Dear NYU Legal History Colloquium participants:

Thanks very much for taking the time to read my work. Attached are two draft chapters from my book-in-progress, *A Nation at Sea: The Federal Courts and American Sovereignty in the Age of Revolution*. I have also attached a draft book proposal, to give you sense of the project’s broader scope.

As you will see, this is very much a work in progress, and I welcome your comments on all aspects of the chapters or the book generally. I am particularly curious to know what you think of the paired chapter structure, in which Chapter Two sets up the problem the Washington Administration faced in the 1790s, and Chapter Three explains how the courts became the solution to that problem. That structure has costs and benefits, and I’m not sure how they weigh out.

Substantively, my biggest challenge is figuring out what to make of the Washington Administration’s robust articulation of judicial independence in this period. I think there is a larger story to tell about evolving conceptions of judicial authority, but I’m not sure this is the place do it (the chapters are long enough already).

I look forward to your thoughts.

Best,

Kevin Arlyck
Associate Professor of Law

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A Nation at Sea:
The Federal Courts and American Sovereignty in the Age of Revolution

Kevin Arlyck
Associate Professor of Law
Georgetown University Law Center

A Nation at Sea tells a new story about the federal courts, and about the United States itself. Traditional accounts of the judiciary’s origins tell us that the early Supreme Court laid the constitutional foundation for strong national authority in domestic affairs. As this book explains, the courts were equally instrumental in establishing American sovereignty abroad. From 1789 to 1820, disputes arising from war at sea thrust the judiciary into the center of the inter-imperial contestations that defined the era. Amid the conflicts of the French Revolution, the War of 1812, and the struggle for South American independence, battles over the legal status of persons, ships, and property washed onto American shores. The courts adjudicated the legality of naval captures made by warring powers, regulated the conduct of American merchants and privateers, and criminally tried pirates, slave traders, and others who sought to turn the chaos of transatlantic warfare to their personal advantage. In so doing, the courts repeatedly intervened in contentious international debates over the rights and duties of sovereign nations under international law.

The courts’ arbitration of wartime disputes was essential to consolidating the United States’ hard-won independence. For a new and fragile nation surrounded by militarily powerful empires, nothing mattered more than steering clear of the bitter and destructive conflicts raging across the Atlantic world. Indeed, as statesmen like Thomas Jefferson understood, a firm commitment to neutrality was an existential imperative. Warmaking risked economic destruction and even dismemberment of the union, while neutrality would allow American commerce to flourish as the European powers tore each other apart. But under the constitutional compromises of the late 1780s, the nascent federal government had limited ability to control a fractious populace driven by avarice and ideology to enter the revolutionary fray. As American officials struggled to keep faith with the nation’s peaceable commitments, foreign anger over suspected American perfidy repeatedly threatened to drag the United States into war.

The solution to this predicament lay in the courts. By taking jurisdiction over cases arising from international conflict, the judiciary provided a forum for victims of maritime violence to vindicate their legal claims to persons, vessels and goods that traveled the high seas. Though judicial decisions could never satisfy everyone, the courts’ intervention relieved pressure on executive branch officials who faced demands for action from powerful competing constituencies. At the same time, judicial proceedings offered a way for the weak federal government to regulate the conduct of Americans and foreigners whose actions undermined the nation’s standing abroad. Indeed, the judicial commitment to resolving individual disputes in accord with treaty and international law helped assure a foreign audience of the United States’ fitness for membership in the transatlantic community of “civilized nations.”
At the same time, the courts’ rulings in this period increasingly privileged American authority over international consensus. When the United States went to war in 1812, the courts began articulating doctrines that sacrificed the nation’s longstanding devotion to neutral rights to promote the interests of a nation growing in commercial, military, and political power. And as the Age of Revolution entered its last phase, the courts asserted expanded jurisdiction to police the conduct of self-proclaimed revolutionaries sailing the Atlantic’s roiled waters. Ultimately, the courts became one of the leading exponents of a new, imperial vision of American independence, one that combined freedom from European control with nascent hegemony over the emerging polities of the Americas.

The courts’ role in promoting American sovereignty was not accidental. The Constitution’s framers designed the federal judiciary in part to provide a forum for protecting foreign interests. Yet the ink on the founding charter had barely dried before the courts’ involvement in foreign affairs began evolving in unexpected ways. Faced with competing demands from foreign diplomats, merchants, and privateers, the executive and legislative branches repeatedly turned to the courts for help in navigating transnational tensions. Officials like Jefferson, James Monroe, and John Quincy Adams actively recruited the judiciary into international disputes by insisting that claimants go to the courts for relief. To justify this buck-passing, they reframed disagreements over the wartime rights of sovereign nations as mere domestic disagreements about the fate of private property and persons entangled in conflict. As such, they were entirely amenable to judicial resolution.

This turn to the courts was controversial. Foreign officials resented judicial intervention in the affairs of state, and cases arising from maritime war became the locus of transnational debate over the courts’ role in relations between sovereign nations. Judges, too, had deep doubts about whether it was a good idea to assume jurisdiction over international controversies. They worried that assertive claims to judicial authority ran contrary to deep-seated international legal principles, and feared the burdens that came with expanded jurisdiction. Over time, however, litigation in federal court fostered a growing confidence in the propriety of judicial intervention in the affairs of state.

Repeated resort to the courts did more than shape the trajectory of American sovereignty. It also influenced the development of the judiciary itself. The early judiciary was a weak and embattled institution, saddled with limited authority and threatened by domestic partisanship. Maritime cases under the courts’ admiralty jurisdiction, however, were one area of unquestioned preeminence. Building out from this core of judicial power, political branch actors (and judges themselves) expanded and defended the courts’ authority to encompass myriad disputes arising at sea. At the same time, elected officials consistently rejected disappointed claimants’ demands for intervention in judicial processes. The judiciary, such officials asserted, was shielded from political interference by the Constitution itself. Though modern observers accustomed to judicial deference in foreign affairs might find it surprising, the court’s early history reveals that an American ideal of judicial independence emerged in response to the pressures that the new nation confronted on the world stage.

Conversations & Contributions

A Nation at Sea is the first monograph to explore the courts’ role in early American foreign affairs. Existing histories of the early judiciary are domestically oriented, preoccupied with federalism, interstate commerce, slavery, and other “internal” matters. This book situates early American constitutional
development in a global context, recognizing that one cannot fully understand the early development of law and legal institutions in the United States without examining the transnational dynamics that shaped them. Drawing on research in diplomatic archives from several countries, lawyers’ papers, and a variety of federal administrative records, *A Nation at Sea* reveals how and why the federal courts became so important in early American foreign affairs. Astute observers have long recognized the degree to which domestic political trends have influenced the courts, or at least the Supreme Court. This book shows what is far less obvious—the degree to which international politics shaped the federal judiciary.

In some ways, the courts’ international origins should come as no surprise. The rich scholarship on the history of empire shows that law in the early modern era was simultaneously a vector of state authority and a source of vocabulary for negotiation, resistance, and compromise. *A Nation at Sea* builds on those scholarly insights to uncover how a diverse array of public and private figures transformed the federal courts into one of the preeminent institutions of early American state-building. And while much recent internationalist scholarship emphasizes the eighteenth-century British imperial world as the key to understanding the American trajectory, *A Nation at Sea* takes a broader view, encompassing not only the French and Iberian empires, but also political developments across the Western Hemisphere.

*A Nation at Sea* also builds on studies of American governance to offer new insights into how the early federal government exercised its power. As recent scholarship has shown, the American state did not emerge fully formed in 1787. It developed as fledging government institutions and federal officeholders grappled with a diverse and unruly public that both desired strong central authority and was suspicious of it. Yet the federal courts have largely been left out of this narrative. Grounded in research into unpublished court records, *A Nation at Sea* reveals the judiciary as a pivotal institution of early American governance. The courts offered persons with legal claims a means of accessing state power, while at the same time providing the government with a mechanism for enforcing the law against those whose actions endangered American sovereignty.

**Outline**

This book consists of seven chapters, plus an introduction and a conclusion. Each chapter averages around 15,000 words; the Introduction and Conclusion about 5,000 words each. Including notes, the final manuscript will total approximately 135,000 words, together with 12 black-and-white images, portraits, maps, and charts. I plan to complete the manuscript by December 31, 2022.


- Introduction
- Chapter 1: From Confederation to Constitution, 1775-1789
  - Part One: The Struggle for Neutrality, 1793-1797
    - Chapter 2: War Comes to America
    - Chapter 3: The Courts as Compromise
- Part Two: The Courts at War, 1812-1816
  - Chapter 4: The Problems of Prize
Introduction

According to the received scholarly wisdom, the federal courts have historically had little meaningful involvement in foreign affairs. In fact, the political branches of the early federal government repeatedly turned to the courts for help in navigating the fraught terrain of international war and revolution. The judiciary was integral to the making of American sovereignty at the start of our nation’s history.

Chapter 1: From Confederation to Constitution

From the moment they began resisting British authority in the 1770s, rebellious North Americans understood the importance of establishing judicial authority over maritime violence. States’ refusal to remedy violations by American privateers provoked diplomatic controversies that undermined the drive for independence. So as the new nation’s political leaders drafted and debated a new Constitution, both supporters and skeptics agreed on at least one thing: The federal judiciary would be responsible for resolving disputes arising on the high seas. As future Chief Justice John Marshall put it, the courts would be “the means of preventing disputes with foreign nations.” But how exactly they would fulfill that role remained to be seen.

Part One, 1793-1797

When the wars of the French Revolution reached American shores, the Washington Administration turned to the courts to define and uphold the nation’s legal rights and obligations.

Chapter 2: War Comes to America

In 1793, the renewed rivalry between France and Great Britain plunged the United States into crisis. As the French Revolution reverberated around the Atlantic, popular support for the cause of liberty engulfed the United States. Encouraged by this enthusiasm, the impetuous French foreign minister, Edmond-Charles Genet, sponsored privateering attacks against British commerce from the United States. With neutrality a political necessity, the Washington Administration tried to prevent Americans from dragging the nation into war, but a lack of federal law enforcement power and the growing political and personal rivalry between Thomas Jefferson and Alexander Hamilton stymied its efforts. As the Neutrality Crisis deepened, Washington dispatched Chief Justice John Jay to London to avert disaster, but the future looked precarious indeed.

Chapter 3: The Struggle for Neutrality

Frustrated and beleaguered, the Washington Administration turned to the courts. Desperate to demonstrate the nation’s sovereign bona fides in the face of British demands for action, Jefferson tasked the courts with responsibility for restoring ships and cargo seized by French privateers. Though initially skeptical, British officials embraced litigation as a means of neutralizing French privateering. French diplomats complained that disputes over sovereign rights could not be resolved judicially, but they too
went to court to defend their national interests. Even federal judges were resistant at first, but the Supreme Court soon accepted jurisdiction over privateering lawsuits, staving off direct confrontation with either France or Great Britain. Though the Court expressed concerns about assuming a role in wartime disputes, a more confident judicial perspective was coming into view.

Part Two, 1812-1816

When the United States itself went to war in 1812, the courts became the solution—however imperfect—to the challenge of managing the nation’s private maritime warfare against Great Britain.

Chapter 4: The Problems of Prize

As long-simmering tensions with Britain burst into open conflict in 1812, the lack of a navy meant that American privateering was essential to countering British dominance at sea. But for many, privateering was little more than legalized piracy. So how could the federal government guarantee profits to privateers while ensuring they followed the laws of war? American statesmen again tasked the courts with striking the proper balance, but lack of familiarity among American judges and lawyers with the mechanics of maritime litigation made the task difficult. There was another problem: For over a decade the Supreme Court—under John Marshall’s leadership—had favored the rights of neutrals over those of belligerents. That approach made sense when the militarily weak but commercially vigorous nation sought to take advantage of wartime trade with Europe. Now that the United States was itself a party at war, legal rules that protected neutrals threatened to hinder the war effort.

Chapter 5: Mr. Story’s War

No one understood the problems the courts faced better than Joseph Story, a talented and ambitious young lawyer from Massachusetts who joined the Supreme Court in early 1812. Brimming with energy, Story tried to reshape federal court adjudication of maritime captures. He was partially successful. Privateering was big business, and investors resented judicial interference, while executive branch officials complained that judicial administration was inefficient and corrupt. The courts became the site of a broader contest over how the United States would balance public interest and private enterprise in wartime. Story was more effective when it came to refashioning the law. While Marshall clung to the deep-seated belief that strong protections for maritime trade benefited the United States, Story saw a future in which a robust military and strong central government were the engine of American nation-building. He persuaded his colleagues to adopt doctrines that favored the rights of belligerent nations over neutrals, pushing the courts—and the country—to assume a more assertive presence on the high seas.

Part Three, 1816-1825

The end of the War of 1812 was the beginning of a new chapter, as the wars of South American independence raised questions about the legitimacy of revolutionary governments and the federal courts’ authority to police the high seas.

Chapter 6: Confronting Revolution

Beginning in 1816, privateering on behalf of South American rebels offered adventurous Americans fresh opportunities for profit. Like the British in the 1790s, Spanish and Portuguese officials in the United States fought back by suing in federal court to recover captured vessels and cargo. But criminal
convictions proved harder to secure. Though Secretary of State John Quincy Adams promised to bring “piratical privateers” to justice, the spectacular failure of prosecutions in Baltimore demonstrated that a patchwork statutory regime, popular support for privateering, and complicity among federal officers made maritime depredations difficult to stop. At a deeper level, privateering cases raised new and difficult questions about sovereign status of South American colonies seeking autonomy. Doubts in the United States about their southern neighbors’ capacity for self-rule were fueled by racial and religious prejudices and the long-lasting specter of the Haitian Revolution. As Congress struggled to adapt to the rapidly-shifting political context in the Americas, federal judges expressed renewed doubts about extending their judicial authority onto the high seas.

Chapter 7: Policing the High Seas

The executive and legislative branches once again turned to the courts for help in navigating the challenges of international politics. Congress took the first step by leaving it to judges to define the legitimate boundaries of maritime violence. As the Monroe Administration redoubled its prosecutions of privateers, the Supreme Court accepted the political branches’ invitation to enter the fray. It declared that South American privateers who preyed on neutral commerce were “outcasts from the society of nations,” and subject to prosecution by all—including the United States. To justify this more expansive judicial authority, the Court cast doubt on the claims to sovereignty advanced by revolutionary polities to the south. It also reconceptualized privateering itself. Echoing the arguments Thomas Jefferson made more than two decades earlier, the Court recast delicate and difficult questions of imperial politics and sovereign right as matters of ordinary criminal conduct. In so doing, the Court asserted the United States’ authority to police the waters of the revolutionary Atlantic.

Conclusion

As the Age of Revolution wound down, lawsuits over captured ships and goods faded from the federal docket, and a nineteenth-century movement to end privateering ensured that such cases would never again dominate judicial attention. In the late twentieth century, new forms of international conflict and new legal paradigms again brought foreign affairs disputes to court, particularly those involving human rights. Those trends sparked an ongoing debate about the judiciary’s role in such matters, with participants regularly looking to the founding generation’s views for support. The rich and complex story told here makes clear that the courts’ historical role in foreign relations did not follow inexorably from a grand plan of government laid down in 1787. Instead, it was a response to the challenges facing the first generation of American nation-builders.

Market

By exploring legal developments in the context of high-stakes domestic and international events, A Nation at Sea speaks to the interests of scholars in legal, political, military, and diplomatic history. The book will also appeal to historically-minded legal scholars, especially those who look to early American history for insights relevant to constitutional questions regarding the separation of power among the three branches of government. In addition, the book’s thematic breadth and readability make it suitable for assignment in graduate and advanced undergraduate courses in U.S., Atlantic, and global history.

A Nation at Sea will also appeal to a broader audience. It features well-known figures such as Thomas Jefferson, Alexander Hamilton, Joseph Story, and John Marshall, providing a new perspective on popular
historical figures. At the same time, the book challenges tropes of heroic individualism and American exceptionalism. An international cast of protagonists includes Peter DuPonceau, the French-born Supreme Court advocate who managed his native country’s litigation effort in the Neutrality Crisis; Benjamin Crowninshield, the beleaguered Navy Secretary who struggled to enlist the courts in regulating War of 1812 privateers; and Thomas Taylor, the privateering ringleader who courted fame while skirting the law. By recounting their exploits, *A Nation at Sea* has the potential to attract a diverse readership.

**Author Information**

I am an Associate Professor of Law at Georgetown University Law Center. I received my Ph.D. in History from NYU and my J.D. from NYU School of Law. Prior to joining the Georgetown faculty, I was a law clerk to Associate Justice Sonia Sotomayor of the Supreme Court of the United States and Judge Robert Katzmann of the United States Court of Appeals for the Second Circuit. I have also held fellowships at Columbia Law School and NYU School of Law, and I practiced law for four years at Orrick, Herrington & Sutcliffe LLP in New York. My work has been supported by grants and awards from the American Society for Legal History, the Nelson Cromwell Foundation, the Gilder-Lehrman Institute of American History, and the Society for Historians of American Foreign Relations, among others.
Chapter Two:
War Comes to America

Introduction

On May 5, 1793, Thomas Jefferson wrote his friend and political ally James Monroe with exciting news. A French naval frigate had recently captured a British merchant ship in Delaware Bay and sailed it into Philadelphia, much to the delight of the multitude that crowded the harbor to welcome its arrival. When the crowd saw the French tricolor flying over a reversed British flag, it reportedly burst into “peals of exultation.” Jefferson was not surprised. He estimated that “99 in a hundred of our citizens” supported the French Revolution, and when word arrived that France had broadened her struggle against European monarchies by declaring war against Great Britain, public enthusiasm for the French cause reached fever pitch. Jefferson, too, was ecstatic. He has already participated in the Revolution’s first stirrings while serving as American minister to France in the late 1780s, and he was persuaded that the transformation overtaking that nation was an enlightened extension of the revolution in colonial North America a decade earlier. Indeed, Jefferson believed the revolutionaries’ success in Europe was bolstering “republicanism” in the United States “All the old spirit of 1776,” Jefferson gushed to Monroe, “is rekindling.”

Even as he celebrated developments across the Atlantic, Jefferson’s letters betrayed a deep anxiety. Cheering for the sister revolution in France was one thing; taking up arms in its defense was another. As Secretary of State to President Washington, Jefferson agreed with his colleagues in the cabinet that the United States had little to offer France as an ally in the war, and much to

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gain from staying out.² American merchants would trade with both sides, profiting handsomely as the European rivals descended into a spiral of mutual destruction. Just as important, if the United States could ensure that its citizens observed “friendly and impartial conduct” toward the warring parties, it would demonstrate to the world the new nation’s fitness to be treated as a coequal sovereign.³ At the same time, failure to steer clear of the conflict could be catastrophic. For Alexander Hamilton, strong commercial relations with Great Britain were essential to the United States’ political and economic well-being. Jefferson had darker fears. He already suspected that Hamilton and his allies wanted to use the recently-ratified federal Constitution as a “stepping stone to monarchy” in the United States, and was convinced that Great Britain would only be too happy to use the war as a reason to cross the Atlantic and “finish their job.”⁴ So it was with equal parts excitement and trepidation that Jefferson expressed his hope to Monroe that the government would be able to “repress” the revolutionary spirit sweeping the nation “within the limits of a fair neutrality.”⁵

Jefferson had good reason to be worried about the Washington Administration’s ability to keep Americans out of the war. British officials had already complained about the French naval capture that so thrilled Philadelphians, and made clear that failure to remedy the injury suffered by British subjects threatened serious consequences. More ominously, Jefferson had just received word that a bold and impulsive French minister was on his way to the United States. He carried with him hundreds of blank privateering commissions, to be distributed to anyone in the

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United States willing to arm private vessels and prey on British commerce. Jefferson’s informant expressed hope that Americans would “rigidly adhere to their Neutrality,” but he worried that “Profligates” in the United States would find the allure of joining the French war effort too strong to resist. Such activities, he warned, would expose the United States to “Suspicion,” and ultimately “involve us in War.”

As Jefferson and his colleagues in the Washington Administration soon discovered, achieving a “fair neutrality” was fraught with difficulties. Part of the problem was the law itself. No one in the cabinet was quite sure how to reconcile the need to maintain neutrality with the United States’ preexisting treaty commitments to France. The administration eventually settled on a policy of absolute impartiality, but the challenge lay in enforcing it. President Washington warned Americans against breaching United States neutrality, but no positive law prohibited Americans from participating in French privateering. More fundamentally, the federal government simply did not have the manpower to police the activities of an unruly maritime populace scattered along a coastline more than a thousand miles long. Compounding the challenge was deep uncertainty about how law enforcement was even supposed to work in a government not yet four years old, especially given the nascent rivalry between Jefferson and Hamilton over who would control the levers of power. For the Washington Administration, fulfilling the stringent duties of neutrality that it had assigned itself would prove to be a nearly impossible task. Ultimately, Jefferson and his colleagues would have to come up with some other way of keeping the nation out of war.

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Confronting Revolution

The French Revolution’s peril and promise came to American shores in the person of Edmond-Charles Genet. Only thirty years old when he disembarked from the French warship L’Embuscade at Charleston in April 1793, Genet was already a rising star in French republican circles. The son of a high-ranking civil servant, he began his career in the royal diplomatic service as a teenager. Intelligent, charming, and a precocious linguist, he was named secretary of the French legation in Russia in 1788. Despite his talents, Genet never exerted much influence at the court of Catherine the Great. Yet he caught the eye of republican leaders in Paris. He embroidered his reports about the activities of royalist French emigrés in St. Petersburg with the language of revolutionary republicanism, and the Girondins who came to power after abolition of the monarchy were delighted to find one of their own in the diplomatic corps. Soon after Genet returned to Paris in 1792, he was appointed as the new minister to the United States.7

Genet’s mission to America was of utmost importance to his sponsors. The Girondins dreamed of helping liberate all the people of Europe suffering under monarchical oppression. Faced with the combined might of the allied European monarchies, a strengthened relationship with the United States was essential to the success of the “worldwide risings” the Girondists envisioned. Not a military alliance; the French government recognized that the United States was too weak to offer help on the battlefield. But there were three things Americans could do to help secure the revolution: make advanced payments on the nation’s Revolutionary War debts, send shipments of grain to feed a starving French populace, and enter into a new commercial treaty that would advantage France (and disadvantage Great Britain). Brimming with optimism, the

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Girondist idealists assumed that their fellow-republicans across the Atlantic would happily come to France’s aid.  

There was another dimension to Genet’s mission, one that would ultimately pose the greatest challenge to American political leaders. Surveying the situation across the Atlantic, the French government saw an opportunity to undermine British and Spanish power. Genet’s instructions urged him to incubate “revolutionary principles” among sympathetic republicans in North America. One prong of this strategy involved building a military force to seize Spanish possessions along the Mississippi. Genet’s second—and far more consequential—assignment was to use the United States as a base for maritime raids on British commerce. Privateering from the United States was a critical component of the French war effort. The British Navy was the world’s most powerful, and the Revolution’s social upheavals had exacerbated the French disadvantage at sea. In addition, political instability and slave rebellion had disrupted French control of its Caribbean possessions, leaving its maritime forces few safe harbors in the Western Hemisphere. American port cities were teeming with fast vessels and experienced mariners, many of whom had extensive experience privateering during the American Revolution. If Genet could successfully turn American maritime prowess to France’s military benefit, the injury to British commerce would be significant.

