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REPLACING THE "SWORD OF WAR" WITH THE "SCALES OF JUSTICE": HENFIELD'S CASE AND THE ORIGINS OF LAWFARE IN THE UNITED STATES

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United States District Attorney William Rawle rose from his seat in the hot, stuffy Philadelphia City Hall, on July 26, 1793, to give the most important speech of his legal career. As the United States Government's lawyer in Pennsylvania, Rawle was responsible for prosecuting *United States v. Gideon Henfield*, a case of critical significance to the young nation.[1] The world's eyes seemed to focus on him as he began his closing argument. Sitting nearby was United States Attorney General Edmund Randolph.[2] Randolph had drafted the Neutrality Proclamation which Henfield had allegedly violated. Also present was Jared Ingersoll, Rawle's colleague and a signer of the federal constitution, who was there to represent Henfield.[3] Meanwhile, the country's highest officials were awaiting the verdict. Thomas Jefferson and Alexander Hamilton, Secretaries of State and Treasury respectively, were engaged in an ideological struggle over neutrality; the outcome of Henfield's case was critical for their personal

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[1] *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360). WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL (2006). Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 29 HARV. J.L. & PUB. POL'Y 65, 69 (2006). Andrew Lenner, *A Tale of Two Constitutions: Nationalism in the Federalist Era*, 40 AM. J. LEGAL HIST. 72, 80-85 (1996). Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 229-30 (1986). Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 292-99 (1986).

[2] *See generally*, JOHN J. REARDON, *EDMUND RANDOLPH: A BIOGRAPHY* (1974).

[3] *See generally*, Horace Binney, *"The Leaders of the Old Bar of Philadelphia: Jared Ingersoll,"* 14 *THE PA. MAG. OF HIST. & BIOGRAPHY* 223, 223-230 (1890).

political objectives.[4] President George Washington, seeking to keep the fledgling federal government and the nation he served out of war, hoped the case would demonstrate United States neutrality.[5] The American people watched, most supporting the French and their revolution, though others supported the British, at war with France. The French, who needed funds to execute their United States strategy and who owned the vessel on which Henfield had served, sought justice for their sailor.[6] The British, who had cause for declaring war on the United States for Henfield's actions, sought retribution. Above all else, Rawle's argument that Henfield committed a federal crime had no clear precedent.

Rawle began his closing argument by addressing the trial's main contention. Did American citizen Gideon Henfield commit a crime by serving as prize master – the officer in charge of a seized ship – on board a French privateer when it captured a British vessel at a time when the United States was at peace with the British government? According to the government, Henfield's conduct violated the law of nations, a body of common law governing international relations.[7] Rawle argued:

> by the laws of nations if one of the belligerent powers should capture a neutral subject fighting under a commission from the other belligerent powers he could not punish him as a pirate, but must treat him as an enemy, and it would be a good cause of declaring war against the nation to which he belonged; and if treated as an enemy without just cause it is the duty of the nation to which he belongs to interfere in his behalf; and thus arises another cause of war. Hence the act of the individual is an injury to the nation, and the right of punishment follows the existence of the injury. [8]

[4] *See generally*, JOHN FERLING, *JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION* (2013).
[5] *See generally*, DON HIGGINBOTHAM, *GEORGE WASHINGTON: UNITING A NATION* (2002).
[6] HARRY AMMON, THE GENET MISSION (New York: WW Norton & Company 1973).
[7] On the Law of Nations and its role in the United States, *see generally* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).
[8] *Henfield's Case*, 11 F. Cas. 1099, 1117 (C.C.D. Pa. 1793) (No. 6360).

His point was simple. Henfield had committed an act of war against Great Britain by serving on a French privateer that captured a British vessel. This act forced the United States government to respond. Failing to do so would give Great Britain cause to declare war on the United States.

The United States was in a difficult position: it had to rectify its apparent act of war against the British and do so in a manner that likewise avoided a kinetic war with France. Knowing that it could not actively fight with either Great Britain or France, the United States used law to achieve its military objective. In doing so, the new government responded with the first instance of lawfare engaged in by the fledgling government. The government's conduct in Henfield's case set a lasting precedent. Criminal prosecution became the default selection for addressing national security threats. Following Henfield's case, at its next meeting, Congress passed neutrality laws, paving the way for future prosecutions.[9] Into the nineteenth century, the United States used law to suppress the slave trade.[10] While the navy participated, prosecutions and forfeitures played a central role.[11] During the civil war, border states used treason prosecutions to take opposing forces off the battlefield.[12] Following the Civil War, civil rights prosecutions helped enforce voting laws.[13] Throughout the Cold War, criminal prosecutions addressed the threat of Soviet espionage.[14] In the years prior to September 11, 2001, terrorism was viewed as a crime rather than a national security matter.[15] So much did the nation rely on prosecution that it failed to consider other means for addressing the threat. Even today, we bring

[9] 1 Stat. 381, Sect. 5 (1794).
[10] *See generally* JONATHAN M. BRYANT, DARK PLACES OF THE EARTH: THE VOYAGE OF THE SLAVE SHIP *ANTELOPE* (2015).
[11] *Id.*
[12] *See generally* JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN (2011).
[13] *See generally* Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L. J. 155 (1995)..
[14] *See generally* JOHN EARL HAYNES & HARVEY KLEHR, EARLY COLD WAR SPIES: THE ESPIONAGE TRIALS THAT SHAPED AMERICAN POLITICS (2006).
[15] *See generally* AMY ZEGART, SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11 (2009).

terrorist suspects back to the United States for prosecution.[16] We also limit our adversary's ability to obtain offensive capabilities when we prosecute export control laws.[17] When some say that we lack a comprehensive lawfare strategy, they overlook the continuing efforts of the Justice Department, United States Attorney offices, and dozens of federal law enforcement agencies who use law to address national security threats without using military force.

This article examines how the Washington Administration utilized law as a weapon to defend itself from the British and French and set the precedent for using prosecutions—a form of lawfare--to achieve national security objectives. Section One first defines lawfare, explaining the term's origins and touching upon the term's contested nature. Section Two then explains why the United States had to remain neutral in the European war, the ideological hurdles to neutrality, and the legal ramifications of its neutrality. Once the United States declared neutrality, the policy was soon tested as Gideon Henfield sailed a British commercial vessel into Philadelphia as a French prize. This third section demonstrates how the administration framed the issue in legal terms. The final section, Section Four, examines the Administration's use of lawfare, evaluates its options, and shows why Henfield's case set the precedent for future national security cases.

I. DEFINING LAWFARE

The concept of lawfare is not new, though the term itself is fairly recent.[18] Major General Charles Dunlap, a former Air Force Judge Advocate, receives credit for coining the term in a

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[16] *See, e,g,*, Ritika Singh, *Breaking: U.S. Captures Osama bin Laden's Son-in-Law in Jordan* LawfareBlog (March 7, 2013) https://www.lawfareblog.com/breaking-us-captures-osama-bin-laden%E2%80%99s-son-law-jordan) (quoting the Wall Street Journal Devlin Barrett, Siobhan Gorman & Tamer El-Ghobashy, *Bin Laden Kin Nabbed*, THE WALL STREET JOURNAL (Mar. 7, 2013), https://www.wsj.com/articles/SB10001424127887324034804578346243937198214.).

[17] *See* 50 U.S.C. §§ 1701-1708 (2012).

[18] *E.g.*, Orde F. Kittrie, LAWFARE: LAW AS A WEAPON OF WAR 4 (2016); Leila Nadya Sadat & Jing Geng, *On Legal Subterfuge and the So-Called 'Lawfare' Debate,* 43 CASE W. RES, J. OF INT'L. L. 153, 157 (2010)

2001 article on law and military intervention.[19] Addressing a military audience about the importance of the rule of law, Dunlap asked whether international law helped or harmed military effectiveness.[20] Defining lawfare as the use of law to achieve a military objective, he described how some use law to manipulate the actions of those who adhere to the humanitarian goals of international law.[21] One method entails asserting that an opposing force's conduct violates the law of armed conflict.[22] Weaker forces often employ lawfare tactics against stronger opponents, diminishing the opponent's will to fight.[23] Dunlap noted that this was just one dimension to lawfare.[24]

Following the publication of Dunlap's article, various scholars and organizations revised and expanded upon his definition of lawfare. Where Dunlap limited his definition to refer to active military operations such as airstrikes, scholars saw law at work in other aspects of war.[25] For instance, these scholars saw debates over the application of international law to specific situations as a form of lawfare.[26] A recent example would be the debate about how to respond to Russia hacking the Democratic National Committee's email accounts.[27] Questions about the proper United States response are framed against an international legal background.[28] The Law

