

# American Fighters, Ukraine, and the Neutrality Act: The Law and the Urgent Need for Clarity

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Following Russia's invasion, Ukrainian President Volodymyr Zelenskyy issued a [worldwide call](#) for people to come to Ukraine and [join the fight](#). Citizens of many countries have responded, [including Americans](#). Ukraine [claims](#) that thousands of Americans have applied, and an unknown number are already there. Groups of foreign fighters not under direct Ukrainian control are [also organizing](#). Online pages for people interested in joining the fight have [tens of thousands](#) of members.

Ukraine's cause is just, and it is easy to admire Americans who are willing to take up arms in defense of a struggling democracy against authoritarian Russia's [illegal](#), [monstrous](#), and utterly unwarranted war of aggression.

Americans contemplating joining the war in Ukraine or already there need to know, however, that they risk violating the Neutrality Act, a foreign relations law dating to the nation's Founding Era. The criminal liability risk mainly pertains if Americans join Ukraine's forces within U.S. jurisdiction, or organize and launch a private military expedition against Russia while still within the United States.

Further complications are ambiguous terms in the law's text, and that the statute has not been consistently enforced over the course of U.S. history. Some experts [have predicted](#) that Neutrality Act prosecutions of Americans for fighting for Ukraine are unlikely. Yet the law remains on the books, it has been [enforced](#) in recent years, and the Department of Defense last week pointedly [urged](#) Americans *not* to join the fighting. The risk remains that well-intentioned Americans could blunder into committing a crime.

I urge the U.S. Government to do several things.

First, provide clarity. In this fast-moving and perilous crisis, the U.S. Department of Justice should announce loudly, clearly, and quickly its understanding of what is legal and illegal, and whether enforcing the Neutrality Act against Americans who illegally join the fight in Ukraine will be an investigative and prosecutorial priority. Congress should act to provide clarity if Justice does not.

Relatedly, and in any event, Congress in consultation with the Executive Branch should squarely make a decision about whether Americans can become mercenaries in this dangerous war. Related legislation was introduced in Congress last week.

Finally, looking longer term, Congress should eliminate the Neutrality Act's exception for Americans who join foreign militaries or launch private wars while outside the United States. Unless Congress specifically acts to allow Americans to participate on their own initiative in a particular foreign army or particular foreign war, the Neutrality Act should be amended to allow Americans to fight in wars only in American forces: as part of the U.S. military or a U.S. intelligence service performing an authorized covert action.

### **The Neutrality Act(s) in Brief**

Foreign fighters played a significant role in the American War for Independence. Gen. Lafayette, "[America's favorite fighting Frenchman](#)," was one of Gen. George Washington's best commanders, and Hessians (Germans) famously fought for the British. There were many others. Congress at President George Washington's request acted in 1794 to prevent Americans from following suit overseas, however. The Founding generation's concern was that individual Americans attacking foreign states could draw the new nation into war with dangerous European powers. Ever since, in evolving form through a series of amendments, and with varying enforcement, the United States has kept this ban on the books.

The Neutrality Act as currently written is a collection of provisions. They have varying terminology and scope. These laws are part of a slate of U.S. Code provisions with a common animating principle: the U.S. Government, not individual Americans taking action on their own, [decides the foreign policy](#) of the nation, and specifically the question of whether America – especially its people and territory – will have a fighting role in foreign wars.

Note what the law does not do. The Neutrality Act does not bind Americans employed by the U.S. Government acting in their official capacity. It does not ban humanitarian aid by the government, nor Americans sending money to help refugees, nor aid work by Americans on the ground in war-torn countries. This law also does not reach the security work of military contractors like Blackwater while under contract with the U.S. Government, nor while hired by a foreign government not at war with a country with which the United States is at peace (but the law can apply to contractors acting [without](#) such safe harbors).

Instead, the law prohibits Americans inside U.S. jurisdiction from joining foreign militaries or launching their own private wars against nations at which the United States is legally at peace. As the statute's name suggests, the law's default command to all of us here at home is neutrality. That is not neutrality in terms of our personal sentiments or even U.S. Government aid to belligerents, but neutrality in terms of not joining the fighting.