8 Relatif aux instructions de Genêt, Dec. 1792, CFM, 201; Casto, Fighting Sail, 16-17; Ammon, Genet Mission, 19-29.


12 Supplement aux instructions donnés au Citoyen Genêt, Dec. 1792, CFM, 207, 208; Genêt to consuls, May 1793, Archives du Ministère des Affaires Étrangères [AMAE], Correspondance Politique, 37:384; Adet to Pickering,
Genet’s instructions warned him not to antagonize American officials, but he showed little caution in pursuing his mission. Embracing his role as the Revolution’s “advance sentinel,” Genet immediately began working with the French consul in South Carolina to raise an armed force for action against Spanish possessions. Those schemes never came to fruition, but Genet’s other project was an immediate success. Within days of his arrival, at least four privateers began cruising the coast for unsuspecting British and Spanish merchant vessels. Genet also distributed commissions to consuls located in other port cities on the eastern seaboard, with instructions on how to oversee the privateering effort going forward. Soon French-commissioned privateers were prowling the eastern seaboard from Boston to Savannah.

Genet had good reason for his enthusiasm, for every indication suggested that Americans were as devoted to the Revolution’s success as he was. Charleston’s pro-French contingent gave him a rapturous welcome, replete with banquets, speeches, and audiences with much of the city’s social and economic elite. After ten delirious days, Genet headed north, to present himself to President Washington. At every stop along the way—from major cities to small towns and villages—he was cheered by enthusiastic crowds and entertained by southern grandees, living, as he put it, “in the midst of perpetual fêtes.” When Genet finally reached Philadelphia, it was

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14 Genêt to Minister of Foreign Affairs, April 16, 1793, CFM, 211-12; Alderson, Bright Era, 110-11; Ammon, Genet Mission, 8, 44-45. For details on the fitting out of privateer vessels in Charleston, see Casto, Fighting Sail, 45-49; Jackson, Privateers in Charleston, 5. On the Charleston consul’s key role in Genet’s schemes regarding Spanish territory, see generally Alderson, Bright Era; Robert Palmer, “A Revolutionary Republican: M.A.B. Mangourit,” William and Mary Quarterly 9 (1952): 483-96.

15 Genêt to Citoyen LeBrun, May 31, 1793, CFM, 216.
more of the same. A delegation of the city’s leading citizens paraded him into town before a crowd of thousands. For the next several days, Genet was preoccupied with exuberant public dinners, featuring liberty caps, rounds of toasts, and roaring renditions of La Marseillaise. Genet reveled in the adulation, telling his superiors in Paris that his warm reception demonstrated Americans’ eagerness to come to the aid of their brothers across the Atlantic.

In many ways, Genet was correct, for his arrival had only quickened the revolutionary excitement many Americans already felt. They nursed longstanding grievances against their former colonial masters, ranging from British efforts to collect longstanding debts to Great Britain’s intrigues among native peoples in the American interior. The prospect of seeing John Bull humbled by stout republicans promoted many to adopt the French cause as their own. French success on European battlefield’s kept enthusiasm running high, even when events in France took a more violent turn with massacres in Paris and the execution of Louis XVI.

Americans took to wearing cockades and the tricolor, they renamed streets to promote republican values, and the celebrating continued unabated. As recounted decades later by Charles Francis Adams—grandson of then-Vice President John Adams—for many Americans, the flowering of republicanism on both sides of the Atlantic promised the creation of a “paradise on earth.”

The American fervor also reflected a deep concern over the future of republicanism itself. By the time of Genet’s arrival, Jefferson and his supporters were convinced that a “monocratic”

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faction in American society was intent on seizing the levers of federal power. The rupture
originally centered around divergent visions of economic development, with Jeffersonians
decrying Federalist machinations on behalf of “merchants trading on British capital” and “paper
men” against the interests of “tradesmen, mechanics, farmers.” But by 1793 this shadowy
conspiracy was much broader, aimed at introducing British institutions into the United States,
concentrating authority under a quasi-king, and perhaps even reestablishing subservience to the
English crown.19 Hamilton was the prime mover of this plot, the Federalists’ “colossus,” whose
actions as Secretary of the Treasury were nothing less than “machinations against the liberty of
the country.”20

For the Jeffersonians, the French Revolution’s success was an existential imperative. It
confirmed the righteousness of their own recent revolutionary history, and reassured them that
constitutionalism, republicanism, and popular sovereignty would inevitably triumph over the
forces of monarchy and despotism. This was by no means a sure thing. Though Jefferson himself
was convinced that true “Republicans” greatly outnumbered “Monocrats” in the United States,
the threat from abroad was palpable.21 As early as 1791, he worried that, if republican
government failed in France, the United States would backslide towards a “kind of Halfway-
house” exemplified by the English constitution. By the time Genet arrived, Jefferson’s fears were
more pronounced. If the allied monarchies prevailed on the European continent, they might

19 Thomas Jefferson to James Madison, [13 May 1793], PTJ; Stanley M. Elkins and Eric L. McKitrick, The Age of
Federalism (New York: Oxford University Press, 1993), 77-132, 257-302; McCoy, Elusive Republic, 152-61;
Banning, Jeffersonian Persuasion, ch. 5 & 6.

20 From Thomas Jefferson to George Washington, 9 September 1792,
https://founders.archives.gov/documents/Jefferson/01-24-02-0330; From Thomas Jefferson to James Madison,
29 June 1793, https://founders.archives.gov/documents/Jefferson/01-26-02-0365; From Thomas Jefferson to

21 From Thomas Jefferson to James Madison, 29 June 1793, https://founders.archives.gov/documents/Jefferson/01-
26-02-0365.
decide to force Americans to change their very “form of government.” His fellow-travelers echoed these fears, in even starker terms. The “craving appetite of despotism,” one newspaper warned, would be “satisfied with nothing less than American vassalage.”

The European contest’s outcome was equally portentous for Jefferson’s opponents. Virtually all Americans had welcomed initial efforts to reform French government into a constitutional monarchy. But early skeptics—like Hamilton and John Adams—became alarmed as radical notions of popular sovereignty prompted increasing concentrations of power in a unicameral French legislature. For American conservatives who had witnessed the alleged excesses of democracy in state governments in the 1780s, the French embrace of “mobocracy” threatened to unleash an even more pernicious form of popular tyranny on the world. The Revolution’s increasingly chaotic and sanguinary character only confirmed those fears. In Hamilton’s view, the upheavals in Europe had ceased to be a “struggle for liberty” long before Genet arrived in the United States. They were instead a descent into “crimes and extravagancies.”

The Revolution’s critics equally concerned about its domestic implications. If the French radicals prevailed over the forces of stability and “regular government,” the disorder would inevitably spread across the Atlantic. In fact, by 1793 their fears were already coming true. France’s declaration of war against Great Britain inspired Americans across the country to form “democratic societies” devoted to the “preservation of civil liberty.” Though their members

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pledged their “attachment to the constitution,” Federalists were deeply alarmed. They were convinced that such “self-created societies” would serve as conduit through which the “ungovernable passions of a simple democracy” would flow from France into the United States. In their view, domestic revolutionaries, those who “pant[ed] for Equality of Persons and Property,” wanted to make common cause with their European brethren and “throw their country into war & anarchy.” George Washington himself would soon see in the societies a French plot—spearheaded by Genet—to “poison the minds of the people” against their duly constituted government.

Federalists may have exaggerated the threat the democratic societies posed, but the political instability wrought by the spread of revolutionary principles had already resulted in their worst nightmare—a massive rebellion by black enslaved persons in the French colony of Saint Domingue. The shocking tales of violence and death reported by white refugees who fled to the United States especially horrified members of the southern slaveholding elite, whose wealth and status depended on principles of racial subordination that the Revolution seemed to be undermining. In their view, when French officials in the colony took the unprecedented step of emancipating all enslaved persons in 1793, the Revolution’s alignment with the forces of anarchy was complete. For many, the seemingly unstoppable spread of revolutionary contagion left Great Britain as the only hope. If the world’s most powerful empire was defeated, arch-

25 Link, Democratic-Republican Societies, 10-12; To Alexander Hamilton from Nathaniel Chipman, 9 June 1794, https://founders.archives.gov/documents/Hamilton/01-16-02-0415.

Federalist Harrison Gray Otis predicted, Americans would need to prepare to be “good and dutiful subjects to the French.”

Yet if Americans partisans viewed European developments in starkly different ways, they agreed on one thing: The United States should not take active part in the conflict. To be sure, some Americans were inspired to provide financial support to France, and a few companies of volunteer soldiers made their way across the Atlantic. And as we shall see, many in the United States were eager to support the French cause via privateering. Divergent views of the Revolution also shaded cabinet debates over how to respond to Genet. Jefferson was initially enamored with the new French minister, finding his requests for American aid to be entirely reasonable. Hamilton, in contrast, cited the political instability in France as justification for repudiating the existing treaties France and even refusing to acknowledge Genet entirely. Alarmed by such provocations, Jefferson believed that Hamilton wanted to join the “confederacy of princes against human liberty” and make war against France.

In truth, both sides wanted to keep the nation out of the conflict. For good reason, as there was little to be gained and much to lose. The United States’ military capabilities were negligible, and it was territorially surrounded by British, Spanish, and potentially hostile Indian forces. Given longstanding tensions over imperial boundaries in the North American interior, any belligerent conduct by the United States hazarded reprisals the new nation was unprepared to resist. In addition, the national economy was largely dependent on maritime commerce, both exporting American-grown food to European colonies in the Caribbean and carrying colonial

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products to markets in Europe. Formal entry into the war would render American vessels fair
game for British warships that patrolled sea lanes in the Caribbean and Atlantic. As Attorney
General Edmund Randolph later put it, for an “infant country” like the United States there was
“no greater curse … than war.”29 And for what purpose? The United States was bereft of both
“men and money,” so a declaration of war would do nothing to change the balance of power.
Indeed, belligerency would allow Great Britain to attack American commerce, denying France
the significant benefits of unfettered access to the “immense resources” of America. Worse yet,
joining the war would saddle France with a junior partner requiring more in protection than it
could provide in aid. Indeed, the French themselves fully recognized that they would derive far
greater benefit from American neutrality than from its belligerency.30

At the same time, neutrality offered the United States unrivaled opportunities. Nations
preoccupied with war—Great Britain and Spain in particular—might be cajoled into making
concessions over far-flung territory.31 More concretely, the ravages of war on the European
continent would increase demand for American products, especially food. Indeed, one of Genet’s
tasks was to buy huge quantities of American grain, and he promised the Washington
Administration that he would use any advanced debt payments to purchase war material and
other supplies. Neutrality also gave American merchants a competitive advantage in maritime
shipping. The vessels of belligerent nations were subject to capture by their enemies. Neutral
vessels, on the other hand, were largely free to trade with each other and with belligerents—at
least in theory. In reality, for the next two decades both France and Britain became increasingly

29 Randolph to James Monroe, June 1, 1795, ASPFR, 1:705, 706.
30 Monroe to Jefferson, May 28 1793, PTJ; Jefferson to Madison, May 19, 1793, PTJ; Casto, Fighting Sail, 16-17.
31 From Thomas Jefferson to Alexander Donald, 29 August 1790,
hostile to neutral rights. But from the perspective of 1793, neutrality offered the tantalizing prospect of unhindered American vessels being paid to carry the Atlantic world’s produce across the seas. As Jefferson explained the Washington, the “great harvest” of profits “is when other nations are at war, and our flag neutral.”32

Indeed, neutrality’s economic benefits appealed to Hamiltonians and Jeffersonians alike. Hamilton’s vision for shaping the United States into an economic powerhouse depended on robust commerce with Europe, and the tax revenue that resulted from it. A growth in foreign trade would swell government coffers, while disruptions threatened the new nation’s fiscal well-being. Jeffersonians were more ambivalent. Echoing longstanding concerns in republican thought, they feared commerce’s corrupting influence on individual morals. At the same time, they recognized that the virtuous agrarian republic they envisioned in North America could not thrive without foreign markets for its produce. If nothing else, Jefferson gleefully proclaimed, the advent of war between European powers meant that “the new world will fatten on the follies of the old.”33 And he was largely correct; between the outbreak of the Anglo-French war in 1793 and the brief interlude of peace following the Treaty of Amiens in 1801, American exports tripled, and the volume of the Atlantic carrying trade quadrupled.34

Remaining neutral would do more than simply promote the United States’ material interests. American abstinence would also serve, in Jefferson’s words, as a “precious example to the world.” For many republicans, war itself was an evil to be avoided at all costs. It was expensive,

34 McCoy, Elusive Republic, 76-166; Bukovansky, “American Identity,” 228.
resulting in taxes and debt that burdened future generations. And it invariably empowered the executive branch, a particular concern for Jeffersonians who already feared a slide toward “monarchical” government at home. Fortunately, republics were naturally less inclined to make war than were despotic governments, which used armed conflict not only to expand territory and accrue resources, but also as a means of cementing their power at home. Hamilton ridiculed this notion; in his view, both republics and monarchies were “administered by men,” and therefore equally prone to armed conflict. But Jefferson was convinced: No country “was ever so thoroughly against war” as the United States, and steering clear of the burgeoning European conflict would show the world the wisdom of its ways.35

**Defining Neutrality**

Neutrality might have been the consensus view, but figuring out what that entailed proved to be more difficult. On April 22, 1793—before Genet reached Philadelphia—President Washington issued a short statement declaring that “the duty and interest” of the United States obliged the nation to be “friendly and impartial” toward the European powers at war. He warned that any American citizen who engaged in or abetted hostile acts against a belligerent would receive no protection from the government. Indeed, transgressions that violated the law of nations would render the perpetrators liable to criminal prosecution in federal court.36

The Neutrality Proclamation—as it came to be known—turned out to be both more and less consequential than it seemed. Members of the cabinet initially debated whether Washington

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36 A Proclamation by the President of the United States, Apr. 22, 1793, *ASPFR*, 1:140.
should issue a statement at all. Jefferson argued that a declaration of neutrality was equivalent to a declaration of war, something the Constitution said only Congress could make. Jefferson ultimately went along in order to preserve American neutrality, but that did not end the controversy. The Proclamation touched off a fierce public debate over the allocation of war powers under the Constitution, culminating in a series of opposing essays by Hamilton and James Madison that ranged broadly over a variety of issues. At the same time, the Proclamation provided Americans with little guidance about what they could (or could not) do. It did not specify what sorts of acts might violate American neutrality. In fact, in order to placate Jefferson, it did not even include the word “neutrality” at all.37

The Proclamation’s lack of clarity stemmed from uncertainty what “neutrality” required, especially in the present circumstances. There was broad consensus in the cabinet as to the general outlines: The United States would maintain a position of “strict” neutrality, giving favor to neither side. Jefferson explained the administration’s thinking to Gouverneur Morris, the United States minister in Paris: Bestowing “favors” on one belligerent, at the expense of the other, would be nothing more than a “fraudulent neutrality.” This position echoed the writings of the law of nations publicists who deeply influenced the Founding generation. In their writings, the publicists repeatedly warned neutral nations against “showing favouritism” to one side or the other. Jefferson’s statement to Morris, in fact, was a direct quote from Emerich de Vattel.38


Neutrality as actually practiced by eighteenth-century nations was more complicated, however. Historically, neutral nations commonly engaged in what later writers termed “benevolent neutrality,” which permitted conduct favoring one belligerent over another as long as that conduct fell short of direct participation in the war effort. For example, a neutral nation could not provide troops to one side or the other. But the neutral might allow one belligerent to raise troops in its territory, without permitting the same to the other side. Or it might provide loans or other financial assistance to one party and not the other. This is precisely what France did during the American Revolution’s early period.39 The line between “strict” and “benevolent” neutrality became especially blurry when the neutral had treaty obligations to one of the belligerents. Law of nations publicists agreed that a nation could fulfill preexisting treaty commitments to a belligerent party and still remain “neutral.” Indeed, it was obligated to make good on such obligations. The challenge lay in determining how far a neutral could go in helping a treaty partner without transforming into a belligerent itself.40

Reconciling neutral status with its treaty obligations was the particular difficulty the United States faced in 1793. The 1778 Treaty of Amity and Commerce with France included several provisions that gave it advantages in wartime, particularly with respect to privateering. Article 17 permitted French armed ships to bring their captures into U.S. ports, explicitly forbade U.S. government officers from searching and arresting such prizes or “mak[ing] examination concerning the[ir] lawfulness,” and denied the same privileges to France’s enemies. Article 22,


in turn, prohibited any nation at war with France from fitting out their ships in U.S. ports, or from selling their prizes there. As Randolph explained, these provisions rendered the United States’ situation “extremely peculiar.” The treaty gave France “preference,” while Great Britain could demand only what it was due under the law of nations, “pure and unqualified.” This disparity, Randolph warned, could cause the United States “great perplexities.”

Randolph’s concern about the “perplexities” that would arise from adhering to a strict conception of neutrality proved prescient. French officials argued that they were entitled by treaty and the law of nations to use the United States as a privateering base against Great Britain. British officials warned that American toleration of such conduct would violate the United States’ duty as a neutral. Hamilton’s proposed response was elegantly simple, yet draconian: Repudiate the 1778 treaties entirely, on the theory that they no longer bound the United States because they had been concluded with a French sovereign—the king—who no longer existed. Jefferson persuaded Washington to reject that approach, forcing the administration to figure out how to square the United States’s treaty obligations with a policy of strict neutrality.

The French privateering effort brought these problems to a head. The first challenge was Genet’s plans to arm and equip privateers in U.S. ports. His legal argument was simple: Article 17 Treaty of Amity granted French armed ships preferential access to U.S. ports and denied the same to its enemies. Article 22, in turn, forbade France’s enemies from fitting out their ships in U.S. ports, or from selling their prizes there. Taken together, the two provisions implicitly gave France carte blanche to use the United States as a base of privateering operations.

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41 Treaty of Amity and Commerce (1778), Art. 17, 22.
Washington Administration rejected this view, choosing instead to interpret the treaty narrowly. Under a theory of strict neutrality, a privilege denied by treaty to one belligerent could not be granted to the other. Article 22 denied Great Britain the right to arm its ships in U.S. ports. Nothing in the treaty expressly granted that right to France. Ergo, the United States was obliged to deny such permission to France as well.44

A second dispute arose over prize proceedings conducted by French consuls stationed in the United States. This was an important issue: Under the laws of war, a captor’s right to property seized at sea was only secure once a tribunal of the commissioning nation ruled that the capture was valid—the so-called “good prize.” But there were no French admiralty courts operating in the United States, and British maritime dominance in the Caribbean made it risky for privateers to send their prizes to French-controlled islands. Genet authorized French consuls to condemn and sell prizes themselves, using a streamlined process that would give privateers quick access to the spoils.45 French officials understood consular jurisdiction over prizes to be fully consistent with the agreements between the two nations, which—in their view—granted French officials the exclusive authority to regulate matters relating to French maritime commerce and the taking of prizes. Again, the Washington Administration disagreed. A foreign officer could only assume jurisdiction when expressly permitted by the nation in which it was to be exercised. A 1788 consular convention between the two nations gave their respective consuls certain powers, but jurisdiction over prizes was not among them.46


45 Mangourit to Ministère de la Marine, May 29, 1793, AMAE, Correspondance Consulaire et Commerciale, Charleston, 2:29; George Miller to Lord Grenville, May 6, 1793, U.K. National Archives [UKNA], FO 5, 2:78; Casto, *Fighting Sail*, 3. For an example of French consul announcing a condemnation proceeding, and inviting “persons concerned” in the capture to “make their objections,” see Federal Gazette, Aug. 9, 1793, p.2.

Third, the administration took the position that American citizens could not serve on French privateers. Indeed, doing so was grounds for criminal prosecution. To Genet, this was nonsense—Americans who took up arms in favor of France were doing nothing more than defending “the glorious and common cause of liberty.” And there were many who did. There were a significant French populations in American cities, “full of zeal for their country,” according to Genet. But as Genet candidly admitted, privateer crews included many United States citizens, drawn into service by a mixture of enthusiasm for the cause of French republicanism, a desire for adventure, and the possibility of sudden riches.47

For the Washington Administration, however, the thorniest question was not what “strict” neutrality looked like. The challenge lay in deciding just how far the United States had to go to preserve it. The administration took an extreme position: Under the law of nations, it had to do everything it could to prevent its citizens (and other individuals residing within its territory) from engaging in conduct that aided one side against the other. This not only meant instituting criminal prosecutions against Americans who entered into French service, but also meant preventing French privateers from arming in U.S. ports. Crucially, the administration also took the position that it had to provide meaningful redress to those injured by such neutrality violations. In particular, the government was responsible for ensuring the return of foreign ships

47 A Proclamation by the President of the United States, Apr. 22, 1793, ASPFR, 1:140; Randolph to Jefferson, May 9, 1793, PTJ, 26:700-702; Notes on Neutrality Questions, July 13, 1793, PTJ, 26:498-500; Memorial from Edmond Charles Genêt, May 27, 1793, PTJ, 26:130, 130; Genêt to Jefferson, June 1, 1793, PTJ, 26:159, 159; Memorandum of Conversations with Edmond Charles Genet, 26 July 1793, PTJ. On the political economy of French privateering, see Jackson, Privateers in Charleston. On sailors and citizenship in the Age of Revolution, see Nathan Perl-Rosenthal, Citizen Sailors: Becoming American in the Age of Revolution (Harvard University Press, 2015).
and goods seized by French privateers, or providing compensation for the loss, whenever it failed to use “all the means in [its] Power” to prevent a neutrality violation that led to the seizure.\textsuperscript{48}

It is doubtful whether the law of nations actually required the United States to assume such complete responsibility for preventing and redressing injuries by French privateers. As a general principle, a sovereign nation that permitted its citizens to “injure a foreign Nation” had effectively caused the injury itself, and was therefore responsible for providing a remedy—either by punishing the guilty party or providing indemnification. Yet there was an important qualification: That responsibility extended only to cases in which it was within the sovereign’s “power” to prevent such injuries. A sovereign was presumed to be able to “controul and punish his own subjects.” But law of nations writers recognized that there could be “defects” in a sovereign’s authority that qualified its obligation to enforce perfect neutrality. As Vattel explained, even “the best governed State” could not always command “exact obedience” from its citizens. In addition, Vattel and others addressed a sovereign nation’s obligations with respect to injuries caused by its own citizens. It was less clear whether a sovereign was presumed to be able to exert “controul” over foreign citizens operating within its borders.\textsuperscript{49}

Most important, there was no indication that the law of nations obliged a neutral nation to restore property that had been captured in violation of its neutrality. The administration took the position that, by treaty, it owed such a duty to France, at least with respect to captures made in U.S. territorial waters. But Jefferson admitted that it owed no similar obligation to Great Britain. And generally speaking, redressing illegal captures was the obligation of the sovereign who had

\textsuperscript{48} Notes on Neutrality Questions, 13 July 1793, PTJ; Jefferson to Hammond, Sep. 5, 1793, PTJ.

commissioned the privateer in the first place. A neutral nation could voluntarily choose to restore ships and cargo seized within its waters, as an incident of its exclusive sovereign authority over its territory. But it had no affirmative obligation to do so. In fact, when Attorney General Randolph canvassed Philadelphia merchants on this question, he reported to the cabinet that restoration of captured vessels by a neutral nation was unheard of in recent European practice.50

The Washington Administration’s choice to adopt such a demanding conception of neutrality was driven by two considerations. First, it believed that responding decisively to British complaints was essential to keeping the United States out of the war. French privateering activities would bring the United States and Britain into direct conflict if left unchecked. Hamilton, for example, argued that failure to provide restitution for captures made in violation of American neutrality would make the United States “an accomplice in the hostility” and “furnish a cause of War” with Great Britain.51

The administration had good reason to be concerned about the consequences that would result from a failure to quash French privateering. Even before Genet arrived in the United States, the government in London warned George Hammond, the British minister plenipotentiary, about Genet’s instructions to advocate the “dangerous and delusive Principles of Liberty and Equality.” The British were particularly concerned about the threat Genet’s privateering commissions posed to British commerce. London instructed Hammond to make the “strongest representations” possible against French plans to arm privateers in American ports. In particular, he was to alert the Washington Administration that permitting French sympathizers to violate American neutrality risked engendering “the most serious misunderstanding” between the

50 Jefferson to Hammond, Sep. 5, 1793, PTJ; Randolph to Washington, May 18, 1793, PGWPS, 12:608-09.
51 Hamilton to Washington, May 15, 1793, PAH, 14:454, 460.
United States and Great Britain. And once Genet’s plans began to bear fruit, Hammond showered Jefferson with a barrage of complaints about French captures. He made it abundantly clear that his nation expected the United States to “repress[]” French privateering activities, and failure to do so would lead to “dangerous consequences.” In particular, Hammond warned that Great Britain would hold the federal government responsible for losses stemming from all captures made by French privateers operating from the United States.