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[19] On Dunlap's influence *see, e.g.* SADAT & GENG, *supra* note 18, at 157.
[20] Charles J. Dunlap, Jr., *Lawfare Today…and Tomorrow*, *in* 87 INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 315 (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger eds., 2011).
[21] *See* CHARLES J. DUNLAP, *LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CENTURY CONFLICTS*, at 4 (2001).
[22] *Id*
[23] *Id*.
[24] *Id*.
[25] *See generally* Michael P. Scharf & Elizabeth Andersen, *Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting September 11, 2010*, 43 CASE W. RES. J. INT'L L. 11 (2010).
[26] 282 *See* Joel P. Trachtman, *Integrating Lawfare and Warfare*, 39 B.C. INT'L AND COMP. L. REV. 267, 272 (2016).
[27] *See* Tom Hamburger & Karen Tumulty, *Wikileaks Released Thousands of Documents About Clinton and Internal Deliberations*, WASH. POST (July 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/22/on-eve-of-democratic-convention-wikileaks-releases-thousands-of-documents-about-clinton-the-campaign-and-internal-deliberations/?utm_term=.f8e7a921148b.
[28] *See* Rebecca Crootof, *The DNC Hack Demonstrates the Need for Cyber-Specific Deterrents*, LAWFARE BLOG (Jan. 9, 2017, 8:00 AM), https://www.lawfareblog.com/dnc-hack-demonstrates-need-cyber-specific-deterrents; *See also Jack Goldsmith and Susan Hennessey on Russian Interference in the U.S. Election*, THE LAWFARE PODCAST

of Armed Conflict permits only appropriate proportional responses to attacks.[29] Yet, what a proportional response looks like in cyberwarfare has not been established.[30] Additionally, law-based organizations have developed their own lawfare strategies. For example, the Lawfare Project, a pro-Israeli legal organization, uses law to counter the lawfare activities of Israel's Arab neighbors.[31] Other groups have sought to disrupt United States counterterrorism activities by bringing lawsuits challenging the legality of the United States' actions.[32] In some circles, therefore, "lawfare" carries a negative connotation.

The common denominator of these three examples of lawfare is that law becomes a weapon to achieve a particular objective. In other words, law essentially secures a place in a government's arsenal.[33] Unlike traditional weaponry, lawfare generates few casualties.[34] Like any other weapon, however, law has offensive and defensive capabilities.[35] Offensive lawfare weakens an opponent. For example, the United States government uses law to prevent designated foreign terrorist organizations from receiving material support.[36] Defensive lawfare occurs when law becomes a shield that prevents an opponent from taking a specific action. For instance, HAMAS launches attacks from civilian locations to prevent Israel from launching counterattacks.[37] This tactic works because HAMAS knows that Israel attempts to comply with

(Oct. 12, 2016), https://www.lawfareblog.com/lawfare-podcast-jack-goldsmith-and-susan-hennessey-russian-interference-us-election.

[29] *See* DEAN L. WHITFORD ET AL., THE LAW OF ARMED CONFLICT DESKBOOK 34-40 (William J. Johnson & David H. Lee eds., 2014); *See also* U.N. Charter art. 51.

[30] *See* Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817, 841-51 (2012).

[31] *See* THE LAWFARE PROJECT, http://thelawfareproject.org/.

[32] *See* David J. R. Frakt, *Lawfare and Counterlawfare: The Demonization of the Gitmo Bar and Other Legal Strategies in the War on Terror*, 43 CASE W. RES. J. INT'L L. 335, 340-41 (2010).

[33] *See* Joel P. Trachtman, *Integrating Lawfare and Warfare*, 39 B.C. INT'L. & COMP. L. REV. 267, 280 (2016). *See also* David Hughes, *What does Lawfare mean?* FORDHAM INT'L. L. J. 1-40 (2016); Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, YALE J. OF INT'L. AFF. 146, 148-149 (2008).

[34] *Id.*

[35] *See* Trachtman, *supra* note 33 at 275-278

[36] *See, e.g.*, 18 U.S.C. § 2339B (2012) (prohibiting material support to designated foreign terrorist organization).

[37] *See* Charles J. Dunlap, Jr., *Has Hamas Overplayed its Lawfare Strategy?* JUST SECURITY (Aug. 5, 2014, 2:30 PM), https://www.justsecurity.org/13781/charles-dunlap-lawfare-hamas-gaza/.

the international law that limits collateral damage to civilians.[38] Using law as another weapon in their arsenal allows governments to achieve their objectives without resorting to more violent tactics.[39]

Other national security experts and analysts define lawfare more broadly. Consider the Lawfare blog, a leading resource for national security law, news, and analysis. Lawfare's contributors accept Dunlap's and other's ideas but also adapt them to their purposes.[40] They extend the lawfare definition to the battle within the United States over how law applies to war.[41] These internal battles remain prevalent (especially in the current form of Presidential politics) and are evident in topics such as cyberwarfare, electronic surveillance and military detention.[42] Often the applicable law is either ambiguous, subject to revision or yet to be created. What the law *should be* becomes just as important as what the law *is*.[43] While this dimension of lawfare is not widely discussed, it is nonetheless important because the lack of law or ambiguities in the law allow opponents to argue that law permits the act or that lack of prohibition makes the act permissible.[44]

Law professor Orde Kittrie recently presented a two-part test to determine if a particular act constitutes lawfare.[45] First, the act's desired effect must be similar to that achieved by kinetic military action.[46] For instance, the act could affect military decision-making. Second, the actor

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[38] *Id.*
[39] *See id.* at 280-282.
[40] *See* Emily Bazelon, *How a Wonky National-Security Blog Hit the Big Time*, N.Y. TIMES MAG. (Mar. 14, 2017), https://www.nytimes.com/2017/03/14/magazine/how-lawfare-hit-the-big-time.html?emc=eta1&_r=0. *See, e.g.* Benjamin Wittes, *Welcome to Lawfare*, LAWFARE BLOG, (Sept. 1, 2010, 12:58 AM), https://www.lawfareblog.com/welcome-lawfare; *About Lawfare: A Brief History of the Term and Site*, LAWFARE BLOG, https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site.
[41] *See About Lawfare: A Brief History of the Term and Site*, *supra* note 40.
[42] *See generally* Lawfare Blog, https://www.lawfareblog.com/.
[43] *See About Lawfare: A Brief History of the Term and Site*, *supra* note 40.
[44] *Id.*
[45] KITTRIE, *supra* note 18, at 8.
[46] *Id.*

must intend to weaken or destroy the opposition.[47] According to Kittrie, this second requirement excludes independent advocacy of legal change such as that engaged in by legal scholars.[48] Adding this second requirement could also exclude legal action not brought for the specific purpose of impairing a nation's capabilities. For example, the Justice Against Sponsors of Terrorism Act (JASTA), allows the victims of terrorist attacks to sue, in United States Courts, foreign sovereigns for damages.[49] The over-riding principle behind this legislation was to give the victims and their families an opportunity to present their case in court and obtain a judgement, not to use law as a means to punish certain states.[50] Of course, an actor's intentions are not always clear and can be mixed. Therefore, whether an act passes the second test is more a function of interpretation and perspective.

While the term "lawfare" is of relatively recent origin, its practice dates to the 1600s when the Dutch created law to justify its seizure of Portuguese ships that prevented the Dutch from using Atlantic Ocean trade routes.[51] According to Kittrie, this innovation represented the birth of international law and the principle of freedom of the seas.[52] Kittrie argues that the United States currently lacks a comprehensive vision for the use of lawfare.[53] Is this simply a case of the United States coming late to the party or has lawfare been a part of United States strategy in the past but been discarded for more conventional forms of warfare? Or perhaps, have we become so accustomed to legal responses that we miss the broader militaristic effects?

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[47] *Id.*
[48] *Id.*
[49] Justice Against Sponsors of Terrorism Act, Pub. L. 114-122, §§ 3 , 4, 130 Stat. 852, 853-54 (2016).
[50] Michael Paradis, *What's Driving the Passion Behind JASTA?* LAWFARE, (Oct. 3, 2016) https://www.lawfareblog.com/whats-driving-passion-behind-jasta.
[51] KITTRIE, *supra* note 18, at 4-5.
[52] *Id.*
[53] *Id.* at 30-33

This article looks at an early use of lawfare by the United States as a way of helping to answer some of these questions. By examining Henfield's case and applying multiple dimensions of lawfare, this article argues that lawfare quickly became an effective United States government tactic.

