Three International Courts and Their Constitutional Problems

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INTRODUCTION

Does Article III of the Constitution allow the United States to create international tribunals to try American or foreign illegal combatants or terror suspects? Could such a tribunal expand its mandate to include drug trafficking?

Imagine the United States grappling with an outbreak of domestic terrorism. Many suspects are detained, but prosecuting them would be difficult because evidence was obtained in violation of the Fourth Amendment, or because the large number of defendants would clog the federal court system. Or consider U.S. policymakers confronted with the problem of closing Guantanamo Bay. Civilian trials in domestic courts are politically unpopular, but the detainees cannot simply be freed.

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To deal with these problems, imagine the United States signs an “International Terror Tribunal Treaty” with Afghanistan, Jordan, Iraq, Morocco, Saudi Arabia, Turkey, the Netherlands, Israel, and the Marshall Islands. Those suspected of terrorism or material support of terrorism from any of the signatory countries would be tried by the International Terror Tribunal, composed of one judge from the highest court of each country. Rules of process, proof, and punishment would be based on those of other prominent international criminal tribunals, and the due process rights of all defendants would be respected.

The issue, however, is far from hypothetical: the International Criminal Court (ICC) does not deal with terrorism or drugs, but operates on the same underlying jurisdictional principles as the hypothetical International Terror Tribunal. If the United States were to join, it would delegate to the ICC jurisdiction to prosecute American nationals for crimes committed at home and abroad. Some crimes within the ICC’s jurisdiction have—like terrorism and drug trafficking in the hypothetical above—been condemned by most nations in a variety of treaties1 but have not assumed the status of universal jurisdiction crimes in customary international law.2 The jurisdiction of the court to try such crimes would come solely from the United States’ ratification of the Rome Statute.3

While the ICC is a largely novel international development, it is not the first time the United States confronted whether the Constitution permits participation in international courts with direct jurisdiction over citizens (as opposed to the commonplace and uncontroversial practice of international arbitration commissions, whose constitutional pedigree dates back to the Jay Treaty).4 In The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals (“Forgotten Precedent”), I examined a major constitutional episode from the early nineteenth century—the United States response to British invitations to join a network of “mixed commissions” that would hear cases involving vessels captured on suspicion of engaging in the slave trade.5 The scheme was a major part of British diplomacy, and many other countries agreed to join such courts.6

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4 See Forgotten Precedent, supra note 3, at 45–46 & n.13.
5 Id. at 75–81.
6 See id. at 58–59 & n.76.
Beginning in 1818, the United States formally rejected these proposals, arguing that the Constitution forbade joining an international criminal court with jurisdiction over American nationals.\footnote{See id. at 63–64.} The constitutional objections were formulated by some of the leading statesmen of the early Republic. John Quincy Adams played a central role in articulating the constitutional objections, first as a diplomat in London, then as Secretary of State, and ultimately as President.\footnote{See id. at 59.} Britain vigorously lobbied for the mixed commissions from 1818–1823, until it became convinced of the firmness of the constitutional objections and sought other alternatives.\footnote{See id. at 67–69, 71 (“The British apparently understood that [the United States’] constitutional objections were in earnest and sought to work around them.”).} Britain continued signing up other countries to its international court system for decades, but the United States remained aloof.\footnote{See id. at 72–73 & nn.158–59 (noting multiple treaties between Britain and other countries signed after negotiations with the United States ended in 1825 and describing continued British efforts to reach an agreement with the United States between 1825–1862).}

The United States put forth two main kinds of constitutional objections. One set focused on Article III: the United States could not by treaty confer jurisdiction over cases that would otherwise fall within the judicial power of the United States to non–Article III tribunals unless they would ultimately be reviewable by Article III courts.\footnote{See id. at 75–79 (describing the Article III objections).} Secondly, the mixed commissions, while no doubt endeavoring to be fair, would not be governed by the particular procedural trial protections enumerated in the Bill of Rights.\footnote{See id. at 79–81.}

The executive branch, which has the responsibility for negotiating treaties, was first to formulate the constitutional objections.\footnote{See id. at 63–64, 75–81.} But its constitutional positions found apparent assent in Congress.\footnote{See id. at 68–69, 75–81.} However, as often happens with legal questions in foreign relations, the “circumstances [did] not give a cognizance of them to the tribunals of the country.”\footnote{See id. at 68–69 (“[A]s far as the views of Congress can be determined, its members concurred in or deferred to the Administration’s constitutional doubts.”).} Ultimately, in the crucible of the Civil War, the Lincoln Administration in 1862 suddenly changed course and signed a mixed commissions treaty. The administration quickly got the treaty through the Senate, with backers curtly claiming the treaty addressed the constitutional defects identified under earlier administrations.\footnote{Letter from Thomas Jefferson to the Chief Justice and Judges of the Supreme Court of the United States (July 18, 1793), in 7 The Works of Thomas Jefferson 451, 452 (Paul Leicester Ford ed., 1904).}
The treaty proved moot as the commissions it created heard no cases, the slave trade having been finally eliminated by the war itself.\textsuperscript{17}

After sifting the evidence, \textit{Forgotten Precedent} argued that the Monroe/Adams Administrations’ rejection of the mixed commissions helps define the constitutionally permissible scope of international courts.\textsuperscript{18} While obviously not as decisive as a judicial decision, that rejection raises constitutional doubts about the International Criminal Court.\textsuperscript{19} Aside from the precedential weight of the arguments, the constitutional objections were based on doctrinal positions and arguments that remain consistent with modern jurisprudence, and indeed, seem to anticipate the “private rights” doctrine of non–Article III courts and the Bill of Rights limits on the treaty power that were only fully judicially articulated in the twentieth century.\textsuperscript{20}

Professor Jenny Martinez, the author of a careful study of the nineteenth century mixed commissions established by Britain,\textsuperscript{21} wrote a response criticizing my evaluation of the historical evidence.\textsuperscript{22} She makes three principal arguments. First, the constitutional objections should be heavily discounted because they were merely political pretexts concocted by the administration, not out of constitutional concern but simply as grounds to avoid entering into arrangements with Britain that the administration found politically distasteful.\textsuperscript{23} Second, Martinez argues that the mixed commissions did not in fact exercise criminal jurisdiction.\textsuperscript{24} Finally, Martinez maintains that to the extent there were any constitutional concerns about giving jurisdiction to the international courts, it was because slave trading was at the time only a municipal (national) crime, not an offense against international law.\textsuperscript{25} When the treaty was finally accepted in 1862, slave trading had become an offense under the law of nations.\textsuperscript{26} Martinez ultimately argues that the slave-trade courts episode does not suggest a constitutional problem with the United States becoming a party to the ICC.\textsuperscript{27}

This Essay responds to the contentions raised by Martinez. It also presents further evidence from the practice of the political branches

\begin{footnotes}
\footnoteref{17} See \textit{id.} at 98–99.
\footnoteref{18} \textit{Id.} at 99–113.
\footnoteref{19} The article pointed out that the precedent does not suggest a blanket unconstitutionality for international courts, even criminal ones. Rather, it indicated limits that the broad and inflexible scope of the Rome Statute happens to cross. \textit{See id.} at 43–44, 106–08.
\footnoteref{20} See \textit{id.} at 113.
\footnoteref{23} \textit{See id.} at 1090.
\footnoteref{24} \textit{See id.} at 1101–11.
\footnoteref{25} \textit{See id.} at 1111–25.
\footnoteref{26} \textit{See id.} at 1123.
\footnoteref{27} \textit{See id.} at 1125.
\end{footnotes}
that bears on the constitutionality of the ICC—this time by examining the history of the International Prize Court (IPC). In the early twentieth century, the United States found a treaty creating this tribunal to be constitutionally unacceptable. The constitutional defects with the International Prize Court also involve the limits on delegating Article III jurisdiction. Thus the IPC episode strengthens and corroborates the objections to mixed commissions raised ninety years before. The same kind of problem that prevented a ratification of the original IPC treaty exists to some degree in the Rome Statute of the ICC.

Part I addresses Martinez’s argument that the constitutional objections were a “strategic” makeweight. Part II discusses Martinez’s suggestion that the mixed commissions did not exercise any form of criminal jurisdiction—a point with which this Essay agrees, though it is a peripheral point on which none of the analysis in Forgotten Precedent rested. Part III discusses her suggestion that the constitutional objections would have fallen away if the slave trade had been an international law offense. It demonstrates that the administration and Congress clearly stated that constitutional problems would disappear only if the offense were not merely international but also one of universal jurisdiction, in which case no treaty would be needed to give alien tribunals jurisdiction. It then goes on to show how the ICC treaty defines offenses that are not universally cognizable and may not even be violations of customary international law, thus making it vulnerable to the same objections that were leveled against the mixed commissions. Finally, Part IV examines the constitutional arguments behind the Senate’s rejection of the original IPC treaty (1908–1910), which sought to create a global court for hearing disputes concerning naval captures that had already been fully adjudicated in domestic courts. These arguments focused on the impermissibility of using the treaty power to create courts outside of or contradictory to Article III, if they would be able to determine the private rights of individuals. It then goes on to explain that the ICC’s jurisdiction suffers from similar defects.

I

Politics & Pretext

Martinez argues that the interpretive weight of America’s long-standing constitutional refusal to join the mixed courts should be discounted because “the members of Monroe’s Cabinet who made the constitutional arguments[, while] not consciously insincere[,] . . .
were also not principally motivated by the constitutional objections.”

