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# The Courts and Foreign Affairs at the Founding

*Kevin Arlyck\**

## INTRODUCTION

In 1793 the Washington administration had a problem. Revolutionary France had recently declared war against Great Britain and several other European powers; what had formerly been a land-based conflict for continental supremacy was now spilling across the Atlantic. As the United States was both militarily weak and economically vulnerable, maintaining neutrality in the expanding conflict was the administration's top priority.

The belligerents were not cooperating. Claiming that treaties dating to the American Revolution gave France the right to license and arm private military vessels in the United States, French officials launched a wave of maritime attacks against British commerce from American shores. In response, Britain insisted that the United States, as a neutral nation, had an obligation to stop such predations and restore captured property to its owners—or face retaliation. Fully convinced of the necessity of remaining neutral in the expanding conflict, the Washington administration was in a quandary: How to respond to the demands of one belligerent without giving offense to the other.

The answer lay in the courts. In contrast to standard presidentialist accounts of how institutional responsibility for foreign affairs was distributed among the branches of the nascent federal government, this Article demonstrates that during the nation's first major foreign affairs controversy following ratification—known as the Neutrality Crisis—the Washington administration actively sought to enlist the help of the federal judiciary in managing a diplomatic emergency with

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dangerous implications. In particular, cabinet officials argued to skeptics at home and abroad that judicial resolution of disputes over British vessels captured by French privateers was consistent with both domestic constitutionalism and customary international practice. In so doing, the administration sought to transform a sensitive controversy over the nature of sovereign rights in wartime into a series of ordinary legal disputes over private property—disputes that the Constitution, Thomas Jefferson insisted, “ascribed to the Judiciary alone.”<sup>1</sup>

Jefferson’s claim may sound odd to modern readers, accustomed as we are to debate on the role of the courts in foreign affairs that generally presupposes an opposition between judicial decisionmaking and presidential policymaking. That was decidedly not the view of the Washington administration, which understood independent judicial resolution of disputes implicating the rights of foreign sovereigns to be supportive of rather than inimical to executive branch objectives. Because the executive branch lacked the institutional capacity to respond effectively to British demands for interdiction of French privateering, the administration sought to demonstrate the new government’s commitment to fulfilling the United States’ obligations as a neutral nation by leveraging the courts’ particular structural advantages. More importantly, pushing the controversy into the courts served as a means of deflecting responsibility for resolution of a highly sensitive diplomatic problem away from the executive. As Edmund Randolph, Jefferson’s successor as Secretary of State, explained to a judge in the midst of the Crisis, the administration’s view was that “the judiciary [was] in great measure combined with the Executive in the promotion of harmony between the United States and foreign nations.”<sup>2</sup>

The complementary dynamic between the two branches in early foreign relations has largely been forgotten. As a general matter, scholars have understood foreign affairs under the Washington

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1. Letter from Thomas Jefferson to Edmond-Charles Genet (June 17, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON 301, 301 (John Catanzariti ed., 1995) [hereinafter JEFFERSON PAPERS].

2. Letter from Edmund Randolph to John Laurance (Aug. 12, 1794), *in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 527, 527 (Maeva Marcus ed., 1998) [hereinafter DHSC].

administration to have been within the president's purview.<sup>3</sup> The few historical treatments of the Neutrality Crisis largely ignore the courts' role,<sup>4</sup> while others treat the courtroom battles over French privateering as a legal sideshow to the diplomatic main event.<sup>5</sup> Even scholarly accounts that specifically attend to the legal and constitutional dimensions of foreign affairs during the Washington administration tend to focus their analysis on the executive branch.<sup>6</sup>

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3. See, e.g., JAMES THOMAS FLEXNER, *GEORGE WASHINGTON AND THE NEW NATION* (1783–1793) 215 (1969) (“Washington did not hesitate to assert his primacy in diplomatic affairs.”); GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 153 (1993) (“[W]ith regard to foreign and military affairs . . . Washington willingly accepted [an] activist notion of presidential power.”); ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 129 (1976) (summarizing Washington’s decision “to assume control of government operations and policy-making over a range of activities”); H. Jefferson Powell, *The Founders and the President’s Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1475 (1999) (arguing that developments under the Washington administration confirm the view that, under the Constitution, “the President possesses significant independent constitutional authority over foreign affairs”).

4. See HARRY AMMON, *THE GENET MISSION* 100 (1973) (mentioning briefly the Supreme Court’s refusal to give Washington an advisory opinion on privateering-related questions); ALBERT HALL BOWMAN, *THE STRUGGLE FOR NEUTRALITY: FRANCO-AMERICAN DIPLOMACY DURING THE FEDERALIST ERA* 75 (1974) (same); ALEXANDER DECONDE, *ENTANGLING ALLIANCE: POLITICS & DIPLOMACY UNDER GEORGE WASHINGTON* 223 (1958) (same); Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling Over Presidential Power Outside the Courts*, in *PRESIDENTIAL POWER STORIES* 21, 39 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (“Resolution of the Neutrality Controversy took place in the Executive Mansion rather than by the Supreme Court.”).

5. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 303–450 (1993) (recounting the Neutrality Crisis with little mention of activity in the federal courts); CHARLES MARION THOMAS, *AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT* 102–05, 117, 210 (1931) (mentioning briefly a handful of district court and Supreme Court cases).

6. See WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 3 (2006) [hereinafter CASTO, *FIGHTING SAIL*] (contending that “the federal courts played a relatively minor role” in resolving the Crisis); CHARLES G. FENWICK, *THE NEUTRALITY LAWS OF THE UNITED STATES* 15–30 (1913) (focusing discussion of the Neutrality Crisis on executive and legislative action); CHARLES S. HYNEMAN, *THE FIRST AMERICAN NEUTRALITY: A STUDY OF THE AMERICAN UNDERSTANDING OF NEUTRAL OBLIGATIONS DURING THE YEARS 1792 TO 1815* (1934) (same); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1023–35 (2010) (discussing the Washington administration’s solicitation of an advisory opinion and its prosecution of Americans involved in privateering but only briefly referencing the extensive civil litigation over privateering); Powell, *supra* note 3, at 1485–95 (discussing the privateering episode without mentioning the courts); Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 418–19 (2012) (devoting a single paragraph to *Glass v. Sloop Betsy*); Charles Anthony Smith, *Credible Commitments and the Early American Supreme Court*, 42 LAW & SOC’Y REV. 75, 95–96 (2008) (same).

Along the same lines, a longstanding preoccupation with presidential behavior in scholarship exploring the founding generation's understanding of constitutional foreign affairs authority has obscured the fact that the first executive delegated significant decisionmaking responsibility to the judiciary.<sup>7</sup>

To be sure, the story told here of the executive's turn to the courts has a familiar ring to it. President Washington's unsuccessful attempt in 1793 to secure an advisory opinion from the justices of the Supreme Court on treaty relations with France presents a well-known—though not well-understood—instance of the early executive seeking judicial assistance in foreign affairs.<sup>8</sup> More broadly, recent scholarship on the founding era has generally recognized the original constitutional understanding that the new federal judiciary would—as John Marshall put it to the Virginia ratifying convention in 1787—serve as “the means of preventing disputes with foreign nations.”<sup>9</sup>

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7. *E.g.*, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 626–87 (2004); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 295–355 (2001); Powell, *supra* note 3, at 1477–1511; Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 290–95 (1996); *see also* Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757 (2002) (asserting that the early federal courts were largely excluded from foreign relations).

8. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 78–80 (5th ed. 2003) (discussing the justices' refusal to answer the President's questions); STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 77–78 (1997) (same).

9. JONATHAN ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 557 (William S. Hein & Co., Inc., 2nd ed. 1996) (1891); *see also* Kevin Arlyck, *Forged by War: The Federal Courts and Foreign Affairs in the Age Of Revolution* (Sept. 2014) (unpublished Ph.D. dissertation, New York University) (on file with author); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) [hereinafter *Alien Tort Statute*] (arguing that the First Congress enacted the Alien Tort Statute as a means of ensuring that law of nations violations committed by American citizens did not irreparably harm United States foreign relations); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989) (similar); Golove & Hulsebosch, *supra* note 6, at 1000–07 (discussing how the Constitution provided for federal court jurisdiction over cases that might implicate relations with foreign nations); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 840 (2006) (asserting that the founding generation intended the federal courts to play “a crucial role . . . in ensuring national security . . . and the peaceful conduct of the Republic's foreign affairs”); Smith, *supra* note 6, at 86–88 (citing founding-era statements expressing sentiments similar to Marshall's).

The privateering cases at the heart of this Article, however, reveal something new about the relationship between the two branches in early foreign affairs. By insisting that disputes over captured British property were to be resolved by the courts, the Washington administration did not simply seek judicial *support* for its foreign policy, as it did in the advisory opinion episode. Rather, it sought to delegate decisionmaking *responsibility* on an important foreign affairs matter to the courts entirely. And it was by no means obvious in 1793—let alone in 1787—that disputes like the one that erupted over French privateering would end up in court. Foreign officials and even members of Washington’s own cabinet expressed grave doubts about whether the courts had the authority to decide questions raised by French privateering.<sup>10</sup> The administration’s turn to the courts in the Neutrality Crisis therefore cannot be understood as either cynically self-interested or constitutionally mandated. It was instead a pragmatic—and only partially successful—strategy by which the executive branch sought to mobilize the institutional resources of a coequal branch of government to address a problem it could not manage alone.

Moreover, the judges themselves were skeptical. Recognizing that neutral-court adjudication of disputes arising between belligerents was contrary to the customary practice of European nations, in the Crisis’s early stages district court judges steadfastly refused to take jurisdiction over cases involving French privateer captures.<sup>11</sup> Even when the Supreme Court reversed course and permitted British legal claims to go forward, the justices struggled to decide cases in a way that helped safeguard the United States’ neutrality while also maintaining fidelity to the legal principles that governed relations among sovereign nations. Furthermore, they displayed a marked unease over the potential implications their assumption of jurisdiction had for the United States’ international standing and the courts’ own institutional well-being. In short, when the Washington administration tried to push the privateering controversy into the courts, the courts pushed back.

The judicial recalcitrance described here poses a challenge to scholarship emphasizing the judiciary’s historically quiescent role in

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10. *See infra* text accompanying notes 105–08.

11. *See infra* text accompanying notes 122–34.

the Neutrality Crisis specifically<sup>12</sup> and in foreign affairs more generally.<sup>13</sup> Though in many respects federal judges supported the Washington administration's effort to contain the French privateering threat, in their decisions they made clear that executive-branch policy priorities would need to be balanced against judicial ones. In other words, rather than simply serving as the "handmaiden of the political branches,"<sup>14</sup> federal judges sought to articulate their own vision of a judicial role in managing foreign nations.

Reframing the Neutrality Crisis away from a narrative of executive primacy and judicial acquiescence also highlights the limitations of current debate. As Curtis Bradley and Trevor Morrison have recently explained, arguments over separation of powers—particularly in the realm of foreign affairs—are powerfully structured by understandings

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12. See CASTO, *FIGHTING SAIL*, *supra* note 6, at 165 ("Throughout the Neutrality Crisis . . . federal judges played an active role in supporting the president's policies."); WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 71 (1995) [hereinafter CASTO, *SUPREME COURT*] ("[T]he major recurring theme of the [1790s] was the Justices' on-going efforts to assist . . . in evolving a stable relationship with the European powers."); JAY, *supra* note 8, at 167–70 (suggesting that the justices of the Supreme Court refused to give the president an advisory opinion in order to allow Alexander Hamilton to control cabinet decisions on foreign policy); David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 148 (2008) [hereinafter Sloss, *Judicial Foreign Policy*] (emphasizing the "consensus" that developed "among cabinet officers and Supreme Court Justices that the federal judiciary should decide the issues raised by the French privateering cases"); cf. Anthony J. Bellia, Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 782–87 (2012) (describing two cases from the Neutrality Crisis as instances where the Supreme Court applied the law of nations in order to uphold specific Article I and II powers granted to Congress and the President); Daniel J. Hulsebosch, *The Founders' Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS U. L.J. 209 (2008) (offering an illuminating gloss on Sloss's account of judicial involvement in the Neutrality Crisis but not questioning his notion of inter-branch "consensus").

13. See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659 (2000) ("Since early in the nation's history, courts have been reluctant to contradict the executive branch in its conduct of foreign relations."); John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 882–901 (2001) (arguing that the events surrounding Washington's Neutrality Proclamation support the principle of executive primacy in treaty interpretation); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 L. & CONTEMP. PROBS. 293, 307 (1993) ("[T]he Court has largely ceded the rights of governance in foreign affairs and war powers to the executive.")

14. WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 103 (1964).

of historical practice.<sup>15</sup> But to a significant extent, discussion of the proper judicial role in foreign affairs is preoccupied with questions of deference—that is, the extent to which courts should cede foreign affairs decisionmaking authority to the executive branch. While the predominant view holds that broad judicial deference to the executive is desirable,<sup>16</sup> a number of scholars advocate for a more prominent role for courts.<sup>17</sup> Underlying the positions on both sides, however, is the assumption that judicial decisionmaking in foreign affairs stands in opposition to presidential policymaking.

The Neutrality Crisis tells us a different tale, one in which the executive branch *sought* judicial intervention on an issue with profound implications for United States foreign relations. In the Washington administration's view, judicial decisionmaking did not undermine presidential policymaking—it complemented it. The story related here reminds us, in other words, that deference is not the only—or necessarily the best—way to think about the interaction between the two branches in foreign affairs, and there may be contexts in which judicial resolution of sensitive questions implicating foreign affairs is fully consistent with executive branch prerogatives. At the same time, however, judicial skepticism in the 1790s about the wisdom of becoming enmeshed in disputes over French privateering suggests that judges themselves might not always agree.

This Article proceeds as follows. Building on extensive research in primary sources from the 1790s, the first three Parts explain how the courts came to assume a preeminent role in the national response to the Neutrality Crisis. Part I outlines the episode's political background. Part II uncovers the Washington administration's attempt to mobilize the federal judiciary to respond to the privateering controversy and chronicles the courts' initial rejection of that approach. Part III details the Supreme Court's struggle to reconcile divergent legal and diplomatic imperatives. Part IV concludes by considering how a full appreciation of the federal courts' role in the Neutrality Crisis can inform current thinking about executive-judicial relationships in foreign affairs.

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15. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 420 (2012) (“Invocations of historical practice are particularly common in constitutional controversies implicating foreign relations.”).

16. See *infra* text accompanying notes 247–50.

17. See *infra* text accompanying notes 251–55.



## I. WAR COMES TO AMERICA

A. *Privateers for the Revolution*

In February 1793 the National Convention of the French Republic declared war against Great Britain, Spain, and the Netherlands, transforming what had largely been a land war in Western Europe into a global conflict fought across the seas. Given British naval superiority in the Atlantic, France's maritime strategy sought to cripple enemy commerce through attacks by privateers—privately-owned armed vessels operating with a license from the French government to capture enemy vessels and cargo for their own profit.<sup>18</sup> Access to American ports was crucial to French success; political instability and slave rebellion in the Caribbean had disrupted France's control of its island possessions, leaving French maritime forces with few safe harbors on the western side of the Atlantic.<sup>19</sup> Moreover, the French government understood Americans to have the best privateers and the fittest ships.<sup>20</sup>

Accordingly, when the government in Paris named Edmond-Charles Genet as the new minister plenipotentiary to the United States, his instructions included a directive to sponsor privateering

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18. Throughout this Article I use the term “privateer” to refer to both the privately-owned armed vessels—usually small, fast merchant ships armed with a few cannons—and the men who manned them. Privateering was a central feature of maritime warfare in the early modern era. Upon receipt of a commission from the government of a nation at war, a privateer was authorized under the laws of war to capture ships belonging to citizens and subjects of enemy nations. Once a seized vessel (and its cargo) was deemed to have been lawfully captured by a tribunal of the government that had granted the commission, the captors were free to sell the property and keep most of the proceeds. Commissioning privateers thereby enabled a nation at war to mobilize military force against enemy commerce with little fiscal drain on the state. *See generally* Arlyck, *supra* note 9, at 28–36; CASTO, *FIGHTING SAIL*, *supra* note 6, at 43–44.