II. THE PROBLEM OF NEUTRALITY

In March, 1789, the United States federal government began operating under the Constitution drafted in Philadelphia two years prior.[54] While the United States had couched its independence movement in legal terms, for purposes of the use of lawfare, the beginning of government operations serves as the starting point.[55] George Washington, the President of this fragile new democracy, focused much of his first term on establishing the national government's credibility internally.[56] For the new country to thrive, its citizens had to accept their new government and recognize its authority.[57] By the end of that first term, however, the people had generally accepted the Constitution and turned to debating its interpretation and meaning.[58] Washington was able to shift his attention from internal matters just as events in Europe heated up and forced him to address foreign affairs.

Seen from a broader perspective, America's Revolutionary War fit into a larger, long-running conflict between France and Great Britain. In 1793, the two countries' on-again-off-again hostilities surfaced again when French revolutionaries, in the midst of their own uprising,

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[54] The First Congress began on March 4, 1789. *History, Art & Archives, U.S. House of Representatives*, "1st to 9th Congresses (1789–1807)," http://history.house.gov/Institution/Session-Dates/1-9/ (October 06, 2017).
[55] *See* John V. Orth, *The Rule of Law*, 19 GREEN BAG 2D 175, 177 (2016).
[56] *See* JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 18-20 (1993).
[57] HIGGINBOTHAM, *supra* note 5, at 51-54.
[58] *See* GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE **pp** (2016); Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789-1793*, 31 WM. & MARY Q. 167, 178-179 (1974).

executed King Louis XVI. [59] With the execution came a declaration of war against the other European nations, including Great Britain. This declaration of war placed the United States in a difficult position.[60] While it had treaty obligations with France, it relied economically on Great Britain.

The roots of these entanglements lay in the American Revolution.[61] To obtain French support during this time, the United States made a treaty with the French monarchy whereby, in exchange for French military assistance, the United States agreed to give France certain benefits.[62] These included protecting French possessions in the West Indies, prohibiting the outfitting of enemy sea vessels in American ports, and not granting any other nation a trade benefit that France did not also receive.[63] The Constitution made treaties such as the one with France part of the supreme law of the United States.

The economic ties to Great Britain were equally binding. Following United States independence and peace with Great Britain, the various states confronted significant war debts.[64] When the new federal government began functioning, Secretary of Treasury Alexander Hamilton embarked on an ambitious plan to enhance the government's power.[65] He first secured approval for the federal government to assume states' war debt.[66] He then established an extensive customs collection system.[67] This system relied heavily on international trade. Great Britain was, by far, the most significant United States trading partner.[68] Imports from and exports to

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[59] STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800 311 (1993).
[60] *See id*.
[61] U.S. CONST. art. VI.
[62] *See* Treaty of Amity and Commerce, Feb. 6, 1778, United States-France, 8 Stat. 12, T.S. No. 83.
[63] *See id*..
[64] ELKINS & MCKITTRICK, *supra* note 59, at 220-24.
[65] *Id.*; SHARP, *supra* note 56, at 35; FERLING, *supra* note 5, at 208-11.
[66] *Id*.
[67] RAO, *supra* note 57, at 6, 54-56, 103-107.
[68] Ron Chernow, ALEXANDER HAMILTON 370-71 (New York: Penguin Press, 2004).

Great Britain funded the new government.[69] War with Great Britain, therefore, not only threatened the nation's military security but also its economic security.

When word reached George Washington that France had declared war, he immediately ordered a cabinet meeting, arranging it via letters to his cabinet secretaries.[70] One of his significant concerns was privateering. Washington wrote Hamilton, "it is incumbent on the Government of the United States to prevent...all interferences of our Citizens in [hostilities]; and immediate precautionary measures ought...to be taken for that purpose, as I have reason to believe...that many vessels...are designated for Privateers & are preparing accordingly."[71] Privateers supplemented a nation's naval power.[72] Warring nations granted merchants letters of marque that authorized merchant vessels to arm themselves and capture any adversary's vessel.[73] As such, privateers had played an important role in the Revolutionary War.[74] Many war veterans relished another opportunity to attack the British. Washington had other ideas, however. He instructed Hamilton, "The means to prevent [privateering], and for the United States to maintain a strict neutrality between the powers at war, I wish to have seriously thought of, that I may...take such steps...as shall be deemed proper & effectual."[75]

The April 19th cabinet meeting, convened to address the question of neutrality and produce a Neutrality Proclamation, aggravated the growing divide between Hamilton and

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[69] RAO, *supra* note 57, at 6.
[70] Letter from George Washington to Alexander Hamilton (Apr. 12, 1793), http://founders.archives.gov/documents/Hamilton/01-14-02-0207. A similar letter went to Thomas Jefferson. Letter from George Washington to Thomas Jefferson (Apr. 12, 1793), http://founders.archives.gov/documents/Washington/05-12-02-0353.
[71] "To Alexander Hamilton from George Washington, 12 April 1793," *supra* note 69.
[72] *See* Robert C. Ritchie, *Government Measures against Piracy and Privateering in the Atlantic Area, 1750-1850*, *in* PIRATES AND PRIVATEERS: NEW PERSPECTIVES ON THE WAR ON TRADE IN THE EIGHTEENTH AND NINETEENTH CENTURIES 10-11 (David J. Starkey et al. eds., 1997) (discussing privateering).
[73] CASTO, *supra* note 1, at 43-44.
[74] William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 THE AMERICAN JOURNAL OF LEGAL HISTORY 117, 122-135 (1993).
[75] "To Alexander Hamilton from George Washington, 12 April 1793," *supra* note 70.

Thomas Jefferson.[76] Jefferson and Hamilton had never been close, but the emergence of Hamilton's economic program during the previous two years revealed substantial philosophical differences that caused them to interpret the new Constitution differently.[77] Where Hamilton endorsed expansive executive powers, Jefferson preferred power to be located within Congress or the states.[78] He argued that a Presidential proclamation of neutrality would unduly infringe upon the Congressional power to declare war.[79] When this position gained no support, Jefferson argued that the United States should seek concessions from both sides prior to declaring neutrality officially.[80] This approach was too risky for Hamilton.[81] Any threat to commerce with the British posed grave danger to his economic strategy.[82] Attorney General Edmund Randolph, who had occasionally been Washington's personal attorney, also attended the meeting.[83] He often played a mediating role between the two Secretaries.[84] In this instance, he sided with Hamilton's preference for a clear neutrality declaration.[85] Washington, as was his practice, sided with the majority and asked Randolph to draft a proclamation.[86]

Randolph, as usual, sought a middle ground between Hamilton's and Jefferson's positions. Hamilton's ally, Supreme Court Chief Justice John Jay, provided Hamilton with a draft proclamation on April 11.[87] Jay's version included significant detail about the importance

[76] FERLING, *supra* note 4. at 213-17.
[77] *Id.*
[78] CHARLES M. THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 14-21, 35 (1931).
[79] *Id.*; AMMON, *supra* note 6, at 48.
[80] Id.
[81] GILBERT LESTER LYCAN, ALEXANDER HAMILTON AND AMERICAN FOREIGN POLICY: A DESIGN FOR GREATNESS 160 (1970).
[82] THOMAS, *supra* note 77, at 20.
[83] AMMON, *supra* note 6 at 48.
[84] REARDON, *supra* note 2, at 220-23.
[85] THOMAS, *supra* note 77, at 46.
[86] *Id.*
[87] "Enclosure: [Proclamation by George Washington], [April 1793]," *Founders Online*, National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Hamilton/01-14-02-0200-0002.

of Americans not acting against either of the warring sides.[88] Whether Randolph saw the draft is not known but Randolph included similar language in his version, albeit with less detail.[89] Randolph wrote: "I have therefore thought fit...to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such ["conduct friendly and impartial toward the belligerent powers"]." [90] Randolph was also conscious of Jefferson's objections to declaring neutrality.[91] As a result, Randolph omitted the term "neutrality" from the proclamation.

