of international law, including treaties. If knowledgeable members of the Founding Generation were asked whether treaty obligations were part of the "law of nations," they would certainly have agreed with Vattel and Blackstone and answered "yes." At the very least, no one would doubt that including treaties within the "law of nations" is a plausible understanding of that term. And it is the only understanding that comports with the specific history and purpose of the Offenses Clause. That understanding is also reflected in this Court's precedents.

B. This Court Has Confirmed That The Purpose Of The Offenses Clause Is To Secure Compliance With All The United States' International Obligations

1. This Court has explained that the purpose of the Offenses Clause is to secure compliance with the United States' international obligations.

In *Boos v. Barry*, for example, the Court confirmed that "the United States has a vital national interest in complying with international law" and that "[t]he Constitution itself attempts to further this interest by expressly authorizing Congress '[t]o define and punish … Offenses against the Law of Nations.'" 485 U.S. at 323. The Court did not distinguish between customary international law and treaties. Indeed, the Court noted that the law at issue was most strongly supported by Article 22 of the Vienna Convention on Diplomatic Relations, "which all parties agree represents the current state of international law." *Id.* at 322.

Similarly, this Court in *United States v. Arjona* upheld a statute criminalizing the counterfeiting of foreign securities as a proper exercise of Congress's power under the Offenses Clause. The Court observed that "Congress is expressly authorized to 'define and punish ... offences against the law of nations" because the National Government is "responsible to foreign nations for *all* violations by the United States of their international obligations." 120 U.S. at 483 (emphasis added). And the Court concluded that "if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent,

it is an offence against the law of nations." *Id.* at 488. In other words, *Arjona* held that the Clause "permit[s] Congress to punish actual violations of the law of nations but also to punish offenses that would trigger the international responsibility of the United States if left unpunished." Jack L. Goldsmith, The Heritage Guide to The Constitution, Define and Punish Clause.[11] And while *Arjona* did not involve a treaty obligation, the Court's rationale for the Clause applies equally to treaties. *See* Henkin, *supra*, at 70 (under *Arjona*, Congress may "enforce by criminal penalties any new international obligations the United States might accept").

This Court's military commission cases have expressly applied the Offenses Clause to treaties. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court upheld Congress's authority to establish military commissions in Article 15 of the 1920 Articles of War. The Court explained that Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." *Id.* at 28. The Court made clear that treaties were included in the law of nations that Congress had defined and punished, relying expressly on the Fourth Hague Convention of 1907 as stating the crucial distinction between lawful and unlawful "bellig-

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[11] *Available at* http://www.heritage.org/constitution#!/articles/1/essays/48/define-and-punish-clause.

erents." *See id.* at 34-35; *see also In re Yamashita*, 327 U.S. 1, 7-8, 14-16 (1946) (reiterating that Article 15 was an exercise of the Offenses Clause authority, and relying heavily on the Fourth and Tenth Hague Conventions, and the Geneva Red Cross Convention of 1929 for the punishable violations); *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (invalidating 2001 military commissions as inconsistent with the "with the 'rules and precepts of the law of nations'—including … the four Geneva Conventions signed in 1949" (citation omitted) (quoting *Quirin*, 317 U.S. at 28)); *id.* at 601-02 (plurality opinion) (observing that the elements of an offense triable by military commission may be "defined by statute or treaty" or by "plain and unambiguous" customary international law).

Thus, in construing the Offenses Clause, and consistent with its purpose, this Court has not distinguished between unwritten international law and treaties. The Court's jurisprudence instead recognizes that the Clause applies to all forms of international law.

2. There is no plausible reason why Congress should have plenary authority to punish violations of obligations derived from customary international law under the Offenses Clause, but not treaties. Treaties have been intertwined with customary international law from the Founding. Early treaties defined the United States' obligations with respect to neutrality and granted safe conducts that the United States also had an obligation to enforce under customary international law. *See supra* at 10-12. In 1788, the year after the Constitutional Convention,

the United States entered a Consular Convention with France, 8 Stat. 106 (1788), supplementing U.S. obligations toward diplomats under the unwritten law of nations. The same is true today. The Hague and Geneva Conventions at issue in the military commission cases represent both the codification of customary international law and the progressive development of the international law of war. Similarly, the Vienna Convention on Diplomatic Relations establishes the modern international law rules concerning diplomatic agents. *See Boos*, 485 U.S. at 322.