19. Letter from Edmond-Charles Genet to Consuls (May 1793), Archives Ministère des Affaires Étrangères, Correspondance Politique, 37:384–85 [hereinafter AMAE-CP]; Letter from Pierre-Auguste Adet to Timothy Pickering (May 18, 1796), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 650–51 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1833) [hereinafter ASPFR]; MELVIN H. JACKSON, *PRIVATEERS IN CHARLESTON, 1793–1796: AN ACCOUNT OF A FRENCH PALATINATE IN SOUTH CAROLINA* 1–2 (1969).

20. Remarks on the United States (Sep. 13, 1793), AMAE-CP, 38:215–17. American privateering had a long pedigree, *see* CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960) (describing privateering in the colonial era and during the American Revolution), and privateering was enshrined in the Constitution, *see* U.S. CONST. art I, § 8 (granting Congress the power to “grant Letters of Marque and Reprisal,” i.e., privateering commissions).

raids on British maritime commerce from bases in the United States.<sup>21</sup> Genet was given blank privateering commissions, to be delivered to ship captains in the United States, authorizing them to prey on the maritime commerce of the Republic's enemies.<sup>22</sup>

Within days of his arrival in Charleston, South Carolina in April 1793, Genet gave commissions to the owners and captains of several private armed ships, and soon the privateers began capturing merchant vessels at sea and sending them into Charleston to be sold.<sup>23</sup> Under the law of prize, however, the captors could only sell the seized vessels and cargo once a French tribunal had deemed the capture valid—a determination that generally turned on whether the captors were operating with a proper commission and whether the captured property truly belonged to enemy citizens or subjects.<sup>24</sup> As there were no regularly-constituted French admiralty courts operating in the United States, Genet authorized French consular officials to conduct condemnation and sale proceedings.<sup>25</sup>

After launching privateers in Charleston, Genet headed north to officially present himself to President Washington in Philadelphia. Along the way he was cheered by enthusiastic crowds and entertained by the cream of southern society “in the midst of perpetual fetes.”<sup>26</sup>

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21. Supplement Aux Instructions Donnés Au Citoyen Genet (Dec. 1792), *in* CORRESPONDENCE OF THE FRENCH MINISTERS TO THE UNITED STATES, 1791–1797, at 207, 207–09 (Frederick J. Turner ed., 1904) [hereinafter CFM]. Genet was also instructed to incubate “revolutionary principles” among settlers on the Spanish frontier along the Mississippi and intrigue among Native Americans in the northwest. *See* Relatif Aux Instructions de Genet (Dec. 1792), *in* CFM, *supra*, at 201, 201–02; Mémoire pour servir d’instruction au Citoyen Genet (Dec. 1792), *in* CFM, *supra*, at 202, 205; *see generally* AMMON, *supra* note 4, at 21–29.

22. Relatif Aux Instructions de Genet, *supra* note 21.

23. *See* Letter from Edmond-Charles Genet to Minister of Foreign Affairs (April 16, 1793), *in* CFM, *supra* note 21, at 211–13 (describing his activities); Letter from Edmond-Charles Genet to Consuls (May 29, 1793), AMAE-CP 37:469–70 (instructing consuls in other ports to distribute additional privateering commissions); *see generally* JACKSON, *supra* note 19.

24. CASTO, FIGHTING SAIL, *supra* note 6, at 37–40.

25. *See* Letter from Michel-Ange-Bernard Mangourit to Citoyen Monge (May 29, 1793), Archives Ministère des Affaires Étrangères, Correspondance Consulaire et Commerciale [hereinafter AMAE-CCC], Charleston, 2:29–30 (describing a streamlined adjudicatory process meant to encourage privateers by giving them quick access to the proceeds from prize sales).

26. Letter from Edmond-Charles Genet to Citoyen LeBrun (May 31, 1793), *in* CFM, *supra* note 21, at 216; *see also* Letter from James Monroe to Thomas Jefferson (May 9, 1793), *in* 25 JEFFERSON PAPERS *supra* note 1, at 697 (reporting that in Virginia one “scarcely f[ou]nd a man unfriendly to the French revolution”); AMMON, *supra* note 4, at 51–55 (detailing Genet’s reception by the American public).

Things were the same in Philadelphia,<sup>27</sup> which came as no surprise to Jefferson, who claimed that “99 in a hundred” of Americans were—like he—supporters of the French Revolution.<sup>28</sup> Jefferson’s enthusiasm was tempered, however, by a keen awareness of the dangers that popular fervor posed for the United States. In describing the Philadelphia scene to James Monroe, he added a cautionary note: “I wish we may be able to repress the spirit of the people within the limits of a fair neutrality.”<sup>29</sup>

### B. *Proclaiming Neutrality*

Neutrality—fair or otherwise—would prove difficult to ensure. Alarmed by reports of the privateering activity in Charleston, Washington’s cabinet convened in Philadelphia in mid-April to consider its course of action. Though personal opinions of the French Revolution within the cabinet ranged from hostile to enthusiastic, all agreed that going to war against Britain as a French ally would be foolish.<sup>30</sup> The new nation’s military capabilities were negligible, and it was territorially surrounded by British, Spanish, and potentially hostile Indian forces. More importantly, the national economy was largely dependent on maritime commerce, both in exporting American-grown food to European colonies in the Caribbean and in carrying colonial products to markets in Europe. Formal entry into the war would render American ships fair game for the British warships that prowled sea lanes in the Caribbean. Conversely, by remaining neutral as the belligerents decimated each other’s commerce, the United States could ensure that its merchants profited from the increased demand for American products and shipping services.<sup>31</sup>

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27. See Letter from Thomas Jefferson to James Monroe (May 5, 1793), in 25 JEFFERSON PAPERS, *supra* note 1, at 660–62 (describing Genet’s reception in Philadelphia); CASTO, FIGHTING SAIL, *supra* note 6, at 41–43 (similar).

28. Letter from Thomas Jefferson to William Short (Jan. 3, 1793), in 25 JEFFERSON PAPERS, *supra* note 1, at 14; see also Letter from Alexander Hamilton to William Short (Feb. 5, 1793) in 14 PAPERS OF ALEXANDER HAMILTON 7 (Harold C. Syrett ed., 1969) [hereinafter HAMILTON PAPERS] (“The popular tide in this country is strong in favor of the last revolution in France.”); ELKINS & MCKITRICK, *supra* note 5, at 308–17 (discussing enthusiasm for the French Revolution).

29. Letter from Thomas Jefferson to James Monroe, *supra* note 27, at 661.

30. See CASTO, FIGHTING SAIL, *supra* note 6, at 21–25 (discussing cabinet views).

31. See Letter from Gouverneur Morris to Thomas Jefferson (Mar. 7, 1793), in 25 JEFFERSON PAPERS, *supra* note 1, at 333 (opining that adherence to strict neutrality “will give to our Navigation an Encrease too rapid almost for Conjecture”); Opinion on Ship Passports

Fortunately, the French government had no intention of asking the United States to directly join the fight.<sup>32</sup> Recognizing that American military weakness made the new nation a liability rather than an asset in war, the French government instead wanted the United States to pay off its remaining Revolutionary War debt to France, provide food for its armies in Europe, and facilitate French military activity in the Americas.<sup>33</sup>

Thus the central question the Washington administration faced in 1793 was not whether to remain neutral but rather what exactly “neutrality” entailed and how to go about securing it. One difficulty was that the particular rights and obligations of neutral nations under the law of nations were by no means clear.<sup>34</sup> In particular, opinions diverged regarding the sorts of assistance a neutral could provide to a belligerent.<sup>35</sup> Complicating matters, there were questions regarding the extent to which preexisting treaty commitments to one belligerent affected a neutral’s general obligation of equal treatment.<sup>36</sup>

In spite of the profound legal complexities the war provoked, the cabinet agreed that the government needed to take steps to prevent American participation in French privateering from “embroiling” the nation in the conflict.<sup>37</sup> Accordingly, President Washington issued a

(May 3, 1793), in 25 JEFFERSON PAPERS, *supra* note 1, at 646 (“The great harvest for [profits] is when other nations are at war, and our flag neutral.”); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 43–47 (1999) (discussing the importance of neutrality for American commerce).

32. See AMMON, *supra* note 4, at 21–22.

33. DECONDE, *supra* note 4, at 204–06; CASTO, FIGHTING SAIL, *supra* note 6, at 16–17.

34. See Thomas Jefferson, Opinion on the Treaties with France (Apr. 28, 1793), in 25 JEFFERSON PAPERS, *supra* note 1, at 608, 613 (“Where [law of nations publicists] agree their authority is strong; but where they differ, and they often differ, we must appeal to our own feelings and reason to decide between them.”).

35. See HYNEMAN, *supra* note 6, at 36–41; Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L.J. 1, 10–13 (1983); Reinstein, *supra* note 6, at 384–400.

36. See HYNEMAN, *supra* note 6, at 23–24; *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 155, (1795) (Paterson, J.) (“An exact impartiality must mark [a neutral nation’s] conduct towards the parties at war . . . . To this rule there is no exception, but what arises from the obligation of antecedent treaties, which ought to be religiously observed.”).

37. Letter from George Washington to Thomas Jefferson (Apr. 12, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 541; see also Letter from Gouverneur Morris to Thomas Jefferson, *supra* note 31, at 333 (warning that Genet’s commissioning of privateers “might expose us to Suspicion and finally involve us in War”); Reinstein, *supra* note 6, at 391 (“Had the administration supported Genet’s plan for using United States ports as bases for preying on

short statement on April 22, now known as the Neutrality Proclamation. Declaring that “the duty and interest” of the United States required the government to “pursue a conduct friendly and impartial toward the belligerent Powers,” Washington warned that American citizens who engaged in or abetted hostile acts against a belligerent, in violation of the law of nations, would receive no protection from the government.<sup>38</sup> In addition, he called for the criminal prosecution of any such transgressions that came “within the cognizance of the courts of the United States.”<sup>39</sup>

The administration’s resolve to remain neutral was immediately put to the test. Early on, Minister Genet returned a British vessel that had been seized within United States waters<sup>40</sup> and instructed consuls that privateering commissions were to be given only to French-owned and French-manned vessels.<sup>41</sup> But he made clear that French consuls stationed in the United States were generally to dispose of French prizes “without the intervention of the American Government.”<sup>42</sup> And with good reason: Article 17 of the 1778 Treaty of Amity between France and the United States stipulated that the privateers of either party could “freely . . . carry whithersoever they please, the ships and goods taken from their enemies” without being “arrested or seized” in the ports of the other, and that the “officers” of both parties were forbidden from “mak[ing] examination concerning the lawfulness of such prizes.”<sup>43</sup> From the French perspective, these provisions gave them explicit permission to use the United States as a base for privateering.<sup>44</sup>

The Washington administration soon discovered that reconciling France’s favored status with a policy of strict neutrality would be

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British ships, the result could have been a calamitous war with Great Britain.”); ELKINS & MCKITTRICK, *supra* note 5, at 334.

38. Proclamation of American Neutrality (Apr. 22, 1793), *in* 1 ASPFR, *supra* note 19, at 140.

39. *Id.*

40. Letter from Edmond-Charles Genet to Thomas Jefferson (May 27, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 124–27.

41. Letter from Edmond-Charles Genet to Consuls (May 29, 1793), AMAE-CP, 37:469.

42. *Id.*

43. Treaty of Amity and Commerce, Fr.-U.S., art. XVII, Feb. 6, 1778, 8 Stat. 12, 22 [hereinafter Treaty of Amity].

44. *See* Letter from Edmond-Charles Genet to Thomas Jefferson (June 14, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 281 (protesting the arrest of a French privateer armed in New York as a violation of Franco-American treaties).

difficult.<sup>45</sup> George Hammond, the British minister plenipotentiary to the United States, sent Jefferson a barrage of complaints about French privateering,<sup>46</sup> warning that its persistence could “lead to the most dangerous consequences.”<sup>47</sup> Though Hammond did not elaborate, his meaning was clear enough: The British government would consider the arming of privateers in the United States and the condemnation and sale of prizes as hostile acts on the part of the United States—conduct that might demand reprisals from Britain.

Faced with this alarming prospect, Jefferson asked French officials to stop the consular condemnations taking place in Charleston and announced that French privateers were prohibited from fitting out in the United States.<sup>48</sup> But as reports of privateering activity continued to roll in,<sup>49</sup> the administration recognized that general threats would not dissuade adventurous Americans from joining the privateers, nor would ad hoc responses to individual incidents satisfy general British complaints. More decisive action would be required.

## II. RECRUITING THE JUDICIARY

Confronted with an intractable foreign affairs problem it could not manage on its own, the Washington administration turned to the courts. Initially the administration’s judicial recruitment effort took three forms: instituting criminal prosecutions against Americans who joined the French privateering effort, seeking an advisory opinion

45. Alexander Hamilton’s preferred solution was to declare the treaties with France void or suspended, on the theory that the United States was authorized under the law of nations to avoid its prior obligations until the French political situation was resolved. Letter from Alexander Hamilton & Henry Knox to George Washington (May 2, 1793), *in* 14 HAMILTON PAPERS, *supra* note 28, at 367. Jefferson convinced Washington to eschew this radical (and transparently pro-British) approach. CASTO, FIGHTING SAIL, *supra* note 6, at 32–33.

46. *See, e.g.*, Memorial from George Hammond to Thomas Jefferson (May 8, 1793), *in* 25 JEFFERSON PAPERS, *supra* note 1, at 684; Memorial from George Hammond to Thomas Jefferson (May 8, 1793), *in* 25 JEFFERSON PAPERS, *supra* note 1, at 685, 685–86; Memorial from George Hammond to Thomas Jefferson (May 8, 1793), *in* 25 JEFFERSON PAPERS, *supra* note 1, at 686, 686–87.

47. Memorial from George Hammond to Thomas Jefferson (May 8, 1793), *in* 25 JEFFERSON PAPERS, *supra* note 1, at 685, 685–86.

48. Letter from Thomas Jefferson to Jean-Baptiste Ternant (May 15, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 42, 42–43; Thomas Jefferson, Cabinet Memorandum on French Privateers (June 1, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 155; Letter from Thomas Jefferson to Edmond-Charles Genet (June 5, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 195–96.

49. *See, e.g.*, Letter from William Vans Murray to Thomas Jefferson (May 9, 1793), *in* 25 JEFFERSON PAPERS, *supra* note 1, at 698, 698–99.

from the Supreme Court regarding a number of privateering-related questions, and instructing the owners of captured British ships to file suit for their recovery under the federal courts' admiralty jurisdiction. Though each step was taken in response to particular circumstances, the administration's approach to management of the privateering controversy reflected a central understanding that judicial intervention in the Crisis could help secure United States neutrality and keep the nation out of the conflict.