Randolph's draft issued a warning, too: those who failed to abide by the proclamation would face criminal prosecution under the law of nations.[92] Randolph wrote, "I have given instructions...to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations..."[93] The warning was not, in and of itself, novel. Washington had issued eleven proclamations up to this point, several of which had stated that citizens who violated the terms would face prosecution. For example, in March 1791, Washington proclaimed that anyone helping James O'Fallon to disrupt the Indian tribes around Kentucky would be in violation of law and treaty and be prosecuted.[94] The key distinction between this earlier proclamation, and others like it, and the newly-drafted Neutrality Proclamation was that no treaty or statute authorized the latter. Congress was not in

[88] *See id*..
[89] *See* CASTO, *supra* note 1, at 28, 31.
[90] "Neutrality Proclamation, 22 April 1793," *Founders Online,* National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Washington/05-12-02-0371.
[91] REARDON, *supra* note 2, at 224-25.
[92] "Neutrality Proclamation, 22 April 1793," *supra* note 89.
[93] *Id*.
[94] Proclamation (Mar. 19, 1791), *in* 7 THE PAPERS OF GEORGE WASHINGTON, 1 DEC.-21 MAR. 1791, 605-06 (Jack D. Warren, Jr. ed., 1998), http://founders.archives.gov/documents/Washington/05-07-02-0343; AMMON, *supra* note 6 at 48.

session, nor was it due to meet until December.[95] The Administration unanimously agreed not to call Congress into special session on the neutrality issue.[96] This meant no statute would be forthcoming. Yet, for Randolph's warning to have any effect, the Administration had to demonstrate it had enforcement power. They would soon get their chance.

Washington issued the Neutrality Proclamation on April 22, 1793.[97] Three days prior, however, the new French minister to the United States, Charles Edmond Genet, commissioned and sailed multiple privateers from Charleston, South Carolina.[98] While Charleston had a significant contingent of French citizens, Genet also recruited Americans who were sympathetic to the French cause.[99] At least one recruit, Gideon Henfield, made his living as a seaman.[100] Originally from Salem, Massachusetts, Henfield was a former Revolutionary war privateer who had been imprisoned by the British. Now he found himself in Charleston without any money after being robbed and without funds to travel north.[101] [102] Genet's offer to serve on a privateer undoubtedly enticed him both as an answer to his financial woes and as a way of avenging his imprisonment. [103] Henfield departed Charleston as the prize master for the *Citizen Genet* privateer.[104] When the *Citizen Genet* seized a British vessel, the *William*, off the coast of Virginia, Henfield took command and sailed the vessel north to Philadelphia.[105]

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[95] The Second Congress had just adjourned at the beginning of March. *See* "1st to 9th Congresses (1789–1807)," *supra* note 53. The Third Congress would not meet until December. *See id.*
[96] THOMAS, *supra* note 77, at 38.
[97] "Neutrality Proclamation, 22 April 1793," *supra* note 89.
[98] CASTO, *supra* note 1, at 46-48.
[99] ROBERT J. ALDERSON, JR., THE BRIGHT ERA OF HAPPY REVOLUTIONS: FRENCH CONSUL MICHEL-ANGE-BERNARD MANGOURIT AND INTERNATIONAL REPUBLICANISM IN CHARLESTON, 1792-1794 63-65, 111 (2008).
[100] CASTO, *supra* note 1, at 100.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*.

The incident ignited a foreign affairs crisis. The British wasted little time protesting as news of the seizure preceded Henfield's arrival in Philadelphia.[106] George Hammond, the British minister to the United States, wrote Jefferson and provided statements from those involved.[107] He pointed out that the seizure of the ship breached "that neutrality which the United States profess to observe," as if daring the young nation to live up to its new and much-vaunted ideals.

The Administration, however, quickly framed the incident as a legal issue. Jefferson forwarded Hammond's complaint to William Rawle.[108] He instructed Rawle that it was "the desire of the Government that you would take such measures for apprehending and prosecuting them [neutrality violators] as shall be according to law."[109] Rawle dispatched a justice of the peace to investigate.[110] Following the investigation, Henfield was arrested.[111] Genet protested the arrest, asserting that Henfield should not be prosecuted because he was protected as a French citizen.[112] Jefferson queried Randolph whether Genet's assertions were correct legally and whether Henfield had, in fact, violated the law.[113] Without providing any legal authority for his position, Randolph asserted that Henfield could be prosecuted and that the French did not have the right to interfere.[114] He wrote, "because [Henfield is] a citizen, he is amenable to the

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[106] Memorial from George Hammond (May 8, 1793), http://founders.archives.gov/documents/Jefferson/01-25-02-0626.
[107] *Id*.
[108] Letter from Thomas Jefferson to William Rawle (May 15, 1793), http://founders.archives.gov/documents/Jefferson/01-26-02-0032.
[109] *Id*.
[110] On the role of justices of the peace in Philadelphia, *see* ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800-1880 38-41 (1989).
[111] CASTO, *supra* note 1, at 86.
[112] *See* Edmund Randolph's Opinion on the Case of Gideon Henfield (May 30, 1793), http://founders.archives.gov/documents/Jefferson/01-26-02-0135.
[113] *Id*.
[114] *Id*. This was not the first time Randolph asserted the law of nations bound the United States government. In December, 1792, Randolph contradicted Jefferson's assertion that the law of nations did not apply to a specific case.

laws,...and the very act...is a violation of the sovereignty of the United States….Henfield is punishable; because treaties are the Supreme law of the land; and by treaties with three of the powers at war with France, it is stipulated, that there shall be a peace between their subjects, and the citizens of the United States."[115] This opinion became the starting point from which the Administration based its argument.

The lack of legal authority for Randolph's position demonstrates the ambiguous place of neutrality within the law of nations. Governing the relations between sovereign states, the law of nations was part of the common law. Leading American lawyers considered its application to the United States and the nation's federal system.[116] For the Administration, Swiss legal expert Emmerich de Vattel was the leading authority on the law of nations.[117] Vattel identified only two principles for neutrals (neutral nations).[118] The first recognized that neutrals had a duty to give no assistance to either side of an international conflict unless a separate obligation, such as a treaty, required them to give it.[119] Vattel did not define assistance but stated that neutrals could not voluntarily supply materials of war, including troops.[120] Second, Vattel asserted that neutrals could not refuse to one side what they gave to the other.[121] This did not require oversight of openly available materials so long as the neutral did not deny one side access.[122] These principles, however, failed to clearly dictate a path for Washington's Administration. The matter

Edmund Randolph's Opinion on Offenses against the Law of Nations (December 5, 1792), http://founders.archives.gov/documents/Jefferson/01-24-02-0689.

[115] Edmund Randolph's Opinion on the Case of Gideon Henfield *supra* note 111.

[116] Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547 (2012).

[117] *Id*.

[118] EMMERICH DE VATTEL, THE LAW OF NATIONS Bk. 3, Ch. 8, Sec. 109 (available at: http://www.constitution.org/vattel/vattel.htm).

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id*.

was complicated by the fact that Vattel was not the only expositor of the law of nations.[123] Grotius, Pufendorf and Barbeyrac also considered and wrote about the law of nations.[124] Randolph, in his opinion on another French seizure, cited all four sources when attempting to determine what constituted neutral waters.[125] Therefore, the lack of authority in Randolph's opinion indicates the precarious position in which the Administration found itself when Henfield sailed the *William* into Philadelphia. While the Administration may have interpreted actions one way, the British could perceive the failure to act as an injury that justified war.

III. THE U.S. SOLUTION AND ITS JUSTIFICATION

Henfield's actions created a significant problem for the Administration. Under the law of nations, Henfield had injured the British. By participating in an attack on a British vessel, seizing the vessel, and receiving compensation for it, Henfield, at minimum, had contributed to an injury to a British citizen by taking his vessel. This required the United States to remedy the situation. Due to the nation's novel separation of powers and federal-style government, the Washington Administration was unsure of who was responsible for addressing the problem. One thing was clear: the United States had to avoid war. Rather than call Congress into session, rather than rely on executive redress, the Administration used law to remedy the harm Henfield's actions caused the British.

On June 5th, Jefferson responded to Hammond's complaint utilizing a legal framework.[126] First, he focused on French privateering generally.[127] Jefferson applied the law of

[123] Richardson, *supra* note 115, at 548.
[124] *Id*.
[125] Edmund Randolph's Opinion on the Case of Gideon Henfield (May 30, 1793), *supra* note 111.
[126] Letter from Thomas Jefferson to George Hammond (June 5, 1793), http://founders.archives.gov/documents/Jefferson/01-26-02-0190.
[127] *Id*.

nations to the situation and provided Hammond a legal analysis emphasizing that the President lacked legal authority to intervene.[128] Jefferson wrote:

> The principal Agents in this Transaction were French citizens. Being within the United States, at the moment a war broke out between their own and another country, they determine to go into it's defence; they purchase, arm, and equip, a vessel, with their own money, man it themselves, receive a regular Commission from their nation, depart out of the United States, and then commence hostilities, by capturing a vessel. If, under these circumstances, the Commission of the captors was valid, the property, according to the laws of War, was, by the capture, transferred to them, and it would be an aggression on their nation, for the United States to rescue it from them, whether on the high Seas or on coming into their ports. If the Commission was not valid, and, consequently, the property not transferred, by the laws of war, to the Captors, then the case would have been cognisable in our Courts of Admiralty, and the Owners might have gone thither for redress. So that on neither supposition, would the Executive be justifiable in interposing.[129]