Whether reflecting custom or not, treaties are, and have always been, a crucial part of the United States' relations with foreign nations, as the Offenses Clause's history amply demonstrates. But the importance of treaties—and thus the crucial importance of enforcing them—has only increased over time. "In our day, treaties have become the principle vehicle for making law for the international system." Restatement (Third) of Foreign Relations Law, Introductory Note. Punishing individual infractions of U.S. treaty obligations thus is increasingly vital to the core purpose of the Offenses Clause.

In sum, the Offenses Clause is part of a comprehensive scheme to ensure that the National Government has sufficient authority to comply with its international obligations. The purpose of the Offense Clause identified by this Court, and supported by the history and original understanding of the Clause, applies to *all* international law obligations. There is no basis to depart from that understanding, particularly as the importance of treaties—and thus

the importance of Congress's authority to implement them—has grown since the Founding.

II. CONGRESS HAS REPEATEDLY RELIED ON THE OFFENSES CLAUSE TO IMPLEMENT TREATIES

"The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). Not only does the original understanding of the Offenses Clause extend to treaties, but Congress has repeatedly relied on the Clause to implement treaties through criminal or civil liability.[12] Legislation from the 1789 Alien Tort Statute to the 2006 Military Commissions Act shows that Congress has consistently understood the Offenses Clause as authority for legislation implementing the United States' treaty obligations.

1. As mentioned earlier, Congress first exercised its authority under the Offenses Clause in 1789 by enacting the ATS to provide district court jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations *or a treaty of the United States*." Judiciary Act, ch. 20, § 9, 1 Stat.

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[12] The Offenses Clause permits Congress to punish by imposing civil or criminal liability. *See* Stephens, *supra*, at 483-525. For example, this Court has noted that Congress relied on the Offenses Clause in passing the Foreign Sovereign Immunities Act, a statute concerning civil liability. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989).

73, 76-77 (1789), *codified as amended at* 28 U.S.C. § 1350 (emphasis added). Although the ATS did not expressly invoke any constitutional grant of authority, it is commonly understood to fall within the Offenses Clause. *See, e.g.*, Kontorovich, *supra*, at 1678; Henkin, *supra*, at 358-59 n.20. It would have been logical for Congress to rely on the Offenses Clause in passing the ATS because both the statute and the constitutional provision had their origins in the same 1781 Resolution, discussed above, which recommended that the States provide "punishment" for "offences against the law of nations," including treaty violations. *See Sosa*, 542 U.S. at 716, 721-23 (discussing relationship of 1781 Resolution to the ATS). And like the 1781 Resolution, the ATS extended not just to violations of the unwritten law of nations but also to violations of "a treaty of the United States."

Congress exercised its authority under the Offenses Clause again the following year, when it passed the Crimes Act of 1790, which punished piracy, violations of safe-conducts, and violence against ambassadors. *See* 1 Stat. 112. These provisions criminalized violations of the unwritten law of nations as well as obligations established by treaty, particularly those providing for safe-conducts. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 874-79 (2006). The Crimes Act did not itself fully implement the recommendations in the 1781 resolution—it did not address neutrality and lacked a general prohibition against violating treaties. But Congress's failure to enact such provisions does not mean that Congress lacked authority to do so. The assumption in 1790 was that at least some treaty

violations could be prosecuted at common law, as they were in the neutrality prosecution in *Henfield's Case*, 11 F. Cas. at 1109-15 (charging violations of the treaties with Britain, the Netherlands, and Prussia, as well as violations of the unwritten law of nations).

Notably, following Henfield's acquittal, Congress passed the 1794 Neutrality Act, 1 Stat. 381, which implemented what Congress understood to be a general obligation of the unwritten law of nations *and* the provisions of U.S. treaties pledging peace between the countries' inhabitants. Although Congress did not specify the source of its authority, this Court has identified the Neutrality Act as Offenses Clause legislation. *See Arjona*, 120 U.S. at 488.

2. Congress's first extended discussion of its authority under the Offenses Clause involved the 1884 Counterfeiting Act at issue in *Arjona*. That Act did not implement a treaty. But the accompanying House Report described Congress's authority as extending to all of "international law":

> "The law of nations," as used in this clause, is obviously what is now known among publicists as international law; in other words, what the Constitution termed the law of nations, or *jus gentium*, is now termed the *jus inter gentes*, or international law.
>
> Whatever, therefore, may be regarded as an offense against the law which regulates the just relations between na-

> tions may be defined and punished [under the Clause].

H.R. Rep. No. 48-1329, at 1 (1884).