The administration’s assumption of full responsibility for redressing French privateering injuries also had a deeper purpose: It offered a means of gaining entry into the community of “civilized” nations. As discussed in Chapter One, the diplomatic failures of the Confederation government taught the Founding generation that nothing was more important to a new and fragile polity than “recognition”—being treated as a sovereign state by other nations. Recognition was needed to engage in commerce, to acquire territory, and to make war on equal footing with powerful European empires. One of primary ways of securing recognition as an independent, sovereign state was to demonstrate the willingness—and the ability—to fulfill its obligations under treaty and international law. In other words, if the United States wanted to be treated as an equal sovereign, it needed to act like one. This was all the more true because the United States was, as Randolph put it, in a “state of probation,” its international status yet to be determined.

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The French privateering crisis provided the Washington Administration a welcome opportunity to demonstrate the United States’ bona fides as a sovereign nation. If the law of nations obliged a neutral nation to prevent violations by persons over whom it exercised “control,” it was essential that the United States show the world that it could, in fact, regulate the conduct of both its own citizens and foreigners. Hamilton stressed this point in urging that the government assume full responsibility for every capture made by a French privateer armed in the United States. He acknowledged that, under the law of nations, a government could be excused for the “nonperformance of its duty” if lacked the power to provide the necessary redress to an injured party. But Hamilton balked admitting to such a deficiency in the United States. In his view, a sovereign was responsible for the conduct of “all parts of the community over which it presides.” And it was presumed to have “a competent police everywhere” to prevent infractions of its neutral duty towards foreign nations. In other words, a nation that sought to “excuse” its failure to police its territory by pointing to its own weakness was one that would never be worthy of foreign respect.55

Hamilton’s colleagues largely agreed with his understanding of the obligations the government should assume. Jefferson and Randolph successfully argued that Great Britain could not reasonably hold the government responsible for captures made in the Neutrality Crisis’ earliest days, by privateers operating from a port far from the seat of government. Indeed, to

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55 Hamilton to Washington, 15 May 1793, https://founders.archives.gov/documents/Washington/05-12-02-0461. This was a point Hamilton made five years earlier in Federalist No. 11: “The rights of neutrality will only be respected, when they are defended by an adequate power. A nation, despicable by its weakness, forfeits even the privilege of being neutral.”
forcibly restore ships seized by French privateers before the administration had definitively proscribed them would arguably be an “aggression” against France itself.\(^5\) But everyone agreed that the United States should assume responsibility for any British vessels captured after June 5, 1793—the date on which the government definitively prohibited French privateers from arming in U.S. ports. Jefferson explained to Hammond that the United States would restore or provide compensation for any British property seized in violation of American neutrality after that date, unless the government had used “all the means in [its] power” to prevent the injury.\(^5\)

Jefferson did not specify what “means” for combatting French privateering Great Britain could expect the government to employ. But he emphasized that the executive had already ordered French privateers to depart from American ports, and Washington had publicly pledged to institute criminal prosecutions against Americans who had participated in captures.\(^5\) In Jefferson’s view, these measures offered “unequivocal proofs” of the United States’ commitment to a stringent version of neutrality that shaded in favor of neither of the warring parties. And he optimistically predicted that, in light of the administration’s firm stance, French raiding from American shores would “soon disappear altogether.”\(^5\) He would very soon be proven wrong.

**Administrative Impotence**

In early May 1793, William Vans Murray, a Federalist member of the House of Representatives from Maryland, wrote to Hamilton regarding a “little event” that had taken place in his district. A British ship captured by the French privateer *Sans Culottes* had just entered into


\(^5\) Jefferson to Hammond, Sep. 5, 1793, *PTJ*.


port on the western shore of Chesapeake Bay, and Murray was unsure what to do about it. The
prize was piloted by an American, John Hooper, bearing a purported French commission.
Harboring doubts about whether Hooper’s conduct was lawful, Murray consulted with the local
federal customs officer, and together they detained the vessel, pending instructions from the
cabinet.60

Direction is what Murray most wanted. Without legal precedents to guide him, Murray had
“no clue but the treaty”—the 1778 Treaty of Amity and Commerce between the United States
and France. Murray professed that his “whole Soul” was “devoted to the success of the French
Republic.” But he thought it his duty, as a citizen, to construe the treaty’s provisions “strictly,” in
accord with both the “spirit” of Washington’s Neutrality Proclamation and “the essential
principles of good faith in Neutrality.” To do so, however, he needed guidance from the
executive branch, “some leading impression.” Federal officers were too widely dispersed to be
effective absent central direction. As Murray put it, the new federal government was “so
extremely naked…wanting in not only cloathing, but in limbs.”61

Murray was not exaggerating, for in 1793 there was barely any federal government at all.
The State Department—created by Congress to handle matters “respecting foreign affairs”—had
fewer than ten employees in the United States. The War Department had a few dozen, but no
standing military force.62 The Treasury Department was far better staffed, with more than five

60 William Vans Murray to Alexander Hamilton, 8 May 1793, PAH.

61 William Vans Murray to Alexander Hamilton, 8 May 1793, PAH; Murray to Thomas Jefferson, 9 May 1793, PTJ.
On Murray’s later role in brokering peace with France after the Quasi-War, see Peter P. Hill, William Vans
Murray, Federalist Diplomat: The Shaping of Peace With France, 1797-1801 (1971); Alexander DeConde, “The
Role of William Vans Murray in the Peace Negotiations between France and the United States, 1800,”

62 In theory the president could activate a state militia when federal lawbreaking was too extensive to be suppressed
“by the ordinary course of judicial proceedings,” but Washington had yet to exercise that authority and it was not
evident that the Neutrality Crisis qualified. “An Act to provide for calling forth the Militia,” 1 Stat. 264 (1792).
hundred employees, the vast majority of whom were located along the east coast of the United States. But most of them never left the ports in which they were stationed, which left it to thirty-odd officers in revenue cutters to patrol a national coastline over a thousand miles long. Finally, there were only sixteen federal district attorneys—one for each judicial district—and they were only part-time government officers.63

It was also unclear who was in charge of this skeletal administration. Murray wrote Jefferson the day after he wrote Hamilton, on the theory that the Secretary of State would soon hear about the privateer incident from foreign representatives in the United States. Indeed, the British consul at Norfolk had already sounded the alarm—but to the governor of Maryland, not to Jefferson. The governor disclaimed any “authority to interfere” in the matter, something only the “general government” enjoyed. Murray even reached out the federal district court judge for Maryland, looking for someone—anyone—who could advise him on what to do. Perhaps wary of their claims running into administrative dead-ends, Norfolk merchants who had run-ins with the Sans Culottes simply wrote to President Washington directly.64

This administrative uncertainty was understandable. After all, the federal government was not even four years old, and the United States itself was, in Randolph’s words, an “infant country.” Moreover, Congress in 1789 had provided little guidance as to what sorts of

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63 An act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, July 27, 1789, 1 Stat. 28. For a list of federal officers in 1792, see 1 ASPM 57-68. On the early federal government’s small size, see Homer S. Cummings and Carl McFarland, Federal Justice: Chapters in the History of Justice and the Federal Executive (New York: Macmillan, 1937); Henderson, New Nation; White, The Federalists; Rao, National Duties; Balogh, Government Out of Sight. On the early military, see Max M. Edling, A Hercules in the Cradle: War, Money, and the American State, 1783-1867.

64 William Vans Murray to Alexander Hamilton, 8 May 1793, PAH; Murray to Thomas Jefferson, 9 May 1793, PTJ; Thomas Sim Lee to Thomas Jefferson from, 20 May 1793, PTJ; Thomas Newton, Jr., and William Lindsay to George Washington, 5 May 1793, PGWPS.
responsibilities fell to the three primary departments of the executive branch in 1789—Treasury, War, and State. Complicating matters, it was not entirely clear what kind of problem the French privateering effort posed. Was it a diplomatic problem, to be handled by the Department of State? Or was it a military matter, under the purview of the Department of War? Perhaps a combination of both?65

In practice, the Washington Administration’s response to the Neutrality Crisis was a collective effort. Every significant decision—and many less significant ones—were taken only after deliberation by the full cabinet. This approach had its advantages; it helped ensure that the administration’s policy conclusions were measured and subject to scrutiny from political leaders with different perspectives and priorities. But this deliberative style also came with costs. In particular, internal wrangling over details made quick and decisive action difficult, compounded—in Jefferson’s view—by Randolph’s maddening indecisiveness. As a result, cabinet members repeatedly responded to requests for action from government officers, foreign diplomats, and private citizens with inconclusive statements and promises that a final decision would come “in due course.”66 It did not help that an outbreak of yellow fever in the summer of 1793 forced thousands of Philadelphians to vacate the city, including the members of Washington’s cabinet.67

The difficulties the administration faced were compounded by the increasingly bitter enmity between Jefferson and Hamilton. Hamilton proposed a strategy for detecting and interdicting

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66 Notes on Alexander Hamilton and the Enforcement of Neutrality, 6 May 1793, PTJ; Thomas Jefferson to James Madison, [13 May 1793], PTJ.

neutrality violations in which customs officers would report suspected neutrality violations to Hamilton directly. For Jefferson, this idea was a nonstarter. To begin with, “proceedings which respect foreign nations” were more properly the province of his department, not Treasury, which superintended only “matters of revenue.” Plus, the latter had a big enough share of the administrative pie already; Hamilton’s plan would only aggrandize a department already “amply provided with business, patronage, and influence.” Jefferson’s suspicions went deeper than professional rivalry. The generation that fought the American Revolution was familiar with the ways in which officers charged with enforcing trade and revenue laws could be the instruments of repression. Jefferson protestation that Hamilton sought to transform the customs collectors into a “corps of spies or informers” invoked a long tradition of American suspicion of central political authority.

The stalemate between Hamilton and Jefferson resulted in an inelegant compromise, brokered by Randolph. The Attorney General was unwilling to disregard the valuable information customs officer could provide, but proposed that they report neutrality violations to the local federal district attorney, who would be responsible for instituting criminal prosecutions in consultation with the cabinet. Hamilton eventually agreed, but amid the ongoing controversy he did not issue instructions to the customs collectors for several more months. In the

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68 Notes on Alexander Hamilton and the Enforcement of Neutrality, May 6, 1793, *PTJ*, 26:667. Hamilton’s draft circular has not survived, so the discussion here of its content relies on commentary from Jefferson and Randolph.


70 Thomas Jefferson from Edmund Randolph, 9 May 1793, *PTJ*.

71 Treasury Department Circular to the Collectors of the Customs, *PAH*, 15:178-81.
meantime, Randolph instructed the district attorneys to seek information from the collectors about possible neutrality violations and to bring charges against offenders. But how the system was to work in practice was not entirely clear. Indeed, the federal district attorney for Maryland first informed the cabinet of his prosecution against a U.S. citizen involved in the Sans Culottes capture in a letter to Secretary of War Henry Knox—much to Jefferson’s displeasure.72

Administration officials recognized a collective effort would be needed to stem the privateering tide. At the same time that Hamilton finally issued his instructions to the customs collectors, Knox circulated the substantive neutrality rules the administration had developed to each of the state governors, asking them to “suppress all practices” tending to violate those rules.73 Jefferson assured Hammond that federal officials would be vigilant in defense of neutrality, but he asked that foreign consuls stationed in the United States provide the government with any information regarding alleged infractions they could procure.74 Most important, the administration determined that state governors would have primary responsibility for deciding whether a neutrality violation had occurred and, if so, the appropriate remedy. The administration’s regulations charged federal district attorneys with convening arbitral panels to determine whether captures had occurred within the United States’ territorial limits, and empowered the governors to restore vessels to their owners or release them to the captors accordingly.75 As Edmund Randolph explained to French officials, the nation’s sheer size

72 Notes on Alexander Hamilton and the Enforcement of Neutrality, 6 May 1793, PTJ; Thomas Jefferson to Zebulon Hollingsworth, 25 June 1793, PTJ.


“impose[d] the necessity of substituting the agency of the Governors in the place of an instantaneous action in the Federal Executive.”

Much to the administration’s chagrin, state officials proved to be unreliable enforcers of American neutrality. Some governors took their responsibilities seriously. On occasion consular complaints triggered restoration of captured property through gubernatorial intervention. George Clinton in New York was particularly proactive, at times taking action with no prompting from the local British consul. By September 1793 Hammond was able to report to London several French privateers had been disarmed, and their prizes restored to their owners. At times, however, even diligent state officials let suspected privateers go free, worried about the political and financial consequences of detaining vessels without specific instructions from the executive branch.

More problematically, some governors were downright recalcitrant. The administration’s allies in Massachusetts were convinced that state officials—including Governor John Hancock—were slow to act against French privateers because they were “obviously in favour of the French Claims.” This was not necessarily surprising; many merchants involved in privateering were politically powerful, and there were allegations that some state officials were directly involved in the business. Indeed, British officials were convinced that “a great majority” of state

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76 Randolph to Joseph Fauchet, Oct. 22, 1794, ASPFR, 1:589.
78 Sir John Temple to Clinton, June 9, 1793, UKNA, FO 5, 2:33; August 18, 1793, FO 5, 2:67.
79 Hammond to Grenville, Sep. 17, 1793, UKNA, FO 5, 1:290.
80 From Thomas Jefferson to George Hammond, 14 November 1793.
governors—especially southern “partisans” of “evil disposition”—were so hostile to Great Britain that they would “readily to connive at measures . . . injurious to her interests.”\textsuperscript{82} Or as the British consul at Norfolk put it, the Washington Administration might have been “sincere” in its desire to maintain neutrality. But state officials were “partial to a fault in favor of France.”\textsuperscript{83}

In British eyes, the greatest offender was South Carolina governor William Moultrie. Moultrie was a veteran of the American Revolution, and friendly with Washington. But the Neutrality Crisis sorely tested that relationship. Moultrie was an avowed supporter of the French Revolution. Before Genet arrived in Charleston, Moultrie organized a festival honoring the Revolution’s successes, with the French consul as guest of honor. From the moment of Genet’s landing, Moultrie proved to be a reliable supporter of French interests. He quietly encouraged Genet’s privateering plans, advising the minister that there was no positive law in the United States proscribing them. Even as Genet’s provocative conduct led French sympathizers to turn against him, Moultrie remained steadfast in his support.\textsuperscript{84}

Moultrie even challenged the Washington Administration directly. Soon after French privateers began sailing from Charleston, the president asked Moultrie and other governors to “interpose” and prevent such activities.\textsuperscript{85} When the privateer \textit{Sans Pareille} brought a prize into Charleston, Moultrie initially ordered the local militia commander to seize the captured vessel. But he subsequently reconsidered. He explained his actions in a letter to Secretary of War Knox

\textsuperscript{82} Hammond to Grenville, June 27, 1794, UKNA, FO 5, 5:131.

\textsuperscript{83} Hammond to Grenville, Nov. 5, 1794, UKNA, FO 5, 5:345; Hamilton to Dundas, Feb. 19, 1794, UKNA, FO 5, 6:160.


(a copy of which ended up in the French diplomatic archives). Moultrie noted that, by oath, he was obligated to uphold the Constitution. It stipulated that treaties with foreign nations were the law of the land, and Article 17 of the 1778 Treaty precluded American officials from scrutinizing the “lawfulness” of French prizes. As a result, Moultrie disclaimed the authority to make “any determination respecting the Lawfulness or the unlawfulness of [a] Capture”—even though that was precisely what the administration had asked state governors to do. Moultrie wished he could heed the President’s request for intervention. But he was required to “exercise [his] own judgment” in the matter, and he ordered the vessel’s release.\(^86\)

Moultrie’s unwillingness to constrain French privateering did not sit well with the Washington Administration. Unwilling to trust state officials, Hamilton wrote the federal customs collector in Charleston to demand more information about the “very alarming” reports emanating from there. The administration contemplated stronger measures, as well. According to Hammond, the president wanted to garrison a fort at Charleston with federal troops, to aid in suppressing privateers fitting out there. Any orders to that effect would be directed to federal officers, not to Moultrie, who had too often “refused to obey instructions.”\(^87\) The federal government, in other words, would have to go it alone.

The Defense Rests

In early May 1793, the British merchant vessel *William* arrived in Philadelphia. Bound on a transatlantic voyage from the North Sea to the Chesapeake, the *William* was seized off Delaware by the *Citoyen Genet*, one of the Charleston privateers launched into action by its namesake.

\(^86\) Moultrie to Knox, Jan. 23, 1794, AMAE, Mémoires et Documents, 39:124.

Rather than taking the *William* back to Charleston, the *Citoyen Genet*’s captain opted instead to send her into Philadelphia, to be condemned as a lawful prize of war by French consular officials. Gideon Henfield, an experienced Massachusetts mariner, was put in charge of the prize. Given the public exultations over the visit of a French frigate a few weeks earlier, one can forgive Henfield for expecting a similarly warm embrace upon his arrival in Philadelphia.\(^8\)

The reception Henfield received was not what he or his sponsors had anticipated. He was taken into custody, arraigned before a local alderman, and thrown in jail—charged with having disregarded President Washington’s proclamation that American citizens should take no part in the growing transatlantic conflict.\(^9\) At the same time, a party of twenty-five Pennsylvania militiamen boarded the vessel “to keep her in safe custody.” Genet had recently arrived in Philadelphia by land, and immediately protested the arrest to Jefferson. Henfield, the French minister argued, had done no wrong. Indeed, the “crime” of which he was accused was one of which Genet “could not conceive.” Having entered into French service by enlisting on the privateer, Henfield was under the minister’s protection, and Genet demanded that Jefferson immediately secure his release.\(^9\)

Jefferson politely declined. Taking up a theme he would expound throughout the Neutrality Crisis, Jefferson disclaimed any authority over the proceedings of the “civil magistrate” who had ordered Henfield into custody. “In our country” Jefferson later explained, “the Judiciary is sovereign in its department, and can neither be controuled nor opposed by the Executive.”

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\(^8\) Casto, *Fighting Sail*, 91-92.


\(^9\) Memorial from Edmond Charles Genêt, May 27, 1793, *PTJ*, 26:130, 130; Genêt to Jefferson, June 1, 1793, *PTJ*, 26:159, 159; Thomas Mifflin to George Washington from, 22 June 1793, PGWPS.
Jefferson nonetheless assured Genet that Henfield would be afforded every opportunity to demonstrate his innocence. His conduct would be examined by a jury of his co-citizens, “in the presence of Judges of learning and integrity.” Though Jefferson acknowledged that “[t]he forms of the law involve certain necessary delays,” he assured Genet that the case would be dismissed if Henfield’s actions were found lawful.91

Jefferson’s demurrer was largely disingenuous. In truth, the Secretary himself arranged Henfield’s arrest and subsequent prosecution. When Jefferson learned that American citizens were involved in the William’s capture, he asked William Rawle, the federal district attorney for Pennsylvania, to take measures for “apprehending and prosecuting” the participants, “according to law.”92 Indeed, from the Crisis’s earliest days, the Washington Administration made concerted efforts to identify and prosecute American citizens who joined the French war effort as well as foreigners who violated United States neutrality. Cabinet officials instructed federal district attorneys to solicit information from federal customs collectors respecting all neutrality violations of which they became aware, “particularly as to building & equipping Vessels for war,” and to “bring the culprits to condign punishment.”93

Criminal prosecutions were essential to the Washington Administration’s effort to preserve American neutrality. Recall that the administration took the position that the United States was legally obliged to do everything in its power to prevent Americans (and others) from violating neutrality in ways that injured a belligerent. As Jefferson explained to Hammond, criminal

92 Jefferson to Rawle, May 15, 1793, PTJ, 26:40-41.
93 Jefferson to Harison, June 12, 1793, PTJ; Jefferson to Henry Lee, May 21, 1793, PTJ; Notes on Alexander Hamilton and the Enforcement of Neutrality, 6 May 1793, PTJ; Edmund Randolph to William Channing, May 12, 1793, Manuscripts and Archives Division, New York Public Library, http://digitalcollections.nypl.org/items/bac0a75c-2673-b981-e040-e00a18067fd9
prosecutions would help “satisfy” that obligation. They would also demonstrate to the world that the federal government could fulfill its duties under the law of nations—i.e., that the government was actually able regulate the conduct of people under its authority. Successfully imposing punishment on neutrality violators, in other words, would mark the United States’ status as a fully-fledged sovereign nation.94

Bringing criminal charges against Henfield and others could also secure judicial support for the administration’s actions.95 In the federal system, a grand jury—a body of “discreet and respectable” citizens—convened to decide whether evidence of criminal conduct was sufficient to allow prosecutions to go forward (if so, they were tried before a “petit” jury). Crucially, grand jurors did not assess the viability of particular prosecutions based solely on their own knowledge of the law. Instead, they proceeded under the guidance of judges. The federal circuit court, which had original jurisdiction over most federal crimes, was an episodic institution. Composed of a justice of the Supreme Court and the judge of the local federal district court, the circuit court met twice annually, in spring and fall. Though the justices largely resented the extensive travel that “circuit riding” required, the arrival of a representative of the central government was a major event in local communities.96

The centerpiece of the administration’s plan was the judge’s charge to the grand jury. The presiding judge—usually the Supreme Court justice— informed the jury of the statutory and common law context in which they were to consider indictments against accused individuals. In many cases, the justices also took the opportunity to instruct the citizenry more generally. As the

94 Jefferson to Hammond, June 5, 1793, PTJ.
nation’s “republican schoolmasters,” they extolled the virtues of the new Constitution and tutored their audience in how best to uphold it. Oftentimes the justices also made their opinions known regarding contemporary political matters. The justices were loath to forgo the opportunity to promote “the progress of useful truths” among their fellow-citizens, even as they acknowledged that such topics were not always “pertinent” to the legal questions at hand. The discussion ran both ways; though the grand jury’s primary responsibility was to determine whether there were grounds for prosecution, jurors took the opportunity to comment on public matters, make suggestions, and air grievances.97

The judges’ pedagogical function was critical for bolstering the administration’s position, both at home and abroad. In Jefferson’s view, federal judges presiding over grand jury proceedings were well-positioned to “study and define” doctrines of international law that would be unfamiliar to many Americans. The jurors themselves would not be the only beneficiaries. Newspapers often reprinted jury charges, ensuring a wide audience for judicial perorations. Jefferson also forwarded copies of grand jury charges in privateering prosecutions to American representatives in Paris and London. Judicial pronouncements about the nation’s rights and duties under law, he believed, would provide foreign nations proof positive of the United States’ “bona fide intentions to preserve neutrality.”98

The administration had every reason to believe that federal judges would articulate a version of American neutrality that was consistent with its own approach. Washington had populated the

97 Johnston, Correspondence and Public Papers of John Jay, 3:390 (April-May, 1790); Lerner, “Republican Schoolmaster,” 131-34.

early judiciary with like-minded political elites, staunch supporters of the new Constitution and federal government. The first justices all had significant political experience, including participation in the Continental and Confederation Congresses. Some—like Chief Justice John Jay—had diplomatic backgrounds. Consultation between cabinet members and the justices of the Supreme Court on legal and political matters was commonplace during Washington’s presidency, including collaboration in crafting grand jury charges. Most importantly, from the Crisis’s outset Jay had been intimately involved in discussions around the legal and political questions raised by Genet’s arrival, and wrote the first draft of Washington’s Neutrality Proclamation. As Justice Iredell later wrote, he and his colleagues were eager to use their position to explain Washington’s neutrality proclamation and to “point out the duties of Individuals in [support] of the Government.”

