

The Need for Urgency in Closing the War Crimes Act's Loopholes

by [Michel Paradis](#)

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With atrocities uncovered in Ukraine near daily, it is long past time for the U.S. Congress to close the loopholes in the War Crimes Act that weaken the country's capacity to use one of its greatest assets – the rule of law – to counter Russian aggression. That law's current requirement that either the victim or perpetrator be a U.S. national undermines accountability for atrocities. It is currently easier for the United States to seize an oligarch's yacht than to prosecute soldiers [who tied a prisoner's hands behind his back](#), shot him in the head, and left him with rubbish on a road. As former Justice Department attorney Edgar Chen [persuasively argued in *Just Security*](#) in March, closing these loopholes can and should be done immediately to strengthen the country's ability to respond with all the tools at its disposal. And given the constitutional constraints on retroactive changes to criminal laws, every day that Congress fails to act is another day that it affords war criminals impunity.

On April 5, 2022, Sen. Dick Durbin (D-IL) announced his intention to introduce the [War Crimes Accountability Act](#) to close these loopholes, and Sen. Lindsey Graham (R-SC) [said](#) he is supporting Durbin in this effort. The text of the bill has not yet been publicly released, but it evidently would, among other things, amend the War Crimes Act to extend criminal liability for war crimes to anyone found in the United States irrespective of nationality. When the War Crimes Act was first introduced, both the Defense and State Departments advocated for the reform that is now under consideration because it was necessary to comply with the United States' [Geneva Convention obligations](#) to punish war criminals “regardless of their nationality” and “to enact any necessary legislation in this respect.” (See also Michael Matheson's [essay](#) at *Just Security*.)

This aspect of Durbin's bill is well within Congress' legislative power. Passed in the mid-1990s, the War Crimes Act's nationality loophole reflected long standing anxieties about Congress' constitutional power to enact extraterritorial laws. It was only after the

September 11, 2001 attacks, for example, that Congress sought to remove [similar nationality loopholes](#) in the nation's anti-terrorism laws. And while there are [some contexts](#) in which Congress' power to pass extraterritorial laws is limited, the war crimes context is not one of them. As the [House Report](#) for the original War Crimes Act recognized, Congress' power to punish war crimes, crimes against humanity, or other violations of international law is rooted in the [Define & Punish Clause](#), which is arguably the broadest proscriptive power the Constitution gives Congress. That Clause has empowered Congress to levy extraterritorial jurisdiction against pirates, torturers, and war criminals across the world for "offenses ... against the law of nations" since the Founding.

To have any use in combating Russian aggression in Ukraine, Congress needs to close the nationality loophole quickly. Why? Because it is doubtful that such reforms could be made retroactive without violating the Ex Post Facto Clause.

At its highest level of generality, the Supreme Court has [held](#) that a law "violates the [Ex Post Facto] Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." Insofar as Congress has limited federal criminal jurisdiction under the War Crimes Act to cases involving U.S. nationals, retroactively eliminating that limitation for the precise purpose of punishing a broader class of defendants falls into the heartland of the Ex Post Facto Clause's core concern.

Some have argued that such reforms could be made retroactive, even to the beginning of the Russian invasion of Ukraine, consistently with the Ex Post Facto Clause because the closing the nationality loophole "do[es] not declare unlawful what had been lawful before." But that is not the test. As succinctly described by the [Supreme Court in 1990](#), the Ex Post Facto Clause means that "[l]egislatures may not retroactively *alter the definition of crimes* or increase the punishment for criminal acts." Removing elements from an offense, such as the elements that create the nationality loophole in the War Crimes Act, would "alter the definition" of the crimes and run headlong into well-settled ex post facto constraints.

An ex post facto challenge to the retroactive removal of the War Crimes Act's nationality loophole would not be a hard case to win. Supreme Court precedent leaves no room for

doubt that a jurisdictional element of a criminal offense relating to the nationality of the perpetrator is no less a part of the “definition” of a crime than any other element of the offense. Indeed, given the strictness with which the Supreme Court has applied the Ex Post Facto Clause, prudent prosecutors would and should be hesitant even to bring such a case.

That the gravamen of the underlying crime remains the same is irrelevant. Since the Founding, the Ex Post Facto Clause [has been understood to prohibit](#) “inflict[ing] punishments, where the party was not, by law, liable to any punishment.” The Supreme Court has held laws to implicate retroactivity constraints when they do no more than [repeal corroboration requirements](#), alter how discretionary [parole applications are evaluated](#), revive [statutes of limitation](#), or remove [jurisdictional defenses](#), such as the War Crimes Act’s nationality loophole. The lower courts too have held that the Ex Post Facto Clause bars the retroactive expansions of [federal jurisdiction in the territories](#), the retroactive federal prosecution of crimes that had been only violations of [state law](#), or the retroactive prosecution of [newly defined war crimes](#). Congress cannot [retroactively amend criminal statutes](#) for the purpose of overriding judicial decisions that narrowed the scope of a prior statute’s liability. Even judicial interpretations of existing statutes that [eliminate defenses](#) or “enlarge” the scope of criminal liability can constitutionally [be given only prospective effect](#). And the very fact that the Durbin bill is necessary shows that the perpetrators of most atrocities in Ukraine presently are “not, by law, liable to any punishment” under the War Crimes Act.