Four years later, Congress enacted the Submarine Cable Act of 1888 (25 Stat. 41), which expressly invoked the Offenses Clause as authority to implement the Convention for the Protection of Submarine Telegraph Cables, Mar. 14, 1884, U.S.T.S. 380. That treaty states that injuring submarine cables is a punishable offense, *id.* art. II, and requires states-parties to proscribe certain offenses, *id.* art. XII. The bill that became the 1888 Act was twice reported out of the House Committee on Foreign Affairs, and each Committee specifically pointed to the Offenses Clause and the Commerce Clause as providing sufficient basis for the bill. H.R. Rep. No. 49-3198, at 3 (1886); H.R. Rep. No. 50-524, at 3 (1888).

To take a more recent example, Congress in 1984 enacted the Aircraft Sabotage Act, Pub. L. No. 98-473, 98 Stat. 2187, Chapter XX, Subpart B, "to implement fully the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation." *Id.* § 2012(3). That Convention required each party "to make the offences [defined therein] punishable by severe penalties." 24 U.S.T. 565, art. 3. Congress explained that offenses under the Convention "are offenses against the law of nations." 98 Stat. 2187 § 2012(2); *see also* S. Rep. No. 98-619, at 2 (1984) (Act "is an exercise of the treaty power, of the power to regulate interstate and foreign commerce, and of the power to punish offenses against the law of nations").

Congress's citation of the Offenses Clause as authority to implement treaties has become more frequent in recent years. In 1992, for example, Congress enacted the Torture Victim Protection Act, 28 U.S.C. § 1350 note, in part to implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984), specifically invoking the Offenses Clause as one basis for its authority, S. Rep. No. 102-249, at 3, 5-6 (1991). Congress invoked the Offenses Clause (H.R. Rep. No. 104-698, at 7 (1996)) in enacting the War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104, which implemented the Geneva Conventions' requirement that parties "provide effective penal sanctions for … grave breaches of the present Convention." *See*, *e.g.,* Geneva Convention (III) relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, art. 130. In 1998, Congress invoked the Offenses Clause (S. Rep. 105-277, at 2-3 (1998)) in amending the Foreign Corrupt Practices Act to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, Article 1 of which requires each party to "establish that it is a criminal offence under its law for any person [to bribe a foreign public official]." And in the Military Commissions Act of 2006, Congress relied on the Offenses Clause in authorizing trial by military commission of "unlawful enemy combatants" for violations of the laws of war found in "international treaties and U.S. criminal law." H.R. Rep. No. 109-664, at 24 (2006); *see also id.* at 25 (noting that "[m]ost of the listed offenses constitute clear violations of the Geneva Conventions, the

Hague Convention, or both"). Thus, Congress consistently has recognized that the Offenses Clause allows Congress to punish conduct condemned in treaties.

III. THE OFFENSES CLAUSE AUTHORIZED CONGRESS TO ENACT THE CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT

When Congress enacted the Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856, it did not specify the source of its constitutional authority. But "it has never been supposed [that statutes resting on the Offenses Clause were] invalid because they did not expressly declare that the offences there defined were offences against the law of nations." *Arjona*, 120 U.S. at 488. "The question of the constitutionality of an action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

Petitioner does not contest the validity of the Convention. Pet. Br. i, 16. Article VII(1)(a) of the Convention obligates the United States to "[p]rohibit natural and legal persons … from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity." As the United States explains, "[t]he criminal provisions of the Act mirror in all material respects the prohibitions of the Convention." U.S. Br. 3. Because the Act punishes conduct pursuant to an international obligation of the United States, it is a valid exercise of Congress's authority

to "define and punish … Offences against the Law of Nations."

The only possible objection to this straightforward conclusion is that the Convention *itself* does not prohibit individuals from developing, acquiring, or using chemical weapons, but instead obligates the states-parties to do so. That objection, however, misunderstands both the nature of most treaties and the scope of the Offenses Clause. Domestic processes for treaty implementation differ, and for this reason, treaties like the Convention obligate a state-party to "adopt the necessary measures to implement its obligations under this Convention" "*in accordance with its constitutional processes*." Convention art. VII(1) (emphasis added). As explained, this is common in both old and modern treaties that Congress has implemented under the Offenses Clause. *See supra* Part II; *see also* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra*, art. 3 ("Each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties."); Convention for the Protection of Submarine Cables, *supra*, art. XII (obligating states "to take or to propose to their respective legislatures the necessary measures for insuring the execution of the present Convention").

Such provisions clearly impose obligations on the United States. And as explained earlier, the Offenses Clause has historically been understood to authorize Congress to punish not only what international law directly proscribes, but also conduct that international law condemns: "if the thing made punishable is one which the United States are required

by their international obligations to use due diligence to prevent, it is an offence against the law of nations." *Arjona*, 120 U.S. at 488. That is precisely what Congress did when it implemented the Convention.