Perhaps most important, a criminal prosecution gave the justices an opportunity to lend their judicial imprimatur to the administration’s position in the context of an actual case. At the same time the Henfield prosecution was proceeding, the cabinet was preparing a list of neutrality-related questions it hoped the Court would answer. As Jefferson explained to the justices, the war had given rise to numerous issues “of considerable difficulty” regarding the United States’ obligations under treaty and the law of nations. Resolution by the Court would help the government avoid “errors dangerous to the peace of the United States.” In truth, the administration did not really need the justices’ legal advice. The cabinet was largely in

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102 Jefferson to the Justices of the Supreme Court, July 18, 1793, *PTJ*, 26:520.
agreement on the most important questions, and it issued a set of rules regarding French privateering before even receiving the justices’ response. But judicial endorsement of the administration’s legal arguments would be eminently helpful in dealing with the crossfire of French and British complaints. The justices’ “kno[w]le[d]ge” and “authority,” Jefferson explained, would “ensure the respect of all parties.”

The justices, however, famously declined to answer the administration’s questions. To “extrajudicially” decide legal questions outside the bounds of an actual case would blur the “Lines of Separation” the Constitution drew between the three branches of government. The justices’ demurral may have come as a surprise to the Washington Administration. Traditional accounts of this episode depict the justices as adhering to a self-evident prohibition against advisory opinions located in the Constitution’s “Case or Controversy” requirement. But more recent scholarship makes clear that such opinions were quite common in the English tradition and in the justices’ own practice, and they had proven willing to assist the administration in the Neutrality Crisis other ways. The best explanation for the refusal is that the justices did not want to concede that the president could demand an opinion from the Court, as the Constitution allowed with respect to the heads of the executive departments. All the more so given that providing definitive answers to the administration’s questions would force the justices to take

sides in an increasingly bitter and dangerous international controversy. The justices regretted any “Embarrassment” their refusal might cause the government, but they expressed confidence in the president’s ability to safeguard “the Rights, Peace, and Dignity of the United States.”

The justices’ refusal to take a stance outside the bounds of an actual case raised the stakes of the Henfield prosecution even more. Justice James Wilson, one of the Constitution’s key architects and supporters, delivered the grand jury charge. Wilson was a renowned legal theorist; his lectures on law delivered at the College of Philadelphia from 1789 to 1791 were the first systematic analysis of the new American constitutional order. Staying true to form, Wilson indulged in a learned (if meandering) discussion of the relation between the law of nature, the law of nations, and the common law. But his central point was clear enough, and entirely consonant with the administration’s views: When the citizens of a sovereign nation engaged in conduct that caused injury to a friendly power, the injured nation was justified in seeking reparations or even engaging in reprisals. Accordingly, because the actions of a single wayward individual could drag the entire country into a conflict, misconduct was punishable “according to the measure of his Offence.”

As he lectured the jury, Wilson paused to acknowledge the difficulty of controlling the behavior of adventurers like Henfield. Channeling Vattel, Wilson noted that “disorderly citizens” could be found even in “the best regulated state.” A sovereign nation could not be expected to perfectly “superintend the whole Behaviour of all,” and it would be unjust to impute individual

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110 James Wilson’s Charge to the Grand Jury, July 22, 1793, DHSC, 2:414-23. For another example of Wilson’s abstruse erudition, see James Wilson’s Charge to the Grand Jury, June 7, 1793, DHSC, 2:396-405.
misconduct to the nation in every case.\textsuperscript{111} Wilson’s preemptive excuse-giving might seem misplaced, given that his task was to persuade grand jurors to act decisively against those who threatened national peace and harmony. But viewed in light of charge’s international audience, Wilson’s apologia makes sense. Henfield’s prosecution could not only reassure France’s enemies of the United States’ commitment to fulfilling its neutral obligations; it also provided an opportunity to remind them that perfect compliance was not required.

Unfortunately for the Washington Administration, Wilson’s caveats proved prophetic. The grand jury returned an indictment against Henfield, but at trial his attorneys had little difficulty identifying the prosecution’s weak spot: There was no statute or treaty that specifically forbade Americans from participating in French privateering. District Attorney William Rawle argued that Henfield’s actions violated the law of nations and the guarantee of perpetual peace between Great Britain and the United States in the 1783 Treaty of Paris, and both were part of “the law of the land.” But the question of whether the federal courts had jurisdiction to try nonstatutory offenses was highly controversial. There was precedent in English and state practice for trying common law crimes, but the notion that the federal government could impose punishments for conduct not explicitly proscribed by the people’s representatives in Congress provoked deep resentment in certain quarters.\textsuperscript{112} Moreover, Article I of the Constitution explicitly granted Congress the power “[t]o define and punish … Offences against the Law of Nations,” so it was especially problematic to assert that acts proscribed by the law of nations were incorporated to

\textsuperscript{111} Ibid.

federal criminal law without Congressional action. Jefferson hoped that a criminal prosecution in federal court would allow the justices of the Supreme Court to resolve any doubts.

Recognizing the weakness in his legal arguments, Rawle also appealed to the jurors’ sense of patriotic duty. Echoing Wilson, Rawle asserted that the federal executive was incapable of the sort of “sudden and unusual exertions of power” needed to satisfy its international obligations. But rather than lament executive impotence, or offer excuses for it, Rawle framed it as a source of “pride and happiness.” In his view, the government’s inability to prevent French privateering created space for courts to exercise the “impartial and unbiased” judgment for which they were known. Judges and jurors were empowered to “apply the law of nations to men.” In doing so here, they would ensure that disputes between sovereigns over the rights and duties of neutrality would be resolved by resort to “the scales of justice,” not “the sword of war.”

Despite their efforts, neither Wilson nor Rawle convinced the jurors of their role in keeping the United States out of conflict. The jury acquitted Henfield after several adjournments, despite Wilson’s closing admonition that jurors were bound by the law, and could not decide the case “as they pleased.” It is unclear precisely why. Henfield’s attorneys had not only questioned the prosecution’s legal basis, but also argued that he had become a French citizen prior to enlisting on the Citoyen Genet, and therefore his actions were not attributable to the United States (or punishable by it). Some—like Hamilton—suspected that the acquittal was driven from pro-French sympathies among the jury and the broader public. It is also possible that the jury simply

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114 Genêt to Jefferson, June 1, 1793, PTJ, 26:159; Notes on Neutrality Questions, July 13, 1793, PTJ, 26:498-500; Jefferson to James Monroe, July 14, 1793, PTJ, 26:501, 502.
115 Henfield’s Case, 11 F. Cas. 1099, 1117, 1120 (C.C. Pa. 1793).
116 Ibid., 1121.
found Henfield’s conduct innocent, given that he had enlisted before news of Washington’s
Neutrality Proclamation had reached Charleston.117

Whatever its cause, the Henfield verdict was the Framers’ nightmare come true. Arguments
in 1787 against providing a jury trial guarantee in civil cases were motivated by fears that
untutored and parochial laymen would decide diplomatically sensitive cases without sufficient
regard for the national interest. From the administration’s perspective, this is just what happened
in Henfield’s case. An unaccountable jury reached a decision that prevented the nation from
keeping faith with its commitment to strict neutrality. Granted, Henfield’s acquittal did not
necessarily mean that American participation in French privateering was now legal. Randolph
anonymously penned a newspaper note emphasizing that the judges, “with whom the law rests,”
had unanimously declared Henfield’s actions to be criminally punishable.118 Jefferson similarly
reported to the United States minister in Paris that the jury had acquitted Henfield because it did
not think he had intended to compromise American neutrality, not because his actions were
legal.119

The Washington Administration’s effort to spin the Henfield verdict fooled no one. Genet
understood the acquittal to vindicate his belief that Americans could join the French war effort,
and he subsequently published newspaper advertisements inviting all “Friends of Liberty” to
enlist in the republican cause.120 Others apparently drew the same lesson. Immediately after the
verdict, a Philadelphia writer declared that a citizen of the United States could, “by law,” serve

117 Hamilton to George Washington, Aug. 5, 1793, PAH, 15:194, 194; Jefferson to Gouverneur Morris, Aug. 16,
1793, PTJ, 26:697, 702; To George Washington from Edmund Randolph, 21 August 1793,
118 Casto, Fighting Sail, 99-100.
119 Jefferson to Gouverneur Morris, Aug. 16, 1793, PTJ, 26:697-711.
120 Thomas, American Neutrality, 173-74.
on board a French privateer without fear of prosecution.\textsuperscript{121} In Georgia several men indicted for serving on a French privateer were similarly acquitted “contrary to the opinion of the judges.”\textsuperscript{122} The lead defendant proclaimed that the jurors—like those in Philadelphia—had “established the rights of man.”\textsuperscript{123} Privateersmen were not the only ones who celebrated Henfield’s acquittal. “Republican circles” in Boston toasted the “virtuous and independent jury,” and future Chief Justice John Marshall later recalled that the verdict produced “extravagant marks of joy and exultation” around the country.\textsuperscript{124}

President Washington was far less thrilled with the outcome in Henfield’s case. Shortly after the verdict, a cartoon circulated in Philadelphia depicting the president and Justice Wilson hauled before a guillotine. The president’s head poked through the lunette, Hamilton and British Minister Hammond looked on mournfully.\textsuperscript{125} Washington exploded in anger when Knox mentioned the cartoon in a cabinet meeting called to discuss whether to request Genet’s recall. The president railed about the “personal abuse” he constantly received, despite the “purest motives” that guided his every decision. Working himself into “one of those passions when he cannot command himself,” Washington declared that he would “rather be in his grave than in his present situation.”\textsuperscript{126}

Washington’s frustration was no doubt exacerbated by a deep sense of powerlessness. French consuls continued to conduct prize proceedings in the United States, even after Jefferson

\textsuperscript{121} The Diary; or Loudon’s Register, Aug. 7, 1793, p. 2.

\textsuperscript{122} Dunlap’s American Daily Advertiser, Dec. 10, 1793, p. 2.

\textsuperscript{123} Dunlap’s American Daily Advertiser, Dec. 10, 1793, p. 2; Casto, Fighting Sail, 100.

\textsuperscript{124} National Gazette, Aug. 17, 1793, p. 3; John Marshall, Life of Washington 274 (1807).


threatened them with expulsion if they continued.\textsuperscript{127} French-commissioned privateers continued fitting out in American ports, despite the administration’s declaration that such conduct was impermissible. In fact, on the eve of Henfield’s trial, Genet had allowed a privateer armed in Philadelphia to leave port, despite having assured Jefferson it would stay put until the president could decide how to proceed. Hamilton advocated placing cannon in position to prevent the ship’s departure, but Jefferson talked him out of it. If the administration took such measures, “bloody consequences” would certainly follow.\textsuperscript{128}

Things only got worse as the summer wore on. The French consul in New York refused to allow a federal marshal to take possession of a ship seized by a French privateer, on the ground that a decision on the capture’s legality was exclusively his to make.\textsuperscript{129} The federal district attorney in Massachusetts was unable to secure any help in preventing a French privateer from leaving port. According to a friend of Hamilton’s, both state and federal officials had encouraged the French activities, either because they “had a particular Interest in promoting the business” or were simply “Opposers of all Government.” When the owners of a ship captured by the privateer sued for recovery in federal district court, the French consul ordered an armed guard to prevent the federal marshal from taking possession. Administration officials were incensed, but a prosecution against the consul ended with another acquittal, the jury having decided not to seek the judge’s advice regarding the applicable law. The government managed to secure misdemeanor indictments against others involved, but they never went to trial, and in 1794


Washington ordered that the prosecutions be abandoned. Privateer crews likewise showed little hesitation in evading federal authority by deception and even threats of force.

These humiliations left Washington despondent. French officials’ defiance of government orders was bad enough. But Genet, intoxicated by the joyous public reception he had received, had also threatened to appeal the administration’s neutrality policy “to the people.” For Washington, this was the last straw. “Is the Minister of the French Republic,” he queried, “to set the Acts of this Government at defiance—*with impunity*?” The question was rhetorical. Obviously Genet and his subordinates could not be allowed to engage in such behavior without consequences. The cabinet shortly agreed to present their complaints about Genet to the French government, and request his recall. But Washington’s letter also revealed the deep anxiety that he and his allies felt as French officials continued to make war from the United States without consequence. “What must the world think of such conduct,” he plaintively asked Jefferson, “and of the Government of the U. States in submitting to it?”

**A Deepening Crisis**

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131 Hamilton to Grenville, June 29, 1793, UKNA, FO 5, 2:214; Hamilton to Grenville, Aug. 8, 1794, UKNA, FO 5, 6:243.

The Washington Administration actually knew full well what foreign audiences thought of the situation in the United States. British officials were appalled by the government’s inability to prevent neutrality violations. Hammond complained to his superiors in London that the Washington Administration resorted to “half-measures and empty assertions of authority”—mere “palliatives,” so negligible in effect that they “would disgrace the miserable republic of San Marino.”133 As the British saw it, the problem was not simply one of motivation, for the government lacked the “energy” necessary to actually enforce the law.134 Indeed, the root of the problem was the diffuse American constitutional order itself: “In so relaxed a system of Government,” the British consul at Philadelphia averred, “little reliance is to be placed upon the Protection of Laws, or the Interference of unwilling magistrates.”135

Desperate for help, the Washington Administration turned to Congress. This was not a new idea. Jefferson had suggested calling the legislature into early session in the summer of 1793, but the cabinet was hesitant to give Genet a venue for challenging the President’s authority.136 By late 1793, the situation had become dire. When Congress met in regular session in December, Washington asked for legislation strengthening American neutrality. The president noted that his administration had issued rules prohibiting the arming of privateers in American ports, but the penalties for violations of the law of nations were either “inadequate” or “indistinctly marked.” The provision of “prompt and decisive remedies” was therefore crucial.137

135 Bond to Grenville, Apr. 17, 1794, UKNA, FO 5, 6:44.
136 Thomas, Cabinet Government, 235-45.
137 To the United States Senate and House of Representatives, Dec. 3, 1793, PGWPS, 14:462-467.
Unfortunately for the administration, the legislative gears ground slowly. Randolph drafted a bill criminalizing participation in French privateering, but after a brief debate it was referred to committee for amendment, and did not reemerge until March 1794. When it did, it contained a new, highly controversial provision: A ban on the sale in the United States of prizes captured by any of the warring powers, irrespective of whether the capturing vessel had violated American neutrality. This was not a minor addition. In light of British dominance on the high seas, French privateers needed continued access to markets in the United States. Irked by this transparently pro-British provision, French sympathizers in Congress, led by James Madison, worked to sink the legislation. The bill squeaked through the Senate, but upon arrival in the House—where the pro-French faction was “avowedly dominant,” according to the British consul general—the legislation languished for several more months.\textsuperscript{138}

This setback could not have come at a worse time for the Washington Administration. Though Genet’s conduct had prompted Hamilton to predict in August 1793 that war between the United States and France was likely, by 1794 the tide had turned strongly in the other direction.\textsuperscript{139} Relations between Britain and the United States had long been rocky, but by early 1794 tensions were reaching the breaking point. Much of the disharmony had roots dating back to the American Revolution. For example, Americans resented the continued British occupation of western forts meant to be ceded to the United States under the 1783 Treaty of Peace, while the British complained about the continued obstacles British creditors faced in recovering their debts in state courts. Other difficulties were of a more recent vintage, such as British impressment of

\textsuperscript{138} Bond to Grenville, Apr. 17, 1794, UKNA, FO 5, 6:44; Casto, \textit{Fighting Sail}, 159-60.

\textsuperscript{139} Hammond to Grenville, Aug. 10, 1793; Thomas 227.
American seamen, Britain’s alleged role in encouraging attacks on in the Mediterranean by vessels from the Barbary states, and alleged British incitement of Indians in the northwest.\textsuperscript{140}

The flashpoint for reemerging tensions came in late 1793, when British warships began seizing hundreds of American merchant vessels for trading with French-controlled ports in Europe and the Caribbean.\textsuperscript{141} As news of the seizures broke, public anger against Britain erupted.\textsuperscript{142} Cabinet officials insisted that Britain provide compensation, and the House of Representatives passed resolutions calling for the sequestration of debts owed to British creditors for that purpose. Out in the streets, angry citizens took measures of their own. When a former American vessel arrived in Boston after seizure and sale in Barbados, a mob attacked its captain, and Hammond recalled the British consul in Baltimore to Philadelphia out of fears for his personal safety.\textsuperscript{143}

The strain on diplomatic relations was palpable. To respond to British provocations, Hamilton recommended strengthening national defenses and instituting a general embargo. For their part, British officials were already outraged over efforts by Madison and Jefferson—who resigned as Secretary of State in December 1793—to enact legislation that would favor American trade with France, and disfavor that with Britain.\textsuperscript{144} With relations eroding to a dangerous point, many in the United States thought war with Britain was imminent. British officials certainly thought so. The consul at Philadelphia opined to his superiors that the United

\textsuperscript{140} Hamilton to Jay, June 4, 1794, \textit{PAH}, 16:456, 457; Casto, \textit{Fighting Sail}, 158-59; Tucker & Hendrickson, 62-63; DeConde, \textit{Entangling Alliance}, 84.

\textsuperscript{141} Elkins and McKitrick, \textit{Age of Federalism}, 388-96, 451-61.

\textsuperscript{142} Hammond to Randolph, April 2, 1794; April 5, 1794, NARA, Notes from British Legation in the United States, microfilm M50.

\textsuperscript{143} MacDonogh to Grenville, July 24, 1794, UKNA, FO 5, 6:282; Hammond to Grenville, April 17, 1794, UKNA FO 5, 4:173.

\textsuperscript{144} Elkins and McKitrick, \textit{Age of Federalism}, 381-90.
States, “tho’ but an infant,” was undoubtedly “the avowed Rival of Great Britain.” His colleague at Norfolk had more parochial concerns. He asked London to give him as advance warning of war between the U.S. and Britain, so that he could avoid being thrown in jail, for “to be a Prisoner here would, of all ills, be to me the most terrible.”¹⁴⁵ To stave off disaster, Hamilton recommend that the president send Chief Justice Jay to Britain to secure a treaty addressing the myriad difficulties between the two nations.¹⁴⁶ As Jay left on his mission, the future of American neutrality looked precarious indeed.

¹⁴⁵ Bond to Grenville, Nov. 23, 1794, UKNA, FO 5, 6:112; Hamilton to Grenville, Mar. 31, 1794, UKNA, FO 5, 6:173.
Chapter Three:
The Courts as Compromise

Introduction

On June 17, 1793, Thomas Jefferson sat down to write yet another letter. It had been a trying
couple of months, as Edmond Genet was proving to be deeply troublesome. Thanks to the
French minister’s generous distribution of privateering commissions, armed vessels were
prowling the eastern seaboard. He was also concocting plans for attacks on Spanish possessions
in North America, all while inflaming American public opinion against Great Britain. Genet was
also bombarding Jefferson with a steady barrage of complaints about the various ways in which
the United States was failing to live up to its obligations to France. He was disappointed in the
Administration’s refusal to accelerate its debt payment to France, which would have allowed
Genet to purchase needed food and supplies in the United States. He was offended by the
Administration’s position that French vessels could not arm in American ports. And of course he
was outraged by Gideon Henfield’s arrest and prosecution for having served on board a French
privateer.¹

Now Genet had a new complaint: Acting at the behest of British merchants, “Judicial
officers” in Philadelphia and New York had seized ships captured by French armed vessels, and
had prevented their sale by French consuls. Genet found this outrageous. In his view, French
consuls had exclusive jurisdiction over prizes taken by French-commissioned vessels, and any
intervention by American officials was a violation of that principle. Moreover, this was not how

¹ To Thomas Jefferson from Edmond Charles Genet, 22 May 1793,
https://founders.archives.gov/documents/Jefferson/01-26-02-0075; To Thomas Jefferson from Edmond Charles
Genet, 8 June 1793, https://founders.archives.gov/documents/Jefferson/01-26-02-0210; To Thomas Jefferson
disputes over alleged violations of American neutrality were to be resolved. Any disagreement had to be adjusted by “the intervention of public ministers,” not the process of an “incompetent” court. At best, judges could only be considered as “counselors” in such matters, for no court had the power to “interpose itself between two nations.” Genet demanded that the president immediately order restoration of the vessels to the captors, with damages and interest to compensate for the disruption.²

Jefferson’s response was almost apologetic, for there was nothing he could do. “By the laws of this Country,” Jefferson explained, any individual claiming a right to property could “demand process from a court of Justice.” And they were entitled to a judicial decision on their claim, “because justice is to be denied to no man.”³ Once underway, there was no basis on which the executive branch could intervene. Under the American scheme of government, the executive was not “competent” to decide “[q]uestions of property between Individuals.” Such matters—including disputes over vessels and goods captured in maritime war—were “ascribed to the Judiciary alone.”⁴

Jefferson’s protestations notwithstanding, he was no innocent bystander in these proceedings. In fact, it was his idea to have the owners of vessels captured by French privateers secure their recovery through lawsuits in federal district court. He proposed this approach in response to demands by British minister Hammond that the administration restore ships and cargo captured by French privateers. The executive, Jefferson explained to Hammond, could not intervene in such matters without giving either France or Great Britain cause for complaint. But, he noted, suit over an unlawful capture would be “cognisable in our Courts of Admiralty.” Accordingly,

² Genêt to Jefferson, June 14, 1793, PTJ, 26:281, 281; Genêt to Jefferson, June 22, 1793, PTJ, 26:339.
³ Jefferson to Genêt, June 17, 1793, PTJ, 26:301-02.
⁴ Jefferson to Genêt, June 17, 1793, PTJ, 26:301-02.
claimants who wanted to recover their property would need to go to court. State militias would be available to help enforce judgments in cases where “the ordinary means of coercion” available to judges were insufficient. In general, however the administration expected that the victims of French privateering would vindicate their rights “judicially.”