The following discussion zeroes in on the Neutrality Act's relevant text, highlights the law's important but ambiguous geographical double standard, and urges our nation's leaders to clarify and modernize the law.

### **Three Core Provisions**

Americans considering joining the fight in Ukraine should be aware of three provisions in particular. Each has criminal penalties: fines, prison time, or both.

The first provision, [18 U.S.C. 958](#), applies criminal penalties to any U.S. citizen here in the United States who “accepts and exercises a commission” to serve a foreign polity in war against any entity at which the United States is at peace. The United States today is not in an armed conflict with Russia, Ukraine appears to have officially created a foreign legion to fight the Kremlin's armies, and so U.S. citizens who sign up in the United States could in theory face prosecution. This provision reads:

Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, against any prince, state, colony, district, or people, with whom the United

States is at peace, shall be fined under this title or imprisoned not more than three years, or both.

A second provision, [18 U.S.C. 959](#), in relevant part includes both U.S. citizens and non-citizens, and does not depend on whether the foreign force the American is joining is at war. This provision provides that no one in the United States may “enlist or enter” into the service of a foreign state, nor hire another person to enlist one’s self, nor hire another person to enlist themselves in a foreign force, “as a soldier or as a marine or seaman on board any vessel.” The relevant statutory text for Americans thinking of fighting for Ukraine is Sec. 959(a):

Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined under this title or imprisoned not more than three years, or both.

The third provision, [18 U.S.C. 960](#), is the modern amended version of the statute first enacted at the request of President Washington. Like Sec. 959, this provision is not limited to U.S. citizens. It also includes financing and organizing. Where Sec. 960 differs is that its language is not tied to joining foreign armies. It bans any expeditions launched from the United States to fight any foreign polity with which the United States is at peace.

The plain text of this provision would thus bar people in the United States from organizing, joining, or initiating a private war against Russia in Ukraine’s defense. The statute reads:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with

whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.

## **The Geographical Distinction: Abandoning One's Neutrality in the United States is Criminalized**

Alert readers have noticed the caveat in the textual analysis above: all three provisions have a geographic distinction. It is illegal for Americans to join foreign armies “within the jurisdiction” of the United States (Sec. 958) or “within the United States” (Sec. 959). Similarly, organizing or beginning a private military campaign against a polity at peace with the United States is illegal “within the United States” (Sec. 960).

In short, an American may be able to escape criminal liability by making sure that their signing up with a foreign force, the launching of their private war, or otherwise abandoning their personal neutrality happens outside the United States. The idea over the centuries has been that Americans joining the fight beyond U.S. borders are acting alone and therefore do not call into question the neutrality of the United States under international law. (But note that U.S. jurisdiction can extend to ships on and planes over international waters). In the mid-1800s, a U.S. Attorney General offered [another reason](#) for this geographic double standard: recruitment inside the United States by a foreign belligerent risks a “gross national aggression on the United States and insults our national sovereignty.” A little over a century later, after a Moscow-backed regime took control of Cuba in 1960 and then Americans were involved in the disastrous 1961 Bay of Pigs invasion of Cuba by CIA-backed Cuban exiles, Attorney General Robert F. Kennedy [captured these rationales](#) in comments to the press:

the neutrality laws were never designed to prevent individuals from leaving the United States to fight for a cause in which they believed. There is nothing in the neutrality laws which prevents refugees from Cuba from returning to that country to engage in the fight for freedom. Nor is an individual prohibited from departing from the United States, with others of like belief, to join still others in a second country for an expedition against a third country...What the law does prohibit is a group organized as a military expedition from departing from the United States to take action as a military force against a nation with whom the United States is at

peace. There are also provisions of early origin forbidding foreign states to recruit mercenaries in this country.