There are important differences, however, in these three strategies. In instituting criminal prosecutions and requesting an advisory opinion, the administration primarily sought judicial approval and support for policies the cabinet had already settled upon. Such moves reflected the administration's desire to marshal the courts' institutional authority in support of its policy of strict neutrality.

In contrast, by seeking to have disputes over the disposition of property captured by French privateers adjudicated by federal judges rather than be addressed through diplomatic negotiation, the administration sought to delegate to the courts decisionmaking authority on questions of sovereign right with deep implications for United States foreign relations. In fact, by insisting to foreign representatives that independent judicial resolution of such disputes—free from executive interference—was the only appropriate means of addressing the privateering problem, the administration deliberately sacrificed its own authority over foreign affairs in the interest of defusing a diplomatic controversy of dangerous scope.

The administration's initial attempt to enlist the judiciary largely failed. Though federal judges agreed that American participation in French privateering was punishable as a matter of law, securing criminal convictions from local juries proved impossible.<sup>50</sup> More problematically, the justices of the Supreme Court refused the administration's request for an advisory opinion,<sup>51</sup> and district court judges rejected the notion that private suits under the courts' admiralty jurisdiction were a proper means by which the owners of vessels and cargo seized by French privateers could secure their restitution.<sup>52</sup> Though administration officials still held out hope that the courts would eventually intervene, by late 1793 judicial reluctance to become involved left the executive adrift.

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50. *See infra* text accompanying notes 73–79.

51. *See infra* text accompanying notes 93–94.

52. *See, e.g.*, *Findlay v. William*, 9 F. Cas. 57, 61 (D. Pa. 1793) (No. 4790).

*A. Criminal Prosecution*

Within days of the Neutrality Proclamation, the Washington administration moved to marshal judicial support for its neutrality policy. On Jefferson's orders,<sup>53</sup> the federal district attorney at Philadelphia instituted a criminal prosecution against Gideon Henfield, an American seaman involved in the capture of a British vessel by a French privateer off the capes of Delaware.<sup>54</sup> From Jefferson's perspective, the prosecution would serve two purposes: First, it would "satisfy the complaint of the British Min[ister]" regarding American participation in the French war effort while sparing the administration from the full diplomatic consequences of such action.<sup>55</sup> For example, when Genet demanded that the administration secure Henfield's release,<sup>56</sup> Jefferson demurred on the ground that the executive branch had no authority over the court that had authorized Henfield's arrest.<sup>57</sup> But he assured Genet that the trial would be overseen by "Judges of learning and integrity" and that if Henfield had violated no law he would be duly acquitted.<sup>58</sup>

In Jefferson's view, prosecution of an American participant in French privateering would also "try the question" of whether such conduct was punishable by law.<sup>59</sup> There were grounds for doubt. As Minister Genet astutely pointed out, there existed no positive law or treaty forbidding Americans from participating in French privateering.<sup>60</sup> Though criminal prosecutions for violations of federal common law were not as controversial in 1793 as they would soon

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53. Letter from Thomas Jefferson to William Rawle (May 15, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 40, 40–41.

54. DUNLAP'S AM. DAILY ADVERTISER (Phila.), May 15, 1793, at 3; Memorial from Edmond-Charles Genet to Thomas Jefferson (May 27, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 130; *see generally* CASTO, FIGHTING SAIL, *supra* note 6, at 46–48, 85–86, 91.

55. CASTO, FIGHTING SAIL, *supra* note 6, at 246.

56. Memorial from Edmond-Charles Genet to Thomas Jefferson, *supra* note 54; *see also* William R. Casto, *Foreign Affairs Crises and the Constitution's Case or Controversy Limitation: Notes from the Founding Era*, 46 AM. J. LEGAL HIST. 237 (2004).

57. Letter from Thomas Jefferson to Edmond-Charles Genet (June 1, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 160.

58. *Id.*

59. *See* Thomas Jefferson, Notes on Neutrality Questions (July 13, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 498, 498–99.

60. Letter from Edmond-Charles Genet to Thomas Jefferson (June 1, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 159.



become,<sup>61</sup> the Washington administration knew that its prosecutorial theory—that Henfield could be criminally punished for violating the general laws of neutrality—was vulnerable.<sup>62</sup> A successful prosecution would resolve that problem.

More importantly, “try[ing] the question” in federal court would enable the administration to mobilize judicial “learning and integrity” in the service of executive-branch policy goals. The federal circuit courts—composed of the local district court judge and a traveling justice of the Supreme Court<sup>63</sup>—had original jurisdiction over most federal crimes.<sup>64</sup> At the opening of each sitting of the circuit court, the senior judge gave a general charge to the grand jury in which he outlined the applicable statutory and common law.<sup>65</sup> In many cases he also instructed his co-citizens more generally on the rights and obligations they enjoyed under their new government—including the necessity of respecting treaties and the law of nations.<sup>66</sup> Their charges

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61. On the early history of the federal common law of crimes, see generally CASTO, SUPREME COURT, *supra* note 12, at 129–41; Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26 (1978); Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223 (1986); Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919 (1992).

62. See Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 502 (noting that the federal district attorney had doubts about whether Henfield had committed a punishable offense); see also CASTO, SUPREME COURT, *supra* note 12, at 131 (noting Justice Iredell’s “considerable doubts” about whether a defendant could be punished for a nonstatutory crime).

63. Under the Judiciary Act of 1789, the circuit courts were originally composed of two justices and a district court judge, but in response to the justices’ complaints about the onerous burden of circuit riding Congress reduced the requirement in March 1793. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75; Judiciary Act of 1793, ch. 22, § 1, 1 Stat. 333, 333–34; see generally Wythe Holt, “*The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects*”: *The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301 (1987) (describing 1790s changes in circuit riding).

64. Judiciary Act of 1789, ch. 20, § 11.

65. See Maeva Marcus, *The Effect (or Non-Effect) of Founders on the Supreme Court Bench*, 80 GEO. WASH. L. REV. 1794, 1799 (2012) (“Each session [of the circuit court] would begin with the presiding judge giving a charge to the grand jury.”).

66. See, e.g., John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 20, 1790), in 2 DHSC, *supra* note 2, at 25, 29 (“You will recollect that the Laws of Nations make Part of the Laws of this, and of every other civilized Nation.”); see generally Marcus, *supra* note 65, at 1799–1800 (discussing the prominence of the law of nations in grand jury charges).

were regularly reprinted in the newspapers for edification of the general public.<sup>67</sup>

Because the obligations of neutrality were unfamiliar to most Americans, Jefferson hoped that erudite charges from federal judges would serve to warn the broader public against “acts which may endanger our peace.”<sup>68</sup> The intended audience was not simply a domestic one, either; Jefferson sent copies of the Henfield grand jury charge to European capitals to “explain[] abroad the position of the United States,”<sup>69</sup> transforming the charge from a set of instructions to the jury in a specific criminal case into a policy statement regarding the United States’ understanding of its obligations as a neutral nation.

The administration’s efforts to promote its policy objectives through the courts would only succeed, of course, with cooperation from the justices themselves. The cabinet, however, had good reason to believe that support would be forthcoming. The federal bench was stocked with Federalists,<sup>70</sup> and Chief Justice Jay was a close friend of Washington and Hamilton and a strong proponent of strict neutrality.<sup>71</sup> The administration’s confidence was vindicated when

67. See generally Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127; Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789–1800*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 31 (Robert A. Katzmann ed., 1988). Volumes two and three of the DHSC contain numerous examples of the justices’ grand jury charges during this period.

68. Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), in 25 JEFFERSON PAPERS, *supra* note 1, at 691, 691–92; see also Letter from Thomas Jefferson to George Hammond (June 13, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 270, 270–71 (assuring the British minister that prosecution in a few cases would rapidly acquaint the citizenry with its duties and “lessen the occasions of recurrence to the public authority” in the future).

69. FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49 n.\* (1849); see also Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1693), in 26 JEFFERSON PAPERS, *supra* note 1, at 697, 697–702; Letter from Thomas Jefferson to Gouverneur Morris (Aug. 26, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 760.

70. See R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 150 (2001) (“[T]he federal judiciary under Washington and Adams [was] exclusively Federalist.”); see also CASTO, FIGHTING SAIL, *supra* note 6, at 27–28.

71. Jay had in fact prepared a first draft of the Neutrality Proclamation at Hamilton’s request, CASTO, FIGHTING SAIL, *supra* note 6, at 27–28, and in the early days of the crisis he had instructed a Virginia grand jury that participation in the conflict was criminally punishable as a violation of United States’ treaties as well as the law of nations. John Jay’s Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793), in 2 DHSC, *supra* note 2, at 381, 381–85; see also Sandra Frances VanBurkleo, “Honour, Justice, and Interest”: John Jay’s Republican Politics and Statesmanship on the Federal Bench, 4 J. EARLY REPUBLIC 239, 264–65 (1984) (noting Jay’s support for Hamilton during the Crisis).

Justice James Wilson charged the grand jury specially convened to consider Henfield's case. Noting that nations were generally accountable for the conduct of their citizens, Wilson fully endorsed the administration's view that participation in French privateering was criminally punishable in federal court.<sup>72</sup>

Even working together, however, judges and executive branch officials were unable to convince jurors that the obligations of neutrality warranted punishment for Americans who joined the French privateering campaign.<sup>73</sup> Though the reasons are not entirely clear, the jury in Henfield's case found him not guilty.<sup>74</sup> Administration officials tried to spin the acquittal as one based on sympathy, not law,<sup>75</sup> but French officials viewed it as affirmation of their view that Americans could freely join the French war effort,<sup>76</sup> and the public appeared to agree. Soon thereafter, several defendants indicted for serving on a French privateer were acquitted in Georgia, "contrary to the opinion of the judges."<sup>77</sup> Numerous other prosecutions appear to have gone nowhere.<sup>78</sup> The difficulty, Justice

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72. James Wilson's Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (July 22, 1793), in 2 DHSC, *supra* note 2, at 414.

73. *See id.* at 420–21 (framing Henfield's conduct as not simply an individual criminal act but one that posed an existential threat to the nation itself).

74. The jury was apparently swayed by Henfield's argument that he had renounced United States citizenship by enlisting on the French privateer, and was therefore not bound by the laws of neutrality, though one juror complained that he had been induced to vote for acquittal by public threats from French partisans against anyone who voted to convict. CASTO, FIGHTING SAIL, *supra* note 6, at 97; *see also* JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 389–90 (Robert Faulkner & Paul Carrese eds., Liberty Fund, Inc., spec. ed. for schools 2000) (1838) (concluding that the jury rejected what they perceived to be the Washington administration's attempt to impose legal obligations by executive fiat).

75. *See* CASTO, FIGHTING SAIL, *supra* note 6, at 99–100 (noting that Attorney General Randolph published an anonymous newspaper item attributing Henfield's acquittal to either a deficiency of proof or "equitable circumstances"); Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 697, 697–702 (characterizing the verdict as a pardon, not an acquittal, granted because the jury was convinced that Henfield had not actually intended to violate the law or compromise United States neutrality).

76. *See* THOMAS, *supra* note 5, at 173–74 (noting that after Henfield's acquittal, French officials published newspaper advertisements inviting all "Friends of Liberty" to enlist in the republican cause).

77. CASTO, FIGHTING SAIL, *supra* note 6, at 100.

78. *See* United States v. Sheftall (Cir. Ct. Ga. April 16, 1794), National Archives and Records Administration [hereinafter NARA], Circuit Court for Georgia, Case Files; CASTO, FIGHTING SAIL, *supra* note 6, at 101–02; HYNEMAN, *supra* note 6, at 83–84; CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 114–15 (1922); Letter from

James Iredell later explained, was that it was “scarcely possible to explain to a Jury’s satisfaction the obligations arising from Common Law”<sup>79</sup>—a tacit acknowledgement that judicial support for executive-branch policy might be insufficient to resolve the deep problems created by the French privateering effort.

### B. *Advice from the Court*

Judicial cooperation also proved maddeningly elusive. Even before Henfield’s acquittal, Washington’s cabinet had resolved to seek the courts’ support for its neutrality policy by other means as well. With British officials insisting that the federal government had an obligation to interdict privateers<sup>80</sup> and their French rivals defying government requests that they curtail their activities,<sup>81</sup> the administration went to the Supreme Court for help.<sup>82</sup> The cabinet drafted a list of twenty-nine questions respecting the activities of French privateers and asked the justices whether they would be amenable to answering them.<sup>83</sup> In communicating the President’s request, Jefferson indicated that the administration needed help in reconciling its policy of strict neutrality

Christopher Gore to Thomas Jefferson (Sept. 10, 1793), in 27 JEFFERSON PAPERS, *supra* note 1, at 79, 79–80; CONN. J., Sept. 4, 1793, at 3; DAILY ADVERTIST (Bos.), Oct. 26, 1793, at 2.

79. Letter from James Iredell to Edmund Randolph (May 2, 1794), in 2 DHSC, *supra* note 2 at 451, 451–52.

80. *E.g.*, Letter from George Hammond to Thomas Jefferson (July 10, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 461; Letter from George Hammond to Thomas Jefferson (June 19, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 322, 322–23.

81. *See, e.g.*, Letter from Edmond-Charles Genet to Thomas Jefferson, (July 9, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 456, 456–57. Matters came to a head when French officials—no doubt emboldened by recent court victories—allowed a privateer allegedly fitted out in Philadelphia to leave port, despite the administration’s demand that it be detained. *See* CASTO, FIGHTING SAIL, *supra* note 6, at 103–06; JAY, *supra* note 8, at 132–34; Editorial Note, *The Referral of Neutrality Questions to the Supreme Court*, in 26 JEFFERSON PAPERS, *supra* note 1, at 524–26.

82. *See* Editorial Note, *The Referral of Neutrality Questions to the Supreme Court*, in 26 JEFFERSON PAPERS, *supra* note 1, at 524, 524–25; Letter from Thomas Jefferson to George Hammond & Edmond-Charles Genet (July 12, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 487 (noting that the President had “determined to refer the questions [respecting neutrality] to persons learned in the laws”).

83. Thomas Jefferson, Questions for the Supreme Court (July 18, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 534, 534–36; Letter from Thomas Jefferson to the Justices of the Supreme Court (July 18, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 520. It is unclear whether the actual list of questions was ever sent to the justices. JAY, *supra* note 8, at 136–38.

with the nation's obligations under treaty and the law of nations.<sup>84</sup> The war between France and Britain gave rise to questions “of great[] importance,” he explained, but they often arose “under circumstances which do not give a cognisance of them to the tribunals of the country.”<sup>85</sup> By providing guidance, Jefferson asserted, the justices would help secure the government “against errors dangerous to the peace of the [United States].”<sup>86</sup>

Examined in isolation, the administration's request for an advisory opinion has generally been understood as motivated by the cabinet's uncertainty over the United States' international rights and obligations and its belief that the justices' expertise in such areas rendered them specially fit for resolving any doubts.<sup>87</sup> While there is no doubt some truth to such explanations,<sup>88</sup> when considered in light of the administration's turn to the courts more generally, it becomes evident that the administration's request for an advisory opinion was not primarily motivated by a desire to get the best legal advice available. Cabinet members were actually in agreement on the most important questions,<sup>89</sup> and Jefferson's stated intention of publicizing the justices' responses<sup>90</sup>—as he had done with Justice Wilson's grand jury charge in *Henfield*—indicates that diplomatic considerations

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84. Letter from Thomas Jefferson to the Justices of the Supreme Court (July 18, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 520.