The entire Cabinet approved the response which indicates their desire to re-frame the matter as a legal problem rather than a militaristic one.[130] An executive response favoring the British could be construed as a neutrality breach. What's more, Genet had already received a cool reception from Washington, and actively opposing the French could create further tensions.[131] Therefore, Jefferson directed the British to seek redress from the courts.[132]

Jefferson then turned to Henfield's case specifically. He first distanced the United States, as a nation, from the action of its citizens, writing, "...the transaction can in no wise be imputed to [the United States]. It was in the first moment of the War, in one of their most distant ports, before measures could be provided by the Government to meet all the cases, which such a state of things was to produce; impossible to have been known, and, therefore, impossible to have been prevented by that Government."[133] Yet Jefferson also understood the need for government

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[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] Ammon, *supra* note 69, at 59; Casto, *supra* note 1, at 54.
[132] Casto, *supra* note 1, at 86.
[133] Letter from Thomas Jefferson to George Hammond, *supra* note 125.

action. Therefore, he informed Hammond about Henfield's prosecution. He wrote, "On a suggestion that Citizens of the United States had taken part in the act, one, who was designated, was instantly committed to prison, for prosecution; one or two others have been since named, and committed in like manner; and, should it appear, that there were still others, no measures will be spared to bring them to Justice."[134] With this communication to Hammond, the Administration hoped to mollify the British and avoid armed conflict.

Unfortunately for the Administration, their initial attempt at a legal resolution fell victim to the new government's separation of powers. Following Jefferson's letter, Hammond advised the *William*'s owners to file suit in federal court seeking the *William*'s return.[135] To represent them, the *William*'s owners retained William Rawle and William Lewis, Rawle's predecessor as United States District Attorney.[136] This assignment gave Rawle the opportunity to further investigate the incident. He obtained depositions from several people who had served on the *William* and established the facts that formed the basis for the criminal prosecution.[137] Because he was a U.S. attorney, Rawle's involvement may also have held some symbolic value for the British. Genet, for his part, adamantly opposed the *William*'s return and hired Peter DuPonceau, a French immigrant and well-known Philadelphia attorney, to represent him.[138] Having the government's attorney representing their interests may have given the British the sense that, in some way, the United States government supported its position. Even if they had this sense,

[134] *Id*.
[135] CASTO, *supra* note 1, at 86.
[136] *Id*. For biographical information on William Lewis, see ESTHER ANN MCFARLAND, ET AL: ENLIGHTENED STATESMAN, PROFOUND LAWYER, AND USEFUL CITIZEN (2012).
[137] Affs. of John Whiteside & James Leggett, *Findlay et al v. The William*, 9 F. Cas. 57 (D. Pa. 1793).
[138] CASTO, *supra* note 1, at 86-88.

however, the feeling ended abruptly when federal District Court Judge for Pennsylvania, Richard Peters, dismissed the case, claiming that federal courts lacked subject-matter jurisdiction.[139]

With the judiciary refusing to hear the case, the Administration had to resolve the matter itself. While crafting enforcement policies, the Administration again looked to federal courts. The federal Circuit Court, which would preside over Henfield's case, was not scheduled to meet again until November. The Administration required a quicker response, though, so Rawle, in the days following Henfield's arrest, wrote to Supreme Court Chief Justice John Jay requesting a special Circuit Court session in Philadelphia.[140] Weeks later, Supreme Court Associate Justice James Iredell responded and approved the session, scheduling it for the last weeks in July just prior to the Supreme Court's scheduled August session.[141]

By the end of June, the facts and logistics of Henfield's case were settled, leaving only a legal question. Was Henfield's conduct punishable in federal court? Henfield's conduct did not violate a federal statute. It did not violate any treaty provisions. It was not even a typical common law crime. Instead, the government asserted a single citizen violated the law of nations. The new federal government faced an unprecedented legal situation. To succeed, the government needed a convincing legal argument. If it failed, the British might lose patience and seek redress through military action. Therefore, the government spent late June through July developing its case.

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[139] *Findlay et al v. The William*, 9 F. Cas. 57 (D. Pa. 1793).
[140] THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, VOL. II: THE JUSTICES ON CIRCUIT, 1790–1794, 394 n.2 (Maeva Marcus ed., 1988).
[141] Order for Special Session of the Circuit Court for the District of Pennsylvania, May 29, 1793, in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* n. 139, at 393-94.

William Rawle had the responsibility of presenting the government's argument.[142] A Quaker loyalist during the Revolutionary War, Rawle had studied law under John Tabor Kempe, colonial New York's Attorney General, and then for several months at the Inns of Court, Middle Temple in London.[143] He returned home to Philadelphia following the war and began his legal practice.[144] He frequently worked closely with fellow Quaker William Lewis.[145] When Lewis resigned his United States District Attorney position to become District Court judge in [give year?], Rawle replaced his colleague.[146] Rawle favored the new Constitution but detested politics and avoided the ratification debates.[147] As United States District Attorney, he worked closely with Hamilton and probably shared with him a similar ideological stance.

Between Hamilton, Jefferson and Randolph, Hamilton likely provided the most immediate legal assistance to Rawle. Randolph could not as he was away from Philadelphia for most of June and July.[148] As for Jefferson, his correspondence with Rawle was minimal and usually took the form of instructions. The remaining correspondence between Hamilton and Rawle indicates that Hamilton met with both Rawle and William Lewis in the weeks prior to the

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[142] William Rawle, *Prayer Composed Upon Appointment as United States District Attorney*, RAWLE FAMILY PAPERS, SERIES ONE, PENNSYLVANIA HISTORICAL SOCIETY.

[143] THOMAS I. WHARTON, A MEMOIR OF WILLIAM RAWLE, LL. D.: PRESIDENT OF THE HISTORICAL SOCIETY, &C. 10 (1840). Kempe succeeded his father as Attorney General. During the French-Indian War, Kempe prosecuted numerous treason cases. Kempe's experience with these cases may have shaped Rawle's views during the Whiskey Rebellion and Fries Rebellion. In the same year Rawle returned to the United States and Kempe departed for England, facing treason prosecutions in both New York and New Jersey. *John Tabor Kempe*, HIST. SOC'Y N.Y. CTS., http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-kempe-john.html (last visited Oct. 15, 2017).

[144] WHARTON, *supra* note 142, at 21.

[145] MCFARLAND, *supra* note 135, at 49-50.

[146] Like Rawle's District Attorney appointment, Lewis received his judicial appointment during a Congressional recess. The opening occurred when Washington's initial appointment for Pennsylvania's District Court Judgeship, Francis Hopkinson, died. Lewis would only remain on the bench less than a year before he resigned to return to private law practice. Richard Peters replaced Lewis. "From George Washington to the United States Senate, 31 October 1791," *Founders Online*, National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Washington/05-09-02-0077.

[147] WHARTON, *supra* note 142, at 23; Journal Entry, September 9, 1790, Rawle Family Papers, Series One, *supra* note 141.

[148] REARDON, *supra* note 2, at 232-34; *Henfield's Case*, 11 F. Cas. 76,82 (C.C.D. Pa. 1793) (No. 6360).

trial. In late June, Hamilton sent a letter to Rawle requesting that he attend a meeting at Hamilton's office.[149] In July, Hamilton wrote to Lewis returning law books Lewis had lent to Hamilton.[150] Notably, Hamilton makes reference to a provision that "military expeditions out of the territory of a neutral Power cannot rightfully be made by a Power at War & that if permitted the Neutral Nation is answerable."[151] Rawle used this provision in his argument during Henfield's case.[152] Finally, Hamilton's influence appears in the Grand Jury's indictment of Henfield. Ordinarily, the United States District Attorney drafted indictments. In this case, while Randolph penned a draft indictment that formed the basis for that of the grand jury, Hamilton made changes throughout the document.[153]

Jefferson's involvement in the legal arguments is more difficult to unravel. In Jefferson's view, those who worked with Hamilton could not be trusted. For example, Jefferson seethed over Randolph's tendency to agree with Jefferson in principle but with Hamilton in practice.[154] This meant that Rawle's connection to Jefferson was not strong. Yet, Jefferson agreed with Henfield's prosecution.[155] In a letter to James Monroe, Jefferson wrote, "Treaties are laws. ...He who breaks that peace [with England]...breaks the law…."[156] Then, he tells Monroe that the case against Henfield might be factually deficient but prosecutions were necessary "to satisfy the complaint made and to serve as a warning to others."[157] Ultimately, Jefferson "confess[ed]...that the case is punishable."[158] He also kept close tabs on the case, sending Rawle a letter at the end