## Ambiguities the Justice Department and/or Congress Should Clear Up

The obvious question is this: how much preparatory activity in the United States is too much? How much indication of intent to join Ukraine's forces, or how much preparation for a private war on Russia, constitutes a crime if it happens in the United States? Again, despite the "knowingly" term in Sec. 960, the Justice Department has indicated that merely leaving the United States with intent to fight is not enough. The Supreme Court has made clear that under Sec. 959 an arrangement for [payment is enough](#). How about agreeing to fight pro bono, and inside the United States signing a printed-out Ukrainian commissioning or enlistment certificate? Raising one's right hand and taking an oral oath to Kyiv? Doing so over a Zoom call with Ukrainian officials? Or how about making a general plan for a private American mission against Russian forces and getting a kit together – including an itinerary, money, and a few weapons – in concert with fellow Americans before departing the United States? Or an Ohioan texting a Floridian "I'm in for this mission, see you at the rally point in Poland BTW we get paid"?

How about inside the United States clicking "JOIN" on the website of the International Legion of Defense of Ukraine, and filling out an online form? Does that accomplish acceptance of a commission under Sec. 958 or enlistment under Sec. 959?



# INVADED UKRAINE

JOIN

**join volunteer  
troops to fight for  
Ukraine**



Or, how about following the site's additional recommendations to "1) Come To The Embassy Physically; 2) Call Us By Phone; 3) Apply By Email"? Ukraine's website is likely hosted overseas, but the site is accessible here and all these recruiting avenues are available within the United States.

4:33

◀ Facebook



🔒 [fightforua.org](https://fightforua.org)

## 7 STEPS

### FOR FOREIGN NATIONALS TO JOIN THE INTERNATIONAL LEGION OF DEFENSE OF UKRAINE

1

Apply To The Embassy Of Ukraine In Your Country With The Intention To Join The International Legion Of Defense Of Ukraine (Ask a Defense Attache Or Consul. See The Embassy's Website For Additional Information)

There Are Three Ways To Apply: 1) Come To The Embassy Physically; 2) Call Us By Phone; 3) Apply By Email.

2

Specify What Documents And Clothing (Equipment) You Need Or Are Recommended To Have.

Documents: Internal Document; Passport To Travel Abroad; Documents Confirming Your Record Of Military Service (Service In Law Enforcement Agencies) And Participation In The Combat; Other Documents As Requested By The Defense Attache Or Consul.

3

Arrive At The Embassy With Documents For



- 3 An Interview With The Defense Attache And Visa Arrangements With The Consul.
- 4 Submit An Application To Enlist For Voluntary Contract-Based Military Service In The Armed Forces Of Ukraine (With Assistance From The Defense Attache).
- 5 Get Instructions On How To Travel To Ukraine, The Necessary Documents And Equipment. It Is Recommended, If Available, To Bring Your Military Kit, Such As Clothing Or Its Elements, Equipment, Helmet, Body Armor, Etc.
- 6 Travel To Ukraine In a Defined Way. Representatives Of Ukrainian Embassies, Consulates (Abroad) And Territorial Defense

With Americans already on their way or even in the fight in Ukraine, and others surely preparing, the Justice Department should clarify its understanding of the law. Justice should do so in a clear public statement. Justice should also address any other ambiguities in the law that might reasonably cause Americans to blunder into violation. After some initial confusion, the British government is now [telling its citizens](#) that an expedition from the United Kingdom would be illegal – an example of public notice the United States should follow.

The Neutrality Act has been enforced in a variety of situations across the breadth of U.S. history, but not consistently. And again, the Pentagon is asking Americans not to join the war in Ukraine. In this context, and with a flood of media stories and social media posts daily about Americans heading off to fight the Russians, the Justice Department should also announce whether as an exercise of prosecutorial discretion it intends to assign inherently scarce law enforcement resources here.

Of course, if Congress is unhappy with Justice's view of how the Neutrality Act applies to Ukraine, then Congress should resolve the matter. Congress has repeatedly amended the Neutrality Act (famously before and during World War II, for example) and should again.

Congress should legislate on two issues: whether Americans can fight in this specific war, and going forward whether Americans can fight in any foreign war without being in the service of the United States.

## **The Most Important Question is Geopolitical**

Our nation's leaders need to think carefully about the larger issue here: the geopolitical implications for the explosively tense war in Ukraine.