Most of the constitutional arguments were aired in two cabinet meetings, one in 1818 and the other in 1820, which established policy that would be reflected in a long diplomatic correspondence between the United States and Britain. Martinez argues that the precedential value of the episode is further weakened because “the constitutional objections were mostly raised in private meetings and diplomatic correspondence.” To a significant extent, these are general objections about the authoritativeness of constitutional interpretation by political branches, especially the executive branch, which typically coincides with policy interests and are not arrived at through an open, deliberative process.

Martinez’s argument is ultimately incapable of proof or disproof because it deals with the subconscious intentions of the relevant actors. It bears noting that this is not a widely used or accepted means of evaluating political branch constitutional interpretation: precedents generally serve as such despite the actors’ aligned policy interests (except perhaps in extreme cases), and the underlying arguments stand on their own merit. Nonetheless, this Part will show that the broader context in which these arguments were made demonstrates they were not makeweights. The arguments were accepted outside the administration without any fuss, even by those in the cabinet and Congress who did not share the administration’s underlying agenda. Moreover, the administration made no secret of its policy goals in discussions with the British, making it hard to understand why the administration would need to resort to the legal pretexts as a cover up.

A. Private Arguments?

Martinez argues that the precedential value of the episode is limited because it consisted of “private diplomatic correspondence” that was never “fully aired in some official, public forum.” The diplo-

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29 Martinez, supra note 22, at 1090.
30 See Forgotten Precedent, supra note 3, at 63–66.
31 Martinez, supra note 22, at 1089.
32 See, e.g., Clinton v. City of New York, 524 U.S. 417, 468 (1998) (Scalia, J., concurring in part, dissenting in part) (discussing President Nixon’s opinion on the President’s ability to constitutionally impound appropriated funds and the Court’s later rejection of that view); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–89 (1952) (discussing the constitutional relevance of analogous actions taken by prior administrations, without objection from Congress).
33 See infra notes 57–60 and accompanying text.
34 See infra notes 78–80 and accompanying text.
35 Martinez, supra note 22, at 1089. Martinez also notes that I drew constitutional arguments from John Quincy Adams’s diaries. These of course were private, but they were largely used in my earlier article to flesh out and give depth to arguments already openly made in Adams’s official papers.
matic correspondence is certainly enough to establish the executive’s position on the issues, which itself has constitutional weight, even though such positions are typically not arrived at through debate in a “public forum.” In any case, the correspondence was not private. It was reported to Congress on a series of occasions: several House committees requested the papers as they prepared reports addressing how the United States should respond to British slave trade diplomacy. And it was subsequently forwarded to the Senate as they ultimately advised on the modified search treaty in 1824. The House reports addressed the constitutional objections raised by the administration and did not gainsay them.

Notably, no one in the House or Senate appears to have expressed any hesitation about the constitutional arguments. Indeed, the reason the constitutional objections were not “fully debated by Congress,” as Martinez says, is that both houses seemed to find the constitutional arguments unremarkable. Given that the House and Senate knew the executive was repeatedly making strong constitutional representations in diplomatic correspondence, someone would have found occasion to object if the arguments were bogus. Congress had many members who forcefully opposed the slave trade, and the silence of these gentlemen makes it hard to argue that the constitutional arguments were pretextual. When the correspondence was subsequently published, leading jurists accepted the constitutional arguments without hesitation.

37 See Forgotten Precedent, supra note 3, at 72.
38 See Suppression of the Slave Trade—Conference of Foreign Governments on the Subject (communicated to the House of Representatives Feb. 9, 1821), in 5 American State Papers: Foreign Relations, supra note 36, at 90–92; see also Abstract of the Information Laid on the Table of the House of Commons, on the Subject of the Slave Trade, The Edinburgh Review 36.71, at 34, 50–51 (Oct. 1, 1821) (describing very favorably the House reports and their proposal).
40 Martinez, supra note 22, at 1089.
41 See Forgotten Precedent, supra note 3, at 68–69; see also supra note 38 and accompanying text.
42 See Forgotten Precedent, supra note 3, at 68.
43 See id.
44 See, e.g., Henry Wheaton, Enquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessels Suspected to be Engaged in the African Slave-Trade 89 (1842) (discussing the “constitutional objection which must ever apply to the jurisdiction of the mixed commissions”).
B. Pretextual Arguments?

Martinez’s central argument is that the constitutional objections were purely instrumental to rejecting the primary part of the British scheme, which would allow vessels of each nation to search each other’s ships on the high seas for slave trading. The United States had long resisted British claims of a broader “right of search” on the high seas as an interference with national sovereignty and maritime commerce. The issue was particularly sore as a result of the British practice of impressment. Martinez and I agree that Adams and much of the Monroe Administration opposed the search part of the treaty for those reasons. However, even in the executive branch, statesmen with no sympathy for the slave trade made clear that they would concede the search issue to stamp out the traffic. In contrast, they regarded the mixed tribunal objection as not open to negotiation because of its constitutional basis—unlike the search proposals. As Albert Gallatin wrote in a letter to John Quincy Adams:

The government of the United States had principally objected to the new principle that such cases, supposing the capture to be permitted, should be tried before a mixed tribunal. . . . This was repugnant to our Constitution . . . . If any agreement, therefore, was made, it appeared to me indispensable that, exclusive of every other restriction, it should be made an express and absolute condition that the vessel and crew that might be captured should in every instance be sent to the country under whose flag they sailed or to which they belonged . . . .

While concern about the proposed treaty was certainly linked for some to anti-British sentiment, it is notable that the government was ultimately willing to agree to a modified search right against the slave trade but would not agree to any kind of trial in mixed commissions. Martinez acknowledges, “That the 1824 treaty [approved by the Senate] included a right of search without a provision for mixed courts is

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45 See Martinez, supra note 22, at 1090 (“[T]heir objection to the British proposals was primarily based on policy and political concerns.”).

46 See id. at 1094.

47 See id.

48 See, e.g., Diary Entry of John Quincy Adams for Dec. 23, 1820, in 5 Memoirs of John Quincy Adams 216, 217 (Charles Francis Adams ed., 1875) (noting that Secretary of the Navy Smith Thompson agreed with the constitutional objections to the mixed courts proposal but not with the objection to search because “[h]e thought there was very little analogy” between the proposed search treaty and the broader search right previously claimed by the British).

49 See Forgotten Precedent, supra note 3, at 63–64, 81 & n.190.


51 See Martinez, supra note 22, at 1100.
probably the strongest piece of evidence supporting the argument that the constitutional objections were sincere. But the 1824 treaty was itself simply the culmination of numerous calls that had been made in both houses and by administration officials to sever the search part of the treaty from the mixed courts part and accept the former. Thus, the “strongest piece of evidence” is broader and stronger than the 1824 treaty and involves both houses and the executive itself.

The House of Representatives was filled with what Adams called “a spirit of concession” on the issue; in every session from 1818 to 1823 the House would make “some proposition . . . to request the President to negotiate for the mutual concession of this right of search.” Indeed, Adams, who admittedly “had at the time a feeling to the full . . . against the right of search,” would recall that the principal sponsor of these efforts, congressman Charles Fenton Mercer of Virginia, was so earnest about this concession that he had a heated and impolitic fight with Adams at a White House party.

Committees of the House of Representatives called for conceding the search issue in two reports, which adverts approvingly to the executive’s constitutional arguments. Finally, in 1823 the House itself overwhelmingly approved a resolution to this effect and was soon joined by the Senate. The executive diligently and faithfully followed these instructions, ultimately signing a modified reciprocal search treaty, which won the approval of the Senate. Yet all of these actors, while willing to concede search to various degrees, accepted that mixed courts were entirely off-limits. Martinez posits that the mixed commission’s arguments were motivated by bitterness towards the British, but it would have been expanded search rights by the Royal Navy that would most offend national pride. It is hard to see how the constitutional objections to mixed commissions were merely “straw men” to ward off concessions on search when the entire government ultimately conceded the latter but not the former.

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52 Id.
53 See Forgotten Precedent, supra note 3, at 71–72.
54 JOSIAH QUINCY, MEMOIR OF THE LIFE OF JOHN QUINCY ADAMS 358 (1858).
55 Id. at 357.
56 See id. at 358–59.
57 See THEODORE LYMAN, JR., 2 THE DIPLOMACY OF THE UNITED STATES: BEING AN ACCOUNT OF THE FOREIGN RELATIONS OF THE COUNTRY 263 (1828) (noting, as well, that the envisioned treaty would return detained vessels to their own countries for trial); see also Forgotten Precedent, supra note 3, at 71 & n.149.
58 See Forgotten Precedent, supra note 3, at 71–72.
59 See id. at 72.
60 See Lyman, supra note 57, at 263.
61 Martinez, supra note 22, at 1097.
Martinez also suggests that the broader question of slavery, which had become more salient during the Missouri Compromise debates, casts a shadow over negotiations with the British, perhaps further chilling American interest.\textsuperscript{62} However, according to a contemporary observer, slave-state senators were at least as receptive to the search proposal as Northern ones.\textsuperscript{63} Martinez also notes that much of the cabinet did little to restrict slavery.\textsuperscript{64} Yet Adams would recall that the rest of the administration was much more inclined to compromise on search than he was, including the slave owners.\textsuperscript{65}

The willingness of Congress and the administration to agree to any kind of reciprocal search arrangement was an extraordinary concession of a politically explosive issue. It was motivated by an understanding that national sentiments and patriotic sensitivities had to be suspended to effectively suppress the trade.\textsuperscript{66} The refusal of subsequent administrations to agree even when the British offered to finally accept the amended treaty proposed by the Senate in 1824 demonstrates the depth of the concession.\textsuperscript{67} And concession of a modified search right continued to be opposed during the negotiation of the Webster-Ashburton Treaty of 1842 and throughout the diplomacy of the late 1850s.\textsuperscript{68} Thus, the politicians who developed the constitutional objections to the mixed commissions were singularly flexible on the search issue.