For Jefferson, channeling complaints about French prizes into the courts had obvious advantages. In his view, the executive branch was ill-suited to decide the “questions of law and fact” that inhered in these cases. More important, the judiciary was the ultimate expositor of the law. The Washington Administration’s position was that, as a matter of treaty and the law of nations, the United States had both the right and the obligation to prevent France from using American territory as a base for attacks on British commerce. Judicial elaboration of the law of neutrality in civil suits would apprise those involved in privateering of “what they might or might not do,” guidance the administration had been unable to secure via criminal prosecution and its direct inquiries to the justices of the Supreme Court.

In many ways, however, Jefferson’s turn to the judiciary was an act of desperation. The administration had assigned itself the responsibility of ensuring that Americans and others observed perfect impartiality between the belligerent parties. It had even promised to compensate those who were injured by deviations from such strict neutrality, and failure to do so would expose the new federal government’s weakness to the world. Yet the administration’s efforts to enforce President Washington’s declaration had largely failed. Criminal prosecutions of privateers had gone nowhere, state governments were unreliable (or worse), and the federal executive was institutionally too weak to effectively police a maritime border more than a

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thousand miles long. Making matters worse, legislation meant to put legal teeth into the administration’s neutrality policy was on hold in Congress, a victim of the broader battle brewing between Federalists and Republicans over how to respond to the social, political, and economic uncertainty of the French Revolution. What is more, whatever steps the executive did take were fraught with danger. French officials strongly resented any action that impaired what they understood to be their unqualified sovereign right to wage war against their enemy. Yet the Administration knew that if it was unable to satisfy British demands for action against Genet and his cohorts, direct conflict with Great Britain might be the result. Judicial resolution of the high-stakes questions posed by French privateering could spare the Washington Administration the obligation of choosing sides in the conflict.

There was only one problem with Jefferson’s plan: It was doubtful whether the courts in fact could hear cases involving French captures. Under the laws of war, the legality of a maritime seizure was exclusively within the jurisdiction of the capturing nation’s tribunals. According to Genet, this meant that only French consuls had the authority to restore captured vessels and cargo—which of course they rarely did. British officials had their own doubts about the federal courts’ ability to render justice, and some members of Washington’s cabinet agreed with Genet that the means of redressing French violations of American neutrality was a political question, not a legal one. Even federal judges themselves were skeptical about the wisdom and the propriety of assuming jurisdiction over disputes between foreign sovereigns.

Jefferson was undeterred. When federal judges’ initially refusal to enter the fray, he worked assiduously to give the Supreme Court an opportunity to overrule judicial resistance. After Jefferson resigned from the cabinet, his successors continued to insist that the courts were the proper institution of government for resolving disputes over French privateering, and many
skeptics—including the British—came to appreciate the benefit of such an approach. French officials were never persuaded. They deeply resented what they saw as unwarranted judicial interference with French sovereign prerogatives, and demanded that the Washington Administration shield French prizes from British lawsuits. Cabinet officials responded to such complaints by exalting the judiciary as a co-equal branch of government, one beyond the executive’s control.

The justices of the Supreme Court accepted a judicial role in preserving American neutrality, though not without misgivings. The Court initially took up Jefferson’s invitation to open the courts to litigation over privateer captures. But when confronted with a flood of British lawsuits, the justices adopted a cautious approach. They agreed that the United States had the right and the responsibility to defend its neutral status. At the same time, they recognized that treaty commitments to France and international norms governing relations between sovereign powers imposed limits on the redress that courts could offer. Wary of the burdens such cases would impose, the Court also limited its own role in such controversies, despite protestations that close supervision by the nation’s highest tribunal was essential to maintaining American peace and security. In the end, however, the justices supported the administration’s effort to quash French privateering, and Jefferson’s vision of a robust judicial role in foreign affairs was vindicated.

Recalcitrant Courts

As ingenious as it was, Jefferson’s theory failed its first test. Acting on the Secretary’s suggestion, Hammond persuaded the owner of the British ship William to seek restoration of their vessel in court.7 (This was the same vessel that the unfortunate Gideon Henfield had piloted

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7 Hammond to Campbell, June 5, 1793, UKNA, FO 116, 2:156.
The owners engaged prominent Philadelphia lawyers to represent them: William Rawle, the federal district attorney (in his private capacity), and William Lewis, the former federal district judge in Pennsylvania.\(^8\) In their libel, the owners asserted that the capturing privateer, the *Citoyen Genet*, had seized the *William* within U.S. territory, in violation of both the “laws of nations” and the “laws of the United States.” They asked the court to order the captors to return the vessel and pay damages for the detention.\(^9\)

Argument in the case stretched over two days, and was covered in depth by several newspapers, given how “deeply interested” the public was in the “great political question” it involved.\(^10\)

The captors were represented by Peter Stephen DuPonceau, a prominent attorney who led the French government’s litigation efforts during the Neutrality Crisis. In many ways, DuPonceau was the perfect person to convince federal judges of the French position. Born in France as Pierre-Etienne DuPonceau, he served in the Continental Army during the American Revolution and was an aide to the Secretary for Foreign Affairs before taking up the practice of law. By 1793, DuPonceau was a leading member of the Philadelphia bar and a frequent advocate before the Supreme Court.\(^11\) Like many lawyers in port cities, DuPonceau had deep experience representing an international clientele in admiralty proceedings. He was well-versed in maritime law and the law of nations—expertise that was essential to litigating cases implicating wartime seizures and neutral rights.\(^12\) DuPonceau defended Henfield in the criminal prosecution that

\(^8\) Hammond to Grenville, July 7, 1793, UKNA, FO 5, 1:193, 201; Hammond to Grenville, June 10, 1793, UKNA, FO 5, 1:175.


\(^12\) Henry v. Ship Betsey (1789); Barrabé v. Bailly de Suffren (1790); Clow v. Nuestra Senora de las Mercedes (1790); Weir v. Workman (1791); Darvoy v. La Belle Creole (1792); NARA, Pennsylvania Admiralty.
resulted from the *William*’s capture, and, as privateering-related litigation expanded across the country, DuPonceau came to serve as general counsel for the French defense effort.

From the start, DuPonceau had little trouble identifying the weaknesses in the owner’s case. He did not bother disputing that the *Citoyen Genet* had captured the *William* within U.S. territory. Instead, he argued that the federal court did not have jurisdiction over the case regardless. Article 17 of the Treaty of Amity between France and United States permitted French warships and privateers to bring prizes into U.S. Moreover, it explicitly forbade American “officers” from arresting such prizes or “or mak[ing] examination concerning the[ir] lawfulness.”

According to DuPonceau, that meant that courts in the United States could not hear suits seeking recovery of French prizes, and at least some of Jefferson’s colleagues in the administration appeared to agree.

In DuPonceau’s view, the treaty only confirmed what the law of nations already declared: The courts of a neutral nation could not take “cognizance” of a capture made by a sovereign at war. Citing a number of leading treatises, DuPonceau asserted that French captures had to be adjudicated by French courts. This was for two reasons. First, a sovereign was ultimately responsible to his fellow-sovereigns for the conduct of his subjects in war. If a French-commissioned privateer unlawfully injured the citizens or subjects of another nation, the French sovereign was responsible for righting the wrong. Second, no sovereign could be called to account for his actions in the tribunals of another. As the Supreme Court would later explain, every sovereign was therefore “the acknowledged arbiter of his own justice,” and only the

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13 Treaty of Amity and Commerce (1778), Art. 17.
sovereign could judge the lawfulness of captures made under its authority. Indeed, DuPonceau argued, a neutral court’s assumption of jurisdiction over a prize would be “an infringement on the sovereignty of the state that granted the commission.”

Most important, such suits thrust the courts into a position in which they did not belong. Echoing Genet’s arguments to Jefferson, DuPonceau insisted that alleged violations of American neutrality were simply not amenable to judicial resolution. Even if the Citoyen Genet did violate U.S. territorial sovereignty, that was an offense against the United States, not against the William’s owners. And the only way to resolve that problem was for the executive branch to negotiate directly with the French government. “[T]he executive,” DuPonceau’s co-counsel reminded the court, was “the only organ of government by which we communicate with foreign nations.” French officials repeated the point in their communications to the executive branch. Courts, they conceded, could “render justice between individuals.” But privateer captures involved questions regarding “the political relations which exist between nation and nation,” which could only be resolved by direct negotiation.

On this point, DuPonceau and Genet had an unlikely ally in Alexander Hamilton. He consistently urged Washington to intervene and restore French prizes to their owners. The courts, he argued, were “not competent” to decide such questions. Controversies over what redress was owed to the victims of French privateering were “an affair between … Governments,” one

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16 L’Invincible, 14 U.S. 238, 254 (1816); T. Rutherforth, Institutes of Natural Law (Cambridge: J. Bentham, 1754), 594-600.
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18 Federal Gazette, June 19, 1793, p. 2.
19 Federal Gazette, June 21, 1793, p. 3.
properly settled “by reasons of state, not rules of law.”

British officials concurred, even as they encouraged property owners to go to court. Only days after the William’s owners filed their libel, the British consul at Philadelphia complained to his superiors in London that resort to the judiciary was “perfectly inexpedient.” In his view, intervention by the executive branch was the “only medium” through which French violations of American neutrality could be redressed.

Faced with this authority against him, Rawle tried to recharacterize the dispute entirely. The question before the courts was not whether the William was a valid prize under the laws of war. The dispute was about whether the vessel had been “taken upon neutral ground”—i.e., in violation of U.S. territorial sovereignty. And that question was perfectly amenable to judicial resolution. True, such a question could be settled by negotiation between governments, but judicial resolution was “more conformable to justice.” Judges would decide such cases on their “merits,” according to “well known principles.” The executive branch, in contrast, would be unduly influenced by “motives of policy.” Rawle’s co-counsel, Lewis, also doubted whether restitution by the executive branch would be effective. While “despotic sovereignties” could restore captured vessels as they saw fit, in a “government of laws” the executive had limited ability to command obedience to its decisions.

As clever as it was, Rawle and Lewis’s argument failed to persuade. The attorneys made their case to Richard Peters, one of the nation’s leading jurists and an experienced admiralty judge. Peters began his opinion by acknowledging that the capture of a British vessel within

21 Hamilton to Washington, May 15, 1793, PGWPS, 12:577, 582.
23 Federal Gazette, June 19, 1793, p. 2.
24 Federal Gazette, June 24, 1793, p. 2; Findlay v. The William, 9 F. Cas. 57, 58-59 (D. Pa. 1793).
25 Presser, Original Misunderstanding, 56-57, 60-61. Thomas Bee, the judge of the South Carolina district court, noted Peters’s “[r]espectable character for legal knowledge” and equated his “sound argument and clear
American territorial waters was “a flagrant violation of the rights of neutrality,” one that implicated both “national dignity” and the United States’ “duty towards a friendly power.” Peters had no doubt that such an offense demanded restitution to the victims—a conclusion even the captors did not appear to dispute. But neither the illegality of the capture nor the necessity of redress answered the central question: “Who is to enquire into the matter, and either give or attempt the redress?”

The courts were not the answer, according to Peters. As a legal matter, the question was easy. The weight of international authority established that the courts of a neutral nation could not adjudicate the validity of a prize of war. Even if the William’s capture violated the United States’ sovereign rights, such rights were not established for the benefit of “private individuals,” and could not serve as the basis for “a war of suits” between enemy combatants. Instead, Peters submitted—echoing Genet, DuPonceau, and Hamilton—“these disputes must be settled by sovereignties alone.” Peters also had deeper considerations in mind. He recognized that his decision left the executive branch in a bind, as Congress had not vested the president with the powers necessary to prevent privateers from arming in the United States or selling prizes there. But that did not mean that the judiciary should exercise such authority. To his mind, “political convenience” did not justify judicial intervention. The United States was in a delicate position, caught between jealous belligerents sensitive to any favoritism toward their rivals. The best way to demonstrate the United States’ evenhandedness was to adhere to “the customs of other

deduction” with the writings of preeminent law of nations publicists. Castello v. Bouteille, 5 F. Cas. 278, 280 (D.S.C. 1794).

26 Findlay, 9 F. Cas. at 59.

27 Ibid., 61; Moxon v. The Fanny, 17 F. Cas. 942, 946 (D. Pa. 1793).
nations” and decline jurisdiction.28 Peters dismissed the case, expressing confidence that British officials would hold the court blameless for failing to exercise power it did not enjoy.29

Peters’s refusal to take jurisdiction over privateer captures was a blow to the Washington Administration. At first, there was hope in the cabinet that the judge would reconsider his position, or at least that one of his brethren would form a “contrary Opinion.”30 But Peters soon dismissed another case involving another French capture, on similar grounds.31 His colleagues on other federal district courts followed suit. They acknowledged that French captures in violation of American neutrality required restitution to the victims. But they agreed that the executive, not the judiciary, was the organ of government that had to provide it.32

For these judges, refusing jurisdiction was essential to keeping the nation aligned with international opinion. As James Duane noted in New York, the nation’s “constitution and laws” did not spell out which branch of government was responsible for addressing violations of American neutrality by belligerent powers. Accordingly, the “usage of nations” was necessarily his guide.33 Respecting international tradition was not simply an abstract imperative, for judicial intervention ran the risk of bringing federal judges into conflict with their foreign counterparts. As William Paca noted in Maryland, federal court adjudication of French prizes undermined the French admiralty courts’ exclusive jurisdiction, potentially leading to parallel proceedings and

28 Findlay, 9 F. Cas. at 59, 62 n.4.
29 Findlay, 9 F. Cas. at 61.
30 Cabinet Opinions on Privateers and Prizes, Aug. 5, 1793, PTJ, 26:620, 620; Jefferson to Gouverneur Morris, Aug. 16, 1793, PTJ, 26:697, 704. The one exception to the courts’ blanket rejection of jurisdiction came in Massachusetts, where the court concluded that it had authority to adjudicate a libel filed by the American captain of a vessel captured by a French privateer. Folger v. Lecuyer (D. Mass. 1793), in Columbian Centinel (Boston), Jan. 4, 1794, p. 1.
31 Moxon v. the Fanny, 17 F. Cas. 942 (D. Pa. 1793).
32 Duane, Decree on the Admiralty Side, 8-9.
33 Duane, Decree on the Admiralty Side, 19-20, 34.
confusion over who had rightful title to captured ships and cargo. The judges also rejected Jefferson’s theory that that suits over French captures were simply ordinary disputes over private property. Alleged French violations of American neutrality, Duane explained, were not a “private injury.” They were an “affront to the state.” France was not formally a party to these proceedings, but she was “virtually,” and the court was bound to respect her rights and privileges. As a result, dismissal was the only proper course for the court take. In South Carolina, Thomas Bee agreed: Any complaint about a privateer’s illegal conduct “must be made to the executive.”

The Supreme Court Opens the Door

The district judges’ refusal to take jurisdiction over French privateer captures could not have come at a worse time. Soon after Judge Peters dismissed the case involving the William, the jury in Henfield’s case absolved him of any wrongdoing in the capture. At the same time, British officials redoubled their demands that the executive branch intervene to secure the restoration of seized ships, while French officials asserted all the more stridently their exclusive authority to dispose of such captures. The pressure was becoming unbearable. As Washington proclaimed

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35 Duane, Decree on the Admiralty Side, 30.
36 Ibid., 22, 33-34.
37 Ibid., 35.
to his cabinet, if French privateering from United States ports continued unabated, the executive branch would be “incessantly harassed with complaints.”

Fortunately for the Administration, Jefferson still had a card to play. As Judge Duane in New York noted, the question of whether the federal courts could adjudicate cases involving captures in violation of American neutrality was one of “novelty and importance,” and deserved an answer from “a much higher tribunal” than a district court. Jefferson did not need the hint. The claimants in the William case declined to appeal Judge Peters’s dismissal. But Jefferson had his eye on another dispute working its way through the federal courts in Maryland. The privateer Citoyen Genet had seized a Swedish ship, the Betsey, and brought it to Baltimore in June 1793. The Betsey’s owners initially asked Genet to return the vessel, but he refused, and the French consul at Baltimore decreed the Betsey a valid prize. Fearing the loss of their property forever, the Betsey’s owners asked Jefferson to intervene and restore the vessel.

Faced with yet another demand for intervention by the executive, Jefferson stalled for time. At first he did not respond—or at least there is no record of a response. When the federal district court dismissed the owners’ subsequent suit, Jefferson rejected the owners’ request that he intercede. Any executive intervention would be by “military force only,” and Secretary of War Knox concluded that the Betsey did not qualify for restoration under the administration’s rules. An appeal to the circuit court was the only way forward. Knox’s basis for concluding that the Betsey did not qualify for executive restoration was evidently wrong. Yet Jefferson made no

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40 Washington to the Cabinet, July 29, 1793, PTJ, 26:582, 583.
41 Duane, Decree on the Admiralty Side, 4.
42 Richard Soderstrom to Jefferson, [July 3, 1793], PTJ, 26:432; Richard Söderström to Edmond Charles Genêt, July 6, 1793, DHSC, 6:313, 313; DHSC, 6:300-01.
43 Lucas Gibbes and Alexander S. Glass to Jefferson, July 8, 1793, PTJ, 26:453; William Paca’s District Court Opinion, Aug. 15, 1793, DHSC, 6:324, 324-32.
effort to correct the mistake. When Justice Patterson affirmed the district court dismissal, the owners came to Jefferson a third time—and again he declined to intervene: The “only” remedy available to them was “in the courts of justice.”

Jefferson knew exactly what he was doing. He wrote to Gouverneur Morris, the American minister in Paris, the day after the Maryland district court dismissed the *Betsey* case. In summarizing his disagreement with Genet over the courts’ role in privateering disputes, Jefferson acknowledged that the district courts had declined to take jurisdiction. Yet the question of which branch of government would resolve such disputes was “not yet perfectly settled.” Indeed, Jefferson noted, the matter was still under consideration, and he expressed confidence that the justices of the Supreme Court would “decide it finally.”

By the time the Court heard argument in February 1794, *Glass v. Sloop Betsey*’s importance was apparent—a “case of consequence,” as Justice William Cushing described it at the time. Relations between the United States and Great Britain had reached their nadir, and many on either side of the Atlantic believed that war between the two nations was imminent. At the same time, relations with France continued to be tense. Peter DuPonceau, representing the captors, emphasized the stakes involved. Echoing the arguments he made in the *William*, he asserted that the federal court’s assumption of jurisdiction over a wartime capture would contravene France’s

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44 Lucas Gibbes and Alexander S. Glass to Jefferson, July 8, 1793, *PTJ*, 26:453; *DHSC*, 6:305; Jefferson to Alexander S. Glass, Sep. 10, 1793, *PTJ*, 27:79, 79; Knox to Jefferson, Sep. 11, 1793, *PTJ*, 27:90. For some reason, Knox indicated that, because the *Betsey* had been captured prior to August 5, 1793, she was not eligible for restoration by the executive branch. Knox to Jefferson, Sep. 11, 1793, *PTJ*, 27:90. But nothing in the surviving records of the administration’s deliberations suggests that this was a relevant criterion. Under the administration’s rules, prizes made before *June 5th* would not be restored, as that was the date on which the administration ordered that all French privateers commissioned in the United States to depart from American ports. Cabinet Opinion on Prizes and Privateers, Aug. 5, 1793, *PTJ*, 26:603, 603.


47 Cushing to Increase Sumner, Feb. 24, 1794, 6 *DHSC* 350.
exclusive right to judge the validity of prize made by its ships of war. A judicial ruling “in opposition” to France’s prerogatives under treaty and the law of nations, he warned, would give that nation “a just and honorable cause of war.” The Betsey’s attorneys—former federal judge William Lewis and Edward Tilghman, another leading Philadelphia lawyer—agreed as to Glass’s “great importance,” but for the opposite reason. The federal courts’ failure to take jurisdiction would represent a rejection of the nation’s duty to France’s enemies, for even foreigners were entitled “to have their property protected by the laws.”

The key to Lewis and Tilghman’s argument was their refinement of Jefferson’s theory as to why jurisdiction was permissible. In Jefferson’s view, lawsuits in federal court over French captures were not really prize cases at all. That is, they did not inquire into the “lawfulness” of a prize in the traditional sense—for example, whether the privateer had a valid commission or whether the seized vessel and cargo were truly enemy property. Instead, the suits merely asked whether the captors had violated American neutrality. As everyone agreed, that was a question the American government had every right to answer, as long as it did so consistently with France’s treaty rights and international legal norms. And what institution of government was better-suited for answering questions about neutral rights than the judiciary? In this sense, federal court adjudication of privateering disputes was not an infringement on France’s sovereign authority to adjudicate the legality of its own prizes. As Jefferson explained to Genet, it was simply an “exercise [of] the sovereignty of this country”—that is, the United States’ right to preserve its own neutrality by providing redress to injured foreigners—but framed as a “judiciary

48 Ibid., 9-12.
49 Glass v. Sloop Betsey, 3 U.S. 6, 6 (1794).
The choice to delegate such questions to the judiciary was merely a “question of internal arrangement,” dictated by “the laws and Constitution.”

In *Glass*, Lewis and Tilghman expanded on Jefferson’s argument by emphasizing American exceptionalism. They implicitly conceded that disputes over captures that violated neutrality were usually resolved by government-to-government negotiation. But Congress had seen fit to deviate from that rule by granting the federal district courts jurisdiction over “all civil causes of admiralty and maritime jurisdiction.” By voluntarily bringing the *Betsey* into the United States, the captors had subjected themselves to that authority. More important, the courts’ exercise of jurisdiction was a natural consequence of the superior American constitutional order. In Europe, monarchs could unilaterally restore captured vessels because they exercised commingled judicial and executive authority—powers often “acquired by force, or fraud.” In the United States, in contrast, the people had wisely chosen to keep the powers of government separate. Under this system, the courts were “sovereign as to determinations upon property.” To preclude them from adjudication risked aggrandizing the executive beyond constitutional bounds, leaving the property rights of foreign claimants dependent “upon the will of a secretary of state.”

It is difficult know whether the justices were persuaded by Lewis and Tilghman’s appeal to the particular genius of the American system of government. Despite four days of argument, the Court’s three-paragraph opinion said little, and remains one of the great mysteries of its early years. The Court declared that the federal district courts possessed “all the powers of a Court of admiralty,” and therefore the district court in this case had jurisdiction to decide whether

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53 Glass v. Sloop Betsey, 3 U.S. 6, 6, 13-14 (1794); Judiciary Act of 1789, 1 Stat. 73, 77, § 9.
restitution was proper under domestic and international law. Accordingly, the Court reversed the dismissal below and directed the district court to proceed upon the owners’ libel “agreeably to law and right.” The decision was apparently unanimous, despite the fact that Justice Paterson had affirmed dismissal of the case while sitting on the circuit court.\textsuperscript{54}

The Court’s brevity was no doubt intentional. On the one hand, allowing the possibility of a judicial venue for British complaints about French privateering could help soothe tensions with Great Britain.\textsuperscript{55} That would explain how the Court reached a decision contrary to both the decisions of the lower courts and the consensus of international authority.\textsuperscript{56} The Court also signaled its sensitivity to British complaints by answering a question that had not been addressed by the attorneys or the courts below: whether French consuls could convene prize tribunals in the United States. Believing that the question was “of great public importance,” the Court declared that foreign nations could only establish prize tribunals in the United States by special agreement. As the existing treaties with France did not include such a provision, the jurisdiction exercised by French consuls was “not of right.”\textsuperscript{57} In so holding, the Court affirmed the

\textsuperscript{54} Glass v. Sloop Betsey, 3 U.S. 6, 16 (1794).