On the one hand, Americans with military training and combat experience may be very valuable to Ukraine in resisting Russia's monstrous invasion. Their prowess – especially those with [special operations](#) training – could further raise the costs of invasion for the Kremlin, without the United States or its NATO allies entering a perilous armed conflict with nuclear-armed Russia.

On the other hand, war is very much about perceptions. It is quite conceivable that Russia could sincerely or pretextually ignore the distinction between Americans killing Russian troops on their own initiative or as part of the U.S. armed forces. Especially given how public some Americans have been about their intentions to join the fight, Moscow will surely notice if Washington lets Americans on their own initiative attack Russian troops. It is hard at this point to predict Russian behavior on this matter with any certainty, but the de facto U.S. policy so far of strategic ambiguity about Americans fighting for Ukraine could backfire. Russian President Vladimir Putin has already [cited economic sanctions](#) by the West as grounds for an evidently first-ever nuclear alert. The Kremlin conceivably could claim that American foreign fighters – along with those powerful economic sanctions and large amounts of [NATO weapons and intelligence](#) now flowing to Ukraine – mean that NATO has not only given up its neutrality but functionally entered the armed conflict. Russia could use that as a reason or pretext to expand the war to Eastern European NATO states or beyond. Although horrifying, keep in mind that Putin may actually seek war with NATO as a way of shoring up his domestic support as [anti-war sentiment](#) manifests across Russia and his [economy craters](#).

Simply put, we are in the midst of the most dangerous international security crisis in many decades – perhaps since the [1983 Able Archer](#) nuclear war scare, or perhaps since the [1962 Cuban Missile Crisis](#). The current crisis carries mortal peril for all humanity,

thanks to Russian and American (and British and French) nuclear arsenals, and thanks to Putin's [nuclear threats](#) and potential [aspirations](#) of restoring the Kremlin's imperium over lands lost in 1991 that are now independent (like Ukraine) and in some cases now inside NATO and the European Union (much of the rest of Eastern Europe).

Informed by the U.S. government's military and intelligence professionals and by consultations with U.S. allies, the executive branch and Congress should squarely make a decision about whether allowing Americans to fight the Russians is wise foreign policy.

If their answer is Yes, then the Justice Department could make clear that it will not prioritize enforcement of the law regarding Ukraine, or elect to interpret it leniently. Alternatively, Congress could pass [legislation](#) introduced last week that would explicitly allow Americans to fight in Ukraine on their own initiative.

If U.S. elected officials think Americans fighting in Ukraine is bad foreign policy, then the executive branch should more strongly discourage Americans from signing up and underscore the risk of criminal prosecution. Congress could enact a total ban on Americans joining this war.

### **Congress Should Eliminate the Statute's Foreign/Domestic Distinction**

Looking beyond the present war, Congress should eliminate the Neutrality Act's geographical distinction and thereby its safe harbor for Americans who join foreign armies or foreign wars while outside the United States.

The world has evolved considerably in the two-and-a-quarter centuries since the Neutrality Act's initial enactment in 1794. The international law of neutrality that informed the Neutrality Act in the U.S. Code has lost most of its legal punch, as Oona Hathaway and Scott Shapiro [recently explained](#). War and wars of aggression in particular were generally outlawed during the first half of the 20th century, and the obligation of impartiality by non-combatant states toward both aggressor and victim states became a thing of the past. Gone too is the idea that imposing economic measures or providing arms in support of aggression's victim makes the helping state fair game for attack. States join wars through use of armed force, and states can do much short of that to support victims of aggression. If a state can overtly deliver lethal aid to a victim of

aggression, it gets harder to build a case that it cannot permit its citizens of their own initiative to aid the victim as well, wherever those citizens enlist in the victim's forces or defense.

Technology has changed things, too. Thanks to websites such as Ukraine's, online offers of enlistment flow across the globe and foreign recruiters need not set foot on a nation's soil. For their part, the experience of an American using the International Legion for Defense of Ukraine website is identical whether one is in Boston or Berlin. In geopolitical terms, why should the U.S. government care, why should Ukraine's government care, and why would the Kremlin care, if an American who seeks to fight the Russian army clicks "JOIN" in Minneapolis or on a day trip to Montreal?