85. *Id.*

86. *Id.*

87. *See, e.g.*, CASTO, FIGHTING SAIL, *supra* note 6, at 108–10 (asserting that Washington sought an advisory opinion in part to resolve internal cabinet disagreement on privateering-related questions); Reinstein, *supra* note 6, at 418–19 (arguing that President Washington sought the justices' opinion primarily because he understood the law of nations as binding on the executive).

88. *See* Letter from William Bradford, Jr. to Elias Boudinot (July 14, 1793), in 6 DHSC, *supra* note 2, at 744 (suggesting that the request was motivated by “some difference in construction of the treaty [with France] . . . among the President's advisors”); Thomas Jefferson, Alexander Hamilton & Henry Knox, Cabinet Opinion on Consulting the Supreme Court (July 12, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 484 (noting that the cabinet had resolved to refer the questions “to persons learned in the laws”).

89. *See* Thomas Jefferson, Notes on Neutrality Questions (July 13, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 498, 498–99 (noting cabinet unanimity as to whether the Treaty of Amity allowed the United States to prohibit the arming of French privateers in port, whether such action was required by the law of nations, and whether U.S. citizens could be criminally punished for participating in hostilities).

90. *See* Letter from Thomas Jefferson to the Justices of the Supreme Court (July 18, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 520 (asking “[w]hether the public may, with propriety, be availed of [the justices'] advice on these questions”).

loomed large in the administration's request. From the executive's perspective, because the Court's expertise and authority "ensure[d] the respect of all parties" to the controversy,<sup>91</sup> an opinion from the justices endorsing the administration's strict neutrality policy would be a great help in countering foreign claims of legal right, particularly those advanced by France.<sup>92</sup>

The justices, however, famously declined to answer. To "extrajudicially" answer legal questions outside the bounds of an actual case, they said, would blur the "Lines of Separation drawn by the Constitution between the three Departments of Government" and undermine the Supreme Court's position as the tribunal of last resort in the federal scheme.<sup>93</sup> Though the justices regretted any "Embarrassment" that their refusal might cause the government, they expressed confidence in the President's independent ability to "discern what is Right," and to "surmount every obstacle to the Preservation of the Rights, Peace, and Dignity of the United States."<sup>94</sup>

The significance of the justices' refusal to give an advisory opinion has been much discussed by historians of the early federal judiciary.<sup>95</sup> The traditional story—that the justices were adhering to a self-evident prohibition against advisory opinions located in the Constitution's "Case or Controversy" requirement<sup>96</sup>—has been called into question by more recent scholarship, which notes that such opinions were quite common in the English tradition and in the justices' own practice.<sup>97</sup> Accordingly, scholars who understand the judiciary as largely having played a supporting role in the Neutrality Crisis have been hard-pressed to explain why an otherwise-complaisant Court would refuse

91. *Id.*

92. See CASTO, *FIGHTING SAIL*, *supra* note 6, at 109 ("In seeking advice from the Court, President Washington undoubtedly was motivated in part by a desire to obtain political support for his decisions.").

93. Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), *in* 13 THE PAPERS OF GEORGE WASHINGTON 392 (Theodore J. Crackel et al. eds., 2007) [hereinafter WASHINGTON PAPERS].

94. *Id.*

95. See JAY, *supra* note 8, at 1–9 (reviewing the literature).

96. See, e.g., JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 626 n.68 (1971) ("[The justices' refusal] was grounded on . . . the impropriety of extrajudicial decision of the questions proffered."); THOMAS, *supra* note 5, at 150 ("The justices explained the refusal solely on constitutional grounds. There is no reason for attributing any other motive to them.").

97. See JAY, *supra* note 8, at 10–112 (discussing the English and American tradition of advisory opinions).

Washington's request for advice. Some have argued that the justices sought to strike a blow for judicial independence by establishing the principle that the president could not *demand* an opinion from the Court, as the Constitution allowed with respect to the heads of the executive departments.<sup>98</sup> Others have suggested, somewhat paradoxically, that the justices' refusal was in fact meant to strengthen the administration's hand.<sup>99</sup>

When viewed in the context of the Neutrality Crisis more generally, however, the justices' refusal can be understood to reflect some of the same concerns raised by their district court brethren regarding the wisdom of judicial involvement in matters implicating foreign relations.<sup>100</sup> To be sure, individual justices had shown no hesitation in jumping into the privateering fray in criminal cases.<sup>101</sup> But in that context they only had to decide whether the federal government had the legal authority to criminally punish Americans who participated in French privateering, an issue that only tangentially impacted the sovereign rights of foreign nations. The request for an advisory opinion, in contrast, posed numerous questions directly addressing the French government's authority to use the United States as a base for prosecuting its war against British maritime commerce.<sup>102</sup> Providing definitive answers to the administration's questions would force the justices to take sides on matters of significant international import.<sup>103</sup>

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98. See Marcus & Van Tassel, *supra* note 67, at 33–34; Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 144–58; see also U.S. CONST. art. II, § 2 (stating that the president “may require the Opinion, in writing, of the principal Officer in each of the executive Departments”). This view has some evidentiary support. See Letter from Supreme Court Justices to George Washington, *supra* note 93, at 392 (noting that “the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been *purposely* as well as expressly limited to *executive* Departments”).

99. In his insightful study of the advisory opinion episode, Stewart Jay suggests that Alexander Hamilton's allies on the Court—Chief Justice Jay in particular—declined the president's request for advice so as to give the domineering Treasury Secretary a freer hand in shaping administration policy. JAY, *supra* note 8, at 167–70. As ingenious as this theory is, it is bereft of evidentiary support.

100. See discussion *infra* Section II.C.

101. See discussion *supra* Section II.A.

102. See Thomas Jefferson, Questions for the Supreme Court (July 18, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 534–36.

103. Cf. JAY, *supra* note 8, at 161–67 (suggesting that the refusal to give an advisory opinion was prompted by the justices' desire to avoid entanglement in the domestic political debate over the French Revolution).

Viewed in this light, the justices' stated desire to maintain the "Lines of Separation" between the departments of government was not just a hedge against judicial aggrandizement, nor was it simply a declaration of autonomy. It was an attempt to define the fraught territory of foreign relations as an area of executive, not judicial, responsibility. As we shall see, this initial line in the sand would, under the pressure of political necessity, later become blurred.<sup>104</sup> But in the early days of the Neutrality Crisis, judicial reluctance to become enmeshed in the privateering controversy confounded executive attempts to share responsibility for keeping the nation out of war.

### C. *Private Lawsuits*

The Washington administration fared no better in turning to the district courts. One of the key points of contention in the Neutrality Crisis involved the disposition of ships and cargo captured by French privateers operating from the United States.<sup>105</sup> British officials made it abundantly clear that they would hold the federal government responsible for losses stemming from such captures.<sup>106</sup> Taking up this theme, Hamilton warned the cabinet that failure to provide recourse would give Great Britain grounds for retaliation against American commerce.<sup>107</sup> But as Jefferson pointed out, a French privateer sailing with a valid commission had a right to seize enemy ships and an infringement of United States neutrality did not necessarily give the federal government grounds to restore an otherwise lawfully-seized

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104. See discussion *infra* Part III.

105. See Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 40 (reserving the question of prize restoration for additional deliberation by the cabinet); Reinstein, *supra* note 6, at 441 ("The sales of French captured prizes was one of the more difficult issues for the administration.").

106. See, e.g., Letter from George Hammond to Thomas Jefferson (Aug. 30, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 789, 789–90 (reiterating his understanding that the government will restore prizes seized by privateers fitted out in the United States to their owners, or pay compensation); Letter from George Hammond to Thomas Jefferson (May 8, 1793), in 25 JEFFERSON PAPERS, *supra* note 1, at 687 (expressing his confidence that "the executive government of the United States will pursue such measures as to its wisdom may appear the best calculated for . . . restoring to their rightful owners" captures made by French privateers).

107. Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON PAPERS, *supra* note 28, at 460.



prize to its owners. In fact, doing so could well be considered an act of war against France, raising the specter of reprisal from that side.<sup>108</sup>

With good reason to fear that executive action (or inaction) could lead to hostilities with one belligerent or the other, the executive branch again turned to the courts. Seeking to deflect demands for direct executive intervention, administration officials instructed British officials to seek recovery of captured property via suit under the federal district courts' admiralty jurisdiction.<sup>109</sup> Though Jefferson assured the British minister that state militias would be available to help enforce judgments rendered by "the civil power," he made clear that the administration understood these disputes fundamentally to involve "questions of private property," for which answers were "provided for by the laws."<sup>110</sup> Accordingly, the owners of the captured vessels were "to take measures as in ordinary civil cases for the support of their rights judicially."<sup>111</sup>

In classifying privateering-related disputes as "ordinary civil cases" amenable to standard legal process, the Washington administration pushed the boundaries of the judicial role in foreign affairs. Of course, the federal judiciary had been created in significant part to obviate difficulties in foreign relations by providing foreign litigants—especially British creditors—an impartial forum in which to pursue their legal claims, something they were often denied in the state courts.<sup>112</sup> In particular, the constitutional and statutory grant of federal jurisdiction over "admiralty and maritime" cases was meant to ensure that international commerce—the lifeblood of the new nation—flowed free of the entanglements of local parochialism.<sup>113</sup> And international litigation over the prizes of war had been an established

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108. Thomas Jefferson, Opinion on the Restoration of Prizes (May 16, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 50, 50–52; *see also* Letter from Thomas Jefferson to George Hammond (June 5, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 197, 197–98 (contending that if French privateers were operating with a valid commission "it would be an aggression on th[at] nation" for the government to restore the prizes they seized to their original owners).

109. Letter from Thomas Jefferson to George Hammond (June 13, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 270, 270–71.

110. *Id.*

111. *Id.*

112. *See* Golove & Hulsebosch, *supra* note 6, at 1004; Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1452–57.

113. Golove & Hulsebosch, *supra* note 6, at 1004; Smith, *supra* note 6, at 88.

feature of inter-imperial relations for centuries.<sup>114</sup> Accordingly, in promoting the resolution of a sensitive diplomatic matter through the judicial application of legal rules to fact-specific cases, the Washington administration adopted an approach that broadly accorded with domestic constitutional principles as well as longstanding practices of European empires.

At the same time, however, the administration's approach represented an important innovation in—or violation of—international legal norms. One of the fundamental rules of the law governing maritime prizes was that the validity of such captures be adjudicated by a tribunal of the nation under whose authority the seizure had been made.<sup>115</sup> As Hamilton himself acknowledged, there was no warrant under the laws of war for the courts of a *neutral* nation to make such determinations.<sup>116</sup> From his perspective, redress for French violations of United States neutrality was “an affair between . . . Governments” properly settled “by reasons of state, not rules of law.”<sup>117</sup> French officials made the same argument: In customary international practice, neutrality violations were to be addressed through the intervention of “public ministers,” not the process of “incompetent” courts.<sup>118</sup>

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114. *See generally* HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775–1787* (1977); RICHARD PARES, *COLONIAL BLOCKADE AND NEUTRAL RIGHTS 1739–1763* (1938); Lauren Benton, *Legalities of the Sea in Gentili's Hispanica Advocatio*, in *THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS: ALBERICO GENTILI AND THE JUSTICE OF EMPIRE 269* (Benedict Kingsbury & Benjamin Straumann eds., 2011); Arlyck, *supra* note 9, at 28–43.

115. *See* *L'Invincible*, 14 U.S. (1 Wheat.) 238, 253–57 (1816) (discussing the rule that jurisdiction over a prize lies in the courts of the capturing nation); HENRY WHEATON, *A DIGEST OF THE LAWS OF MARITIME CAPTURES AND PRIZES 258* (New York, R. M'Dermut & D.D. Arden 1815) (“The validity of maritime captures is . . . determined in courts of prize established in the country of the captor.”).

116. Memorandum from Alexander Hamilton (May 15, 1793), in 12 *WASHINGTON PAPERS*, *supra* note 93, at 577, 577–82 (arguing that courts in the United States were “not competent” to rule on the restitution of privateer captures); *see also* *Findlay v. William*, 9 F. Cas. 57, 59–61 (D. Pa. 1793) (No. 4790) (concluding that, under international practice, the courts of neutral nations could not take jurisdiction over prizes captured by belligerents).

117. Memorandum from Alexander Hamilton (May 15, 1793), in 12 *WASHINGTON PAPERS*, *supra* note 93, at 582. Recognizing that the failure to provide any recourse to the victims of privateer seizures would be dangerous, Hamilton eventually agreed that it would be advisable to “make the experiment of a reference to the Civil Tribunal.” Letter from Alexander Hamilton to Rufus King (June 15, 1793), in 14 *HAMILTON PAPERS*, *supra* note 28, at 547.

118. Letter from Edmond-Charles Genet to Thomas Jefferson (June 14, 1793), in 26 *JEFFERSON PAPERS*, *supra* note 1, at 281; *see also* Protest of Citizen Hauterive, Consul of the republic of France, at New York, against the process and seizure of the Catherine of Halifax

In response, Jefferson sought to justify judicial intervention on both practical and constitutional grounds. Judges, he asserted, were better able to decide the “questions of law and fact” inherent in privateering-related cases than were executive branch officers.<sup>119</sup> In addition, putting the privateering question before the courts—the ultimate expositor of the law—would serve to apprise those involved of precisely what conduct was permissible.<sup>120</sup> Most importantly, judicial resolution of disputes over privateer captures was not only sensible, it was obligatory. Under the American constitutional scheme, “[q]uestions of property between Individuals” were not for the executive to decide; they “are ascribed to the Judiciary alone.”<sup>121</sup> Jefferson assured French officials, however, that the federal courts would faithfully apply the general principles of the law of nations and maritime law and that the resulting judgment would be no different than one that would be obtained in France “or in any other country of Europe.”<sup>122</sup>

Within the cabinet, Jefferson’s position won out, as the President decided that the government would not intercede to see the prizes restored.<sup>123</sup> Though Hamilton still had his reservations, he ultimately agreed that “the experiment of a reference to the Civil Tribunal” on the privateering question was advisable, for the lack of “some competent judicial authority to do justice between parties” would leave “a great *chasm* in the law.”<sup>124</sup> If nothing else, the cases would likely turn on “nice points” of fact and questions about the extent of the United States’ territorial waters, ones “which the Courts had best settle.”<sup>125</sup>

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(June 21, 1793), *in* 1 ASPFR, *supra* note 19, at 153 (“[T]ribunals are instituted to render justice between individuals, and not to . . . decide on the political relations which exist between nation and nation.”).

119. Letter from Thomas Jefferson to George Hammond (June 13, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 270, 270–71.

120. Letter from Thomas Jefferson to Edmond-Charles Genet (June 17, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 297, 297–300.

121. *Id.* at 301.

122. *Id.*

123. *See* Letter from Thomas Jefferson to William Vans Murray (May 21, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 77.

124. Letter from Alexander Hamilton to Rufus King (June 15, 1793), *in* 14 HAMILTON PAPERS, *supra* note 28, at 547, 547–48.

125. *Id.* at 548.