\textsuperscript{56} As luminaries like Joseph Story and Henry Wheaton would later acknowledge, the Court’s ruling was in serious tension with “the unquestionable principle of public law” that questions of prize belonged exclusively to the captor’s tribunals. L’Invincible, 13 F.Cas. 72, 75 (C.C.D. Mass. 1814); The Divina Pastora, 17 U.S. 52, 66 n.3 (1819).

\textsuperscript{57} Ibid., 16. It is possible that the Court thought that the question of consular jurisdiction was relevant because the decision by the French consul in Baltimore that the \textit{Betsey} was a lawful prize—if valid—might preclude courts in the United States (or anywhere) from revisiting the issue. Casto, \textit{Supreme Court}, 86-87. But even if this argument had merit, the parties’ failure to raise it gave the Court good reason to ignore it if it had wanted to.
Washington Administration’s longstanding position, and the French government in Paris took note.58

At the same time, the decision in Glass left many issues unresolved. The Court’s statement that the federal courts enjoyed full admiralty jurisdiction only begged the central question: Did the powers of an American admiralty court include jurisdiction over a maritime seizure by a foreign nation at war? Because the district court had answered “no” to that question, reversal of that judgment necessarily meant the answer was “yes,” at least in the present case. But it was unclear how far the rule extended. Perhaps broadly—the parties had stipulated that the Betsey was captured “on the high seas,” outside U.S. territorial limits.59 The implication was that the mere fact that the Citoyen Genet had been armed in the United States was enough to confer jurisdiction on the courts. At the same time, the Betsey was a neutral vessel, so the ruling perhaps did not authorize the courts to entertain suits regarding French seizures of British-owned property. This was all the more true given the Court’s silence as to whether Article 17 of the Treaty of Amity precluded jurisdiction over prizes made by France against its enemies (as opposed to neutrals like the Betsey owners).60 In addition, the French government had already repudiated Genet’s assertion of consular jurisdiction over prizes, and the issue no longer presented a live controversy at the time Glass was decided.61 In the end, the only thing the Court truly resolved was whether this particular suit could go forward.

58 A copy of the Court’s opinion in the French foreign ministry’s files noted that it concerned their consuls’ “admiralty powers.” Décisions de la cour suprême des E.U., Feb. 19, 1794 (1 Ventôse An 2), AMAE, Correspondance Politique, 40:103.

59 Despite the parties’ stipulation to the capture having taken place on the high seas, Hammond mistakenly informed his superiors in London that the Court had decided that American admiralty courts had jurisdiction over captures made “within the jurisdiction of the United States.” Hammond to Grenville, Feb. 22, 1794, UKNA, FO 5, 4:43.

60 Treaty of Amity and Commerce (1778), Art. 17.

Glass can therefore be understood as a half-measure, one that deflected the most critical questions regarding the federal courts’ jurisdiction. The justices certainly knew about the neutrality legislation then pending in Congress, which would likely resolve the jurisdictional questions raised by litigation over French captures. At the same time, the justices were no doubt aware of the determined Republican opposition the legislation faced and the Washington Administration’s struggles to enforce its own neutrality rules. By leaving the door open to British lawsuits, the Court ensured that the claims of a powerful foreign constituency would receive an audience within the federal government. Yet the Court stopped short of irrevocably committing the judiciary to fulfilling that role going forward. The full scope of the courts’ authority to resolve disputes over French privateering would have to be hashed out case-by-case.

A Proxy War in Federal Court

The Supreme Court’s timing could not have been better—or worse, depending on one’s perspective. By allowing suit to go forward in Glass, the Court reinvigorated British litigation just as political and military developments in the broader international conflict caused a spike in French privateering. In the summer of 1794 France began to reestablish control over its colonial possessions in the Caribbean. It retook Guadeloupe’s main port from the British, and a temporary alliance between the acting French governor and Haitian general Toussaint L’Ouverture stabilized the political and military situation in Saint Domingue. At the same time, French naval capacity in the western Atlantic dropped significantly. To increase the number of armed French

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62 Goebel, Antecedents, 765.
vessels able to cruise against British merchant shipping. French political and military authorities in the Caribbean willingly gave privateering commissions to ships from the United States.\(^{63}\)

Charleston quickly became the center of privateering. Given its close proximity to French ports in the Caribbean, and its significant population of French expatriates and sympathizers, the city had long been the subject of British complaints.\(^{64}\) Encouraged by the French consul, Charleston merchants and ship captains pooled their resources to purchase seaworthy vessels and refit them for commerce raiding. The city’s port was inundated with the arrival of numerous British and Spanish prizes, and many also ended up in Savannah and smaller ports in the region. The surge in privateering activity from Charleston in the period was so dramatic that that one student of the period has described the city as “a French palatinate in South Carolina.”\(^{65}\)

As reports of valuable British merchant vessels arriving in Charleston came rolling in, British frustration began to boil over. Privateers had successfully devised numerous “Frauds and Deceptions” that allowed them to American neutrality, including outfitting ships as merchant vessels and then bringing arms aboard after clearing port, or arranging for pretended sales to French purchasers in the Caribbean.\(^{66}\) In Hammond’s view, such practices rendered the entire city of Charleston a “sink of villainy.”\(^{67}\)

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\(^{65}\) Jackson, *Privateers in Charleston*, 68-86.


\(^{67}\) Hammond to Read Admiral Murray, Jan. 18, 1795, UKNA, FO 116, 2:303.
The British directed equal ire at American officials. The Washington Administration’s demonstrated inability—or unwillingness—to respond effectively to British grievances persuaded Hammond that it was simply “useless” to seek help from the federal executive.68 Part of the problem was consistency; the administration’s policies were so “fluctuating” that Hammond found it impossible to even guess at the government’s future conduct.69 Yet British officials also suspected American bad faith. Complaints about privateer captures were too often referred to state governors, of whom “a great majority” were “hostile” to Great Britain.70 As the British consul at Norfolk succinctly put it, “the Government of this country winks at everything that favors the French.”71 Even the Washington Administration itself could not be trusted. Jefferson had promised that the government would compensate British subjects for seized property that could not be restored via judicial or executive process. But when Hammond later brought this up with Randolph—who succeeded Jefferson as Secretary of State—he asserted that the executive could make no payments absent an appropriation from Congress.72 For Hammond, the “puerile futility” of this evasion only confirmed that no help would be forthcoming.73

With diplomacy leading only to dead ends, British officials began to see the judicial branch as the institution best positioned to help them in their battle with French privateers. They were reluctant converts. They had witnessed first-hand the difficulties British subjects had in recovering pre-Revolutionary War debts owed them by Americans, and had serious doubts about

68 Hammond to Grenville, Nov. 5, 1794, UKNA, FO 5, 5:345.
69 Hammond to Dorchester, May 26, 1794, UKNA, FO 116, 2:221.
70 Hammond to Grenville, June 27, 1794, UKNA, FO 5, 5:131; Randolph to Hammond, July 28, 1794, UKNA, FO 5, 5:243.
71 Hamilton to Grenville, June 26, 1794, UKNA, FO 5, 6:219.
73 Hammond to Simcoe, Aug. 10, 1794, UKNA, FO 116, 2:239.
the courts’ capacity to protect their compatriots’ interests. As Hammond put it on the eve of the Neutrality Crisis, the federal judiciary was an “experiment[]” that “remain[ed] in many respects defective and incomplete.” With these concerns in mind, Hammond promised British merchants that he would continue to seek restitution for captured ships from the executive.

At the same time, Hammond came to appreciate that suit in federal district court was “the most probable and speedy mode” of securing restitution. Indeed, a lawsuit had several distinct advantages over executive action. Courts had the authority to act independently; a judge did not have to consult with any other official in order to issue a writ of attachment and prevent the sale or departure of a captured vessel, whereas state governors often referred questions to the executive for consultation, if not decision. Plus, attachment was essentially automatic upon filing suit, whereas every allegation of illegal privateering directed to a state official required that a governor make a judgment call about whether to act. Perhaps most importantly, filing suit in federal court bought time. Though Judge Peters issued his decree denying jurisdiction in the William case three weeks after the libel was filed, adjudication usually came far less swiftly. Crucially, an unfavorable judgment in the district court was not necessarily the final answer. As

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75 Hammond to Grenville, Mar. 7, 1793, UKNA, FO 5, 1:78.
76 Hammond to Grenville, June 8, 1794, UKNA, FO 5, 5:59.
77 Hammond to Grenville, June 8, 1794, UKNA, FO 5, 5:59.
demonstrated by the proceedings in *Glass*, successive appeals could drag a case out for months, depriving the captors of the profits they hoped to reap from sale of the ship and cargo.

The newfound British enthusiasm for litigation was also driven by a grudging acceptance that the Washington Administration wanted questions about captured property to be handled by the courts. Following the Court’s decision in *Glass*, the Washington Administration’s policy on the restoration of captured property shifted more strongly toward judicial resolution. Randolph explained the administration’s thinking in in a circular letter to state governors. He asked them to refrain from intervening in any case that fell within the courts’ jurisdiction—which, after *Glass*, might include any capture arguably made in violation of American neutrality. According to Randolph, judicial resolution of privateering disputes had two principal advantages. It would avoid the “vexation” that accompanied executive intervention. And it would leave questions of what the Treaty of Amity allowed to the institution that was “more particularly the expositors of it.” Allowing the judiciary to take the lead would best insure that the United States’ legal obligations were “best preserved from violation.”

British officials got the message that battles over privateering would be fought in the courts. In early 1794, a new and enthusiastic British consul, Benjamin Moodie, arrived in South Carolina. When he first assumed his post, he expected that privateering-related grievances would be “speedily removed by the Executive of the United States.” After a series of disappointments, however, Moodie came to realize that the administration did not consider itself obligated to take action, and it was up to him to seek relief in the courts “in the first instance.”

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82 Moodie to Grenville, Mar. 4, 1794, UKNA, FO 5, 6:127.
83 Moodie to Grenville, Dec. 17, 1794, UKNA, FO 5, 6:140.
Bond, the consul at Philadelphia, reported to London, the Washington Administration deemed application to the federal courts to “the only medium, thro’ which Justice is to be obtained.”

Left no choice, British consuls launched a concerted campaign to use litigation as a means of combating French privateering. Their sporadic earlier efforts had required persuading often-hesitant owners to assume the expense and inconvenience of litigation. Now consuls like Moodie regularly filed suit themselves. As a formal matter, Moodie was merely standing in for the owners, but in most cases the litigation was his to conduct. This was a risky approach; Moodie repeatedly expressed his concern about whether the government would repay his expenses in cases he lost. His superiors in Philadelphia supported him, if only out of necessity. Without consular intervention, there was no “chance of so much as a discussion of the legality of the capture.” Accordingly, they authorized advances for litigation expenses—a good thing, since he had already spent his own money to institute proceedings in several cases.

Moodie was an aggressive litigator, libeling vessels that had “any prospect” of recovery. By his own count, he sued over half of the British vessels brought into Charleston in the latter half of 1794. He engaged the ablest lawyers he could find to argue his cases—including an attempt to enlist Alexander Hamilton. He paid informants to procure information “from amongst the

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84 Bond to Grenville, Jan. 27, 1795, UKNA, FO 5, 10:35.
85 For a partial list of cases Moodie brought in his own name, see DHSC, 7:51.
86 Moodie to George Miller, Nov. 28, 1794, UKNA, FO 5, 11:88; George Miller to James Bland Burges, July 16, 1794, UKNA, FO 5, 11:92; Bond to Grenville, Jan. 27, 1795, UKNA, FO 5, 10:35; Moodie to Bond, Apr. 28, 1795, UKNA, FO 5, 11:101.
87 Bond to Grenville, June 8, 1793, AHA Report, 528; Bond to Grenville, Jan. 27, 1795, UKNA, FO 5, 10:35; Moodie to George Miller, Nov. 28, 1794, UKNA, FO 5, 11:88; George Miller to James Bland Burges, July 16, 1794, UKNA, FO 5, 11:92.
88 Moodie to Miller, Nov. 28, 1794, UKNA, FO 5, 11:88; List of British Vessels Carried into Charleston South Carolina as Prizes, UKNA, FO 5, 11:91.
Privateer’s Men.” According to his opponents, he even bribed witnesses and suborned perjury. Moodie recognized the risks of an aggressive approach, and his enthusiasm was leavened with pragmatism. When a vessel was not worth much, or the evidence offered little hope of victory, he declined taking action. Litigation was expensive, keeping track of privateer comings and goings was difficult, and Moodie’s feared the losses that would result if his suits were unsuccessful.

Moodie’s greatest challenge was legal. The Supreme Court ruling in Glass allowed the possibility of federal court jurisdiction over French captures, but how far it extended was an open question. The initial returns in the district courts were not promising. Judge Peters in Pennsylvania seemed unwilling to extend Glass beyond its facts. The district courts could take jurisdiction over cases involving American and neutral-owned property, but not British. As before, political caution shaped Peters’s reasoning. “[I]mproper Decisions” by courts in privateering cases risked angering belligerents and subject American commerce to reprisal. Judges should therefore only intervene in the most “clear and unequivocal cases.” Thomas Bee in South Carolina was similarly hesitant, though for a different reason. The Constitution “wisely separated” the judicial and executive branches, and adjudication of privateering disputes threatened to “infringe th[os]e barriers.”

89 Moodie to Bond, Apr. 28, 1795, UKNA, FO 5, 11:101; Moodie to Jacob Read, Dec. 29, 1795, DHSC, 7:62; Jean Bouteille to Représentans, (26 Germinal An 3), AMAE, Mémoires et Documents, 39:15.
90 Moodie to Bond, Apr. 28, 1795, UKNA, FO 5, 11:101; Moodie to Barnes, Aug. 28, 1795, DHSC, 7:819-20.
91 Moodie to George Miller, Nov. 28, 1794, UKNA, FO 5, 11:88; Moodie to Miller, July 16, 1795, UKNA, FO 5, 11:94.
92 Hollingsworth v. The Betsey, 12 F. Cas. 348, 351 n.3 (D. Pa. 1795).
93 Dubois v. Brig Kitty, decree, Mar. 25, 1794, NARA, Pennsylvania Admiralty.
94 Castello v. Bouteille, 5 F. Cas. 278, 279 (D.S.C. 1794). It is possible that Judge Bee was not aware of the Glass ruling. He issued his decision in Castello on March 18, 1794—a month after Glass—but the Glass decree was apparently not published in South Carolina until a week later. City Gazette & Daily Advertiser, Mar. 26, 1794, Page 3.
Over time, however, the British litigation campaign pushed federal judges toward a more expansive view of their authority. This evolution was most evident in Judge Bee’s courtroom in Charleston. He recognized that Article 17 necessarily placed some limit on the courts’ jurisdiction over French prizes. Accordingly, federal courts could not entertain British complaints that a seizure was improper under the laws of war—for example, because the captors did not have a valid commission. At the same time, Bee emphasized that many privateering cases implicated the United States “neutral character.” As a result, credible allegations of violations of American neutrality could overcome the jurisdictional barriers erected by treaty and the law of nations. Captures made by privateers owned or manned by American citizens could be challenged in court. More importantly, so could captures made by French privateers armed and equipped in the United States. Those who engaged in such conduct could not expect to be exempted from claims in court.

The lynchpin of the British litigation campaign was the legislation defining American neutrality that Congress finally passed in June 1794. As we will see, the Neutrality Act was incomplete in several respects. But the Act identified and proscribed specific conduct that violated American neutrality. In particular, it forbade Americans from accepting commissions to engage in hostilities against nations with which the United States was at peace, or enlisting on ships with such intent. The Act also prohibited anyone from fitting out or augmenting the force

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95 Stannick v. Brig Friendship, 22 F. Cas. 1056, 1057 (D.S.C. 1794); Reid v. Ship Vere, 20 F. Cas. 488, 488 (D.S.C. 1795). For a detailed discussion of the events surrounding Judge Bee’s decisions, see Jackson, Privateers in Charleston, 47-62.


of any ship with the intent of committing such hostilities. These proscriptions were substantively no different than those the Washington Administration had announced a year earlier. But by enshrining them in statute, Congress mooted the question of whether the President’s directives had the force of law.

Armed with this statute, Moodie (and his lawyers) were able to persuade Judge Bee to ignore Article 17’s limits on judicial “examination” of French captures. The most common question respecting an alleged neutrality violation was whether the capturing vessel’s “force” had been “increase[d] or augment[ed]” within the United States, as the Neutrality Act prohibited. This was necessarily a fact-intensive question, often necessitating documents and testimony from witnesses in far-flung locales. As a result, the threshold question of whether the court could take jurisdiction over claims arising from a French capture was only answerable after the very sort of judicial investigation of the facts of a particular capture that Article 17 ostensibly was aimed at preventing. And because a neutrality violation was, in Bee’s view, also a basis for judicial restoration of a captured vessel to its owners, “jurisdiction” and “merits” merged into one query. In later cases, Bee ignored the jurisdictional question altogether, and simply determined whether the capturing privateer had augmented its force in the United States.

Bee’s willingness to entertain challenges to French captures did not guarantee success for British litigants. He dismissed libels when there was insufficient evidence that the privateer had

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100 “An Act in addition to the act for the punishment of certain crimes against the United States,” § 1-4, 6, 1 Stat. 381, 382-84 (1794) [Neutrality Act of 1794].
103 The Betty Carthcart, 17 F. Cas. at 653; British Consul v. The Nancy, 4 F. Cas. 171, 171 (D.S.C. 1795).
been armed or equipped in the United States.\textsuperscript{104} Even when they had, the “sale” of a privateer armed in the United States to a French purchaser effectively cleansed the ship of any neutrality violation.\textsuperscript{105} In fact, it appears that Moodie lost at least as many cases as he won.\textsuperscript{106} Despite the mixed results, Moodie was undeterred, spurred by a sense of official duty as well as the entreaties of British property owners who sought his help.\textsuperscript{107} Most importantly, he recognized that tying French captures up in court hamstrung France’s ability to wage maritime war against Britain and her allies. Indeed, in a moment of puffery he crowed to a British admiral that his legal efforts had done more than the British Navy to protect British property from French depredations.\textsuperscript{108} Though Moodie did not anticipate success in appealing cases he had lost, litigation’s importance for the war effort meant that he had “gone too far to stop now.”\textsuperscript{109}

\textbf{Debating the Judiciary}

The British litigation campaign reignited the debate between French and American officials over the judiciary’s proper role in relations between sovereign nations. The French government recalled Genet in late 1793, but for the next several years his successors continued to complain that suits over French prizes violated treaty and international law. They demanded that the Washington Administration take action to quash British lawsuits and resolve disputes over

\begin{itemize}
\item[\textsuperscript{104}] British Consul v. The Mermaid, 4 F. Cas. 169, 171 (D.S.C. 1795); Moodie v. The Brothers, 17 F. Cas. 653, 654 (D.S.C. 1795).
\item[\textsuperscript{105}] British Consul v. Schooner Favourite (1795), in Hon. Thomas Bee, \textit{Reports of Cases Adjudged in the District Court of South Carolina} (Philadelphia: William P. Farrand, 1810), 1:39.
\item[\textsuperscript{106}] Moodie to Miller, May 8, 1795, UKNA, FO 5, 11:94; Miller to James Bland Burges, July 16, 1795, FO 6, 11:92; Charleston Privateers to National Convention, (25 Germinal An 3), AMAE, Mémoires et Documents, 39:8. Almost no South Carolina district and circuit court records from the period have survived, so it is impossible to accurately measure Moodie’s success rate.
\item[\textsuperscript{107}] Moodie to Bond, Apr. 28, 1795, UKNA, FO 5, 11:101.
\item[\textsuperscript{108}] Moodie to Vice Admiral Murray, Apr. 6, 1796, UKNA, FO 5, 15:78; \textit{DHSC}, 7:116.
\item[\textsuperscript{109}] Moodie to Bond, Apr. 28, 1795, UKNA, FO 5, 11:101.
\end{itemize}
French captures by government-to-government negotiations. The Washington Administration rejected such demands out of hand. Under the American constitutional system, they repeatedly explained, the executive branch had no authority to interfere with judicial proceedings.

The catalyst for the renewed disagreement was a subtle but important shift in the French position. Genet categorically rejected the legitimacy of federal court jurisdiction over French prizes. Any judicial involvement infringed on France’s sovereign right to do with her captures as she saw fit. Genet’s successors, in contrast, conceded that the courts could take jurisdiction over some suits—notably, those involving privateers that had been armed or fitted out in the United States, in violation of American neutrality. This moderation resulted in part from pragmatism. Some in the French camp wanted to challenge Glass’s jurisdictional ruling directly, believing it to be legally infirm and driven by “political expediency.” But Peter DuPonceau recognized the futility in continuing to argue that federal court jurisdiction was illegitimate. He conceded that the federal courts’ jurisdiction was shaped in part by “the

110 Fauchet to Randolph, Sep. 13, 1794 (27 Fructidor An 2), ASPFR, 1:590, 591; Fauchet to Randolph, June 8, 1795 (20 Prairial An 3), ASPFR, 1:614, 615; Adet to Pickering, Nov. 15, 1796, ASPFR, 1:579, 582; Memorandum regarding Citizen Théric’s complaints, Feb. 5, 1796 (16 Pluviôse An 4), AMAE, Mémoires et Documents, 39:36; Ministère des Relations Extérieures to Dupont, Apr. 23, 1796 (4 Floréal An 4), AMAE, Correspondance Consulaire et Commerciale, Charleston, 2:275.

111 Fauchet to Randolph, June 8, 1795 (20 Prairial An 3), ASPFR, 1:614, 615.

112 Internal politics may also have played a role in the modified French stance. The government in Paris recognized that Genet’s combative style had done the republic more harm than good. Genet’s successor, Joseph Fauchet, arrived in the United States with specific instructions to avoid confrontation with the American government. Instructions to the Commissioners, Nov. 15, 1793 (25 Brumaire An 2), CFM, 288-94. Fauchet’s more conciliatory approach was likely also shaped by the Jacobin ascension to power in France. Though in many ways the French Revolution took a radical turn domestically in 1793, as a matter of foreign policy the Montagnards showed less desire than their Girondist predecessors to spread revolutionary war across the globe. Elkins and McKitrick, Age of Federalism, 330-33, 365-72; Alderson, Bright Era, 20-21, 164-65; DeConde, Entangling Alliance, 395-98.

113 Opinion of J.S. Martin, July 7, 1794; Opinion of J.S. Martin, July 10, 1794, AMAE, Archives Consulaires, Boston, box 71, La Catherine.