C. Connections Between Search and Mixed Courts

Martinez argues that some comments by Adams and Secretary of the Navy Richard Thompson show that the replacement of mixed courts with national courts was itself a political response motivated by hostility to the right of search, not by independent constitutional con-

\textsuperscript{62} See id. at 1090–92.
\textsuperscript{63} See LYMAN, supra note 57, at 276–77 (suggesting that Northern senators were more opposed to the treaty because they feared British search rights would interfere with their commercial shipping).
\textsuperscript{64} Martinez, supra note 22, at 1093.
\textsuperscript{65} See QUINCY, supra note 54, at 358 (“[A]lthough I was not myself a slaveholder, I had to resist all the slave-holding members of the cabinet, and the President also.”).
\textsuperscript{66} See, e.g., Letter from Albert Gallatin to J.Q. Adams (Feb. 2, 1822), supra note 50, at 230 (“[N]o nation was more jealous than the United States were of the pretensions of Great Britain on the subject of maritime rights . . . . But I would acknowledge that unless something of that kind [i.e., a treaty recognizing a limited right of search] was done . . . it appeared impossible completely to suppress it.”).
\textsuperscript{68} See id. at 39–40. Thus President Tyler would maintain that “[t]he examination or visitation of the merchant vessels of one nation, by the cruisers of another,” would not be “consistent with the honor and dignity of the country.” Message from President Tyler to the Senate, S. JOURNAL, 27th Cong., 2d Sess. 689, 695 (1842).
cerns.\textsuperscript{69} The relevant statements suggest that the bringing in of the captured ship to its own ports would guard against "abuses" of the right of search, such as impressment.\textsuperscript{70} These statements do not do justice to the full scope of the administration's and public's concern with the right of search. The core objection lay in the right itself—the supremacy assumed by one nation when it searches the vessels of another in peacetime.\textsuperscript{71} More practically, America's longstanding defense of neutral rights (to be free from the interference of being stopped and searched for contraband by belligerents) was primarily about its ability to trade with warring parties.\textsuperscript{72} Seizure was a further abuse of the right of search, but the right itself set Britain up in position to exercise dominance over the seas, and the right was thus roundly opposed by nations subject to such seizures.\textsuperscript{73}

The assertion of such a right was "analogous to that of searching the dwelling-houses of individuals on land."\textsuperscript{74} That is, it was the assertion of a "global police" power and the consequent offense to national sentiment that made search so objectionable. The objection to search was not limited to cases where evidence of wrongdoing was found: indeed, search was most offensive when no illegal conduct was revealed. The very act of a foreign navy putting a U.S.-flagged vessel through what today would be called a "stop and frisk" outraged Americans' sense of national honor.\textsuperscript{75}

Trial in the courts of the flag state would only serve as a check in those cases where search was "incidental to the right of detention and capture."\textsuperscript{76} Eliminating mixed courts would not solve most of the vexations attendant to search—the interference with shipping, the invasiveness, and even impressment when the searched vessel is not taken in for condemnation. Indeed, as Thompson and Adams noted, this would only reduce the very great objections to search.\textsuperscript{77} Thus these comments show the extent to which the United States was ultimately willing to compromise these principles by accepting the British reciprocal search proposal.

\begin{footnotes}
\item[69] See Martinez, supra note 22, at 1100–01.
\item[70] Id.
\item[71] See Soulsby, supra note 67, at 17; see also Message from President Tyler to the Senate, supra note 68, at 693.
\item[72] Many Americans viewed the seizure and impressment of neutral vessels as "an obnoxious and intolerable abuse of the belligerent right." Soulsby, supra note 67, at 17; see also Martinez, supra note 21, at 26–27 (discussing British naval seizure practices and the American opposition to them).
\item[73] Martinez, supra note 21, at 27.
\item[74] Wheaton, supra note 44, at 91.
\item[75] See, e.g., Message from President Tyler to the Senate, supra note 68, at 693 ("Interference with a merchant vessel by an armed cruiser, is always a delicate proceeding, apt to touch the point of national honor, as well as to affect the interests of individuals.").
\item[76] Wheaton, supra note 44, at 89–90.
\item[77] See Martinez, supra note 22, at 1100–01.
\end{footnotes}
Martinez claims that “Adams . . . used the constitutional arguments strategically in negotiations with the British to avoid the more sensitive topic of impressment.”78 It is not apparent why a “straw man” would be needed. Adams did not avoid discussing the search issues; indeed, from the beginning he forcefully elaborated on them in his discussions with the British. In an 1817 encounter with William Wilberforce, Adams ruled out any joint search project strongly and forcefully: “the prejudices of my country are so immovably strong” about search.79 The objection was openly and strenuously maintained throughout the correspondence.80

D. Politics and Principle in the Political Branches’ Constitutional Interpretation

From 1818–1862, and especially under the Monroe and Adams Administrations, the United States refused to join mixed courts to try slave traders on explicitly constitutional grounds.81 Martinez argues that because the constitutional objections coincided neatly with the policy views and diplomatic goals of the administration, this largely nullifies the weight of this episode for interpreting the foreign affairs powers in the Constitution.82 Above, I have challenged the factual basis of Martinez’s critique, showing how even those with opposite diplomatic and political agendas to Adams opposed mixed courts.83 But assume the arguments did coincide with political interests. Martinez’s position still proves too much.

It is quite common, if not typical, that the political branches’ constitutional views coincide with their views of the national good. Those who supported the constitutionality of a national bank also thought it a national priority, though the two are not formally connected.84 Such politico-legal coincidences are not typically grounds for dis-

78 Id. at 1094.
79 QUINCY, supra note 54, at 358.
80 See Diary Entry of John Quincy Adams for Dec. 23, 1820, supra note 48, at 189–90 (recounting conversations with Canning in 1820 about the Administration’s constitutional objections); Letter from John Quincy Adams to Albert Gallatin and Richard Rush (Nov. 2, 1818), in 5 AMERICAN STATE PAPERS: FOREIGN RELATIONS, supra note 36, at 72, 72–73 (instructing these ambassadors to communicate to the British that “the admission of a right . . . to enter and search the vessels of the United States in time of peace, under any circumstances whatever, would meet with universal repugnance in the public opinion of this country; that there would be no prospect of a ratification . . . to any stipulation of that nature; that the search by foreign officers, even in time of war, is so obnoxious to the feelings and recollections of this country, that nothing could reconcile them to the extension of it, however qualified or restricted, to a time of peace”).
81 See Martinez, supra note 22, at 1086–87.
82 See id. at 1087–88.
83 See supra notes 38–39 and accompanying text.
84 See WALTERS, supra note 50, at 357–58 (discussing Gallatin’s support for and thoughts on a national bank).
missing the sincerity or precedential value of the constitutional interpretation.

The historical practice by the political branches is a common tool of constitutional interpretation. Justice Felix Frankfurter even famously suggested that such practice can put a "gloss" on the Constitution's meaning in separation of powers cases. Regardless of what one thinks of the role of the political branches in constitutional interpretation,85 in areas where the courts are unlikely to have an opportunity to rule or where the political branches have a prominent gatekeeping role, such as foreign relations, a genuine interpretive role seems inevitable.86 According such interpretations precedential value seems necessary for rule-of-law values like consistency and predictability.87 Moreover, the slave courts episode has several features that tend to support the use of historical practice: agreement among the branches, a foreign relations subject matter,88 and questions involving the separation of powers—in this case, the erosion of the role of Article III courts and the lack of contrary judicial precedent or contrary textual mandate.

Martinez’s standard would essentially eliminate the use of political branch interpretation by requiring it to rise to a standard akin to statements against partisan interest. (But even that standard would also be satisfied here.) It would particularly undermine the precedential value of the 1862 acceptance of mixed commissions, done under a sense of great diplomatic compulsion.89 Indeed, Martinez’s “other agenda” argument need not stop with the political branches. Judicial decisions of constitutional questions commonly reflect the judges’ political views of the substantive questions involved.90 If one agrees that

85 See Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 412 (2012) (“Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers.”). Bradley and Morrison deal with the typical separation of powers dispute, between the legislative and executive branches, and caution about presuming past congressional acquiescence from inaction. The international courts question, by contrast, involves the powers of the political branches at the expense of Article III courts—and thus in this framework, narrow interpretations of their powers by the political branches should carry weight.
87 See Lawrence B. Solum, Originalism and the Unwritten Constitution, 2013 U. Ill. L. Rev. 1935, 1979 (2013) (“Originalists whose normative concerns focus on the rule of law and judicial constraint may welcome historical practice arguments—as they provide a basis for settling constitutional questions.”)
89 See Forgotten Precedent, supra note 3, at 95–96.
90 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring in the judgment) (“The opinions of judges . . . often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote . . . .”).
constitutional interpretation by the political branches has any precedential or interpretative value, it is hard to see why it would be held to a psychological standard not applied to the courts.

More broadly, Martinez’s notion that the constitutional arguments made in extensive diplomatic correspondence were make-weights sounds like a conspiracy theory. The arguments were presented to the cabinet (more willing than Adams to make a deal with the British), both houses of Congress, and eventually the public. Yet throughout this period, no one gainsaid the validity of the constitutional arguments, let alone their earnestness.