[149] Rawle Family Papers, Series One, *supra* note 141.
[150] "From Alexander Hamilton to William Lewis, [July 1793]," *Founders Online,* National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Hamilton/01-15-02-0124.
[151] *Id*.
[152] *Henfield's Case*, 11 F. Cas. at 1115.
[153] *Id*.
[154] Letter from Thomas Jefferson to James, *supra* note 107, at 25–27.
[155] Letter from Thomas Jefferson to James Monroe, *supra* note 107, at 501–503.
[156] *Id*.
[157] *Id*.
[158] *Id*.

of June asking for specific facts that related to the United States' jurisdiction over the case.[159] Most interesting however, is that Rawle may have disagreed with the Administration about the case's viability.[160] In the letter to Monroe, after discussing how United States District Attorneys agreed cases in New York and Maryland were prosecutable, Jefferson stated, "Lately Mr. Rawle...on a conference with the District Judge, Peters, supposes the law more doubtful." While this could conceivably relate to the factual deficiency Jefferson identified earlier, Jefferson indicates that the law, not the case, was "more doubtful."[161]

Although Randolph was away on a public relations mission for Washington and unable to meet with Rawle frequently before the case, he had the most influence on the government's legal position.[162] Randolph had repeatedly argued that federal jurisdiction encompassed Law of Nations violations. In May, Randolph provided legal advice on neutrality to Washington and Jefferson through two formal opinions and one set of notes. The first, on May 17th, responded to a question about whether the United States owed Great Britain restitution for the *William*.[163] Randolph emphasized that this was not merely a question of whether the capture was a valid prize.[164] Instead, the problem centered on Henfield's participation.[165] Randolph wrote, "The punishment of the citizens, who have entered on board the privateer may, in some measure, be a justice due to the powers…."[166] Randolph believed the United States had to respond to Henfield's actions. Yet Henfield was not the only American involved so Randolph drew a

[159] Letter from Thomas Jefferson to William Rawle, *supra* note 107, at 381.
[160] Letter from Thomas Jefferson to James Monroe, *supra* note 154.
[161] *Id*.
[162] REARDON, *supra* note 2, at 232-34.
[163] "Memorandum from Edmund Randolph, 17 May 1793," *Founders Online*, National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Washington/05-12-02-0474.
[164] *Id*.
[165] *Id*.
[166] *Id*.

distinction.[167] The person who received the commission would be considered a pirate, at least according to some treaties.[168] Others, who only served as crew, were guilty of misdemeanors.[169] Randolph concluded by highlighting the prosecution's purpose: "For, altho' the experiment should miscarry, it will vindicate the sincerity of our neutrality."[170] This shows that Randolph had doubts about the case but believed it necessary to proceed further. Demonstrating neutrality was Randolph's central concern because the "acquiescence of the U.S. in a too moderate retribution will indicate...partiality...of the U.S."[171]Two weeks later, Randolph penned a short opinion on Genet's representations of Henfield's case.[172] Randolph bluntly asserted: "...Henfield is punishable because…[in] treaties with three of the powers at war with France, it is stipulated, that there shall be a peace…"[173] According to Randolph, Henfield's actions were criminal because "...at the common law, ...his conduct comes within the description of disturbing the peace of the United States."[174] Finally, near the time of the formal opinion on Henfield's case, Jefferson asked Randolph's thoughts on expelling the *William* from Philadelphia.[175] Randolph's response emphasized the action's external significance.[176] He wrote, "...it is always adviseable for a neutral nation, to avoid even a suspicion of the faith of its neutrality."[177] Later, in court, Rawle's closing argument echoed and expanded upon these principles.[178]

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[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] *Id*.
[172] "Edmund Randolph's Opinion on the Case of Gideon Henfield, 30 May 1793," *Founders Online*, National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Jefferson/01-26-02-0135.
[173] *Id*.
[174] *Id*.
[175] "Memorandum from Edmund Randolph, [ca. 28–30 May 1793]," *Founders Online*, National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Jefferson/01-26-02-0126.
[176] *Id*.
[177] *Id*.
[178] Henfield's case 11 F. Cas. at 1117.

In addition to consulting with members of the Administration, Rawle conferred with the Philadelphia legal community, which included some of the nation's top talent, such as Rawle's colleague, William Lewis.[179] The two worked together on many cases during the time Rawle served as U. S. District Attorney; yet, interestingly, they were not always on the same side. However, in this case, Lewis and Rawle collaborated. They had modified their arguments in the *William* case to fit the criminal aspects encountered in Henfield's case. Rawle and Lewis had known that District Judge Richard Peters would serve as one of the judges in the *William* case.,[180] and they had anticipated a ruling in their favor. When Peters dismissed the case, they likely then sought his counsel on Henfield's case, especially because Peters had hinted that a higher court might have more power to set a precedent.[181] While this sort of collaboration would be a major ethical issue today, it was routine practice then.[182] An independent judiciary had yet to be strongly established.[183] It is not known exactly what Peters told them, but it apparently gave Rawle second thoughts about the prosecution's merits.[184] Rawle and Peters likely shared similar legal perspectives thus making Rawle sympathetic to Peters' perspective.[185] In fact, Peters had such a significant impact on Rawle that Rawle was the only government attorney to question whether the government could prosecute Henfield.[186]

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[179] Robert R. Bell, THE PHILADELPHIA LAWYER: A HISTORY, 1735-1945, 58-60 (Susquehanna University Press, 1992).
[180] At this time, Circuit Court sessions sat in panels of three judges each. Two were Supreme Court Justices and the third was the District Court Judge. *See* First Judiciary Act, ch. 20, § 4, 1 Stat. 73, 74-75 (1789)
[181] CASTO, *supra* note 1, at 89.
[182] Lawrence Friedman, A HISTORY OF AMERICAN LAW, 3RD ED. 82-92 (Touchstone, 2005); Gerhard Casper *"The Judiciary Act of 1789 and Judicial Independence*" in Maeva Marcus (ed.); ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789. New York: Oxford University Press, (1992) 285-86.
[183] *See generally*, CASPER, *supra* note 184.
[184] Letter from Thomas Jefferson to James Monroe (14 July 1793), *in* THE PAPERS OF THOMAS JEFFERSON Vol. 26,11 May–31 August 1793 (John Catanzariti, ed., 1995), http://founders.archives.gov/documents/Jefferson/01-26-02-0445.
[185] On the jurisprudence of District Court Judge Richard Peters, *see* Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federal Jurisprudence*, 73 NW. L. REV. 26, 34-40 (1978-1979).
[186] "From Thomas Jefferson to James Monroe, 14 July 1793," *supra* note 186.

On July 22, 1793, Peters and Supreme Court Associate Justices James Iredell and James Wilson, a signer of both the Declaration of Independence and the Constitution, opened the Special Session of the Circuit Court for Pennsylvania.[187] The grand jury received its charge from Justice Wilson.[188] Wilson, the pre-eminent American scholar on the common law, began his charge to the grand jurors by emphasizing common law principles.[189] Wilson spoke, "On some occasions the spirit of a system of common law is accommodating; but on others its temper is decided and firm. The means are varied according to times and circumstances, but its great ends are kept steadily and constantly in view."[190] Wilson then transitioned to his larger point that the common law embraces the Law of Nations. He said, "The common law...is a social system of jurisprudence. She receives other laws and systems...and associates [with] those who can give her information, or advice, or assistance."[191] Then he compared the law of nations with the common law: "On states and sovereigns it is obligatory in the same manner and for the same reasons, as the law of nature is obligatory upon individuals."[192] Wilson informed the jurors about the relevant law of nations. He said, "This sacred law prohibits one state from exciting disturbances in another, from depriving it of its natural advantages, from calumniating its reputation, from seducing its citizens, from debauching the attachment of its allies, from fomenting or encouraging the hatred of its enemies."[193] Wilson then reached the crux of his instruction. Should one citizen, who excites a disturbance in another nation, with whom the United States is at peace, be able to draw the entire nation into a war?[194] Wilson explained,

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[187] *Henfield's Case*, 11 F. Cas. at 1117.
[188] *Id*.
[189] *See generally* Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence,* 29 J. OF L. AND POL. 189, 194 (2013).
[190] *Henfield's Case*, 11 F. Cas. at 1105.
[191] *Id*. at 1107.
[192] *Id*.
[193] *Id*.
[194] *Id*

"That a citizen, who in our state of neutrality, and without the authority of the nation, takes an hostile part with either of the belligerent powers, violates thereby his duty, and the laws of his country, is a position so plain as to require no proof…."[195] In essence, Wilson told the jury that Henfield unquestionably violated federal law. With this ringing endorsement from Justice Wilson, the grand jury indicted Henfield the next day.[196]

Henfield's trial began two days later.[197] Rawle, with Randolph by his side, represented the United States.[198] Genet had hired the same attorneys who represented the privateers that captured the *William*.[199] The most noteworthy of these attorneys was Jared Ingersoll. In the fractured politics of the 1790s, Ingersoll was a Federalist.[200] He had signed the Constitution as a Pennsylvania delegate and later would replace Rawle as interim U. S. District Attorney in 1800.[201] Peter DuPonceau and Jonathan Sergeant assisted Ingersoll.[202] A full circuit panel comprising Justices Wilson, Iredell and District Judge Peters, sat for the case.[203] The evidence, which had been developed in June during the admiralty proceeding, was uncontested.[204] Instead, the case rested on counsel's arguments.