114 DuPonceau to Fauchet, June 9, 1795, HSP, DuPonceau Letterbooks 1:97; DuPonceau to Letombe, Aug. 14, 1795, HSP, DuPonceau Letterbooks, 1:128; DuPonceau to Fauchet, Apr. 14, 1795, DHSC, 7:20-21; Opinion of Jared Ingersoll, John Coxe, and Peter S. DuPonceau, July 26, 1796, HSP, DuPonceau Letterbooks 1:168; DuPonceau to Citoyen Arcambal, July 9, 1794, HSP, DuPonceau Letterbooks, 1:36; Petry to Barriere, May 9, 1794 (20
political opinions of the day.” But he saw no profit in directly attacking a recent Supreme Court decision. Better to emphasize the limited reach of Glass’s holding and distinguish new cases on their facts. DuPonceau was willing to oppose the Republic’s enemies with every argument at his disposal, but he accepted Glass’s basic premise: Such battles would be fought in the courts.¹¹⁵

French officials’ grudging acceptance of judicial involvement, however, only heightened their disgust over how such proceedings were actually conducted. In the French view, the British litigation campaign was nothing but harassment by lawyers. As soon as a captured vessel came into port, British officials “launch[ed] their birds of prey.” By employing the “English expedient” of bribing witnesses to falsely accuse French privateers of having armed in the United States, claimants could tie up French prizes in “unjust and odious proceedings” whose sole purpose was to “discourage and fatigue the captors.”¹¹⁶ Privateers based in Charleston were so outraged by Moodie’s litigiousness that they sent an agent directly to the government in Paris to present their complaints.¹¹⁷ French officials in the United States likewise peppered the metropole with a steady stream of missives about the injustice of the British litigation campaign.¹¹⁸


¹¹⁸ Dannery to Commissaire de la Marine, [undated], Correspondance Consulaire et Commerciale, Philadelphia, 3:301; Duhail to Ministère des Relations Extérieures, Oct. 2, 1795 (10 Vendémiaire An 4), Correspondance Consulaire et Commerciale, Baltimore, 1:136; Commissaires de la République Française près des États-Unis to Commissaire des Relations Extérieures, May 6, 1795 (17 Floréal An 3), CFM, 681-83; Mozart to Ministère des
For the French, British success was not simply due to their rivals’ ingenuity; it also reflected a fundamental defect in the American political character. In their view, American lawyers and judges were too accepting of British efforts to manufacture legal disputes where none should have existed. As French consuls explained to the government in Paris, the United States was a nation “peopled by lawyers,” where “hair-splitting and quibbling” were the order of the day.\(^\text{119}\) Americans’ enthusiasm for legalism made it far too easy for “evil minded persons” to “abus[e] the laws” and inundate the courts with meritless lawsuits.\(^\text{120}\) This ire extended to judges themselves. French consuls were convinced that many federal judges were British partisans—“Tor[ies] by any other name”—who turned a blind eye to British dirty tricks.\(^\text{121}\) Sworn to uphold treaties between France and the United States, judges had instead proven themselves to be “unfaithful guardians of the alliances between nations.”\(^\text{122}\)

The quandary French officials faced was how to combat the British litigation effort without endorsing its legitimacy. This was a dilemma they never fully solved. Not content to simply protest, consuls from Boston to Charleston were active participants in federal court proceedings. They hired lawyers, paid fees, collected depositions, secured witnesses, and offered strategic

\(^{119}\) Mangourit to Ministère des Affaires Étrangères, Feb. 21, 1794, AMAE, Correspondence Consulaire et Commerciale, Charleston, 2:204; Mozard to Ministère des Relations Extérieures, Aug. 15, 1796 (18 Thermidor An 4), Correspondence Consulaire et Commerciale, Boston, 3:39.

\(^{120}\) Adet to Pickering, Sep. 22, 1795, \textit{ASPFR} 1:632-33.

\(^{121}\) Mangourit to Genêt, Feb. 15, 1794, AMAE, Correspondance Consulaire et Commerciale, Charleston, 2:191; Commissaires de la République Française près des États-Unis to Commissaire des Relations Extérieures, May 6, 1795 (17 Floréal An 3), \textit{CFM}, 681-83; Adet to Dupont, Oct. 22, 1795 (30 Vendémiaire An 4), Dupont Papers, box 2, folder 309.

\(^{122}\) Mangourit to Genêt, Feb. 15, 1794, AMAE, Correspondance Consulaire et Commerciale, Charleston, 2:191; Etat A, AMAE, Mémoires et Documents, 39:43.
advice.\textsuperscript{123} At the same time, they worried that their involvement in privateering cases risked validating the very proceedings they abhorred. Consuls fretted over the “delicate and embarrassing” prospect of subjecting French sovereign rights to judicial examination, and sought guidance from their superiors over when to intercede in disputes over French captures.\textsuperscript{124} Without any clear solution available, the legation in Philadelphia gave consuls one general directive: whenever possible, “avoid contestations with American courts.”\textsuperscript{125} But as French officials well knew, the stream of British lawsuits meant that “brushes with American justice” were unavoidable. Genet’s successor as French minister, Joseph Fauchet, explained to his superiors in Paris that he would continue to advocate for privateers wrongly accused of violating American neutrality “with warmth.” But, he added, when there was sufficient evidence to maintain a suit in federal court, he could defend them “only with lawyers.”\textsuperscript{126}

Confronted with this dilemma, what French officials most wanted was for the Washington Administration to take privateering disputes out of the courts. Fauchet proposed two innovations to that end. First, he urged that plaintiffs alleging an illegal capture should be required to post “security” when they filed suit, to cover damages they might owe the captors once the case was dismissed. Such a measure, Fauchet averred, would render British claimants more cautious and “less ingenious.”\textsuperscript{127} Second, he suggested that the executive could divert cases out of the courts entirely, by pre-screening them to see if there were sufficient grounds to institute proceedings.

\textsuperscript{123} Etat K, AMAE, Mémoires et Documents, 39:150; Hamilton to Grenville, June 26, 1794, UKNA, FO 5, 6:219; Mozart to Adet, Sep. 10, 1795 (24 Fructidor An 3), AMAE, Archives Consulaires, Boston, box 13; Dupont to Adet, Dec. 15, 1795 (24 Frimaire An 4), Dupont Papers, box 2, folder 309.

\textsuperscript{124} Arcambal to Mozart, Feb. 22, 1796 (3 Ventôse An 4), AMAE, Archives Consulaires, Boston, box 23.

\textsuperscript{125} Arcambal to Mozart, Feb. 16, 1796 (27 Pluviôse An 4), AMAE, Archives Consulaires, Boston, box 23.


\textsuperscript{127} Fauchet to Randolph, Oct. 17, 1794 (26 Vendémiaire An 3), ASPFR, 1:589.
Fauchet’s proposal was short on details, but the goal was clear. If it was too easy for British litigants to “discourage and fatigue” French privateers through lawsuits, the solution was simple: Prevent suits from reaching court in the first place.\textsuperscript{128}

The administration rejected the French demand, on the basis of a robust theory of judicial independence. Though Jefferson stepped down as Secretary of State in December 1793, Edmund Randolph was no more receptive to French critiques. He vouched for federal judges’ “firmness and disinterestedness,” and assured Fauchet that privateering disputes would be adjudicated according to “universal law.” Randolph agreed that, in theory, French privateers should not be “wantonly vexed” by litigation. But the administration’s hands were tied, for the courts were “entirely independent of Executive mandates.”\textsuperscript{129} This was precisely what Jefferson had already told Genet: The federal courts were “liable neither to controul nor opposition from any other branch of the Government.”\textsuperscript{130} This was especially true with respect to the executive branch; the judiciary was subject to neither its “coercion” nor its “admonitions.”\textsuperscript{131}

Randolph also made explicit a key tenet of Jefferson’s theory. The executive branch was not only barred from intervening in judicial proceedings already begun. It also could not do what Fauchet wanted—divert disputes over captured property away from the courts in the first place. According to Jefferson, the courts were not simply an appropriate mechanism for providing redress to those injured by neutrality violations—they were the mechanism. As Jefferson explained to a claimant, “wherever the courts can give a remedy, the Executive do not

\textsuperscript{128} Fauchet to Randolph, June 8, 1795 (20 Prairial An 3), ASPFR, 1:614, 615.

\textsuperscript{129} Randolph to Fauchet, Sep. 8, 1794, DHSC, 6:527-28; Randolph to Fauchet, Oct. 22, 1794, ASPFR, 1:589; Randolph to Fauchet, June 13, 1795, ASPFR, 1:617, 618.

\textsuperscript{130} Jefferson to Genêt, Sep. 9, 1793, PTJ, 27:67; Jefferson to Genêt, June 29, 1793, ASPFR, 1:161; Randolph to Joseph Fauchet, Oct. 28, 1794, June 13, 1795, ASPFR, 1:593, 617-20; Pickering to Adet, Aug. 25, 1795, Oct. 1, 1795, ASPFR, 1:631-32, 634.

\textsuperscript{131} Notes on Cabinet Meetings, Sep. 4. 1793, PTJ, 27:32, 33.
intermeddle.” This meant that, even if the executive believed that a particular suit was unsupported by evidence, it could not prohibit a private litigant from seeking redress in court. According to Randolph, this principle of noninterference was constitutionally obligatory. The “partitions of power” in the federal government did not allow one branch to intervene in the business of another, he explained to Fauchet: “So speak the constitution and the law.”

French officials had difficulty accepting the administration’s conception of judicial authority. At a high level of abstraction, there was common ground. When Randolph justified the administration’s position by invoking the “partitions of power,” Fauchet reassured his counterpart that he agreed with the general principle. In his view, the “independence of the judicial power” was a “sacred maxim” common to all “liberal governments.” Fauchet had recent authority for his assertion: The French Declaration of the Rights of Man and the Citizen itself declared that “[a]ny society in which ... there is no separation of powers has no constitution.”

The two sides differed significantly, however, as to why judicial independence mattered. For the Americans, the separation of powers enshrined a principle of executive nonintervention in judicial affairs. As Jefferson put it to Genet, the federal courts exercised “the sovereignty of this country in judiciary matters.” Jefferson believed that shielding the judiciary from executive branch interference was essential to the preservation of private property, and once a private litigant had exercised his fundamental right to submit his claims to a court “there is no power

134 Decl. of Rts. of Man and Citizen of 26 Aug. 1789, Art. 16.
which can take them out.” To allow such disputes to be diverted out of the courts threatened the very foundations of a governmental system predicated on ensuring that no branch of government held too much power over its citizens.\textsuperscript{135}

For French officials, separation of powers meant something different. The evil that threatened from a failure to enforce the lines demarcating the branches of government was not the crumbling of the judicial bulwark that protected individual rights. Instead it was the reverse: Judicial “meddling” in what were fundamentally political affairs—as French officials accused the Washington Administration of permitting—undermined the sovereign lawmaking authority of the people.\textsuperscript{136} Such views were undoubtedly informed by the deep suspicion of the judiciary that ran through the politics of the French Revolution. Under the \textit{ancien régime}, courts in France—especially the regional \textit{parlements}—were redoubts of aristocratic privilege, reviled for exercising quasi-legislative powers and interfering with the administration of justice. Cabining judicial authority became a central tenet of French revolutionary reforms. To that end, the Constituent Assembly passed a law that mandated popular election of judges to short terms of office, abolished appellate courts, and prohibited courts from “making regulations.” Indeed, the law forbade them from interfering with either the legislature or the executive branches at all—a principle subsequently enshrined in the constitutions of 1791 and 1795.\textsuperscript{137} Courts were not the only problem, for litigation itself interfered with citizens’ enjoyment of their rights. Reform legislation in the 1790s required claimants to present their grievances to lay justices of the peace,


\textsuperscript{136} Mangourit to Ministère des Affaires Étrangères, Feb. 21, 1794, AMAE, Correspondence Consulaire et Commerciale, Charleston, 2:204.

encouraged arbitration as “[t]he most reasonable means for terminating disputes,” and even abolished the organized bar.\footnote{Nicolas Deresse, “Words and Liberty: Hopes for Legal Defence During the French Revolution,” \textit{Quaderni Storici}, Vol. 47, No. 141 (3) (December 2012), pp. 745-770.} One deputy aptly summarized the revolutionary perspective: “Rendering justice is only the second obligation of society. Preventing lawsuits is the first.”\footnote{Quoted in Woloch, \textit{The New Regime}, 307.}

French officials in the United States never persuaded the Washington Administration of the importance of “preventing lawsuits.” The administration’s approach was not entirely hands-off. On occasion it did intervene—gently—to protect France’s sovereign rights from litigious abuse. When a Philadelphia merchant brought suit directly against a French naval warship for an alleged illegal seizure in the Caribbean, Randolph deflected French demands that the executive branch release the vessel outright by asking the federal district attorney for Pennsylvania to file a “suggestion” with the district court urging dismissal on the basis of sovereign immunity.\footnote{Yard v. Ship Cassius, suggestion of William Rawle, Aug. 21, 1795, Pennsylvania Admiralty; \textit{DHSC}, 6:720.} Yet when the plaintiffs simply refiled their case in another court, the administration responded to French outrage by repeating its mantra: “[A]s long as the question is in the hands of the courts,” averred Randolph’s successor Timothy Pickering, “the Executive cannot withdraw it.” Though the federal attorney eventually persuaded the second court to dismiss the case, by that time the ship had fallen into disrepair and was not worth recovering. Soon after, Fauchet’s successor summed up mounting French frustration in a bitter letter to Pickering. For three years, the Washington Administration had repeatedly failed to fulfill its treaty obligations to France. Instead, it had simply “abandoned French privateers to its courts of justice.”\footnote{Pickering to Adet, Aug. 25, 1795, Oct. 1, 1795, \textit{ASPF}, 1:631-32, 634; Adet to Pickering, Nov. 15, 1796, \textit{ASPF}, 1:580; \textit{DHSC}, 6:726-27.}
A Cautious Court

The tensions that arose from litigation over French captures soon arrived at the Supreme Court’s door. By early 1796, its docket was crowded with cases arising from French privateering, almost all of them appeals by claimants who had lost in the courts below. As a result, British officials were not confident in their prospects for success, and their fears proved prescient. The captors ended up prevailing in fifteen out of nineteen cases the Court decided in 1796 and 1797. Benjamin Moodie, the British consul in Charleston, was responsible for eleven of the cases appealed, and he lost every one.142

The challenge the justices faced was more difficult than the lopsided tally of wins and losses might suggest. On the one hand, three years of litigation had largely rendered federal court jurisdiction over privateer captures a fait accompli. It would be unthinkable for the Court to now rule that the courts were closed to claims alleging violations of American neutrality. On the other hand, just how far that jurisdiction extended was still subject to dispute. French officials may have conceded that judicial involvement was legitimate in the abstract, but they continued to insist that the United States was obliged by treaty and the law of nations to shield French captures from their opponents’ legal depredations. It would be left to the Court to decide how to reconcile the nation’s legal duties with the need for providing redress to injured claimants—just as the Washington Administration had hoped..

The Court made one thing clear in its first privateering case following Glass: The federal courts’ jurisdiction over French captures was no longer seriously in question. In Talbot v.

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142 Bond to Moodie, Mar. 3, 1796, UKNA, FO 5, 15:76; Sloss, “Judicial Foreign Policy,” 176-83. Though determining with precision the total number of cases the early Court considered in a given term is difficult, one tally puts the number for 1796 and 1797 at twenty-three. Lavinbuk, “Early Judicial Involvement,” 897. During this period the Court heard two cases, MacDonogh v. Dannery and United States v. Peters, which arose from captures made by French national warships, not privateers. DHSC, 6:719-27; 7:11-17.
Jansen, the Court unanimously ruled that direct American participation in French privateering could serve as the basis for restoration of captured vessels and cargo.\textsuperscript{143} Talbot involved the capture of a Dutch ship by two French-commissioned privateers that had allegedly been fitted out in the United States and captained by Americans. Because France and Holland were at war, DuPonceau urged the Court to limit Glass’s grant of jurisdiction to captures of American or neutral vessels. It declined. In fact, the justices largely ignored the question that had sparked so much controversy in the lower courts: whether jurisdiction over prizes made by French-commissioned vessels was proper under treaty and international practice. Talbot involved complicated questions respecting the captains’ citizenship, the provenance of their commissions, and the circumstances of the capture. Argument took ten days, and resulted in four separate opinions. But the justices agreed that the fact that the privateer vessels had been fitted out in the United States was sufficient to justify restoration of the seized property.\textsuperscript{144}

The decision in Talbot sent a strong signal that the Court would not permit Americans to avoid legal responsibility for their depredations. The ship captains in the case had clearly colluded in an attempt to evade the restrictions in the Neutrality Act, yet—once again—criminal prosecutions against them had failed. As Justice Paterson explained, to allow such conduct to go unpunished altogether would be to condone a “fraudulent neutrality” and endanger “the safety of the nation.”\textsuperscript{145} Justice Iredell likewise echoed the warnings President Washington issued in his Neutrality Proclamation: “[E]ach Citizen must conform his conduct” to the obligations of

\textsuperscript{143} Talbot v. Jansen, 3 U.S. 133, 152-55 (1795) (Paterson, J.).  
\textsuperscript{144} Only Justice Iredell addressed the question. Given the captors’ flagrant violation of “our law” as well as “the law of nations generally,” Iredell had not “the slightest doubt” that jurisdiction was proper. Talbot, 3 U.S. at 161 (Iredell, J.).  
\textsuperscript{145} Talbot, 3 U.S. at 153, 155 (Paterson, J.); DHSC, 6:655-56.
neutrality; otherwise, “war might [be] the consequence.”146 Restoring the seized ship to its rightful owners was the least the United States could do.

At the same time, the Court expressed concern that opening the courts entirely would violate the nation’s obligations under treaty and the law of nations. The 1778 Treaty of Amity, Chief Justice Oliver Ellsworth asserted in a subsequent case, “must have its effect.” To that end, the Court limited the degree to which violations of the Neutrality Act could serve as the basis for restoration of captured property. For example, while the Act prohibited arming ships to make war, the Court ruled that minor alterations to a vessel were permissible, in light of Article 19’s express provision allowing French privateers to visit American ports for repairs.147 The Court also ruled that, even when a vessel had been altered in a way that violated the Neutrality Act, Article 17’s prohibition on the “examination” of French prizes by U.S. officials prohibited suit if the ship was first sold to a French purchaser. The claimants protested that tolerating such transactions would render it too easy to subvert American neutrality, but the Court ruled in the captors’ favor without even needing to hear argument from their counsel.148

In fact, the justices’ desire to hew to international law raised doubts about whether Neutrality Act violations could serve as the basis for the restoration of property at all. The Court actually had little occasion to consider its remedial authority, because it only ruled in the claimants’ favor in a handful of cases. And in Talbot the Court had no qualms about exercising such authority. But in a later draft opinion that was never published, Justice Iredell expressed misgivings about restoration of prizes. As he noted, the Neutrality Act provided specific penalties for violations:

146 James Iredell’s Draft of a Supreme Court Opinion, [Mar. 12-14, 1796], DHSC, 7:180, 183, 184.
fines and imprisonment for individuals, and forfeiture of the offending privateer vessel to the government. The Act did not grant the courts authority to return captured vessels or cargo to their original owners. To be sure, Congress had also not prohibited restoration, so a court could theoretically use its general remedial powers to do so. But that was true only if the law of nations allowed for such a remedy. Like district court judges had earlier, Iredell doubted whether the law of nations authorized courts to restore maritime property captured in violation of American neutrality. Such an act was a mere “local offence,” perpetrated only against the United States, not against the individual claimant. Finding no warrant in the law of nations for the restoration of prizes, Iredell declined to infer that Congress had implicitly granted the courts such authority.

The Court recognized that a constrained reading of the Neutrality Act created difficulties for American relations with Great Britain. Under the Treaty of Amity, British privateers were largely excluded from American ports, but the Court’s narrowing of the Neutrality Act allowed French privateers more latitude. The justices may have agreed with the Washington Administration that observing a perfect impartiality between the warring powers was the most diplomatically profitable path. But the importance of keeping faith with the nation’s commitments under treaty and international law trumped such considerations. Ellsworth made the point explicit in response to the argument by British claimants that it was politically dangerous to allow French privateers to equip in United States ports. “Suggestions of policy and

149 James Iredell’s Draft of a Supreme Court Opinion, [Mar. 12-14, 1796], DHSC, 7:186.
150 James Iredell’s Draft of a Supreme Court Opinion, [Mar. 12-14, 1796], DHSC, 7:184-85.
151 James Iredell’s Draft of a Supreme Court Opinion, [Mar. 12-14, 1796], DHSC, 7:185-86.
152 Treaty of Amity and Commerce (1778), Art. 22.
conveniency,” the Chief Justice explained, “cannot be considered in the judicial determination of a question of right.”

The Court’s decisions also reflected a deeper discomfort over assuming the task of enforcing American neutrality. At various points the justices registered their concern about the impact that legally complex, fact intensive, and diplomatically sensitive cases would have on the courts themselves. As Iredell noted in a draft opinion, a broad reading of the Neutrality Act’s prohibitions would do precisely what French officials complained about: It would enable victims of French privateering to complain of any “trifling augmentation” of a privateer’s force, creating “an inexhaustible fund of dispute” with which to invoke the federal courts’ jurisdiction.

In 1796, an “inexhaustible fund of dispute” was anathema to the justices. Adjudicating privateering cases usually obliged district court judges to sift through a great deal of evidence in order to determine the facts regarding the privateer’s construction, repair, armament, crew, sale, and commissioning. The same was true for appellate judges, including the justices of the Supreme Court. In early cases, they followed the traditional admiralty practice of reviewing cases on “appeal,” under which an entire proceeding was transferred to a superior tribunal for full rehearing (and sometimes a new trial). It was not entirely clear whether this was correct procedure under the Constitution and the Judiciary Act of 1789, but the justices reflexively

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153 The Phoebe Anne, 3 U.S. at 319.
154 James Iredell’s Draft of a Supreme Court Opinion, [Mar. 12-14, 1796], DHSC, 7:180, 185, 186.
155 British Consul v. The Mermaid, 4 F. Cas. 169 (D.S.C. 1795); Moodie v. The Brothers, 17 F. Cas. 653 (D.S.C. 1795); Moodie v. The Betty Carthcart, 17 F. Cas. 651 (1795).
conformed to British and pre-Ratification state practice.\textsuperscript{157} As a result, privateering cases consumed the court’s attention. The sheer number of lawsuits doubled the size of the Court’s docket, and each case individually took significant time to adjudicate.\textsuperscript{158} In the midst of the ten-day argument in \textit{Talbot}, Justice Iredell complained to his wife that he was trapped in Philadelphia because the attorneys were “so scandalously long in arguing” over the facts of the case.\textsuperscript{159}

The justices did not appreciate the increased workload. They were are already aggrieved by Congress’s refusal to relieve them of their circuit-riding duties, which required them to be away from home for months at a time. Indeed, the justices considered the southern circuit—which included the privateering hotspot in Charleston—to be so burdensome that they privately agreed to each pay a portion of their own salaries to a colleague who volunteered for that duty.\textsuperscript{160} The justices had also resisted legislative attempts to saddle them with additional administrative responsibilities.\textsuperscript{161} Throughout the 1790s, in fact, reservations about these demands prompted a

\textsuperscript{157} Article III of the Constitution gave the Supreme Court appellate jurisdiction “both as to law and fact.” Section 21 of the Judiciary Act specified that “appeals” from the district to circuit court were allowed in admiralty cases, but Section 22 provided that all “civil actions” were to be “re-examined … in the Supreme Court” on writ of error only. U.S. Const, art. III, § 2; Judiciary Act of 1789, § 22, 1 Stat. 73, 84-85; Karachuk, “Error or Appeal?,” 94-101.