II

CRIMINAL CONFUSION

The constitutional arguments about the slave trade courts seemed to assume that they would exercise criminal jurisdiction. The administration specifically referred to the criminal nature of the proceedings and to constitutional protections relevant to criminal matters. The accuracy of this characterization seems dubious, and the reasoning behind it is unclear. While the details of the British mixed courts proposal to the United States had not been committed to writing, the other mixed courts treaties that had been negotiated with the Netherlands, Spain, and Portugal limited the powers of the tribunals to condemnation of the vessel and liberation of the slaves. Crews would be returned to their home country for further criminal proceedings. The treaty the United States ultimately signed in 1862 followed these lines.

Thus, why the courts were seen in the United States as exercising criminal powers is a bit obscure, as I noted in Forgotten Precedent, but it does appear that they were truly understood as such. In an attempt

91 See Quincy, supra note 54, at 359–60.
92 Even when the Senate ultimately switched course in 1862, it addressed the Monroe Administration’s arguments on the merits (albeit harshly, dismissing them as “superficial and untenable”). See Final Suppression of the Slave-Trade, Speech in the Senate, on the Treaty with Great Britain (Apr. 24, 1862), in 6 The Works of Charles Sumner 474, 483 (1874).
93 See Forgotten Precedent, supra note 3, at 82.
94 See id. at 82–83 & n.197.
95 See Martinez, supra note 22, at 1083–84.
96 See id. at 1084.
97 See Forgotten Precedent, supra note 3, at 98.
98 Id. at 82–83. Martinez suggests that one should not conclude that the courts were regarded as criminal by the repeated descriptions of them as “penal.” Martinez, supra note 22, at 1109–11. But there were far more indications in the diplomatic correspondence than this. The commissions were described as having power over “the persons” of U.S. citizens and criminal constitutional protections were invoked. See Forgotten Precedent, supra note 3, at 82 & n.197. Finally, when Senator Sumner finally pushed a mixed courts treaty through the Senate in 1862, he noted the constitutional objections raised by Adams were
to reconstruct the reasoning, I briefly speculated that the *in rem* forfeiture proceeding itself could have been seen by the administration as criminal in nature.\textsuperscript{99} Martinez extensively demonstrates that the condemnation of vessels, even for a crime like slave trading, would not have been regarded as criminal and would have been tried by a judge in admiralty.\textsuperscript{100} This is quite right and shows that it would not be the condemnation of the vessels that could account for the criminal characterization of the commissions.

Thus Martinez succeeds in emphasizing the point made in my article that the criminal characterization of the courts is not easy to understand. Certainly this might cast some uncertainty on the precedential significance of the episode—constitutional objections premised on a mistake of fact could be seen as “dicta” from the political branches. At the same time, this characterization did establish rather extensive political branch discussion of the issue, which remains the best “precedent” for discussions of international criminal courts available, whatever its strength. Moreover, the understanding was apparently widely shared—Congress did not dispute it, and the British did little to correct it.\textsuperscript{101}

One indication that the mixed commission’s role went beyond pure condemnation can be found in a clause of the 1862 Anglo-American Treaty.\textsuperscript{102} It provides that the crew of a suspected slaver shall be detained and “delivered” to the mixed court even when the vessel has been abandoned or scuttled by the captor for unseaworthiness.\textsuperscript{103} In such circumstances, the mixed court would apparently adjudicate the guilt or innocence of the voyage despite the absence of the slave ship.\textsuperscript{104} In a standard prize proceeding, the tribunal maintains no interest in the case outside the physical object of the vessel, and the vessel’s destruction moots the case.\textsuperscript{105} Even in the standard case

\textsuperscript{99} See Forgotten Precedent, supra note 3, at 84–85.
\textsuperscript{100} See Martinez, supra note 22, at 1102–09.
\textsuperscript{101} See Forgotten Precedent, supra note 3, at 82–83 & n.203.
\textsuperscript{103} Id.
\textsuperscript{104} The treaty does not spell out exactly what the mixed court should do with the crew turned over to it in these circumstances, but the treaty does require that the captors deliver the suspect vessel’s papers, suggesting some inquiry into its status and mission would be held. See Id. annex A, art. III, at 1230.
\textsuperscript{105} See, e.g., Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808) (“[T]he court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice. Recapture, escape, or a voluntary discharge of the captured vessel would be such a circumstance, because the sovereign would be thereby deprived of the possession of the thing, and of his power over it.”). See also Charles Doyle, Cong. Res. Serv., Crime and
before a commission, upon condemnation of the vessel, the crew
would be delivered home for trial— in effect giving the mixed com-
misson the role of a grand jury. And as I noted in Forgotten Prece-
dent, there may have been some question about the preclusive effect
of judgments of the commissions in subsequent criminal trials.

My article suggested that the Monroe Administration may itself
have been unclear on the precise powers and nature of the interna-
tional courts. While Martinez agrees this may be possible, she
downplays such a possibility by suggesting it would mean the cabinet
was “confused or paranoid” about the role of international courts.
Yet a lack of clarity or concern about the scope of the courts’ powers
need not be attributed to balanced mental states.

This can be clearly seen from the massive ongoing ambiguities
about the scope of the International Criminal Court’s jurisdiction.
More than a decade after its establishment, and with libraries of scholar-
ship written on its functioning, some very basic aspects of the ICC’s
jurisdiction and powers remain unclear. Take, for example, the funda-
mental issue of temporal jurisdiction. A central principle of the
ICC is that jurisdiction is purely prospective, running from when a
nation becomes a state party.

s/misc/97-139.pdf; 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 359 (2d ed. 1832).

106 See Martinez, supra note 22, at 1084.
107 The detention of the crew during the mixed court proceedings could be seen as
raising an issue under the Grand Jury Clause: the crew is “held to answer for a capital, or
otherwise infamous crime” without “presentment or indictment of a Grand Jury.” U.S.
Const. amend. V. To be sure, the crew would not answer for the crime before the commis-
sion, but the crew is nonetheless being held to answer for it by the Commission.

108 The standard rule was that judgments of foreign admiralty tribunals would be con-
clusive in U.S. courts on all facts necessarily determined there, at least with respect to those
who, like the crew, were present for the proceeding. And the fact of the vessel having
engaged in the slave trade would largely dispose of the guilt of the officers and crew. See,
e.g., The Mary, 13 U.S. (9 Cranch) 126, 142 (1815) (“A sentence of a [foreign] Court of
admiralty is said not only to bind the subject matter on which it is pronounced, but to
prove conclusively the facts which it asserts.”); Croudson v. Leonard, 8 U.S. (4 Cranch)
434, 436 (1808) (Washington, J.) (“The established law upon this subject in the courts of
that country is, that the sentence of a foreign court of competent jurisdiction condemning
the property upon the ground that it was not neutral, is so entirely conclusive of the fact so
decided, that it can never be controverted, directly or collaterally, in any other court hav-
ing concurrent jurisdiction.”). This collateral estoppel did not run to criminal proceed-
ings, but that may not have been settled in the 1820s. See Allen v. United States, 1 F. Cas.
518, 520 (C.C.D. Md. 1840) (No. 240) (“[T]he rule has never been applied to criminal
proceedings.”).

109 See Forgotten Precedent, supra note 3, at 82–83 & n.206.
110 Martinez, supra note 22, at 1109.
111 See Rome Statute of the International Criminal Court, art. 11(2), supra note 3, at 99
(“If a State becomes a Party to this Statute after its entry into force, the Court may exercise
its jurisdiction only with respect to crimes committed after the entry into force of this
Statute for that State . . . .”); see also DAvID J. Scheffer, HOW TO TURN THE TIDE USING THE ROME
Rome Statute to contain a significant loophole in article 12(3) that would allow states to give the ICC jurisdiction over events that have already transpired.112 This basic feature of the statute remains ambiguous, though the uncertainty apparently did not arise at all during the drafting.113 Similarly, the ICC can only deal with the gravest offenses,114 but that concept, though central to admissibility, remains loosely defined and open to varying interpretations.115 The operation of the core principle of complementarity remains undefined and open to debate. So do basic questions like what entities qualify as a “state” and the extent of territorial jurisdiction.116

Thus assurances that the ICC would not prosecute American servicemen depend heavily on contested and unproven understandings of gravity, complementarity, and territorial jurisdiction, to say nothing of the disputed definitions of various crimes. The point here is not to criticize the ICC—such uncertainties may be inevitable in an ambitious new institution. However, it does show one does not have to be “confused or paranoid” to not fully understand the operations of such a court. This would have been even truer in the Monroe Administration, when the mixed tribunals had just begun functioning.

III
INTERNATIONAL COURTS FOR INTERNATIONAL LAW?