Rawle's closing argument reflected the legal position the United States government had advocated since the crisis began. He asserted that every member of society is accountable to that society for any and all actions that affect the society.[205] Rawle followed this with the fact that

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[195] *Id.* at 1108.
[196] Minutes of the Circuit Court for the District of Pennsylvania, Special Session, July 1793, *microformed on* Roll M986 Record Group 21 United States Circuit Court for the Eastern District of Pennsylvania, 1791-1840 (NAT'L. ARCHIVES). *But see* Henfield's Case, 11 F.Cas 1099
[197] "Minutes of the Circuit Court for the District of Pennsylvania, Special Session, July 1793", *supra* note 197.
[198] *Henfield's Case*, 11 F. Cas. at 1115-16.
[199] *Id.* at 1119.
[200] Binney, *supra* note 3, at 229-30.
[201] *Id*.
[202] *Henfield's Case*, 11 F. Cas. at 1119.
[203] *Id*.
[204] *Id*. at 1116.
[205] *Id*.

the United States was at peace with all nations and that aggression on the part of its citizens against other nations breached the peace.[206] He then explained how actions such as Henfield's could lead to war, echoing Wilson's charge to the grand jury:

> But by the laws of nations if one of the belligerent powers should capture a neutral subject fighting under a commission from the other belligerent powers he could not punish him as a pirate, but must treat him as an enemy, and it would be a good cause of declaring war against the nation to which he belonged; and if treated as an enemy without just cause it is the duty of the nation to which he belongs to interfere in his behalf; and thus arises another cause of war. Hence the act of the individual is an injury to the nation, and the right of punishment follows the existence of the injury.[207]

After expounding upon these basic principles, Rawle applied Henfield's conduct to them. He summarized the uncontested facts.[208] Henfield's service was a violation of neutrality against all nations with whom France fought.[209] However, he caused injury to only one: the British.[210] Therefore, Rawle argued, "...an infraction of this kind, unless punished, becomes a good cause of war on the part of the offended nation."[211] Here was the United States' problem. It sat on the precipice of war unless it took remedial action. The United States, according to Rawle, chose to take legal action.[212] He compared the government's choice to other areas of law and diplomacy, arguing:

> True, that some writers say they may be treated as pirates, and certain, that they may be treated as enemies. But these do not preclude the national right of proceeding against the delinquents judicially. So a man may defend himself against violence, but the assailant may be indicted. A man may peaceably retake his own property, but he may also have a replevin. A man may enter, &c., but he may have his ejectment. The same observations apply to negotiation. We may negotiate as well on national as on private concerns, but without prejudice to the judicial remedy. But it is the honor of free states that the judicial remedy is necessary. That the executive should be inadequate to sudden and unusual

[206] Id. at 1117.
[207] *Id*.
[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] *Id*.
[212] *Id*.

> exertions of power is our pride and happiness; and that our courts should, with that impartial and unbiased dignity which characterizes their judicial investigations of truth, apply the law of nations to men, of which nations are composed, and substitute the scales of justice for the sword of war.[213]

Rawle's last sentence summarized the entire point of the government's case. By prosecuting Henfield through the courts, the government sought to "substitute the scales of justice for the sword of war."[214] The United States government sought to avoid war and maintain its neutral status in the eyes of Europe.

IV. HENFIELD'S CASE AS LAWFARE

Lawfare sits at the intersection of law and warfare. It requires the use of law to achieve a military objective. While the question of how law achieves this objective and whether the use of law is advisable can be debated, Henfield's case demonstrates how the United States government, when faced with its first external national security threat, utilized "the scales of justice" rather than "the sword of war." The legal solution was not necessarily clear and not necessarily the government's only option. Its use of law in this instance, however, set the stage for future uses of law not only as a means to avoid war but as a supplement to military action. While some may say we have neglected law as a tool, Henfield's case shows that, instead, we have become so accustomed to using law that we overlook its day to day national security benefits, particularly as it relates to the symbolic value of criminal prosecution.[215]

During the spring and summer of 1793, the Washington Administration had a clear objective: to not use its military. The Administration unanimously agreed that it had to remain out of war and preserve its neutrality at almost any cost. In order to achieve this goal, the United

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[213] *Id*.
[214] *Id*.
[215] On the neglect of lawfare as a tool, *see* Hughes, *supra* note 33, at 37. KITTRIE, *supra* note 18.

States had to demonstrate its neutrality to skeptical European nations.[216] Its actions had to speak louder than its words. So when Gideon Henfield sailed the captured *William* into Philadelphia harbor just weeks after the Administration had declared neutrality, it raised the threat of potential military action.[217] If the United States did not remedy the act of war Henfield committed, the British could take matters into their own hands. If this were to happen, the United States would likely cease to exist as it lacked a standing army and navy.[218] It lacked the funds to support one and the French, who had assisted in the Revolution, were now fighting for their own survival.[219]

The Administration ultimately utilized law to remedy the act of war, but it is important to realize that it also had other options. Because Henfield's participation aboard the French privateer was an act of war, the United States could potentially have subjected him to a military tribunal.[220] What's more, Henfield was a Revolutionary War veteran. He served on a French vessel operating with a letter of marque from Genet. Surely, the government could have made an argument that he be treated like a prisoner of war. This option, however, faced two potential obstacles. At minimum, it would have angered the French. It may even have led to retribution because France interpreted its treaty with the United States as allowing France to commission privateers in the United States. Furthermore, Genet also asserted that Henfield was a French citizen now, thus removing Henfield from legal culpability. Therefore, subjecting Henfield to indefinite detention through a military tribunal may have been construed as a violation of

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[216] THOMAS, *supra* note 78, at 17.
[217] On the fear in the United States of war, *see* LYCAN, *supra* note 71, at 163; THOMAS, *supra* note 68, at 50-51.
[218] *Id*.
[219] *Id*.
[220] Nearly twenty years later, the United States declared war on the British and the question arose about what to do with American citizens who sided with the British. Even then, incarcerating them was not seriously considered. *See* Ingrid Brunk Wuerth, *The President's Power to Detain Enemy Combatants: Modern Lessons from Mr. Madison's Forgotten War*, 98 Nw. U. L Rev. 1567 (2003); *see also* Benjamin Wittes & Ritika Singh. *James Madison, Presidential Power, and Civil Liberties in the War of 1812*, *in* WHAT SO PROUDLY WE HAILED: ESSAYS ON THE CONTEMPORARY MEANING OF THE WAR OF 1812 (2012).

neutrality itself. While neither event seems likely to have occurred given the instability of the French government, the Administration did not possess these details and could not assume the risk of reprisal.[221]

Alternatively, the United States government could have paid the British restitution for the *William*. This option was debated by the Administration throughout the neutrality crisis. However, the Administration determined that restitution was not necessary or appropriate. Their rejection rested on the grounds that it was not an American vessel that captured the *William*. Had an American vessel done so then restitution would have been more likely as it was a direct act by a vessel sailing under the United States flag. Instead, Henfield had only served on the French vessel. It was a French vessel that captured the *William* so restitution was not required legally. Additionally, paying restitution for the *William* would set a dangerous precedent. During the summer of 1793, Genet's privateers captured numerous British vessels.[222] Was the United States going to pay every time an American served on board? The United States simply lacked the funds to do so. Doing so would also provide a tempting target for British merchants. When word spread that the United States might pay, litigation would ensue. The United States was still litigating Revolutionary War claims and certainly did not want to encourage new cases. Finally, the British were attacking French vessels and arming privateers in American ports, including Philadelphia. In order to maintain neutrality, the United States would need to pay the French restitution as well.[223]

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[221] On the lack of Administration intelligence capability *see* G.J.A. O'Toole, HONORABLE TREACHERY: A HISTORY OF U.S. INTELLIGENCE, ESPIONAGE, AND COVERT ACTION FROM THE AMERICAN REVOLUTION TO THE CIA 69-79 (1991).