While British officials had doubts of their own, they soon came to recognize that the executive branch's noninterventionist position made recourse to the judiciary a necessity.<sup>126</sup> Accordingly, lawyers in several port cities began filing suit under the federal courts' admiralty jurisdiction seeking restoration of British vessels allegedly captured in violation of United States neutrality.<sup>127</sup>

The fundamental question in these cases was whether the courts had jurisdiction to consider the plaintiffs' allegations.<sup>128</sup> Echoing the arguments made by French officials, lawyers for the captors sought dismissals on the ground that, under the laws of war, the validity of the captures could only be adjudicated by French tribunals.<sup>129</sup> The plaintiffs' lawyers—channeling Jefferson—countered with a paean to judicial integrity and the rule of law. Though “despotic sovereignties” could regulate such claims through force, in a “government of *laws*” the best way to effect restitution was through admiralty proceedings in federal court.<sup>130</sup> Properly-constituted tribunals operating under the law and customs of civilized nations were less likely than executive officers to become “entangled in political considerations,” and considerations of comity and reciprocity ensured that court judgments would be given “particular respect” abroad.<sup>131</sup>

The judges were not convinced. The leading case was decided by Richard Peters, one of the nation's foremost jurists and an experienced admiralty judge.<sup>132</sup> Peters acknowledged that, as a general matter,

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126. See Letter from Benjamin Moodie to Lord Grenville (Dec. 17, 1794), UKNA-FO ser. 5, 6:140 (recognizing that recourse to the executive would be pointless without first having pursued judicial remedies); Letter from George Hammond to Thomas Jefferson (June 14, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 285 (indicating that he had followed Jefferson's “recommendation” that the owners of a captured British vessel be instructed to seek recovery in federal court).

127. See, e.g., *Findlay v. William*, 9 F. Cas. 57 (D. Pa. 1793) (No. 4790); *Moxon v. Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); see also Letter from George Hammond to Lord Grenville (June 8, 1794), UK National Archives, Foreign Office Records, America, ser. 5, 1:175 [hereinafter UKNA-FO] (describing his role in initiating litigation).

128. See *Findlay*, 9 F. Cas. at 59 (stating that “the only point . . . to determine . . . [is] whether this court is vested with the power to enquire into the legality of the prize.”).

129. See *id.* at 57–58.

130. *Id.* at 58 (emphasis added).

131. *Id.* at 58–59.

132. See *Presser*, *supra* note 61, at 34–40 (discussing Peters); see also *Castello v. Bouteille*, 5 F. Cas. 278, 280 (D. S.C. 1794) (No. 2504) (noting that Peters, who authored the *Findlay v. Williams* opinion, is a “[r]espectable character for legal knowledge” and equating his “sound argument and clear deduction” with the writings of preeminent law of nations publicists).

restitution to the victims was the proper remedy for captures made in violation of neutrality,<sup>133</sup> but he found that the weight of international legal authority clearly supported the captors' position that the courts of a neutral nation could not adjudicate the validity of a prize of war.<sup>134</sup> Any redress for French violations of United States neutrality was to be obtained via diplomatic negotiation.<sup>135</sup> Expressing confidence that French admiralty courts would render justice to the plaintiffs,<sup>136</sup> Peters dismissed the case—and several others plaintiffs filed in his court<sup>137</sup>—and other district court judges did likewise.<sup>138</sup>

Though these dismissals were primarily based on a straightforward application of existing legal doctrine, the judges' opinions made clear that prudential considerations loomed large. Judge Peters fully appreciated the delicate position in which the United States found itself,<sup>139</sup> and even acknowledged that judicial resolution of privateering-related disputes could, in theory, be diplomatically beneficial.<sup>140</sup> Nevertheless, in his view “political convenience” could

133. *Findlay*, 9 F. Cas. at 59; *see also* *Moxon v. Fanny*, 17 F. Cas. 942, 946 (D. Pa. 1793) (No. 9895) (stating that “[n]eutral courts or private individuals, are not clothed with authority to vindicate or carry on national contests.”).

134. *Findlay*, 9 F. Cas. at 61; *see also* *Moxon*, 17 F. Cas. at 946.

135. *See Findlay*, 9 F. Cas. at 59–60.

136. *See id.* at 60 (“It is to be expected by one power from another, that her courts and her administration will do justice to the rights of sovereignty and neutrality.”). In fact, one of the reasons judges gave for declining jurisdiction was to avoid encouraging what would effectively be collateral attacks on prize adjudications made by French authorities. *See* William Paca, *William Paca’s District Court Opinion*, MD. J., Aug. 15, 1793, *as reprinted in* 6 DHSC, *supra* note 2, at 324, 332.

137. *See Findlay*, 9 F. Cas. at 62; *Moxon*, 17 F. Cas. at 948; *McCurach v. Mary*, decree (E.D. Pa. Aug. 20, 1793), NARA, Admiralty Case Files for E.D. of Pa., 1789–1840, microfilm M988 [hereinafter *Pennsylvania Admiralty*].

138. *See* JAMES DUANE, DECREE ON THE ADMIRALTY SIDE OF THE DISTRICT COURT OF NEW YORK 30, 35 (New York, Francis Childs & John Swaine 1794); *Castello v. Bouteille*, 5 F. Cas. 278, 279–80 (D. S.C. 1794) (No. 2504); William Paca, *supra* note 136; BOS. GAZETTE, Aug. 5, 1793, at 2. *But see* *Folger v. L’Ecuyer* (D. Mass. 1793), *reprinted in* COLUMBIAN CENTINEL, Jan. 4, 1794, at 1 (concluding that the court had jurisdiction over a libel filed by the American captain of a captured British whaling vessel, on the theory that it was the “duty of the sovereign power to protect the rights of [its] citizens”).

139. *See Findlay*, 9 F. Cas. at 59 (“It is difficult for a neutral nation, with the best dispositions, so to conduct itself as not to displease one or the other of belligerent parties.”); *Moxon*, 17 F. Cas. at 944 (noting that the case turned on “a point of public consequence”).

140. *See Findlay*, 9 F. Cas. at 59–60 (noting the possible “necessity” of judicially deciding the case).

not serve as the basis for judicial intervention in the affairs of state.<sup>141</sup> Not only was such intervention unwarranted by law, it risked offending one party or the other.<sup>142</sup> The surest way for Americans to demonstrate their impartiality, in fact, was “to confine ourselves to the customs of other nations in our predicament,” which necessitated declining jurisdiction over French captures.<sup>143</sup> Otherwise, the belligerents might use claims grounded in neutral rights as the basis for “a war of suits” in federal court.<sup>144</sup>

The district courts’ determination that they did not have jurisdiction over privateer captures was a blow to the Washington administration’s hope that questions respecting the restoration of prizes could be decided judicially rather than politically. In the wake of the dismissals, British officials redoubled their demands that the executive branch intervene to restore seized ships,<sup>145</sup> while French officials asserted all the more stridently their exclusive authority to dispose of such captures.<sup>146</sup> Having been repeatedly rebuffed in its attempts to recruit the courts into management of the privateering controversy, it became increasingly clear that the executive would need to take matters more fully in hand. As Washington exasperatedly proclaimed to his cabinet, unless some “effectual mode” was adopted to prevent French privateers from arming in United States ports, “the Executive of the United States [would] be incessantly harassed with complaints on this head.”<sup>147</sup>

All was not lost, however. As several district court judges had noted, theirs was not the last word on the question of jurisdiction over privateer captures; the issue’s “novelty and importance,” one averred,

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141. *Id.* at 60; *see also* *Castello*, 5 F. Cas. at 279 (“The constitution has wisely separated the judicial and executive departments, and we must not infringe the barriers.”); *Moxon*, 17 F. Cas. at 948 (“I should very willingly relieve [the executive] from part of the burthens thrown upon [it] by the unhappy contests among other nations; but my views of the powers of this court forbid my interference.”).

142. *See Findlay*, 9 F. Cas. at 60.

143. *Id.* at 59.

144. *Moxon*, 17 F. Cas. at 946.

145. *See, e.g.*, Letter from George Hammond to Thomas Jefferson (Nov. 7, 1793), *in* 27 JEFFERSON PAPERS, *supra* note 1, at 318 (asking administration to restore a captured ship to its owners).

146. *See, e.g.*, Letter from Edmond-Charles Genet to Thomas Jefferson (Sept. 13, 1793), *in* 27 JEFFERSON PAPERS, *supra* note 1, at 103–05 (arguing that French consuls have exclusive jurisdiction over French prizes).

147. Letter from George Washington to the Cabinet (July 29, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 582.

made it “worthy of a much higher tribunal than that of a single judge.”<sup>148</sup> Such hints no doubt buoyed hopes within the cabinet that judicial intervention might yet be forthcoming. In a letter to the United States minister in Paris, Jefferson noted that the jurisdictional question was “not yet perfectly settled,” and that “an appeal to the Court of last resort [would] decide it finally.”<sup>149</sup>

### III. THE COURTS IN CONFLICT

Jefferson’s comment was prescient. In its first privateering case in early 1794, the Supreme Court reversed a lower court ruling denying jurisdiction over a French capture, raising the possibility that federal courts would be available to adjudicate such claims.<sup>150</sup> British officials, frustrated in their attempts to secure redress from the executive branch, eagerly accepted the Court’s invitation to press their arguments before the federal bench.<sup>151</sup> And while their French counterparts complained bitterly that courts had no role to play in wartime disputes between sovereign nations, the Washington administration consistently rejected French demands that the executive interfere in matters the administration insisted were properly reserved to the judiciary.<sup>152</sup> The courts therefore soon became the primary forum through which disputes over French privateering were resolved.

The judicial embrace of a more prominent role in the privateering controversy was far from whole-hearted, however. As appeals from privateering lawsuits began to crowd its docket, the Supreme Court was forced to confront the Neutrality Crisis’s full implications. Struggling to reconcile the necessity of safeguarding American neutrality against the need to conform its decisions to the norms and practices of other nations, the Court limited the extent to which privateer activity in the United States could serve as the basis for claims to captured property.<sup>153</sup> At the same time, the Court took steps to

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148. DUANE, *supra* note 138, at 4; *see also Findlay*, 9 F. Cas. at 61 (“There is an appeal, from any determination I may give, to a superior tribunal.”).

149. Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 704.

150. *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794).

151. *See infra* text accompanying notes 180–89.

152. *See infra* text accompanying notes 196–203.

153. *See infra* text accompanying notes 214–21.

protect its own institutional interests by narrowing the scope of its reviewing authority in admiralty appeals to questions of law only.<sup>154</sup> In so doing, the justices signaled their intent to define the Court as the ultimate arbiter of legal questions under the Constitution.

#### A. *Opening the Door to Litigation*

In February 1794, the Court decided its first case involving a French privateer capture, *Glass v. Sloop Betsey*. The *Betsey* was a Swedish vessel carrying Swedish and American cargo, captured in July 1793 by a French privateer armed in Charleston. The owners of some of the *Betsey*'s cargo sought help from the Washington administration in recovering their property,<sup>155</sup> but Jefferson replied that “remedy in the courts of justice” was the only one to which they had access.<sup>156</sup> After the district court dismissed their suit on jurisdictional grounds, Jefferson rebuffed the owners’ second request for executive intervention.<sup>157</sup> When Justice William Paterson—acting in his capacity as circuit court judge—affirmed the district court’s dismissal on appeal,<sup>158</sup> the stage was set for consideration by the full Court.<sup>159</sup>

Despite four days of learned argument respecting the federal courts’ jurisdiction under domestic and international law, the Court’s decree reversing the lower courts was brief and opaque.<sup>160</sup> It contained no reasoning and no citations to authority, so determining precisely what it held presents a bit of a puzzle.<sup>161</sup> On its face, the ruling as to the federal district courts’ jurisdiction over privateering cases was very broad, in that it affirmed their enjoyment of “all the powers of a court

154. See *infra* text accompanying notes 230–37.

155. See Letter from Lucas Gibbes & Alexander S. Glass to Thomas Jefferson (July 8, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 453 (asking that the vessel and cargo be delivered to their agent in Baltimore).

156. Letter from Thomas Jefferson to Richard Söderström (Nov. 20, 1793), in 27 JEFFERSON PAPERS, *supra* note 1, at 409.

157. Commentary on *Glass v. Sloop Betsey*, in 6 DHSC, *supra* note 2, at 296, 301–05.

158. See *Extract of a Letter from Easton, to a Gentleman in this Town*, COLUMBIAN CENTINEL (Bos.), Nov. 30, 1793, at 2 (reporting the basis for Paterson’s decision).

159. Commentary on *Glass v. Sloop Betsey*, *supra* note 157, at 307.

160. *Glass v. Sloop Betsey*, Decree of the Supreme Court (Feb. 18, 1794), reprinted in 6 DHSC, *supra* note 2, at 347–48. The Court added that foreign nations had no right to erect prize tribunals in the United States, unless by special agreement; as the existing treaties with France did not include such a provision, the jurisdiction exercised by the consuls of France was “not of right.” *Id.*

161. See Sloss, *Judicial Foreign Policy*, *supra* note 12, at 170–71.



of Admiralty.”<sup>162</sup> That formulation, however, only begged the central question: Did the powers of a federal admiralty court include the ability to examine the validity of a high-seas capture of a neutral vessel made by a belligerent power at war? Because the district court had answered “no” to that question, the reversal of that judgment by the Supreme Court and the remand for further proceedings necessarily meant that the answer was “yes.” But how far this principle extended was by no means clear.

Though modern-day observers generally understand *Glass* to have definitively extended the federal courts’ jurisdiction over all captures that violated United States neutrality,<sup>163</sup> the ruling actually left open more questions than it answered. Contemporaries were confused as to what the Court actually held,<sup>164</sup> and were uncertain regarding how far the courts’ jurisdiction now extended.<sup>165</sup> As we shall see, the difficulty

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162. This statement was likely meant to respond to the captor’s argument that the Judiciary Act’s grant of jurisdiction in “civil and maritime” cases did not extend to cases involving prizes of war. *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6, 12, 16 (1794). This argument may have informed Justice Paterson’s reasoning on the circuit court. Commentary on *Glass v. Sloop Betsey*, *supra* note 157, at 310 n.69.

163. See, e.g., WARREN, *supra* note 78, at 117 (“No decision of the Court ever did more to vindicate our international rights, to establish respect amongst other nations for the sovereignty of this country, and to keep the United States out of international complications.”); CASTO, SUPREME COURT, *supra* note 12, at 82–87; Sloss, *Judicial Foreign Policy*, *supra* note 12, at 161; HYNEMAN, *supra* note 6, at 91; Reinstein, *supra* note 6, at 419 (stating that *Glass* gave district courts “authority over foreign captures and the power to order restitution for illegally seized prizes”); Golove & Hulsebosch, *supra* note 6, at 1023–27; Sylvester, *supra* note 31, at 34 (“By this one announcement, the Supreme Court was able to ensure federal court jurisdiction over all prize cases arising under the law of nations.”).

164. Some observers believed that the Court had decided that district courts had jurisdiction over captures made within United States territory, Letter from George Hammond to Lord Grenville (Feb. 22, 1794), UKNA-FO ser. 5, 4:43; Opinion of Peter S. DuPonceau (July 9, 1794), AMAE, Boston Consulate, box 71, La Catherine, even though the district court had determined, as a factual matter, that the vessel had been seized on the high seas, Commentary on *Glass v. Sloop Betsey*, *supra* note 157, at 302. On the other hand, French officials apparently thought the decision in *Glass* concerned only their consuls’ authority to judge the validity of prizes brought into the United States, *Décisions de la Cour Suprême des E.U.* (Feb. 19, 1794) (1 Ventôse An 2), AMAE-CP, 40:103, but that question was not argued by the parties, *Glass*, 3 U.S. (3 Dall.) at 15–16, and was addressed by the Court in dicta, *id.* at 16.