As the mixed courts proposal floundered, the British and Americans endeavored to pursue, as an alternative, a diplomatic campaign to declare the slave trade to be “piracy.”117 In Forgotten Precedent, I explained that the significance of this pursuit was piracy’s status as a universal jurisdiction (UJ) offense—all nations had jurisdiction to prosecute it.118 (Thus, if the slave trade became such an offense, there would be no need to delegate Article III jurisdiction by treaty because, as with normal cases of extradition, the extraterritorial tribunal would already have it.) I also noted that this suggests that interna-

113 See Scheffer, supra note 111, at 32.
114 See Rome Statute of the International Criminal Court, art. 8(a)–(e), supra note 3, at 94–97 (restricting the ICC’s war crimes jurisdiction to those offenses which are “grave” or “serious”).
117 See Forgotten Precedent, supra note 3, at 62.
118 Id.
tional criminal courts today could constitutionally prosecute universal jurisdiction crimes.\footnote{See id. at 91–92, 105–06.}

Consistent with her overall argument that the mixed courts arguments were simply made to avoid agreeing to search, Martinez suggests that the characterization of the slave trade as piracy was needed not to avoid constitutional objections to adjudicatory jurisdiction (mixed courts), but rather political ones about enforcement jurisdiction (the right of search).\footnote{See Martinez, supra note 22, at 1119 (“To the contrary, the Americans were focused on redefining the slave trade as [piracy] as a way to cabin the right-of-search issue.”).} Yet there was no constitutional obstacle to agreeing to search through treaty, which is precisely what ultimately happened. The House specifically said that efforts to gain a customary acceptance of slavery as piracy would both allow for search \emph{and} for international trial.\footnote{Report of the Committee to whom was Referred so much of the President’s Message, of the 7th of December last, as relates to the Suppression of the Slave Trade, 1 CONG. DEB. 73, 18th Cong., 2d Sess. (Feb. 16, 1825).} The goal of treaties and laws proclaiming slavery as piracy sought to introduce into general international law the principle that pirates should be \emph{punished} universally,\footnote{Th[e] [1819 House] resolution, in proposing to make the slave trade piracy, by the consent of mankind, sought to supplant, by a measure of greater rigor, the qualified international exchange of the right of search for the apprehension of the African slave dealer, \emph{and} the British system of mixed tribunals created for his trial and punishment; a system of which experience and the recent extension of the traffic, which it sought to limit, had disclosed the entire inefficacy. Id. at 75 (emphasis added).} by “all nations.”

That establishing the slave trade as piracy would address concerns about both international prosecution \emph{and} search is consistent with the United States’ entire policy throughout the negotiations: that these two issues posed separate, parallel objections to the proposed treaties.\footnote{See id. (noting that the United States seeks to generalize its law that treats slave traders as “enemies of the human race, and arm[s] all men with authority to detect, pursue, arrest, and punish them”).} Thus, Martinez is surely correct that the United States saw a piracy designation as a potential solution to the search problem. But this in no way demonstrates that statements about UJ solving the problem of adjudicatory jurisdiction are “misread” if not limited to the search concern. The piracy proposal would affect both search and trial.

Indeed, search and trial were functionally “connected.” The point of searching for pirates or slave traders was to bring back for...
Enforcement and adjudicatory jurisdiction went together; it would be awkward for a navy to return suspects to another country. Martinez correctly notes that the treaty ultimately signed by the Adams Administration agreed to the piracy designation but nonetheless provided for trial by the respective nations’ municipal courts. The project to make the slave trade piracy under the law of nations was in its early stages; thus the right to search was granted purely by the treaty, not as a consequence of the “piracy” designation. Until piracy became a U.S. offense, it would have to be punished in national courts, and such a requirement had to be specified in the treaty. The piracy language in the treaty was designed to be the germ of such a shift in international custom for future purposes, not for current search purposes.

Numerous statements at the time clearly related the attempt to “piratize” the slave trade to adjudicatory jurisdiction, not enforcement jurisdiction. The new British anti–slave trade initiative was kicked off with a memorandum by Lord Castlereagh, the foreign minister, circulated at the Congress of Aix-la-Chapelle:

If the moment should have arrived when the Traffic in Slaves shall have been universally prohibited, and if, under those circumstances, the mode shall have been devised by which this offence shall be raised in the Criminal Code of all civilized Nations to the standard of Piracy; they conceive, that this species of Piracy, like any other act falling within the same legal principle, will, by the Law of Nations, be amendable to the ordinary Tribunals of any or every particular State . . . . If they be Pirates, they are “Hostes humani generis:” . . . and the verification of the fact of Piracy, by sufficient evidence, brings them at once within the reach of the first Criminal Tribunal of competent authority . . . .

As Adams wrote to one U.S. ambassador: “So long as the [slave] trade shall not be recognized as piracy by the law of nations, we cannot, according to our Constitution, subject our citizens to trial for being engaged in it, by any tribunal other than those of the United States.” Similarly, in a discussion of the “outlawry of this traffic as piracy,” Adams mentioned both its implications for search and that it was “essential” under the U.S. Constitution to tolerate “the submission

125 See supra note 121 and accompanying text.
126 See Lyman, supra note 57, at 275.
127 See Martinez, supra note 22, at 1118, 1120–21.
128 See id. at 1083.
129 See id. at 1088.
130 See Forgotten Precedent, supra note 3, at 62.
131 6 British and Foreign State Papers 79 (Foreign Office ed., 1835) (emphasis added).
Similarly, a congressman described the effect of the slave trade becoming piracy under the law of nations: “All nations will have authority to detect, to punish it.”

Discussions of efforts to assimilate the slave trade to piracy focused particularly on pirates’ status as “hostes humani generis”—the phrase that characterized their universal liability, as Martinez has acknowledged. Certainly the jurisdictional aspects of piracy were at the forefront of everyone’s mind in 1818–1820 when the Supreme Court heard a series of high-profile cases about UJ over pirates.

These and other sources show that giving the slave trade piratical status in international law, rather than in a convention with Britain, would address constitutional concerns about trial in any non-U.S. tribunal. Thus it was precisely UJ that was the purpose of designating the slave trade as piracy, and this shows that the constitutional concerns about international criminal courts can only be avoided for UJ crimes. (In practice, this happens to correspond with most of the crimes such courts would be interested in prosecuting.)

However, Martinez argues for a lower bar—that it was not the UJ status of piracy that was important but merely its status as an international crime. It is not clear why the source of the law, rather than its jurisdictional scope, would weaken concerns about mixed commissions. After all, international law is part and parcel of U.S. law.

Still, one important implication of Martinez’s position is that international courts could not be given jurisdiction over purely treaty crimes. All of the crimes would have to be recognized as customary offenses as well. This position takes the ICC from the constitutional fire to the frying pan. Several of the crimes and other aspects of the Rome Statute go beyond customary law and bind the parties simply by

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133 Id. at 3029 (Aug. 8, 1823) (letter from John Quincy Adams to Alexander Everett).


135 36 ANNALS OF CONG. 2209 (1820).

136 See Martinez, supra note 21, at 123 (“Both the United States and Britain hoped that slave trading would eventually become piracy under the general law of nations . . . . Making the slave trade piracy under the law of nations would have several advantages. First, suspected pirate ships were susceptible to search . . . . Second, all countries had jurisdiction to punish individuals who committed piracy as defined by the law of nations.”).


138 See, e.g., Rome Statute of the International Criminal Court, art. 5, supra note 3, at 92 (specifying genocide, crimes against humanity, war crimes, and crimes of aggression as being those within the jurisdiction of the ICC); see also Luc Reydam, Universal Jurisdiction: International and Municipal Legal Perspectives 81–210 (2010).

139 See Martinez, supra note 22, at 1125, 1129.

140 See, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law . . . .”).
virtue of the treaty.\textsuperscript{141} Despite being purely conventional offenses, Martinez argues that “the treaty itself—a widely ratified multilateral treaty—makes them international crimes against international law” and thus “wholly” unlike the slave trade courts.\textsuperscript{142} This argument tries to have it both ways.\textsuperscript{143} On one hand, these relevant crimes have not been recognized by the “law of nations,” or customary international law. They exist purely by virtue of the treaty (and some are also reflected in U.S. national law). But this is the exact situation Britain faced with its anti-slavery search treaties, which enjoyed broad participation among maritime powers but did not establish a customary rule.\textsuperscript{144}

The ICC does not have the “consent of the civilized world”—which, as Adams noted in regard to the slave trade treaties, required the consent of the “maritime powers.”\textsuperscript{145} Indeed, Madison suggested that the transformation would require “universal consent.”\textsuperscript{146} The majority of European nations indeed quickly assented to the British principle, with Portugal as the main holdout,\textsuperscript{147} but this was enough to prevent the necessary kind of international customary norm from emerging.

IV

FROM THE INTERNATIONAL PRIZE COURT TO THE ICC

The slave trade courts were not the last occasion on which the United States rejected an international court treaty on constitutional

\textsuperscript{141} See Robert Cryer et al., An Introduction to International Criminal Law and Procedure 151 (2d ed. 2010); Leena Grover, A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court, 21 Eur. J. Int’l L. 543, 564 & n.122 (2010) (“[C]ommentators have consistently pointed out that the Rome Statute innovates in places by going beyond customary international law to include ‘new’ international crimes . . . .”). Examples include a broadening of crimes against humanity, certain sex crimes, child soldiers, and expanded war crimes. See id. at 553 & n.49. Moreover, customary defenses are abolished, such as head-of-state immunity. See Cryer et al., supra, at 151 (discussing how the Rome Statute’s provisions go further than merely codifying existing law); see also infra note 228 and accompanying text.

\textsuperscript{142} Martinez, supra note 22, at 1125.

\textsuperscript{143} The “wide” ratification of the ICC encompasses about two-thirds of the world’s countries. See Ian Hurd, International Organizations: Politics, Law, Practice 229 (2d ed. 2014).

\textsuperscript{144} The ICC treaty is “multilateral,” but that is purely an arrangement of convenience, identical to the mixed courts treaties secured by Britain. See Forgotten Precedent, supra note 3, at 66.


\textsuperscript{146} Letter from James Madison to Richard Rush (Nov. 13, 1823), in 3 Letters and Other Writings of James Madison 344 (1865); see also 40 Annals of Cong. 1150 (1823) (“The consent of nations may make piracy of any offence upon the high seas.”).