IV. THE OFFENSES CLAUSE CONFIRMS THAT IMPLEMENTATION OF VALID TREATIES IS A UNIQUELY NATIONAL AUTHORITY

This Court need not rely on the Offenses Clause to resolve this case. Congress's authorities under the Commerce Clause, the Article II Treaty Power, and the Necessary & Proper Clause are more than sufficient to sustain the Act's constitutionality. *See* U.S. Br. 17-55. But the purpose and history of the Offenses Clause demonstrate a more fundamental flaw in petitioner's argument. Petitioner argues that the "federal government may step into the States' traditional criminal realm only when it targets conduct that implicates matters of national or international, not just local, concern." Pet. Br. 22. As the Offenses Clause shows, fulfilling the United States' international obligations is *always* a matter of national concern, and *never* purely a local matter. Congress's authority under the Offenses Clause, of course, "does not prevent a state from providing for the punishment of the same thing." *Arjona*, 120 U.S. at 487.

The Treaty Power has long been understood to reach matters ordinarily with the jurisdiction of the States. U.S. Br. 29-46. Once the President has ratified a treaty with the concurrence of two-thirds of the Senate (a body designed to represent the States),

"the United States has a vital national interest in complying with international law." *Boos*, 485 U.S. at 323. The Offenses Clause is part of a constitutional scheme that was established precisely to avoid depending on the States for enforcement of U.S. international obligations. *See supra* at 6-18.

Remarkably, what the Framers saw as a problem, petitioner sees as a solution. She contends that at least in some circumstances, the United States must rely on "state and local governments [to] ensure that the United States is in compliance with its international treaty obligations." Pet. Br. 31. That position turns the constitutional design on its head, and invites the precise state of affairs that the Framers sought to escape.

* * *

The Offenses Clause was intended to secure the United States' place in the community of nations by allowing Congress to punish those acts that the world condemned, including through treaties. That purpose is even more vital today, as international law is increasingly codified. But the Offenses Clause is not the only provision of the Constitution that ensures the National Government's ability to comply with its international obligations, and other constitutional authorities amply support Congress's authority here. *See supra* at 6-8. If this Court were to conclude that the Offenses Clause is limited to customary international law, that result would only reaffirm that Congress must have full power to carry out the United States' treaty obligations under the Necessary & Proper Clause. Otherwise the Nation's international law commitments would again be left

to the States, and a core purpose of the constitutional design would be frustrated.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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August 2013

APPENDIX

APPENDIX

The 1781 Resolution of the Continental Congress recommending that States enact laws to punish offenses against the law of nations, reproduced in 21 *Journals of the Continental Congress* 1774-1779, at 1136-37 (Gaillard Hunt ed., 1912), read as follows:

On a report of a committee, consisting of Mr. [Edmund] Randolph, Mr. [James] Duane, Mr. [John] Witherspoon, appointed to prepare a recommendation to the states to enact laws for punishing infractions of the laws of nations:

The committee, to whom was referred the motion for a recommendation to the several legislatures to enact punishments against violators of the law of nations, report:

That the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations:

That a prince, to whom it may be hereafter necessary to disavow any transgression of that law by a citizen of the United States, will receive such disavowal with reluctance and suspicion, if regular and adequate punishment shall not have been provided against the transgressor:

That as instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries committed by individuals, and the property of the innocent be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.

Resolved, That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment:

First. For the violation of safe conducts or passports, expressly granted under the authority of Congress to the subjects of a foreign power in time of war:

Secondly. For the commission of acts of hostility against such as are in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct:

Thirdly. For the infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States in Congress assembled, by animadverting on violence offered to their persons, houses, [carriages and property, under the limitations allowed by the usages of nations; and on disturbance given to the free exercise of their religion: by annulling all writs and processes, at any time sued forth against an ambassador, or other public minister, or against their goods and chattels, or against their domestic servants, whereby his person may be arrested: and,

Fourthly. For infractions of treaties and conventions to which the United States are a party.

The preceding being only those offences against the law of nations which are most obvious, and public faith and safety requiring that punishment should be co-extensive with such crimes:

Resolved, That it be farther recommended to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on of-

fences against the law of nations, not contained in the foregoing enumeration, under convenient restrictions.

Resolved, That it be farther recommended to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.][1]

[1] This report, in the writing of Edmund Randolph, is in the *Papers of the Continental Congress*, No. 28, folio 197.

The part in brackets was entered in the Journal by George Bond.