\textsuperscript{158} The arrival of the French privateering cases in 1796 caused the Court’s docket to double, and following a steep dropoff once the Neutrality Crisis ended, it would be nearly a decade before its workload reached the same heights. Lavinbuk, “Early Judicial Involvement,” 897.

\textsuperscript{159} James Iredell to Hannah Iredell, Aug. 13, 1795, \textit{DHSC}, 1:780; Karachuk, “Error or Appeal?,” 97.

\textsuperscript{160} Thomas Johnson to George Washington, Jan. 1793, \textit{DHSC}, 2:344; \textit{DHSC}, 2:288-92, 434 n.1, 438. In the 1790s the justices repeatedly asked Congress to reduce or eliminate the burdens of circuit riding, and John Jay nearly resigned as Chief Justice in 1792 due to his displeasure over the requirement. Justices of the Supreme Court to the Congress of the United States, Aug. 9, 1792, \textit{DHSC}, 2:289, 289-90; \textit{DHSC}, 2:434 n.1; Holt, “Federal Courts Have Enemies.”

\textsuperscript{161} On the controversy that erupted over a Congressional plan to have Supreme Court justices review claims to Revolutionary War pensions, see Hayburn’s Case, 2 U.S. 409 (1792); Geyh and Van Tassel, “Independence of the Judicial Branch,” 31.
number of candidates to decline appointment to the Court.\textsuperscript{162} Little wonder that Iredell—who most often rode the southern circuit—vented his frustrations in a judicial opinion: The “petty inquiries” occasioned by allegations of improper equipping in American ports were not a fit undertaking for “a Court of Justice.”\textsuperscript{163}

The solution the Court found was to limit the scope of its review in maritime cases. Section 19 of the Judiciary Act of 1789 required circuit courts to specify the facts in the record upon which they based their judgments, usually in a statement by the presiding judge.\textsuperscript{164} The Supreme Court ruled that such a statement was conclusive when the record did not include the evidence presented below (such as copies of testimony and exhibits presented to the court below). This meant that the parties could not present the evidence anew to the Supreme Court. The Court then went a step further, and ruled that a circuit court’s statement of facts was conclusive even when the record contained other evidence. In other words, under Section 19, the Court could not independently review the facts in an admiralty case.\textsuperscript{165} And in a subsequent decision, the Court extended this principle to its full extent: The Court could not investigate the facts in an admiralty case even when the record included no statement from the court below at all.\textsuperscript{166} In short, the scope of the Court’s review was limited to questions of law only.

The Court’s self-imposed limitation worried some justices. Justice Wilson had served on the committee in the Continental Congress that heard appeals in state court prize cases. He had

\textsuperscript{163} \textit{DHSC}, 6:656 n.33; James Iredell’s Draft of a Supreme Court Opinion, [Mar. 12-14, 1796], \textit{DHSC}, 7:184-87. \\
\textsuperscript{164} Judiciary Act of 1789, § 19, 1 Stat. 73, 83. \\
\textsuperscript{165} \textit{Wiscart} v. Dauchy, 3 U.S. 321, 324 (1796). \textit{Wiscart} was not a French privateering case, but it is clear from the context of the August 1796 term that the rule it announced was deeply informed by the privateering cases the Court was considering at the time. \textit{DHSC}, 7:734. \\
\textsuperscript{166} Jennings v. The Brig Perseverance, 3 U.S. 336, 337 (1797).
witnessed first-hand the bitter dispute that had arisen over the attempt to vest the Court of Appeals in Cases of Capture with the power to revisit the facts in prize cases adjudicated in state courts. The supporters of plenary review worried that the central government would otherwise be unable to “giv[e] satisfaction to foreign nations” in cases where state courts were biased in favor of American captors.\textsuperscript{167} For Wilson, those fears remained nearly two decades later. More than ever, admiralty cases implicated the “rights and pretensions of foreign nations.” It was therefore essential to the nation’s “security and dignity” that its highest tribunal scrutinize a lower court’s conclusions as to both law and fact.\textsuperscript{168} Justice Paterson agreed, complaining that the majority’s deferential approach to factual review “shut[] the door against light and truth.” With the Court forbidden from considering underlying evidence, it would have no way of determining whether the court below had correctly decided the case. As Paterson complained, the Court’s new approach to admiralty cases left “too much to the discretion and judgment of a single Judge.”\textsuperscript{169}

Wilson and Paterson’s anxieties may have sounded familiar, but their colleagues were not persuaded. Chief Justice Ellsworth served on the same Continental Congress appeals committee as Wilson. But he apparently drew a different lesson from that experience. Centralized review of factual determinations made by state juries in prize cases may have been a diplomatic necessity during the Revolution. The same was not true in juryless admiralty proceedings in the new federal courts. Indeed, Ellsworth saw no reason why the justices would be better able to discern the relevant facts when sitting together in Philadelphia than they would while sitting on circuit with district court judges. Echoing the assurances the Washington Administration had

\textsuperscript{168} Wiscart, 3 U.S. at 327.
\textsuperscript{169} Jennings, 3 U.S. at 337; DHSC, 7:817-18.
consistently given to French and British officials, Ellsworth asserted that the parties’ factual assertions would be evaluated by “an impartial and enlightened tribunal” in which they could have full confidence.\footnote{Ibid., 329-30.}

For Ellsworth, the benefits of deference to lower courts outweighed any costs. He noted that plenary review produced great “inconveniency,” both “private and public.” Eyewitness testimony figured prominently in many admiralty cases, so local district and circuit courts were well-positioned develop the facts. In contrast, bringing witnesses from “the remotest parts of the union” to testify before the justices presented a logistical nightmare. And for what purpose? Surely a litigant could have no cause for complaint for being denied the opportunity trying the facts of his case “two or three times over.” Like Wilson, Ellsworth fully recognized the international implications of the Court’s decision. But he doubted whether such refusing to indulge disappointed litigants with multiple bites at the apple would be viewed by foreigners as a denial of justice “imputed to our government.”\footnote{Wiscart, 3 U.S. at 329-30.}

However sensible the decision to limit the Court’s review, its timing was a bit curious. As we will soon see, by mid-1796 the justices could already anticipate an end to French privateering litigation. But the unprecedented crush of cases the Court faced undoubtedly offered the justices an unappealing glimpse of their future. In an era of constant maritime war, plenary review of all cases falling under the federal judiciary’s admiralty jurisdiction would only add to their burdens. The Court’s response was refuse responsibility for ensuring a correct outcome in every case of

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wartime rights that landed on American shores. Instead, in Ellsworth’s words, the Court’s function was only “to preserve unity of principle” and ensure the “administration of justice.”  

**Crisis Averted?**

Despite the Supreme Court’s caution, federal judges ultimately proved instrumental in quashing French privateering in the United States. This was not what Benjamin Moodie predicted. He expected that privateers would redouble their operations, flush with funds from the sale of disputed prizes and emboldened by the Court’s favorable rulings. Nor was he sanguine about his legal chances going forward. Now the only solid ground for seeking restoration of captured ships was direct American involvement in privateering. In his view, both the Neutrality Act and the law of nations had otherwise been “entirely set aside” in the courts.

Yet not all hope was lost. The Senate had ratified the treaty that John Jay negotiated with Great Britain, and Article 24 of that agreement prohibited the sale of prizes made by privateers with commissions from Great Britain’s enemies—i.e., French prizes. This was the very same prohibition that Madison had successfully excised from the Neutrality Act before its passage, and Washington had specifically authorized Jay to accept a prize sale ban in the treaty negotiations. Moodie wanted to make use of this new tool right away, but he was “tired of losing” against French privateers in federal court. So when another valuable French prize arrived

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172 *Wiscart*, 3 U.S. at 329-30. In 1803 Congress effectively overruled the Court’s decision in *Wiscart*. It repealed Sections 19 and 22 of the Judiciary Act of 1789 and explicitly provided that “new evidence” could be introduced in the Supreme Court in admiralty and prize cases. Judiciary Act of 1803, § 2, 2 Stat. 244.

173 Moodie to Bond, Apr. 23, 1796, UKNA, FO 5, 15:80; Moodie to Vice Admiral Murray, Apr. 6, 1796, UKNA, FO 5, 15:78; *DHSC*, 7:116.

174 Moodie to George Miller, Apr. 27, 1796, UKNA, FO 5, 15:86.


in Charleston, Moodie instead asked state officials to prevent the prize’s impending sale by the French consul.177

As Moodie well knew, enforcement of the treaty’s terms by state officials was by no means guaranteed. The treaty was deeply controversial. Jay had concluded it in late 1794, but the Washington Administration kept it secret for months, and the Senate did not ratify it (on a party-line vote) until August 1795.178 Ratification sparked fierce opposition, and things came to a head in the spring of 1796, as debate over treaty implementation inflamed the House of Representatives. One of the chief complaints opponents levied against the pact was that the Washington Administration and its Federalist allies in the Senate had unconstitutionally used the treaty power to exclude the House from domestic lawmaking. They argued that treaty provisions addressing issues within Congress’s legislative authority only had the force of law if Congress passed legislation enacting them.179 Given the ongoing disagreement, vigorous enforcement of an unpopular agreement—in a town that retained French sympathies—was by no means guaranteed.

Moodie was unable to persuade local officials to halt the sale of the prize. Wary of courting controversy in an episode that had become “the talk of the town,” neither the state attorney general nor the federal district attorney were prepared to opine as to Article 24’s legal effect.180

177 Moodie to Charles Cotesworth Pinckney, Apr. 8, 1796, UKNA, FO 5, 15:82; Dupont to Adet, Apr. 12, 1796 (23 Germinal An 4); Dupont to Adet, Apr. 15, 1796 (26 Germinal An 4), Dupont Papers, box 2, folder 309.


180 Moodie to Charles Cotesworth Pinckney, Apr. 8, 1796; Pinckney to Moodie, Apr. 10, 1796; Moodie to John Julius Pringle, Apr. 11, 1796; Pringle to Moodie, Apr. 11, 1796; Victor Dupont to Pierre-Auguste Adet, Apr. 12, 1796 (23 Germinal An 4), Dupont Papers, box 2, folder 309; Victor Dupont to Pierre-Auguste Adet, Apr. 15, 1796 (26 Germinal An 4), Dupont Papers, box 2, folder 309.
Moodie was surely not surprised when the colonel commanding the local militia responded to his request for intervention by referring Moodie to the judiciary: “[T]he Courts of the United States are open to all the subjects of his Britannic Majesty,” the colonel averred, and there could be no doubt they would provide “every degree of Justice” to which the claimants were entitled.” But Judge Bee was not inclined to help either. Absent any allegation that the capturing privateer had violated American neutrality, Article 17 precluded the court from taking jurisdiction over the case.

Then the Supreme Court stepped in and gave Moodie a break. Chief Justice Ellsworth happened to be passing through Charleston on his route through the southern circuit. At Moodie’s request, Ellsworth held a “special court” and issued an injunction to stop the prize sale, on the ground that Article 24 entirely barred the sale of captures made by French privateers. A few days later, the regularly constituted circuit court affirmed the ruling. This was perhaps to be expected. Only a month earlier, the Supreme Court had ruled that the 1783 Treaty of Peace with Great Britain was self-executing, and overrode any conflicting state laws. Though that decision did not involve the Jay Treaty, it provided a firm jurisprudential basis for Ellsworth’s ruling that Article 24’s prize sale ban applied of its own force, without the need for congressional legislation.

British officials immediately used Ellsworth’s “lucky interposition” to goad the Washington Administration into action. At their suggestion, Secretary of State Timothy Pickering asked

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181 William Lee to Moodie, Apr. 12, 1796, UKNA, FO 5, 15:84.
182 Moodie v. Ship Amity (1796), in Bee, Reports of Cases, 1:89.
183 Moodie to Miller, May 14, 1796, UKNA, FO 5, 15:90; Dupont to Adet, May 10, 1796 (21 Floréal An 4), Dupont Papers, box 2, folder 309; Adet to Pickering, Oct. 12, 1796 (21 Vendémaire An 4), ASPFR, 1:654, 654; DHSC, 3:89 & n.16.
184 Ware vs. Hylton, 3 U.S. 199 (1796); Golove and Hulsebosch, “Civilized Nation,” 1057-59.
Ellsworth to circulate his opinion to all federal judges “for their information and guidance.” And with judicial imprimatur of the treaty in hand, Treasury Secretary Oliver Wolcott ordered customs collectors to prevent French privateers from unloading cargo from British captures.\textsuperscript{185}

To top off the British successes, Federalists in the House of Representatives overcame Republican opposition and voted to implement the Jay Treaty.\textsuperscript{186} A British official happily reported to his superiors that, by early summer, the treaty was taking effect “even at Charleston.”\textsuperscript{187}

This reversal of fortune left French officials aghast. They were already alarmed over the treaty’s concessions to Great Britain. In fact, French minister Pierre-Auguste Adet tried to sink the agreement entirely, by helping publicize it when the administration was keeping it secret.\textsuperscript{188} But Ellsworth’s unfavorable ruling, the Charleston consul warned, “entirely change[d] our political situation in this country.”\textsuperscript{189} He was not being hyperbolic, as a ban on prize sales deprived French privateers of their most lucrative market. Adet briefly considered appealing Ellsworth’s ruling, but he counted few friends on the Supreme Court.\textsuperscript{190} The minister was undoubtedly influenced by DuPonceau’s opinion that Article 24 clearly prohibited French prize sales within the United States.\textsuperscript{191} Conceding the impossibility of his situation, Adet ordered French consuls to cease facilitating prize sales in the United States until he received further

\textsuperscript{185} Liston to Pickering, June 29, 1796, NARA, Notes from British Legation to the United States, microfilm M50; Liston to Grenville, July 3, 1796, UKNA, FO 5, 14:63; \textit{DHSC}, 3:90 & n.19; Casto, \textit{Supreme Court}, 115-17.

\textsuperscript{186} DeConde, \textit{Entangling Alliance}, 139-40.

\textsuperscript{187} Shoolbred to Hammond, June 23, 1796, UKNA, FO 5, 15:88.


\textsuperscript{189} Dupont to Adet, May 10, 1796 (21 Floréal An 4), Dupont Papers, box 2, folder 309.

\textsuperscript{190} Adet to Dupont, June 16, 1796 (28 Prairial An 4), Dupont Papers, box 2, folder 309; \textit{DHSC}, 3:89 n.16.

\textsuperscript{191} Opinion of Jared Ingersoll, John Coxe, and Peter S. DuPonceau, July 26, 1796, HSP, DuPonceau Letterbooks 1:168.
instructions from Paris.192 Though Adet continued to press his case in correspondence with
Pickering, he and his subordinates understood their reality all too well.193 Under the Treaty of
Amity, one of them wrote, France was ostensibly in a “privileged” relationship with the United
States. “[B]ut today our privileges are so imperceptible that it becomes ridiculous to even use the
term.”194

For France, the Jay Treaty was the final straw. French officials on both sides of the Atlantic
saw the “Treaty of Amity and Commerce” with Great Britain—as it was officially named—as a
crass choice to privilege American self-interest over the nation’s preexisting commitments to its
former ally. As the French consul in Baltimore quipped to his superiors, the Americans had
“prostituted their friendship to save their commerce.”195 The complaints went beyond the treaty.
In March 1796 Charles Delacroix, the French minister of foreign affairs in Paris, presented
James Monroe with a “summary exposition” of the various ways in which the United States had
favored Great Britain in the war. It included the United States’ acceptance of expansive British
definitions of contraband of war in the Jay Treaty, its tolerance of armed British ships calling in
American ports, and its failure to pursue French deserters. In all these areas, Delacroix
complained, the United States had consistently failed to fulfill its obligations to France.196

Delacroix’s “first complaint,” however, was about the courts. Contrary to express
stipulations, the courts had taken jurisdiction over prizes made by French privateers. Echoing the

192 Adet to Dupont, Aug. 9, 1796 (22 Thermidor An 4), Dupont Papers, box 2, folder 309.
193 Adet to Pickering, Oct. 12, 1796 (21 Vendémaire An 4), ASPFR, 1:654-55; Pickering to Adet, Nov. 15, 1796,
ASPFIR, 1:655-56.
194 Duhail to Ministère des Relations Extérieures, Aug. 29, 1796 (12 Fructidor An 4), Correspondance Consulaire et
Commerciale, Baltimore, 1:164.
195 Duhail to Ministère des Relations Extérieures, June 25, 1796 (7 Messidor An 4), Correspondance Consulaire et
Commerciale, Baltimore, 1:158.
196 Charles Delacroix to James Monroe, March 9, 1796, ASPFR, 1:732, 732-33; Tucker & Hendrickson 70-73.
complaints of French officials in the United States, Delacroix charged that “[t]he disgust, the delays, and the losses,” that resulted from the British litigation campaign had effectively deprived France of the “advantage” to which it was entitled under its treaties.\footnote{Charles Delacroix to James Monroe, March 9, 1796, ASPFR, 1:732, 732.} And despite the good faith French efforts to develop alternative arrangements for resolving disputes over captured ships and cargo, the Washington Administration had failed to prevent this “usurpation” of France’s exclusive authority to resolve disputes over the conduct its privateers.

Monroe’s reply repeated the position taken by the Washington Administration throughout the Neutrality Crisis. He agreed that, generally speaking, American courts could not judge the validity of French captures. But when a privateer violated American neutrality, the United States was bound to uphold its “rights as a sovereign”—just as France would in the same situation. Whether vindication came via “tribunals” or “some other branch of our Government” made no difference. What mattered was that the United States acted as a “neutral party in the present war.”\footnote{Monroe to Delacroix, Mar. 5, 1796, ASPFR, 1:733, 733.} The French government might have been surprised to receive such an unqualified defense of the administration’s position from Monroe. He was strongly pro-French, and had been a severe critic of the Washington Administration before his appointment as minister. His conduct while in office had only heightened suspicions in the cabinet about his excessive friendliness toward France, and Pickering thought Monroe’s overall defense of the United States’ actions was “as feeble as could have been desired.” In fact, Washington recalled Monroe from Paris soon after.\footnote{DeConde, Entangling Alliance, 342-91.}

The French government was no more satisfied with Monroe’s explanations than it had been with Jefferson’s three years earlier. Soon the former allies were at each other’s throats. In
response to what France perceived to be the United States’ repeated breaches of faith, French privateers operating in the Caribbean began seizing American merchant vessels on flimsy pretexts. These aggressions prompted a series of recriminations between the two nations that would soon lead to an undeclared maritime war between the two nations, known as the Quasi-War. Though the federal courts’ assumption of jurisdiction over French prizes was only one item on a long list of grievances, it was a significant one—in Delacroix’s view, first among equals.

The outbreak of hostilities between the former allies does not mean that the Washington Administration’s turn to the courts was a failure. To the contrary; while judicial intervention in the affairs of state helped precipitate armed conflict with France, it may have also helped prevent war with Great Britain. To be sure, British officials never fully agreed that litigation in federal court was an adequate substitute for decisive action by the Washington Administration to interdict French privateering. But they recognized that even a sympathetic executive branch lacked the “energy” required to enforce compliance with the obligations of neutrality. At the same time, they came to appreciate the degree to resort to the judiciary could help further their political and military goals.

In fact, confirmation of the wisdom of the Washington Administration’s approach was not long in coming. One of the Jay Treaty’s provisions called for a bilateral commission to adjudicate British and American claims arising from maritime captures. American claimants were to receive compensation (from Britain) for seizures made by British vessels that violated American neutral rights, and British claimants were to receive compensation (from the United

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201 John Hamilton to Grenville, June 26, 1794, UKNA, FO 5, 6:219.
States) for seizures made by French privateers armed in American ports.202 The commission began its work in October 1796.203 By the time it finished its business in 1804, it awarded more than $11.5 million to American claimants for unlawful British depredations. In contrast, the commission awarded British claimants less than $150,000.204

The huge discrepancy between the two award amounts was vindication of Jefferson’s strategy for making use of the courts. Under the Jay Treaty, American claimants were to receive compensation whenever they could not secure it “in the ordinary course of Justice”—i.e., when they were unsuccessful seeking restoration of their property in British admiralty courts. This was a significant issue, as American claimants faced numerous obstacles in British tribunals. Some were procedural: Claimants had very little time in which to appeal an unfavorable ruling, but then had to suffer endless delays before their appeals were heard. In other cases the problem was substantive fairness. British vice-admiralty courts in the Caribbean were often predisposed to rule in favor of the captors, regardless of the facts of the case. Indeed, some claims the commission heard arose from adjudications by an illegal prize court established by British military forces for the express purpose of condemning captured ships. In light of the blatant discrimination against American claimants, the commission awarded compensation to hundreds.205 The standard for granting compensation to British claimants against the United States did not refer to the courts directly. British claimants were to receive compensation if the United States had failed to use “all the means in [its] Power to protect and defend [British]

202 Treaty of Amity, Commerce, and Navigation, art. 7 (1795).
Vessels and Effects.” This language was not in the Jay Treaty itself. It came from the 1793 letter from Jefferson to British minister Hammond pleading that the Washington Administration would do everything possible to prevent French privateers from using the United States as a base of operations.\(^\text{206}\) Of course, the Administration’s attempt to restrain French privateering through executive-branch action failed, quite miserably. Yet the claims commission nevertheless only awarded British claimants compensation in a small handful of cases.

The courts were the reason the United States paid British claimants almost nothing in compensation. In rejecting numerous British claims, the commission repeatedly noted that the federal courts had been open to claims arising from violations of American neutrality. The commission discussed the Supreme Court’s decision in Glass at length. It noted that, after the Court rendered its decision in that case, “justice was speedily and impartially administered” in courts across the nation—“even in Charleston.” Because the federal courts had delivered justice to British claimants, the United States had no obligation to “exert[] force” to compel restitution of captured ships and cargo, or provide any other mode of redress.\(^\text{207}\)

The commission’s decision was Jefferson’s theory triumphant. According to the commission, the United States fulfilled its legal obligations under treaty and the law of nations simply by providing a judicial forum for restitution of property captured in violation of American neutrality. In fact, it was irrelevant whether British litigants had actually prevailed in court and secured compensation for their losses (and many had not). The commission ruled that, even when judicial means of redress “should fail of their effect,” the United States was not responsible for making up the shortfall. This was a critical point; otherwise, the dozens of British claimants


whose suits were dismissed by the federal courts would have been eligible for compensation. According to the commission, what the United States owed British claimants was not substantive relief in each case. All that was required was an adequate process for pressing claims. And that is precisely what the federal courts had provided.\footnote{Moore, \textit{International Adjudications}, 4:547, 549-50.}

The commission’s decision underscored the degree to which the events of the Neutrality Crisis had stretched the boundaries of the judicial role in foreign affairs. At the Crisis’s outset, federal judges, foreign diplomats, and even members of the Washington Administration believed that the courts lacked the authority to adjudicate disputes with deep implications for the relations between sovereign nations. Even as various protagonists grudgingly came to accept litigation as a means of resolving disputes arising from French privateering, for many—including the justices of the Supreme Court—it was not their preferred mode of proceeding. Yet within a few years there was transatlantic agreement that the judiciary was perfectly capable of fulfilling a critical portion of the nation’s obligations under treaty and international law. Indeed, in the commission’s eyes American courts had proven themselves to be far more capable of providing justice to the citizens and subjects of foreign sovereigns than British tribunals had been. Though it would be a number of years before the promise of a more robust judicial role in wartime foreign affairs would come to fruition, the path forward was now clearly marked.