\textsuperscript{147} Martinez, supra note 22, at 1134 (chronicling in her appendix the dates of Britain’s respective treaties with the Netherlands, Spain, and Portugal).
grounds. A subsequent episode echoed Adams’s concern about giving power over Americans to a court “irresponsible to the supreme corrective tribunal of this Union.”\textsuperscript{148} The next constitutional encounter with international courts came as a result of the Hague Conference of 1907, a major attempt to revise and develop the laws of war.\textsuperscript{149} One of the items agreed to at the conference was the creation of an international prize court.\textsuperscript{150} The Senate opposed the treaty on Article III grounds that both reinforce the genuineness of the objections to the mixed commission and suggest further Article III problems for the International Criminal Court.\textsuperscript{151}

In naval war, belligerents could under certain circumstances seize civilian shipping as a kind of lawful booty; the propriety of such captures would be adjudicated by a prize court of the captor’s nation.\textsuperscript{152} While national prize courts were obliged to disinterestedly apply the law of nations, it was generally thought that in practice they favored prize claims by their own nationals and did not do justice to neutral rights.\textsuperscript{153} The proposed International Prize Court would hear appeals by owners and other interested parties challenging condemnations by national prize courts.\textsuperscript{154} The International Prize Court would ensure international law was applied objectively.

Though it may seem highly specialized now that naval prize has fallen out of use, the prize court proposal was an extremely important diplomatic event in its day. Prize had traditionally been a central part of warfare and a matter of general public interest.\textsuperscript{155} Moreover, the court was no doubt intended by its American proponents to be the foundation of an ambitious system of international tribunals with more general jurisdiction.\textsuperscript{156} In rather modern language, these proponents described the International Prize Court as the beginning of a new world order of global legalism.\textsuperscript{157} Thus, in his 1907 State of the

\textsuperscript{148} Letter from John Quincy Adams to Stratford Canning (Dec. 30, 1820), in 5 American State Papers: Foreign Relations, supra note 36, at 76.


\textsuperscript{151} See George A. Finch, Appellate Jurisdiction in International Cases, 43 Am. J. Int’l. L. 88, 89 (1949).

\textsuperscript{152} See Gregory, supra note 149, at 469; see also id. at 472 (discussing an objection to this practice).

\textsuperscript{153} See id. at 472.

\textsuperscript{154} See Convention Relative to the Establishment of an International Prize Court, supra note 150, 174–77.

\textsuperscript{155} See Gregory, supra note 149, at 468–69 (discussing this history).

\textsuperscript{156} See id. at 475 (“No achievement in the whole history of international negotiation can be recalled which gives promise of weightier or more beneficent consequence. It is the great step forward in the reign of law and order in the chaos of international affairs.”).

Union speech, Theodore Roosevelt described the prize court treaty as an agreement “of the first importance.” Secretary of State Elihu Root would later call it the “principal achievement of the Hague Conference of 1907.”

A. Constitutional Objections to the Prize Court

While the delegates to the Second Hague Convention do not appear to have been concerned by constitutional problems during the negotiations, they did very briefly address the constitutionality of the arrangement in their report to Congress. They suggested that delegating jurisdiction to such a court was supported by the precedent of the consular courts cases. The Supreme Court had upheld the trial of Americans abroad by non–Article III consular courts created by treaty with the foreign power. “A diplomatic court established in a foreign country is not a court of the United States,” a member of the U.S. delegation argued. Martinez made similar arguments in defense of international courts, relying both on arrangements like that upheld in In re Ross, and the notion that Article III only applies to U.S. courts.

Whatever the merits of In re Ross, much of its reasoning has been overruled—in particular, its notion that the Constitution does not apply abroad, after which it is all downhill for non–Article III courts. Boumediene v. Bush recognized that In re Ross may have already been
abandoned by the Court, and if it had not, that decision finished it off.  

It bears dwelling for a moment on the question of whether international courts raise questions about the “judicial power” of the United States at all, as these questions are raised by Martinez about the slave trade courts and by the defenders of the prize court.  

While most non–Article III courts and attendant constitutional problems do involve federal bodies created by the U.S. government, non–Article III courts need not be limited to such situations. Thus, if Congress gave the power to try bankruptcies and their attendant state law claims to a group of private arbitrators, it would presumably pose constitutional problems as much as if Congress gave it to federal bureaucrats.  

True, state courts have concurrent jurisdiction, and Congress can leave matters to them.  But this is because the state courts already had jurisdiction, which was preserved by the Constitution: Congress does not give them Article III powers; state courts would have jurisdiction of federal law issues if Congress did nothing. Foreign countries would have jurisdiction over extraditable offenses. But the slave courts, the prize court, and the ICC would not have jurisdiction over Americans in the relevant cases in the absence of the treaty.  

However, despite this general enthusiasm and the treaty’s acceptance by most naval powers, the U.S. Senate Foreign Relations Committee and various jurists promptly expressed serious constitutional doubts focusing on Article III.  

The objections focused on the prize court’s ability to review and overturn final, fully appealed judgments of U.S. courts. Senators of both parties objected that “after a judicial case had run the usual course, even up to the Supreme Court of the United States, there would be an appeal, in the event of an international dispute, to an international prize court.”  

As the American Delegation to the London Naval Conference reported, the Constitution does not permit non–Article III courts to “have the effect of an-

167 See Martinez, supra note 22, at 1126–28.  
169 See Martinez, supra note 22, at 1126.  
170 See Finch, supra note 151, at 89 (noting that objections were raised by “eminent judges and lawyers and in the Committee on Foreign Relations”). Indeed, the legal advisor to the U.S. Hague Delegation, James Brown Scott, acknowledged an Article III constitutional difficulty with the appeal provision, at least under “a strict construction” of the Constitution. James Brown Scott, The International Court of Prize, 5 Am. J. Int’l L. 302, 314 (1911).  
171 The Hague Treaties: Ratification of Two May Be Opposed in Senate, N.Y. DAILY TRIB., Feb. 29, 1908, at 2. The constitutional complaint was also accompanied with an objection that there would be less need to review American judgments than those of other countries because U.S. courts are better. See id.
nulling” the decisions of law and fact of Article III courts.172 The critics objected particularly to review of Supreme Court decisions by the international court. Such reconsideration would undermine the Supreme Court’s status as “supreme.”173 Article III provides appeals can be taken to the Supreme Court but says nothing about appeals from it, further underlying its nonreviewability.174

1. The Constitutional Defense

The most extended constitutional defense of the court came in an article by Philadelphia lawyer Thomas Raeburn White.175 White understood the question as whether anything in Article III limited the treaty power.176 He thought two reasons justified International Prize Court review of federal decisions, one quite narrow and the other quite broad. The first reason focused on peculiarities of prize law.177

When a vessel was taken as a prize, it would generally be libeled in the prize courts of the captor.178 White argued that in international law “the judicial power of the belligerent captor does not comprehend a final decision of [the] international questions arising in prize cases.”179 A condemnation by the captors’ court does not eliminate the rights of foreigners, and it is these vestigial rights that the International Prize Court deals with:

[U]nder the generally accepted rules of international law existing at the date of the adoption of the Constitution the grant of the judicial power of the United States does not include the power to decide finally the rights of foreigners involved in prize cases. The clause which vested the judicial power in the Federal courts is not, therefore, a denial of the power to provide by treaty for the ultimate decision of such questions by international tribunals.180

174 One former Supreme Court associate justice noted that the treaty’s arrangement raised difficult constitutional questions but speculated that it is “quite possible” that the Congress could use its power to regulate the jurisdiction of federal courts, which may allow it to “waive . . . its sovereignty as to allow an appeal from its own to an international court.” Henry B. Brown, The Proposed International Prize Court, 2 AM. J. INT’L L. 476, 479 (1908).
175 Thomas Raeburn White, Constitutionality of the Proposed International Prize Court—Considered from the Standpoint of the United States, 2 AM. J. INT’L L. 490 (1908).
176 See id. at 494.
177 See id. at 502.
178 See Gregory, supra note 149, at 469.
179 White, supra note 175, at 495–97.
180 Id. at 499.
This is an odd description of international law. What White means apparently is that foreign claimants aggrieved by the decision can seek international arbitration. U.S. decisions are not conclusive on them in that they can demand their government make a fuss—but it is certainly conclusive as a matter of U.S. law. Moreover, the U.S. decision is entirely binding on the interests of the American captor, which is what brought it within the judicial power of the United States in any case.

Then White makes a more sweeping argument: “the power of the Federal Government to provide by treaty for the judicial decision of questions of an international nature is in no case limited by the grant of judicial power to the Federal judiciary.” This argument echoes the one made by Martinez: the international character of the subject matter takes it outside the federal judicial power, or at least allows it to be taken out of the federal judicial power by treaty. The argument has obvious problems: international law is clearly part of the federal judicial power. Issues “arising under” federal law include both treaty and customary international law issues. Thus, White concedes that the doctrine truly applies extraterritorially and again relies on the assumption in the consular cases that the Constitution does not apply abroad.

His argument was, by White’s admission, startling, and was apparently rejected by the Senate, which explicitly endorsed the validity of the constitutional doubts in their future actions. The Senate ultimately refused to give consent to the treaty in its original state, despite supporting the project beyond any cavil about their sincerity.