The fact that war crimes are “universally unlawful” under international law does not change this basic result. That is, clear recognition of war crimes in international law gives them no purchase as extant crimes within the jurisdiction of the United States in the absence of a statute specifically codifying them. Since the Founding, the courts have [uniformly rejected](#) common law crimes, whether that common law was a [brooding omnipresence in the sky](#) or the customary [law of nations](#), on the pragmatic as well as [doctrinal ground](#) that the “common law could be made a part of our federal system, only by legislative adoption.” In 2010, this view was [reiterated by then-Judge Kavanaugh](#) respecting the denial of rehearing en banc in one of the Guantanamo cases, in an opinion that is likely to be treated as authoritative in any criminal prosecution brought under any retroactive amendments to the War Crimes Act: “international-law norms are

not domestic U.S. law in the absence of action by the political branches to codify those norms.”

To be clear, these strict constitutional constraints apply only in the criminal law context. The War Crimes Accountability Act also seeks to close loopholes in various immigration and civil liability statutes. In those non-criminal contexts, there is a strong [presumption against retroactivity](#) that Congress should be mindful of the need to overcome, ideally by including express effective date provisions. And there are, of course, outer limits that typically sound in the Due Process and Bill of Attainder Clauses to ensure that Congress is not attempting to be vindictive or expropriative toward specific individuals. But those are very high burdens for litigants to surmount when challenging laws of general applicability, as Durbin’s bill would be. And it is also in these non-criminal contexts where the “universally unlawful” character of the alleged conduct would likely overcome any constitutional objections to the expansion of liability.

But the rule of federal criminal law is [simple and strict](#): “One may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an act of Congress.” Even if the Durbin bill made it clearly a crime going forward, the criminal code that has existed up to this point has not made such actions committed by non-US nationals plainly and unmistakably an offense.

Confronted with the atrocities in Ukraine, the desire to find ways around the Ex Post Facto Clause is understandable. The ex post facto principle is often explained by the need to ensure fairness and to protect people from being punished for doing things that were “[innocent when done](#).” But reserving ex post facto protections for those who are “innocent” both weakens the prohibition to a near nullity in practice and ultimately misses its fundamental purpose.

No one who is objectively “innocent” to all eyes will ever be prosecuted, let alone targeted for prosecution under a retroactive law. It is precisely because individuals have done something blameworthy, that there is a desire to punish. The right of a perpetrator to fairness is an interest that is inevitably weak in the face of official opprobrium. It is a danger Geoffrey Robertson eloquently identified in his landmark (and time-vindicated)

dissent in the [Norman case](#): “it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem crimen* may not be a household phrase, but it serves as some protection against the lynch mob.”

That certain aspects of a putative defendant’s blameworthy conduct might come close to transgressing existing criminal prohibitions – indeed, potentially in all respects but that of having a different nationality – does not make their prosecution any less of a juridical injustice. Weak rule of law states, such as Soviet Russia, Nazi Germany, or Maoist China, historically fig-leaf their arbitrary punishment of undesirables based upon principles of “crime by analogy.” The Supreme Court has [squarely held](#) that crime by analogy is “not compatible with our constitutional system” and in the [post-war trial of the Nazi jurists](#), the judges of the Nuremberg Military Tribunal held that the “application of principles of law condemned by the practice of civilised nations such as punishment by analogy” were themselves war crimes. And the reason is plain. What those with the power and desire to punish describe as “loopholes” and “technicalities” are the very things that define the elements of crimes.

The emphasis on the “innocent” also misses the point of the ex post facto prohibition. Without the power to pass retroactive criminal laws, civil society and political leaders can be held accountable for the wisdom of their governance. In the U.S. context, this is often expressed as a [guarantee of the separation of powers](#) and the need for “the government [to] abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.” When the morally abhorrent can evade accountability through loopholes and technicalities, the people of a democracy have the need and right to know who bears the blame for the law’s failings.

The current shortcomings of the War Crimes Act highlight that need starkly and should create urgency behind reform. Russia has shifted to an attritional strategy that treats harm to civilians as a means, rather than a cost, to its objectives. Every day that the War Crimes Act’s nationality loophole remains is a day that lawmakers have effectively chosen to immunize the perpetrators of atrocities on a scale not seen in Europe for at least thirty years. If lawmakers fail to act quickly and the United States finds that its

hands remain tied to do more than tisk when the next mass-grave is uncovered, when the next train station is indiscriminately bombed, or when the next child is raped or forcibly deported, the Ex Post Facto Clause will make clear whom is to blame.

IMAGE: (L-R) Sen. Lindsey Graham (R-SC) talks with committee chairman Sen. Dick Durbin (D-IL) during a Senate Judiciary Committee business meeting to vote on Supreme Court nominee Judge Ketanji Brown Jackson on Capitol Hill, April 4, 2022 in Washington, DC. (Photo by Anna Moneymaker/Getty Images).

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