165. See *Hollingsworth v. Betsey*, 12 F. Cas. 348, 351 (D. Pa. 1795) (No. 6612) (expressing doubt, even after *Glass*, about the propriety of federal judges taking cognizance of claims of capture between belligerents); *Dubois v. Brig Kitty*, plea to jurisdiction (Feb. 25, 1794), NARA, Pennsylvania Admiralty, *supra* note 137 (making the argument, subsequent to *Glass*, that the court did not have the authority to restore a captured vessel to its owners); Letter from Peter S. DuPonceau to Martin Jorris (Apr. 8, 1795), in 1 DUPONCEAU LETTERBOOKS 58 (Historical Society of Pennsylvania) [hereinafter *DuPonceau Letterbooks*] (noting that *Glass* said nothing definitive about federal court jurisdiction over prizes captured outside United States

of drawing that boundary would bedevil the Court for years to come.<sup>166</sup>

*Glass*'s inscrutability also points to a more fundamental question about the Court's motivations. On its face, the jurisdictional ruling seems surprising, as it contravened the near-unanimous opinion of district court judges<sup>167</sup> as well as the position taken by Justice Paterson on circuit only a few months earlier.<sup>168</sup> The Court's failure to cite to any authority or offer any reasoning only highlighted the extent to which the decision stood in tension with the fundamental precept that only the tribunals of the capturing nation had the authority to judge the validity of a prize of war.<sup>169</sup> It is of little surprise that contemporary observers understood the decision to have been prompted by considerations of "political expediency."<sup>170</sup>

But what were the "politics" that prompted the Court to contravene established international practice and open the door to federal court resolution of the privateering dispute? Though there is no direct evidence of the justices' thinking, it seems clear that the Court was responding to the need to provide some mechanism for the resolution of British claims arising from French privateering.

By the time *Glass* was decided, Anglo-American relations were at their nadir. In addition to the numerous points of contention between the two nations that festered in the wake of American independence, the outbreak of war with France had given rise to new tensions,

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territory, nor about the courts' authority to restore vessels captured in violation of United States neutrality).

166. See *infra* Section III.C.

167. See *supra* notes 132–44 and accompanying text.

168. The Court's decision was apparently unanimous, *Glass v. Sloop Betsey*, Decree of the Supreme Court, *supra* note 160, at 347–48 (noting that the Court was "decidedly of opinion" and "clearly of opinion" on the substantive questions), and Paterson did not register any objections to the reversal of his ruling on circuit, Commentary on *Glass v. Sloop Betsey*, *supra* note 157, at 310 n.69.

169. See CASTO, SUPREME COURT, *supra* note 12, at 109 (describing *Glass* as a case in which "the Court was willing to issue a fiat overturning settled admiralty law with little or no explanation").

170. Opinion of J.S. Martin (July 10, 1794), AMAE, Boston Consulate, box 71, La Catherine; see also Opinion of J.S. Martin (July 7, 1794), AMAE, Boston Consulate, box 71, La Catherine (averring that *Glass* had "more political than legal ground for its support" and that "able lawyers among themselves dissented from the opinion"); cf. Letter from Peter S. DuPonceau to John Y. Noel (Aug. 1, 1795), in 1 DUPONCEAU LETTERBOOKS, *supra* note 165, at 108 (noting that the precise scope of the federal courts' authority to entertain claims depended largely on "the political opinions of the day").

including mounting British anger over French privateering activities. The state of relations had become so critical by early 1794 that British provocations in the Northwest and the Caribbean had brought the two nations to the brink of war, and Washington felt compelled to send Chief Justice Jay to London to negotiate a treaty and hopefully avert open hostilities.<sup>171</sup>

But why was the judiciary necessarily the institution of government to address British complaints? As numerous contemporaries—including Alexander Hamilton—had argued, violations of neutrality were generally understood to be matters of state to be resolved by government-to-government negotiation, not questions of law to be adjudicated by courts.<sup>172</sup>

The answer is twofold. As indicated earlier, the Washington administration's initial effort to have privateering disputes adjudicated in federal court was driven in part by a disinclination within the cabinet to take action against either British or French interests.<sup>173</sup> By the time *Glass* was decided, British officials understood that the executive branch was incapable of satisfactorily addressing British claims even if it wanted to. In the wake of the district courts' denial of jurisdiction over British claims, the Washington administration had moved to intervene more directly to resolve the many disputes cropping up along the eastern seaboard. It issued a set of substantive rules prohibiting American participation in French privateering<sup>174</sup> and

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171. On Anglo-American relations and the particular circumstances of Jay's mission, see SAMUEL FLAGG BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* (1923); JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS* (1970); ELKINS & MCKITRICK, *supra* note 5, at 375–96.

172. *See supra* notes 115–18 and accompanying text; DUANE, *supra* note 138, at 26–32 (discussing European cases in which neutrality violations in maritime captures were addressed by executive, not judicial, authority).

173. *See supra* notes 105–08 and accompanying text.

174. Rules on Neutrality (Aug. 3, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 608, 609–10.

sought to remedy its own lack of enforcement power<sup>175</sup> by delegating responsibility to state and local federal officials.<sup>176</sup>

The administration's attempt to leverage local law enforcement resources to restrain French privateering was largely ineffective. In many cases state and federal officials could do little to prevent well-armed vessels of war from doing as they pleased.<sup>177</sup> And while a number of governors appear to have taken their new law enforcement responsibilities to heart,<sup>178</sup> others were less inclined to follow orders from the federal executive,<sup>179</sup> especially when such actions threatened serious diplomatic consequences.<sup>180</sup> To make matters worse, the

175. See Letter from George Washington to Alexander Hamilton, Thomas Jefferson, Henry Knox & Edmund Randolph (July 29, 1793), in 15 HAMILTON PAPERS, *supra* note 28, at 144 (expressing his concern that the executive would be “incessantly harrassed [sic] with complaints” from the victims of French privateering); Letter from Edmund Randolph to Joseph Fauchet (Oct. 22, 1794), in 1 ASPFR, *supra* note 19, at 589 (noting that the United States’ sheer size made cabinet resolution of individual cases impossible); see generally LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* (1948) (noting the limited institutional resources of the federal government under Washington).

176. See Treasury Department Circular to the Collectors of the Customs (Aug. 4, 1793), in 15 HAMILTON PAPERS, *supra* note 28, at 178–81 (instructing customs collectors to report neutrality infractions to the governor and local federal district attorney for resolution); Instructions to the District Attorneys [undated], in 27 JEFFERSON PAPERS, *supra* note 1, at 340 (charging the district attorneys with collecting the evidence governors would consider in deciding on restoration); cf. Letter from Thomas Jefferson to George Hammond (Sept. 5, 1793), in 27 JEFFERSON PAPERS, *supra* note 1, at 36–37 (asking British minister Hammond to instruct the consuls under his supervision to provide government officers with information regarding alleged neutrality infractions).

177. See Letter from Governor of Virginia to Edmund Randolph (Feb. 12, 1795), in 1 ASPFR, *supra* note 19, at 606 (noting the lack of “effectual means” to prevent violations by “citizens or subjects of the belligerent nations”); Report of David Robinett (Jan. 5, 1795), in 1 ASPFR, *supra* note 19, at 632 (describing incident in which a French privateer forcibly resisted a seizure attempt by federal officers).

178. See Letter from Governor Samuel Huntington to Sir John Temple (Sept. 3, 1793), UKNA-FO ser. 5, 2:69 (agreeing to restore a British vessel to its owners); Letter from Sir John Temple to Governor George Clinton (Aug. 18, 1793), UKNA-FO ser. 5, 2:67 (seeking information regarding a prize that Clinton had retaken from its French captors).

179. See Letter from Thomas Sim Lee to Thomas Jefferson (May 20, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 67 (showing the governor of Maryland noting his own “incompetency in point of authority to interfere” with a privateer capture); Letter from Isaac Shelby to Thomas Jefferson (Jan. 13, 1794), in 1 ASPFR, *supra* note 19, at 455–56 (the governor of Kentucky asserting doubts about whether he had “any legal authority to restrain or punish” French citizens raising troops for an intended incursion into Spanish territory along the Mississippi).

180. See Letter from Thomas MacDonogh to Lord Grenville (Nov. 14, 1793), UKNA-FO ser. 5, 2:269 (explaining that the Massachusetts governor declined to interdict a French privateer fitting out in Boston from the “apprehension of taking a wrong step”).

administration's parallel effort to secure legislation from Congress to strengthen United States neutrality was thwarted by partisan politics.<sup>181</sup> Republican opposition delayed the law's passage for several months and stripped it of its most important provisions,<sup>182</sup> including those specifically requested by the President that would have definitively established federal court jurisdiction over disputes arising from privateer captures.<sup>183</sup>

Accordingly, one way to read the decision in *Glass*—as several scholars have—is to view it as the Supreme Court's effort to bolster the administration's diplomatic position by paving the way for British victims of French privateering to seek in federal court the recourse

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181. See Letter from George Washington to the United States Senate and House of Representatives (Dec. 3, 1793), in 14 WASHINGTON PAPERS, *supra* note 93, at 462, 462–63 (noting that the penalties under the law of nations for neutrality violations were often either “inadequate” or “indistinctly marked”).

182. The Neutrality Act, as it came to be known, provided criminal penalties for Americans who engaged in hostilities against a country with which the United States was at peace and for those involved in fitting out ships with the intent of committing such hostilities. An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, June 5, 1794, 1 Stat. 381 [hereinafter Neutrality Act of 1794]. Though these provisions obviated any further debate about whether such activities were punishable as violations of federal common law, prosecutions continued to be rare. See *United States v. Guinet*, 26 F. Cas. 53 (Pa. C.C. 1795) (noting conviction of the defendant for his involvement in the arming of a privateer in Delaware); cf. Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822*, 30 LAW & HIST. REV. 245, 258–62 (2012) (discussing the federal government's more concerted effort in the 1810s to use the Neutrality Act as a basis for prosecutions against Americans who participated in privateering against Spain on behalf of revolutionary governments in South America, but again with limited success).

183. See Letter from George Washington to the United States Senate and House of Representatives (Dec. 3, 1793), in 14 WASHINGTON PAPERS, *supra* note 93, at 462, 463–64 (stating that because “several of the Courts have doubted . . . their power to liberate . . . vessels . . . it would seem proper to regulate their jurisdiction in these points”). The original bill—drafted by the administration—gave the courts jurisdiction over claims involving the capture of American and other neutral vessels; but, for reasons unknown, James Madison and others fought to have the provision excluded, and it was removed at some point during the legislative proceedings. *CASTO, FIGHTING SAIL*, *supra* note 6, at 159–62; see also Neutrality Act of 1794, § 6, 1 Stat. 381, 384 (granting the federal courts jurisdiction only over captures made within United States territorial waters). Nor did the law explicitly give the courts the authority to restore vessels captured by privateers who had violated one of the law's substantive prohibitions, so even in cases where jurisdiction was proper, a private claimant's ability to secure a meaningful remedy remained in doubt. See Letter from Peter S. DuPonceau to Martin Jorris (Apr. 8, 1795), in 1 DUPONCEAU LETTERBOOKS, *supra* note 165, at 58 (expressing doubts about the courts' authority to restore vessels captured in violation of United States neutrality); cf. *Moodie v. The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319, 319 (1796) (Ellsworth, C.J.) (questioning whether “an augmentation of force [within the United States] could be deemed . . . a sufficient cause for restitution” of a seized vessel).

they were unable to secure through political channels.<sup>184</sup> Such an explanation accords with general accounts of the judicial role in early foreign affairs that characterize the courts as a willing adjunct to the executive in pursuit of its foreign policy objectives.<sup>185</sup>

Thus, it is important to recognize the limited nature of the Court's decision in *Glass*. If the goal was to ensure that British complaints over French privateering would be resolved judicially, on its face the decision did little. Because the captured ship was Swedish-American owned, the ruling at most indicated that federal district courts had jurisdiction to consider claims from Americans (and perhaps other neutrals) victimized by French privateering.<sup>186</sup> Such a holding, of course, offered little benefit to *British* property owners seeking to recover their vessels and cargo by suit in federal court. Moreover, the opinion did not address the argument that, by treaty, the courts were expressly precluded from inquiring into French captures.<sup>187</sup> By not addressing such issues, the Court ensured that future British attempts to recover property through the courts would face continued obstacles.<sup>188</sup>

*Glass* therefore seems best understood as a prudential non-decision—akin to the one the justices took regarding the advisory

184. See, e.g., CASTO, SUPREME COURT, *supra* note 12, at 109 (asserting that in *Glass* the Court contravened established legal doctrine in the interest of “national security”); Wythe Holt, *Separation of Powers? Relations Between the Judiciary and the Other Branches of the Federal Government Before 1803*, in NEITHER SEPARATE NOR EQUAL: CONGRESS IN THE 1790S 183–210 (Kenneth R. Bowling & Donald R. Kennon eds., 2000); Maeva Marcus, *Is the Supreme Court a Political Institution?*, 72 GEO. WASH. L. REV. 95 (2003).

185. See *supra* notes 12–14.

186. The libellants in the case were American and Swedish owners of the cargo on board the *Betsey* when she was captured. 6 DHSC, *supra* note 2, at 301; see also *supra* note 138 (noting that, prior to *Glass*, a district court had endorsed the theory that it had jurisdiction over claims brought by Americans).

187. See *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6, 6–15 (1794) (argument of counsel); Letter from Edmond-Charles Genet to Thomas Jefferson (June 14, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 281.

188. The Court may have thought the treaty question was not properly presented, given that Article 17 prohibited the examination of prizes captured from France's “enemies,” and the *Betsey* was a neutral vessel carrying neutral cargo. But in the Court's early years the justices routinely opined on legal questions not directly implicated in the case at bar, see generally JAY, *supra* note 8, at 77–112, and even did so in *Glass* itself, see 3 U.S. at 15–16 (opining on French consular authority to condemn prizes in the United States, even though that question was not addressed by the courts below nor by counsel at argument). In addition, given that the captors alleged that the *Betsey* was in fact a British vessel, 6 DHSC, *supra* note 2, at 321, there was ample justification for the *Glass* Court to address Article 17's implications for such claims.

opinion—meant to deflect the most critical questions regarding the federal courts’ authority in foreign relations matters. There can be no doubt that the Court was aware of the neutrality legislation then pending in Congress, and the justices would have had reason to believe that the legislature would resolve the finer jurisdictional questions raised by litigation over French captures.<sup>189</sup> It therefore makes sense that the Court said—and decided—as little as possible.<sup>190</sup>

At the same time, the justices were certainly aware of the Washington administration’s struggles to enforce its own neutrality rules. Accordingly, the Court was careful not to foreclose the possibility that federal admiralty jurisdiction was sufficiently expansive to include claims to British property captured by French privateers. By leaving the door open to further British suits, the Court ensured that the claims of a powerful foreign constituency would receive an audience within the federal government, without irrevocably committing the judiciary to fulfilling that role going forward. And although significant uncertainty remained regarding the full scope of the courts’ authority, for the victims of French privateering, the courthouse door was now ajar.