2. Constitutional Objections Prevail

In his 1910 State of the Union speech, President Taft noted the “grave doubts which had been raised as to the constitutionality” of the treaty. The objections were taken with the greatest seriousness and resulted in the United States proposing an additional protocol to the

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181 See La Nereyda, 21 U.S. (8 Wheat.) 108, 168–69 (1823) (“[T]he Courts of the captors have general jurisdiction of prize, and their adjudication is conclusive upon the proprietary interest.”).
182 This point was considered settled law. See id. at 169 (“The Courts of another nation . . . can acquire no general right to entertain cognizance of the cause, unless by the assent, or upon the voluntary submission of the captors.”).
183 See White, supra note 175, at 496–98.
184 See id. at 494–95.
185 Id. at 499.
186 See Martinez, supra note 22, at 1126, 1129.
187 See Finch, supra note 151, at 89; White, supra note 175, at 490.
188 See Finch, supra note 151, at 89.
189 Taft, Second Annual Message, supra note 158.
treaty. The protocol would allow nations with constitutional difficulties to stipulate, by reservation, a different relationship with the prize court. In this alternate avenue, foreign claimants disappointed by a decision of United States prize courts could bring a new, separate proceeding in the International Prize Court. The prize court would not consider the prior decision of the national court.

The change in procedure went beyond simply insisting the subsequent international proceeding would not be formally denominated an appeal. Rather, it fundamentally restructured it, so that the international proceeding would not even involve the same defendant. While the original treaty contemplated the court having direct jurisdiction over individual captors, in the additional protocol the court’s proceeding would be “a direct claim for compensation” by the aggrieved party against the captor’s government. Unlike in the original design, the international court would only hear proceedings against the United States itself, not American citizens. Moreover, the legal issue before the international court would be different: “[I]t is not for the court to pass upon the validity or the nullity of the capture, nor to reverse or affirm the decision of the national tribunals.” As the Senate put it in its reservations, the court would only have jurisdiction against the United States for “damages for the injuries caused by the capture,” as opposed to determining the legality of a capture already deemed proper by U.S. courts. A contemporary commentator complained that the protocol creates

a systematic avoidance of all communication between the national tribunals and the International Court . . . and no form of decree [is] authorized except that the International Court ‘determines’ the amount of damages to be allowed the claimant, if the capture is

190 See id.; see also Additional Protocol to the Convention Relative to the Establishment of an International Court of Prize, 5 Supplement Am. J. Int’l L. 95, 95–99 (1911).
192 See id. (“[T]he proceedings thereupon to be had shall be in the nature of a trial de novo of the question of liability involved in the alleged illegal act of the captor . . . .”).
193 See id. (describing the Court’s review as “de novo”).
194 See id.
195 Id. at 105, 108.
196 See Additional Protocol to the Convention Relative to the Establishment of an International Court of Prize, art. 7, supra note 190, at 98 (“[T]he court rendering its decision and notifying it to the parties to the suit shall send directly to the government of the belligerent captor the record of the case submitted to it . . . .”).
197 Id., art. 2, at 97.
'considered' illegal. In the one case, a court of appeal, in the other, a board of inquiry.\textsuperscript{199}

While the American objection sounds quite technical—as does its solution—it appears to have enjoyed broad support in Washington.\textsuperscript{200} (Nor was there any suggestion the constitutional objections were pretextual, as the treaty itself was uncontroversial.\textsuperscript{201}) Indeed, both Secretary of State Knox’s proposal and the text of the protocol themselves refer explicitly to American constitutional objections to the original convention.\textsuperscript{202} European authorities thought the protocol a rather clever expedient,\textsuperscript{203} though perhaps a bit annoying as well.\textsuperscript{204} Still, the proposed modifications easily won international approval and ratification by the Senate.\textsuperscript{205}

The Prize Treaty itself was ultimately rejected by the House of Lords in Britain and fell by the wayside.\textsuperscript{206} The central reason for its failure was a dispute between Britain and weaker powers over the “true” law of prize that the court would apply,\textsuperscript{207} and plans to continue negotiations came to naught as a result of World War I.

B. ICC Complementarity and Review of National Courts

The International Criminal Court’s complementarity principle is regarded as one of its major institutional safeguards, designed to preserve the independence and jurisdiction of national proceedings.\textsuperscript{208} In brief, complementarity provides that the ICC cannot take jurisdiction where national authorities have investigated or prosecuted the suspects in question.\textsuperscript{209}

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\textsuperscript{199} Butte, supra note 160, at 801.

\textsuperscript{200} See The Hague Treaties: Ratification of Two May Be Opposed in Senate, supra note 171 (stating that the original prize treaty is “likely to encounter opposition . . . and this is declared to be obnoxious not only to the minority, but to a considerable number of Republicans as well”).

\textsuperscript{201} See Butte, supra note 160, at 829 (noting that while there is no suggestion of ill motive in the proposed modification of the treaty, such constitutional difficulties blocking already negotiated treaties “[have] undoubtedly created in Europe an undercurrent of dissatisfaction, if not of suspicion and resentment”).

\textsuperscript{202} See Knox, supra note 191, at 107–08; Additional Protocol to the Convention Relative to the Establishment of an International Court of Prize, art. 7, supra note 190, at 97 (1911).

\textsuperscript{203} See Butte, supra note 160, at 801.

\textsuperscript{204} These complications led the British House of Lords to reject the naval prize bill before it. See Naval Prize Bill Rejected, BOS. DAILY GLOBE, Dec. 13, 1911, at 18.

\textsuperscript{205} See Additional Protocol to the Convention Relative to the Establishment of an International Court of Prize, supra note 190, at 95–96; Resolution of the Senate of the United States Advising and Consenting to the Ratification of the International Prize Court Convention and Additional Protocol, supra note 198, at 99.

\textsuperscript{206} See Naval Prize Bill Rejected, supra note 204, at 18.

\textsuperscript{207} See id.

conduct in question.\textsuperscript{209} Complementarity gives great deference to national proceedings.\textsuperscript{210} However, while it uses a very generous standard of review, the complementarity norm still permits, and indeed requires, the ICC to review the validity of domestic judicial proceedings.\textsuperscript{211}

Despite the high standard of deference created by complementarity, the final decision of a national court is not final for ICC purposes; rather, the ICC can review the case, including the decisions of the national court.\textsuperscript{212} The complementarity process necessarily requires the ICC to review the legal determinations of the national court.\textsuperscript{213} If they do not meet the test, the national proceedings can in effect be overruled and a new trial in the ICC ordered.\textsuperscript{214} The new trial is not a “separate” proceeding of the kind contemplated by the prize court protocol because it depends on the negation of the national court judgment; that is, a “separate,” collateral proceeding would be barred by \textit{non bis in idem}, or the double jeopardy prohibition.\textsuperscript{215} Getting around that prohibition requires first making substantive determinations about the national court proceedings.

To be sure, the ICC’s standard of review is very deferential—it can only set aside national proceedings in what were thought to be unusual circumstances.\textsuperscript{216} Nonetheless, it is the ICC, rather than national courts, that get the last word.

The ICC’s standard of review sounds forgiving. Where a defendant has been prosecuted and acquitted, ICC complementarity does not apply if the domestic court was “unwilling or unable” to “genuinely” prosecute.\textsuperscript{217} Both of these terms remain substantially undefined, and the precise interaction between the ICC’s complementarity and the decisions of national courts has yet to be tested. However, what is clear is that the ICC is required to review acquittals or other dismissals of prosecutions in national courts to determine whether

\begin{footnotesize}
\begin{enumerate}
\item See \textsc{Cryer}, \textit{supra} note 208, at 146.
\item See \textit{id}. at 146–49.
\item See \textsc{Hurd}, \textit{supra} note 143, at 227 (analyzing the effect of article 17(2)).
\item See \textit{id.}; \textsc{Cryer}, \textit{supra} note 208, at 147.
\item See \textsc{Cryer}, \textit{supra} note 208, at 147 (“\textsc{D}espite the narrowness of the complementarity criteria . . . \textsc{I}f the decision on whether or not these criteria are fulfilled is with the \textsc{ICC} \textsc{i}tself . . . \textsc{I}t is not a separate proceeding of the kind contemplated by the prize court protocol because it depends on the negation of the national court judgment; that is, a separate, collateral proceeding would be barred by \textit{non bis in idem}, or the double jeopardy prohibition.\textsuperscript{215} Getting around that prohibition requires first making substantive determinations about the national court proceedings.”).
\item See \textsc{Cryer}, \textit{supra} note 208, at 147–48; \textsc{Hurd}, \textit{supra} note 143, at 227 (“\textsc{T}he ICC can effectively take the case only if certain States are ‘unwilling or unable’ to investigate or prosecute the offence.”).
\item See \textsc{Hurd}, \textit{supra} note 143, at 247 (citing article 20 of the Rome Statute).
\item See \textsc{Cryer}, \textit{supra} note 208, at 146–49 (“\textsc{T}he ICC can effectively take the case only if certain States are ‘unwilling or unable’ to investigate or prosecute the offence.”).
\item See \textsc{Cryer}, \textit{supra} note 208, at 146–49 (“\textsc{T}he ICC can effectively take the case only if certain States are ‘unwilling or unable’ to investigate or prosecute the offence.”).
\end{enumerate}
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they represent an unwillingness or inability. Unwillingness means that the decision was made “for the purpose of shielding the person concerned from criminal responsibility” or otherwise not conducted “independently or impartially.” All of these appear to be highly subjective determinations of the subjective viewpoint of the national court.

Crucially, it is the ICC that determines the adequacy of national proceedings for complementarity purposes. This necessarily means the ICC reviews, albeit deferentially, both the process and substance of those decisions. Given that the standard of review seems merely to guard against “bad faith” or “sham” proceedings, some might conclude that it would be absurd or highly fanciful to imagine the ICC ever finding that a terminated U.S. prosecution fails to satisfy complementarity. However, in a variety of extremely plausible scenarios, the court could find the standard run of federal justice to demonstrate either inability or unwillingness.