The case for the Neutrality Act's double standard regarding signing up inside or outside the United States is, in short, no longer compelling. What is left is actually the most important idea animating the Neutrality Act: that the U.S. government gets to determine U.S. foreign policy. Just as they get to make decisions about U.S. use of force or provision of humanitarian or lethal aid, so too do the legislative and executive branches have the responsibility to decide whether allowing Americans – wherever they are – to join foreign armies or foreign wars is good foreign policy. An answer of No – and amendment of the Neutrality Act to apply everywhere – is a good default, considering the perilous state of the world.

Another important argument against allowing Americans to join foreign armies and foreign wars in their individual capacity is discouragement of private violence, private military forces, and general militarization of American civil society. Political violence is toxic to democracies. As partisanship and political extremism have spiked in the United States in recent years, so too has the incidence of politically-motivated violence and concern that its public acceptance could grow to levels that democracy cannot sustain. [Scholars](#) and [journalists](#) have noted the links between foreign fighters in Ukraine after Russia's invasion in 2014 and violent extremism in the United States. For this and other reasons, including the mixed record of foreign fighters regarding protection of civilians, experts have [cautioned](#) all nations against allowing private warfare. To whatever extent allowing Americans to fight in foreign wars on their own initiative contributes to the

militarization of U.S. civil society when those fighters return, then those private military expeditions are a matter of great concern.

Unlike during President Washington's two terms (when the entire War Department staff at one point could ride in a single carriage), the country now has a large standing professional military. If Americans are to be involved in fighting overseas, the U.S. government should make and carry out that decision. Americans should only go to war wearing the uniform of the U.S. armed forces or otherwise in government service as part of a duly authorized [covert action](#). That principle would go a long way to ensuring that any war-making by Americans reflects professionalism, oversight, fidelity to the law of armed conflict and to the Constitution, presidential direction subject to the rules Congress writes "for the Government and Regulation of the [land and naval Forces](#)," alignment with U.S. foreign policy, and ultimate control of violence by U.S. elected civilian authorities.

In sum, the Neutrality Act's where-you-sign-up-and-kit-out distinction needs to go. Congress should repeal the statute's "within the United States" caveats, creating a flat ban on private participation by Americans in foreign armies and foreign wars. Congress always retains the power (one Congress could delegate to the president) later to allow such participation on an army-by-army or war-by-war basis with larger judgments about national security – foreign and domestic – in mind.

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Americans may not be neutral in their hearts or heads in Russia's war on Ukraine. Authoritarian Russia is trying to crush struggling democracy Ukraine precisely because Ukraine is a democracy and seeks self-determination, the rule of law, and protection from and association with other democracies in North America and Western Europe. This war reflects a clash of dictatorship and democracy. Russia must be stopped if that is possible without world war.

Legally, however, the United States is at peace with Russia, Ukraine's foreign legion is a foreign army fighting Russia, and the Neutrality Act's default command is therefore neutrality. At least, that is, for Americans inside the United States, and subject to

statutory terms that carry some ambiguity. Although enforcement is a real question, that uncertainty exposes Americans wanting to fight for Ukraine to the risk of blundering into criminal conduct. The status quo also reflects lack of decision by the country's leaders about whether Americans on their own initiative fighting Russians is smart foreign policy in a war that could dangerously escalate. The Neutrality Act is also burdened by a geographic where-people-sign-up-and-kit-out distinction that needs to be repealed.

The executive branch and Congress have a lot to do in these difficult times, but it is well worth it to speak clearly and loudly about the country's rules about whether Americans on their own initiative can fight in the Ukraine war and future foreign wars.

*Image: Ukrainian soldier walks along a trench on the frontline with Russia-backed separatists, not far from town of Avdiivka, Donetsk region, on December 10, 2021 (Photo by ANATOLII STEPANOV/AFP via Getty Images).*

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