#### B. *A Proxy War in Federal Court*

In *Glass*’s wake, British officials began a concerted effort to use litigation in federal court as a means of undermining French privateering. Political and military developments in the broader transatlantic conflict between France and Great Britain caused a surge in privateering activity in 1794,<sup>191</sup> and British officials became increasingly alarmed as vessels and cargo seized by privateers operating from the United States made their way into ports across the eastern seaboard.<sup>192</sup> The British lacked confidence that the Washington

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189. See *supra* note 183 and accompanying text (noting President Washington’s request that Congress “regulate” the federal courts’ jurisdiction over privateering cases).

190. See GOEBEL, *supra* note 96, at 765 (suggesting that the Court’s minimalist decree in *Glass* was “no doubt prudent” in light of pending Congressional action).

191. See JACKSON, *supra* note 19, at 68–86 (explaining increased French need for privateers to solidify its military gains in the Caribbean).

192. See Letter from George Hammond to Lord Grenville (Sep. 5, 1794), UKNA-FO ser. 5, 5:275 (noting that there had been “no diminution” in privateering activity in Charleston); Letter from Benjamin Moodie to Phineas Bond (Dec. 17, 1794), UKNA-FO ser. 5, 6:140 (describing the difficulties he faced in keeping track of all the privateers emanating from southern ports).

administration had either the will or the means to effectively respond to the rise in French privateering. Having witnessed first-hand the ineffectiveness of the administration's attempt to enforce its rules through state and local federal officials, British observers reasonably doubted whether the executive possessed the "energy" necessary to compel compliance with the obligations of neutrality even if it had the desire to do so.<sup>193</sup>

British skepticism was well founded. Not only had executive branch enforcement proven ineffective in practice,<sup>194</sup> but following the Court's decision in *Glass*, the Washington administration's policy on the restoration of captured property explicitly shifted in favor of judicial resolution. Though intervention by state and federal officials in prize disputes did not cease entirely,<sup>195</sup> by late 1794 the administration's stated approach was to leave such controversies to the courts, at least when they had "jurisdiction to inquire into the affair."<sup>196</sup> To the British, the administration's point was clear: filing suit in federal court had become "the only medium[ ] thro' which Justice [wa]s to be obtained."<sup>197</sup>

Accordingly, in late 1794, British consuls in the United States began a concerted effort to use federal court litigation as a means of recovering captured vessels and cargo. The British legal campaign was not simply aimed at securing recompense for individual victims, however; the goal was to undermine the French privateering effort more broadly, by preventing captors from enjoying the profits of their

193. Letter from John Hamilton to Lord Grenville (June 26, 1794), UKNA-FO ser. 5, 6:219; *see also* Letter from George Hammond to Lord Grenville (Oct. 12, 1793), UKNA-FO ser. 5, 1:329 (asserting that federal officials were forced to resort to "half-measures and empty assertions of authority" in their attempts to restrain French privateers).

194. *See supra* notes 174–18080 and accompanying text.

195. *See* Letter from Edmund Randolph to Joseph Fauchet (Sept. 27, 1794), *in* 1 ASPFR, *supra* note 19, at 588 (noting that the Rhode Island governor had determined that a prize captured by a French privateer would be given over to the captors).

196. Letter from Edmund Randolph to Governors of the Several States (Oct. 22, 1794), *in* 1 ASPFR, *supra* note 19, at 589–90.

197. Letter from Phineas Bond to Lord Grenville (Jan. 27, 1795), UKNA-FO ser. 5, 10:35; *see also* Letter from Benjamin Moodie to Lord Grenville (Dec. 17, 1794), UKNA-FO ser. 5, 6:140 (describing his realization that the administration did not consider itself obligated to act on privateering-related complaints unless suit had first been filed in the courts); Letter from George Hammond to Lord Grenville (June 8, 1794), UKNA-FO ser. 5, 5:59 (stating that filing suit was "the most probable and speedy mode of effecting . . . restitution" of captured ships).



ventures and therefore crippling future operations.<sup>198</sup> Though concerns over litigation costs induced British officials to be somewhat selective in choosing which cases to prosecute,<sup>199</sup> in general they demonstrated great willingness to transform the federal courts into a new front in the maritime war raging across the Atlantic.<sup>200</sup>

In order for this strategy to work, however, the courts had to be open to British claims. As noted earlier, the Supreme Court's ruling in *Glass* appeared to carve out a narrow exception to the general principle that neutral courts could not take cognizance of claims arising from wartime captures,<sup>201</sup> as did the neutrality legislation eventually passed by Congress (known as the Neutrality Act).<sup>202</sup> But neither was especially helpful in achieving the central British objective: preventing French privateers from using American ports as a base for launching high-seas attacks on British commerce. Accordingly, claimants pressed new theories supporting judicial restoration of prizes seized by privateers in violation of United States neutrality,<sup>203</sup> forcing

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198. See Letter from Benjamin Moodie to Phineas Bond (Apr. 28, 1795), UKNA-FO ser. 5 11:101 (characterizing his litigation efforts as being motivated by the entreaties of British property owners as well as his sense of official duty). Once a suit was filed, the district court took possession of the prize in question until final disposition, so even if the action ultimately proved unsuccessful legal proceedings could prevent the captors from profiting from the prize for years. See Sloss, *Judicial Foreign Policy*, *supra* note 12, at 182–83 (noting that the time lag between the filing of the initial libel in thirteen privateering cases and final disposition by the Supreme Court ranged from eleven to twenty-nine months). Given that privateering was a capital-intensive operation motivated significantly by a desire for personal gain, any significant delay in realizing a profit from a captured vessel endangered future operations. See Letter from Benjamin Moodie to Phineas Bond (Apr. 23, 1796), UKNA-FO ser. 5, 15:80 (“[T]he detention of considerable sums during the Proceedings in the different courts has had as much if not greater effect in saving British Property than even the success of his Majesty’s Cruizers.”); Letter from Joseph Fauchet to Edmund Randolph (Aug. 26, 1795), *in* 1 ASPFR, *supra* note 19, at 588 (complaining that British litigation “discourage[d] and fatigue[d] the captors”).

199. See Letter from Benjamin Moodie to George Miller (Nov. 28, 1794), UKNA-FO ser. 5, 11:88 (noting litigation’s upfront costs); List of British Vessels carried into Charleston South Carolina as Prizes, UKNA-FO, ser. 5, 11:91 (indicating that Moodie libeled approximately half of the British vessels brought into Charleston by privateers in the latter half of 1794).

200. See Letter from Benjamin Moodie to George Miller (Nov. 28, 1794), *supra* note 199 (expressing his determination to libel every vessel within his purview when “there [wa]s any prospect of recovering them”); Letter from Benjamin Moodie to Phineas Bond (Apr. 23, 1796), *supra* note 198 (indicating that he would appeal all cases lost in the district court).

201. See *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6, 9 (1794) (ruling that the district court had jurisdiction over the capture of a vessel carrying American and other neutral property).

202. See Neutrality Act of 1794, ch. 50, § 6, 1 Stat. 384 (1794) (granting the district courts jurisdiction over captures occurring within the United States’ territorial waters).

203. See, e.g., *Williamson v. The Betsey*, 30 F. Cas. 7, 7 (D. S.C. 1795) (No. 17750) (noting libellant’s argument that the capturing privateer “was armed and equipped for war” in

district court judges to reconcile restrictions on judicial intervention in privateering matters enshrined in treaty and international practice with the necessity of safeguarding the nation from war.

Faced with these competing considerations, the lower courts concluded that although the Treaty of Amity between France and the United States generally prohibited them from adjudicating the validity of French captures,<sup>204</sup> privateer violations of United States neutrality stripped them of the jurisdictional protections afforded them by treaty. Though the doctrinal basis for this approach was at times somewhat muddled,<sup>205</sup> American participation in privateering and the arming or equipping of privateer ships within United States territory were generally sufficient to establish federal court jurisdiction.<sup>206</sup>

The result was a steady erosion of the principle that neutral courts had no business adjudicating the validity of maritime seizures made by belligerents at war. When the evidence established that a neutrality violation of some type had occurred, judges began bypassing the jurisdictional question altogether,<sup>207</sup> and in some cases privateer

Charleston); *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 356 (D. S.C. 1794) (No. 7216) (arguing that the capturing privateer was commanded by an American); *Ormond v. Brig Somerset*, replication (Cir. Ct. Ga. Dec. 22, 1794), NARA, District Court for Georgia, Case Files (arguing that the capturing privateer was owned by “citizens, subjects, and inhabitants of the United States”).

204. See *Williamson*, 30 F. Cas. at 7 (dismissing on jurisdictional grounds suit by owner of a British ship captured by a French privateer); *Stannick v. The Friendship*, 22 F. Cas. 1056, 1057 (D.S.C. 1794) (No. 13291) (concluding that article 17 of the Treaty of Amity “expressly altered” the federal court’s general admiralty jurisdiction by excluding captures made by French ships of war); *Trabudua v. Ship Transmarana*, decree (S.D. Ga. Jan. 2, 1795), NARA, Index Books, 1789-1928, and Minutes and Bench Dockets, 1789-1870, for the S. D. of Ga., microfilm M1172 (dismissing on jurisdictional grounds suit by owner of a Spanish ship captured by a French privateer).

205. See, e.g., *British Consul v. The Nancy*, 4 F. Cas. 171, 171 (D.S.C. 1795) (No. 1898) (citing both the Neutrality Act and the more general obligations of the international “laws of neutrality” as the basis for restoring a captured vessel).

206. See *Jansen*, 13 F. Cas. at 359 (finding a French-commissioned privateer’s seizure of an enemy Dutch ship justiciable, despite article 17, because the captain of the privateer was an American); *Kelly v. Schooner Prosperity*, in 1 REPORTS OF CASES ADJUDGED IN THE COURT OF SOUTH CAROLINA 38–39 (D.S.C. 1794) (restoring a British vessel captured by a French privateer that had formerly been an American vessel and had illegally left the United States); *Ormond v. Brig Somerset*, decree (Cir. Ct. Ga. Dec. 22, 1794), NARA, District Court for Georgia, Case Files (restoring a British ship captured by the same privateer vessel in *Jansen*, on the theory that the privateer was in fact American-owned).

207. See *Moodie v. The Betty Carthart*, 17 F. Cas. 651, 651–53 (D.S.C. 1795) (No. 9742) (noting that Article 17’s impact on the court’s jurisdiction was one of the legal questions requiring resolution, but finding for the libellants without addressing it); *The Nancy*, 4 F. Cas.

counsel no longer bothered to even raise the issue.<sup>208</sup> Though district judges dismissed numerous suits filed by British claimants due to lack of evidence that a neutrality violation had in fact occurred,<sup>209</sup> by lowering the jurisdictional barriers formerly imposed by treaty and custom, the lower court decisions ensured that the British litigants would have their day in court.

Chagrined by these developments, French officials inundated the Washington administration with complaints about the damage that litigation was imposing on their war effort.<sup>210</sup> The core French position—as it had been all along—was that federal court jurisdiction over privateer captures violated the two nations’ treaty commitments and more general principles of sovereign right.<sup>211</sup> While a neutral nation like the United States might legitimately understand itself to be obliged to protect British merchants from attacks launched from within its jurisdiction, that fact did not vest British claimants with rights that were judicially enforceable. The only way the United States could seek redress for French neutrality violations was by dealing with France directly.<sup>212</sup>

Officials in the Washington administration continued to characterize the matter differently. While sovereign nations might choose to adjust claims respecting violations of neutrality through diplomacy, such proceedings did not operate to destroy the rights of

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at 171 (restoring a vessel captured by a French privateer armed in Charleston without addressing the captor’s jurisdictional argument).

208. *See, e.g.*, *Pintado v. Ship San Joseph*; *United States v. La Vengeance*, in 7 DHSC, *supra* note 2, at 526 (indicating that the captors in a New York case did not contest the district court’s jurisdiction).

209. *E.g.*, *British Consul v. The Mermaid*, 4 F. Cas. 169, 171 (D. S.C. 1795) (No. 1897); *Moodie v. The Brothers*, 17 F. Cas. 653, 654 (D. S.C. 1795) (No. 9743).

210. Letter from Joseph Fauchet to Edmund Randolph (Sep. 13, 1794), in 1 ASPFR, *supra* note 19, at 590–91; Letter from Joseph Fauchet to Edmund Randolph (June 8, 1795), in 1 ASPFR, *supra* note 19, at 614–15; Letter from Pierre-Auguste Adet to Timothy Pickering (Nov. 15, 1796), in 1 ASPFR *supra* note 19, at 579–82.

211. *See supra* text accompanying note 118.

212. *See* Letter from Edmond-Charles Genet to Thomas Jefferson (June 22, 1793), in 26 JEFFERSON PAPERS, *supra* note 1, at 339 (“[N]o particular tribunal has the right or power to interpose itself between two nations.”); Memorandum Regarding Citizen Théric’s Complaints (Feb. 5, 1796), AMAE, Mémoires et Documents [hereinafter AMAE-MD], 39:36 (arguing that alleged violations of United States neutrality could only be addressed via “government to government negotiation,” and “under no circumstances” could courts take cognizance of such matters); Ministère des Relations Extérieures to Victor Dupont (Apr. 23, 1796), AMAE-CCC, Charleston, 2:275 (reiterating the French government’s view that Article 17 of the Treaty of Amity precluded the federal courts from taking jurisdiction over French prizes).

private citizens to seek restitution of their property in a court of law.<sup>213</sup> Those rights existed parallel to and independently of sovereign prerogatives.<sup>214</sup> Though administration officials tacitly acknowledged that French complaints about legal proceedings were at times justified,<sup>215</sup> they repeatedly denied any authority to intervene in judicial proceedings involving private rights to maritime property.<sup>216</sup> As Jefferson put it, the courts “exercise the sovereignty of this country in judiciary matters . . . and [are] liable neither to controul [sic] nor opposition from any other branch of the Government.”<sup>217</sup>

By characterizing questions about the proper disposition of maritime property seized in wartime as “judiciary matters” to be resolved by private litigants, rather than political issues to be negotiated between sovereign governments, the Washington administration sought to transform a vice into a virtue. The executive’s inability—or unwillingness—to deal effectively with the privateering problem was not explained as the result of a deficiency in institutional capacity or political will. Instead, the Washington administration’s repeated affirmation of judicial authority and independence was meant to underscore the government’s fidelity to the rule of law in foreign affairs. As Jefferson’s successor explained to the French minister, the

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213. See Letter from Thomas Jefferson to Edmond-Charles Genet (June 17, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 301 (“By the laws of this Country every individual claiming a right to any Article of property, may demand process from a court of Justice, and a decision on the validity of his claim.”).

214. See *id.* (“[Questions of property between individuals] are ascribed to the Judiciary alone, and when either persons or property are taken into their custody, there is no power in this country which can take them out.”).

215. See, e.g., Letter from Edmund Randolph to Joseph Fauchet (Sep. 3, 1794), 1 ASPFR, *supra* note 19, at 588 (acknowledging possibility that French privateers might be “wantonly vexed by unjust [judicial] detentions”).

216. See Letter from Edmund Randolph to Joseph Fauchet, *supra* note 175, at 589 (“If . . . individuals conceive they have a legal claim upon [a captured ship], and draw her before a court of law, the Executive of the United States cannot forbid them.”); Letter from Edmund Randolph to Joseph Fauchet (June 13, 1795), *in* 1 ASPFR, *supra* note 19, at 617, 618 (“[Admiralty courts] are entirely independent of Executive mandates.”); Letter from Thomas Jefferson to Edmond-Charles Genet (June 29, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 1, at 398, 398 (stating that once a suit had been filed contesting a French capture “there was no power in this Country which could take the vessel out of the custody of that Court”); Letter from Timothy Pickering to Pierre-Auguste Adet, (Aug. 25, 1795), *in* 1 ASPFR, *supra* note 19, at 631 (“[A]s long as the [privateering] question in is in the hands of the courts, the Executive cannot withdraw it from them.”).