1. Procedural Issues

The ICC has often targeted heads of states. It is widely held that U.S. drone strikes on terrorists constitute one or more war crimes (such as intentionally targeting civilians). The ICC is currently investigating such crimes by American forces in Afghanistan. President Obama has been responsible for vastly increasing the number of such strikes, with a consequent surge in civilian casualties. Complementarity means that the ICC would defer, initially, to U.S. proceedings.

However, any domestic criminal charges against the President might ultimately be dismissed on executive immunity grounds. It is currently unclear whether the President enjoys immunity while in of-

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218 See CRYER, supra note 208, at 146–49; HURD, supra note 143, at 227.
219 Rome Statute of the International Criminal Court, art. 20(3)(a)–(b), supra note 3, at 103.
220 See CRYER, supra note 208, at 147; Newton, supra note 208, at 136, 139 (“Article 19 mandates that the Pre-Trial Chambers examine the question of jurisdiction regardless of whether or not a party raises the issue.”).
221 See Newton, supra note 208, at 136 (noting that the drafters of the ICC “[a]ccept[ed] the reality that some external standard of review” by the ICC was necessary but chose a highly deferential one, though the “subjective requirement ‘genuinely’ is left completely to the [ICC] to ascertain”).
222 See id. at 142–45 (discussing criticisms of the ICC’s complementarity policy).
223 See, e.g., HURD, supra note 143, at 235–36 (describing the ICC’s issuance of an arrest warrant for Sudanese President Omar al-Bashir).
225 See id.
226 See id.
fice for criminal acts, or at least those committed in the pursuance of his official duties. However, there is a body of opinion to support such a view, and the Supreme Court might ultimately dismiss charges on these grounds. Yet the Rome Statute categorically rules out any kind of official immunity, including head-of-state immunity.

Thus if the Supreme Court concluded that U.S. courts could not prosecute the President, that decision itself would be reviewed by the ICC. Given its rejection of any official immunities, the ICC could well find that the U.S. constitutional law renders American courts “unable” (if not unwilling) to do proper justice. This would also potentially entail a determination that the U.S. court improperly put domestic constitutional law doctrines above what it would see as a jus cogens obligation of international law. Indeed, many commentators have noted that the ICC would review and find invalid national application of official immunity. Thus, commentators have urged states to abolish such immunities by legislation or constitutional amendment.

Similarly, many claim that international criminal law forbids amnesties for serious crimes. Imagine a situation where a president issues pardons to putative war criminals or torturers in his administration, or even a prior one. In any subsequent prosecution of those individuals, the Supreme Court would likely hold that the presidential power is absolute, overriding any contrary international law norm. Or it may even find that there is no such norm. In either case, the ICC could potentially find such a determination as evidence of inability or even unwillingness. Indeed, the purpose of a pardon is to shield from responsibility, and thus a court that honored such a pardon would be a participant in the “shielding.” Note that in these situations the ICC would have occasion to review the Supreme Court’s determinations concerning both constitutional and international law. (A first step in assessing “unwillingness” would be evaluating the weight and sincerity of the constitutional grounds relied on by the national courts.)

227 See, e.g., Randolph D. Moss, Office of Legal Counsel, A Sitting President’s Amenity to Indictment and Criminal Prosecution (2000) (“The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions.”).

228 See Rome Statute of the International Criminal Court, art. 27(1), supra note 3, at 106 (“In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility . . . .”).

229 See id.


231 See, e.g., id. at 132.

232 See id. at 130 (“The principle of complementarity requires States to amend their national laws by rejecting immunity of government officials.”).
2. Substantive Issues

Another area where the ICC might set aside national decisions is where the latter adopted a definition of the crime narrower than the ICC’s, effectively immunizing conduct the ICC regards as criminal. The meanings of various crimes in the Rome Statute remain undefined, leaving many possibilities for such disagreements. U.S. courts might take a position on some of these questions that most international observers would find unreasonable. For example, they might find that particular “enhanced interrogation” techniques do not constitute torture.\textsuperscript{233} American perspectives on the law regarding the targeting of “terrorists” differ considerably from widely held views of international humanitarian law experts around the world.\textsuperscript{234} A U.S. court could readily hold that such strikes do not constitute a war crime. To much of the world, this would seem a self-serving decision by the world’s most aggressive nation to shield its forces from liability. Similarly, if the United States allowed some of its citizens to move to, say, Afghanistan or Iraq when it was under American occupation, some legal scholars could argue that such an activity constituted the war crime of “indirectly . . . deport[ing] or transfer[ring]” civilian population to those places.\textsuperscript{235} Yet U.S. courts, in a prosecution for such conduct, might well hold that it does not violate international law.

It remains entirely unclear what weight the ICC must give to national courts’ determinations of international law. However, the prosecutor has taken the position that complementarity only applies when national prosecutions involve the “same crime,”\textsuperscript{236} which obviously would not be the case. Finally, U.S. courts do not consider themselves bound by the legal interpretations of international courts.\textsuperscript{237} A U.S. court might well choose to not follow the ICC’s definition of, say, torture or transfer and instead follow its own interpretation. Such con-

\begin{itemize}
\item \textsuperscript{233} Torture by U.S. forces in Afghanistan is currently under preliminary investigation by the Office of the Prosecutor. See \textit{The Office of the Prosecutor, Int’l Criminal Court, Report on Preliminary Examination Activities 2013 ¶¶ 50–52 (2013); see also} William A. Schabas, \textit{The Banality of International Justice}, 11 \textit{J. Int’l Crim. Just.} 545, 551 (2013) (calling for international prosecution of Rumsfeld and Cheney).
\item \textsuperscript{235} Rome Statute of the International Criminal Court, art. 8 (2)(b)(viii), \textit{supra} note 3, at 95 (proscribing this activity in accordance with the established framework of international law).
\item \textsuperscript{236} \textit{See id.} at 103–04.
\item \textsuperscript{237} \textit{See Sanchez-Llamas v. Oregon}, 548 U.S. 331, 357 (2006) (rejecting as precedent the International Court of Justice’s interpretation of article 36 of the Vienna Convention as it was articulated in \textit{LaGrand Case (Ger. v. U.S.)}, 2001 I.C.J. 466, 497–98 (June 27)).
\end{itemize}
duct is fully within the constitutional prerogatives of federal courts. Yet under the Rome Statute, the ICC would be able to reexamine such a case.

To be sure, such review is unlikely for political reasons, but not much more so than a case involving American defendants. One might ask whether complementarity review is technically an “appeal.” What makes it an appeal is that complementarity forces the ICC not to consider the question from scratch, but rather, in the face of a national judicial decision, to evaluate the sufficiency of that decision. The ICC can examine the national court’s decision for error (as evidence of inability or unwillingness) and upon finding one throw out the acquittal. Moreover, the ICC can obtain the record in the national courts to review their decisionmaking. Again, while the appellate standard may be abuse of discretion or even higher, it is still an appeal.

Moreover, the flip side of complementarity is that it means every time the ICC prosecuted Americans it would be in a case where complementarity had not been satisfied: either there was no national investigation or the judicial proceedings were deemed inadequate by the ICC.

CONCLUSION

The United States has roughly once per century been asked to join international courts with direct jurisdiction over the property or persons of Americans. In all these situations—the slave-trade mixed commissions, the International Prize Court, and the ICC—the proposed courts were faulted on constitutional grounds. Yet for mixed commissions and the prize courts, work-arounds were ultimately arrived at. Ironically, the ICC only raises constitutional questions in a few of its numerous and complex provisions (non–universal jurisdiction crimes, complementarity in the face of a national judicial decision). The constitutional applications exceed the unconstitutional ones. But unlike the earlier treaties, the Rome Statute allows for no reservations or modifications.

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238 See id.
239 See Rome Statute of the International Criminal Court, art. 17, supra note 3, at 100–01; Hurd, supra note 143, at 227.
240 See Rome Statute of the International Criminal Court, art. 17, supra note 3, at 100–01; Hurd, supra note 143, at 227.
241 See supra Part IV.
242 See supra Part IV.B. See also Helen Duffy, National Constitutional Compatibility and the International Criminal Court, 11 DUKE J. COMP & INT’L L. 5, 6–9 (2001).
243 See Rome Statute of the International Criminal Court, supra note 3; see also Yang, supra note 230, at 123–24 (noting that “[o]ne of the most important roles of the principle of complementarity is to encourage the State Party to implement the provisions of the
There is nothing surprising or exceptionally American about the Rome Statute contradicting national constitutional provisions. Membership, indeed, has forced several countries to amend their constitutions. For the United States, however, that is not so easy. Thus one might say that while Article III and Bill of Rights issues may obstruct America’s joining of the ICC, it is the legal or practical impossibility of modifying either the Rome Statute or the Constitution that truly blocks the way.

244 INT’L COMM. OF THE RED CROSS, ISSUES RAISED WITH REGARD TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT BY NATIONAL CONSTITUTIONAL COURTS, SUPREME COURTS AND COUNCILS OF STATE 21–24 (2003), available at http://www.icrc.org/eng/assets/files/other/issues_raised_with_regard_to_the_icc_statute.pdf (describing various nations’ constitutional objections to the Rome Statute, such as the holding of Ukraine’s Supreme Court that judicial power cannot be delegated to supernational bodies); Bakhtiyar Tuzmukhamedov, The ICC and Russian Constitutional Problems, 3 J. INT’L CRIM JUST. 621, 622–24 (2005).

245 See Yang, supra note 230, at 124–27.