[222] On the other seizures made by the French during the spring and summer of 1793, *see* Ammon, *supra* note 6, at 80-90; CASTO, *supra* note 1, at 36-41, 50-53.

[223] Treaty of Amity and Commerce, Article 2, (available at: http://avalon.law.yale.edu/18th_century/fr1788-1.asp)

Attacking a French vessel also served as a theoretical option, but it was the least realistic and most problematic option. In the weeks prior to Henfield's trial, another vessel seized by Genet's privateers arrived in Philadelphia soon after the *William*.[224] Despite the government's specific orders to not release the refitted vessel, Genet prepared to send it down the Delaware River.[225] Hamilton and Secretary of War Henry Knox advocated setting armaments on an island in the river to forcibly prevent the voyage.[226] This was the closest the United States came to armed conflict during the crisis.[227] The United States lacked the funds and means to fight militarily. Also, an attack on the French could generate retaliatory attacks and escalate to a large-scale conflict. This was the exact opposite of the desired outcome.

These unattractive options left the government little choice but to prosecute Henfield in civilian court for violating federal law. Yet this option offered no guarantee of success. Both Randolph and Jefferson, in official and private correspondence, understood that they were placing Henfield's fate into the hands of his "countrymen." Such an approach represented a very republican idea and likely confounded Hammond. Suppose the outcome did not meet with the British government's expectations? The Administration was relinquishing much control of the situation to the jury. Likewise, the government had jurisdictional problems.[228] Judge Peters had dismissed the Admiralty matter and now sat on the criminal case so a similar outcome could result. The government's argument rested on an expansive reading of the Law of Nations and on a train of logic that connected the common law to treaties through the Constitution. The Law of

[224] AMMON, *supra* note 69, at 80.
[225] Id. at 86.
[226] *Id.* at 86.
[227] The matter was resolved when Genet secreted the vessel down the Delaware River before the Administration could place armaments. *Id*. at 90.
[228] *See* Preyer, *supra* note 1; Palmer, *supra* note 1; *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267 (1986); Stephen B. Presser, *The Supra-Constitution, The Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer*, 4 LAW & HIST. REV. 362 (1986).

Nations did not stipulate how a nation was to remedy a neutrality violation. Therefore, the Administration reasoned, it had the choice of remedies. As Rawle's closing argument demonstrates, the success of the government's legal conclusion was not a certainty. The Constitutional argument was even more tenuous. The Constitution made treaties the supreme law of the land. By treaty the United States was at peace with all nations. When Henfield acted, he breached that peace. Therefore, he became liable for breach of peace at common law. Whether the government had jurisdiction over such common law crimes was an open question. Wilson's position was relatively well known based on his 1791 commentaries but Iredell and Peters could overrule him.[229] This made the prosecution uncertain on factual and legal bases.

To reduce the uncertainty, nearly the entire Administration, including Rawle and Lewis, had provided opinions and crafted arguments. Throughout June and July, the various attorneys had debated the legal merits. Simmering behind these debates was the growing ideological divide within the Administration itself. Both Hamilton and Jefferson maneuvered behind the scenes to gain support for their wider political objectives.[230] Randolph attempted to bridge the divide, drawing on Jefferson's ideological ideals to devise solutions that furthered Hamilton's desire for vigorous executive power. Randolph also travelled the areas between Philadelphia and Williamsburg, Virginia to determine what arguments would resonate with the people and to sell them on the Administration's actions. Finally, Rawle himself wavered on the viability of the government's position. His conversations with Judge Peters had left him believing the government lacked jurisdiction over the matter. With the high stakes and the growing divisions

[229]On Wilson's views of law, *see* John Fabian Witt, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 13-77 (Harvard University Press, 2007).
[230] On the split between Jefferson and Hamilton, see FERLING, *supra* note 4, 358-61.

in the Administration, these battles over the law's requirements and meaning were more pronounced than the remaining correspondence reveals.

When it came to the legal argument, Rawle and the United States government prevailed. Justice Wilson instructed the petit jury on the law, telling them that if Henfield had acted as alleged, then he was guilty of violating the law of nations and, thus, subject to punishment in federal court.[231] However, after several days of deliberating (an unusual occurrence for the time period), the jury returned a not guilty verdict.[232] Genet hailed the result as a victory for the people.[233] Despite their loss, the British did not protest. This may have been because Randolph interviewed at least one juror several days later and learned that the jury had concluded that Henfield was not aware he was violating neutrality when he set sail.[234] As a result, he lacked the requisite intent. The fact that the government lost on the facts and not the law may have pacified the British. It also helped that the Administration continued its efforts to secure the release of the *William*, which was Britain's ultimate goal.[235]

Ultimately, the United States successfully used lawfare to remain out of war. The proof of its success is lawfare's repeated use throughout United States history, specifically in the realm of criminal prosecution. The United States government repeatedly has resorted to criminal prosecution in order to achieve its objectives without having to resort to war. Throughout the 1790s, the United States government used criminal prosecutions to prevent war with France and Great Britain. Congress passed laws prohibiting citizens from assisting either side and from

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[231] *Henfield's Case*, 11 F. Cas. at 1121-22.
[232] *Id*. at 1122.
[233] CASTO, *supra* note 1, at 98-99; AMMON, *supra* note 6, at 71.
[234] Letter from Edmund Randolph to George Washington (Aug. 21, 1793), *in* 13 THE PAPERS OF GEORGE WASHINGTON, 1 JUNE- 31 AUGUST 1793, at 524-25 (Christine Sternberg Patrick, ed., 2007), http://founders.archives.gov/documents/washington/05-13-02-0347.
[235] Letter from Thomas Jefferson to William Rawle (Nov. 15, 1793), *in* 27 THE PAPERS OF THOMAS JEFFERSON, 1 SEPTEMBER- 31 DECEMBER 1793, at 384-85 (John Catanzariti ed., 1997), http://founders.archives.gov/documents/Jefferson/01-27-02-0351.

speaking out against the government. These laws resulted in prosecutions throughout the country. Jefferson, as President, advocated for an embargo against British commerce which, once Congress passed, he enforced through criminal prosecution. This pattern recurs today. The Justice Department's top priority is to protect our nation's security. Their primary means of doing this is to enforce the nation's laws relating to external threats. The Justice Department and Congress have long worked together so that prosecutors can efficiently prosecute cases. Federal prosecutors use a wide variety of statutes, including material support of terrorism, immigration offenses, and export controls to protect the nation.

Using criminal prosecution to protect national security presents several key benefits. Most obviously, it prevents mass casualties. Modern military engagement leads to highly publicized injuries and deaths. In addition to economic costs such as defense spending, health care provision and social services, casualties generate political costs as the public protests the loss of life. Using criminal prosecutions to accomplish similar objectives alleviates much of these economic and political costs. As Henfield's case demonstrates, the United State lacked funds to fight a war but could afford criminal prosecution.

From a policy standpoint, criminal prosecution provides policy flexibility. First, criminal prosecution permits discretion. The government can pick its legal battles more carefully than its military battles. Not prosecuting a case carries no political or financial cost. Not fighting a battle can lead to a longer conflict, increased economic costs and morale costs. Second, the government need not "win" to preserve national security. A jury acquitted Gideon Henfield but the government still succeeded in keeping the country out of war and preserving its neutrality. More recently, a jury acquitted Ahmed Ghailani of 284 counts associated with the 1998 East

Africa embassy bombings but convicted him of one, thus subjecting him to a life sentence.[236] In both instances, the government achieved its objective. The symbolic effects of both cases created lasting impressions.

Finally, prosecution gives the government a wider arsenal. While the United States Armed Forces presents an overwhelming display of weaponry, the United States Criminal Code presents much more. When combined with prosecutorial charging discretion, the government can prosecute national security threats using a wide-variety of charging options.[237] This gives the government tremendous flexibility when deciding what legal action will best protect the nation's security.

William Rawle's closing argument and the Washington Administration's deliberations leading up to it, established criminal prosecution as an effective means of lawfare. As the United States faces a time of renewed debate about the use of force internationally, policymakers might do well to remember that United States history places criminal prosecution as a highly significant tool in our arsenal.

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[236] CHARLIE SAVAGE, POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY 325-27 (2017); Benjamin Wittes and Robert Chesney, *The Politics of the Ghailani Verdict*, LAWFARE (Nov. 17, 2010), https://www.lawfareblog.com/politics-ghailani-verdict.html.

[237] *See also* Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1998). *See generally* HARVEY SILVERGATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2011).