217. Letter from Thomas Jefferson to Edmond-Charles Genet (Sep. 9, 1793), *in* 27 JEFFERSON PAPERS, *supra* note 1, at 67–68.

administration's refusal to intervene was not the result of "any want of cordiality or friendship" towards France, but instead was due to the "sovereignty of the law."<sup>218</sup>

Of course, the administration's characterization of these cases was, to a certain degree, willfully obtuse; given the high degree of involvement by both French and British officials, there could be little doubt that they were waging a proxy battle in federal court. But the administration's approach was not entirely ineffective. Though French officials never endorsed federal court jurisdiction over privateer captures, over time they displayed a begrudging acceptance of the reality—if perhaps not the legitimacy—of litigation over privateer captures.<sup>219</sup> As the British lawsuits worked their way up the appellate ladder, the justices of the Supreme Court were once again forced to consider the proper scope of judicial involvement in the affairs of state.

### C. *A Conflicted Court*

By the time the Supreme Court's August 1795 term began, privateering cases brought by British consuls dominated the Court's appellate docket. Over the next several terms the Court heard nineteen cases related to French privateering and ruled in favor of the French captors in almost all of them.<sup>220</sup> A straightforward tally of wins and losses, however, elides the difficulties the Court faced in charting a path through the fraught territory of transatlantic warfare. In several cases, the justices registered deep concerns about the dangers fostered by French privateering, but also demonstrated a desire to keep the Court—and the nation—aligned with international norms governing relations between sovereigns.<sup>221</sup> This cautious jurisprudence revealed unease about the privateering litigation's potential to compromise the

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218. Letter from Edmund Randolph to Joseph Fauchet (Oct. 28, 1794), *in* 1 ASPFR, *supra* note 19, at 593, 593.

219. *See* Letter from Joseph Fauchet to Commissioner of Foreign Relations (Sep. 3, 1794), *in* CFM, *supra* note 21, at 411 (explaining that when French privateers had been wrongly accused of violating American neutrality he would protest to the executive branch, but adding that "when there is proof against them I can defend them only with lawyers"); Letter from Joseph Fauchet to Edmund Randolph, (June 8, 1795), *supra* note 210, at 615 (admitting "the right of [U.S.] courts . . . to interfere in [privateering] matters"); *see generally* Kevin Arlyck, To Avoid Contestations with American Courts: French Consuls and Maritime War in the United States, 1793-1797 (2015) (unpublished manuscript) (on file with the author) (detailing French officials' extensive engagement with war-related federal court litigation during the Neutrality Crisis).

220. *See infra* text accompanying notes 240–47.

221. *See id.*

Court's own function as the domestic tribunal of last resort. As the cases proliferated, the Court took steps to define itself not as an adjudicator of discrete controversies between foreign litigants but instead as the arbiter of legal questions respecting the nation's foreign relations.

1. *Neutrality and legitimacy*

Like their district court brethren, the justices of the Supreme Court had to balance competing demands in adjudicating the privateering cases that crowded their docket. On the one hand, the Court's rulings evinced a deep concern over the degree to which French privateering activity in the United States threatened the nation's peace and safety. On the other, the justices recognized that privateering was sanctioned by treaty and the law of nations and that resolution by neutral courts of disputes arising between belligerents was contrary to customary international practice. In short, as the Court considered the claims brought before them, it struggled to decide the cases in a way that helped safeguard United States neutrality without compromising its own institutional legitimacy.

In service of the first end, the Court affirmed the view that direct American participation in French privateering, in violation of United States neutrality, could serve as the basis for restoration of captured vessels and cargo.<sup>222</sup> In so doing, the justices largely ignored the question of whether jurisdiction was proper under treaty and international practice,<sup>223</sup> indicating that the Court would not permit Americans who compromised United States neutrality to avoid responsibility for their depredations. In fact, several of the Court's decisions in this period sanctioned a form of rough justice, one that ignored doctrinal niceties in order to ensure that privateers who engaged in particularly egregious acts did not benefit from their conduct.<sup>224</sup>

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222. *See* *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 152–55 (1795) (Paterson, J.) (concluding that a capture made by a privateer captained by a United States citizen could be subject to restitution).

223. *See id.* at 159 (Iredell, J.) (justifying judicial inquiry into the capture on the ground that only “lawfully commissioned” French privateers were exempt from jurisdiction under treaty and the law of nations, and therefore the district court had a “duty” to investigate the facts of the captor's status).

224. *See* *Del Col v. Arnold*, 3 U.S. (3 Dall.) 333, 333–35 & n.\* (1796) (concluding that the owners of an American merchant ship looted and abandoned by a French privateer could be

In explaining the concerns underlying such legally questionable decisions,<sup>225</sup> Justice Paterson undoubtedly spoke for his brethren in citing the need to be vigilant against privateer misconduct. Not only was privateering “licensed depredation . . . that shock[ed] the moral sense, and disgrace[d] the human character,”<sup>226</sup> but for a neutral nation to permit such activity within its borders would be “indicative of an hostile disposition” incompatible with the obligations of neutrality.<sup>227</sup> Echoing the warning Justice Wilson had delivered in his early grand jury charge,<sup>228</sup> Justice Iredell concurred: “[E]ach Citizen must conform his conduct” to the dictates of neutrality; otherwise, “[w]ar might [be] the consequence.”<sup>229</sup> Though criminal prosecutions against American participants had failed, the Court would not permit those who “endanger[ed] the neutrality, peace, or safety of the nation” to reap financial gain from their scurrilous conduct.<sup>230</sup>

The Court’s fears regarding the dangers posed by French privateering were balanced against the need to adjudicate claims premised on violations of neutrality in accord with legal principles that

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compensated from the proceeds from the sale of a British prize lawfully seized by the same captor); *Hills v. Ross*, 3 U.S. (3 Dall.) 331, 332 (1796) (affirming a circuit court ruling that a mercantile firm involved in the sale of British property captured by American-led privateers had to pay damages originally assessed against captors themselves); Letter from Peter S. DuPonceau to Abraham Saspotas (Mar. 1, 1796), in 7 DHSC, *supra* note 2, at 126–27 (counseling an agent for the same privateer vessel as in *Hills* to abandon another case, even though the privateer vessel had been sold to a French buyer and had a different captain and new name); *cf. also Savage v. DeLatre*, order to show cause (Jan. 12, 1796), reprinted in *Columbian Museum* (Savannah) Supp. 1 (Jan. 24, 1797) (requiring privateer owners to show cause why proceeds from the sale of a legally-captured prize should not be used to compensate the owners of property unlawfully seized by the same privateer).

225. See *L’Invincible*, 14 U.S. (1 Wheat.) 238, 259 (1816) (noting that the Court’s decision in *Del Col* “certainly require[d] an apology”); Letter from Peter S. DuPonceau to John Y. Noel (Aug. 1, 1795), in 7 DHSC, *supra* note 2, at 700 (noting his “astonishment” at the dubious circuit court ruling the Supreme Court affirmed in *Hills*).

226. William Paterson’s Supreme Court Opinion in *Del Col v. Arnold* (Aug. 11, 1796), in 7 DHSC, *supra* note 2, at 680–82. On growing international opposition to the practice of privateering in the late eighteenth and early nineteenth centuries, see Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1 (2007).

227. *Talbot*, 3 U.S. (3 Dall.) at 155.

228. See *supra* note 72 and accompanying text.

229. James Iredell’s Draft of a Supreme Court Opinion in *Geyer v. Michel* (Mar. 12–14, 1796), in 7 DHSC *supra* note 2, at 180, 183–84.

230. *Talbot*, 3 U.S. (3 Dall.) at 153. Criminal prosecutions initiated against the American captains of the privateers involved in *Talbot* both failed. *Talbot v. Jansen*, in 6 DHSC, *supra* note 2, at 655–56.

governed the relations among sovereign nations. For example, recognizing that the Treaty of Amity necessarily granted French ships of war *some* protection against suit in federal court (if not outright immunity), the Court adopted a narrow view of judicial authority to restore property that had been seized by privateers in violation of neutrality. While the wholesale refitting of a privateer in an American port could serve as the basis for restitution,<sup>231</sup> relatively minor alterations would not.<sup>232</sup> The Court was not swayed by arguments that allowing privateers to equip in United States ports was politically dangerous: “Suggestions of policy and conveniency,” Chief Justice Ellsworth explained, could not impact “the judicial determination of a question of right.”<sup>233</sup>

Moreover—as Justice Iredell put it—if every “trifling augmentation” of a privateer’s force could justify a lawsuit, the owners of property seized on the high seas would be supplied with “an inexhaustible fund of dispute” with which to invoke the federal courts’ jurisdiction over prizes seized by French privateers.<sup>234</sup> Given that French courts had “the original & proper jurisdiction” over such prizes, for courts in the United States to usurp that role “under one pretext or another” was deeply problematic.<sup>235</sup> The Court, after all, was well aware of the French position that unwarranted judicial interference with France’s privateering effort constituted “a direct attack upon [its] sovereignty and independence.”<sup>236</sup> All the more

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231. James Iredell’s Draft of a Supreme Court Opinion in *Geyer v. Michel* (Mar. 12–14, 1796), in 7 DHSC, *supra* note 2, 229 at 180, 185 (“An original & entire equipment would be a gross insult, & ought to be punished . . . . A large & important augmentation may fall under nearly the same consideration.”).

232. See *Geyer v. Michel*, 3 U.S. (3 Dall.) 285, 292–96 (1796) (affirming circuit court ruling that minor alterations to privateer’s equipment was insufficient basis for restitution); *The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319, 319 (1796) (concluding that because article 19 of the Treaty of Amity gave French ships the right to visit United States ports for repairs, such repairs could not justify prize restitution); James Iredell’s Draft of a Supreme Court Opinion in *Geyer v. Michel* (Mar. 12–14, 1796), in 7 DHSC, *supra* note 2, at 185 (“A small and trifling [augmentation of force] deserves no notice.”); James Iredell’s Notes for a Supreme Court Opinion in *Moodie v. Ship Mermaid* (Mar. 1, 1796), in 7 DHSC, *supra* note 2, at 112 (concluding that Article 17 shielded prizes made by a privateer fitted out in the United States when it had subsequently been sold to a French purchaser and granted a valid French privateering commission).

233. *The Ship Phoebe Anne*, 3 U.S. (3 Dall.) at 319.

234. James Iredell’s Draft of a Supreme Court Opinion in *Geyer v. Michel*, in 7 DHSC, *supra* note 2, at 185–86.

235. *Id.* at 183–85.

236. *Talbot*, 3 U.S. (3 Dall.) at 139.



reason, Iredell concluded, for the Court to adopt a narrow view of judicial authority to intervene in disputes between nations at war and leave such decisions largely to the political branches.<sup>237</sup> Accordingly, while the Court made clear that judicial relief was available to some victims of French privateering, respect for international legal norms and the prerogatives of foreign sovereigns required that the courts' role in adjudicating wartime claims be carefully circumscribed.<sup>238</sup>

## 2. "A Court of Justice"

International comity was not the justices' sole concern; their opinions also reveal a profound anxiety regarding the Court's role atop a judicial system threatened with a flood of legally complex, fact intensive, and diplomatically sensitive cases. Adjudicating privateering cases usually obliged lower court judges to sift through a great deal of contradictory evidence in order to determine the facts regarding the privateer's construction, repair, armament, crew, sale, and commissioning.<sup>239</sup> In early cases, the justices—on both the circuit courts and the Supreme Court—adopted 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).<sup>240</sup>

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237. See James Iredell's Draft of a Supreme Court Opinion in *Geyer v. Michel* (Mar. 12–14, 1796), in 7 DHSC, *supra* note 2, at 185–87 (arguing that questions about prize restoration were better handled by the other political branches).

238. The substantive impact of this approach was borne out in the results: of the eighteen privateering cases the Court decided, the captors prevailed in all but two. See Sloss, *Judicial Foreign Policy*, *supra* note 12, at 176–83 (providing a comprehensive summary of the outcomes in all of the privateering cases). It is important to note that the lopsided numbers reflect a selection bias: it appears that French privateers rarely appealed cases in which they lost in the district court, thus their victories in the Supreme Court came almost entirely in cases where they had already prevailed below. Accordingly, their near-sweep in the Supreme Court did not indicate that British lawsuits were dead on arrival, though it did clarify that there were significant limits on the extent to which litigants could base claims to captured property on violations of United States neutrality.

239. See, e.g., *British Consul v. The Mermaid*, 4 F. Cas. 169 (D. S.C. 1795) (No. 1897); *Moodie v. The Betty Carthcart*, 17 F. Cas. 651 (D. S.C. 1795) (No. 9742); *Moodie v. The Brothers*, 17 F. Cas. 653 (D. S.C. 1795) (No. 9743).

240. See Robert Feikema Karachuk, *Error or Appeal? Navigating Review Under the Supreme Court's Admiralty Jurisdiction, 1789-1800*, 27 J. SUP. CT. HIST. 93, 94–96 (2002). The other mode of review was on a writ of error, in which the superior tribunal only addressed errors of law apparent on the face of the record. Judiciary Act of 1789, § 25, 1 Stat. 73, 85–87 (1789); see also *United States v. Goodwin*, 11 U.S. (7 Cranch) 108, 110–11 (1812) ("An appeal is a civil

This holistic approach quickly proved burdensome. The privateering cases caused a huge spike in the Court's workload, accounting for roughly half of the cases on its docket from 1794 to 1797,<sup>241</sup> and resolution often took up a significant portion of the Court's time.<sup>242</sup> Moreover, the justices were already significantly aggrieved by Congress's refusal to relieve them of their burdensome circuit-riding duties<sup>243</sup> and had recently displayed pronounced resistance to legislative attempts to saddle them with additional administrative responsibilities.<sup>244</sup> Throughout the 1790s, in fact, displeasure over the onerous demands of the position prompted a number of candidates to decline appointment to the Court.<sup>245</sup> Little wonder, then, that at the close of the February 1796 term, Justice Iredell vented his frustrations over the burdens the privateering cases imposed: the "petty inquiries" occasioned by such proceedings, he opined, were not a fit undertaking for "a Court of Justice."<sup>246</sup>

Accordingly, when presented with an opportunity to define itself more clearly as a "Court of Justice," the Supreme Court seized it. In

law process, and removes a cause entirely, subjecting the law and fact, to a review and retrial. A writ of error is a common law process, and removes for re-examination, nothing but the law.").

241. Sloss, *Judicial Foreign Policy*, *supra* note 12, at 147.

242. *See, e.g.*, Talbot v. Jansen, in 6 DHSC, *supra* note 2, at 656 (noting that oral argument in the Talbot case stretched over ten days); James Iredell's Notes of Arguments in the Supreme Court in *Moodie v. Ship Mermaid*, in 7 DHSC, *supra* note 2, at 86–111 (recording extensive discussion of facts at argument).

243. *See* Letter from Justices of the Supreme Court to the Congress of the United States (Aug. 9, 1792), in 2 DHSC, *supra* note 2, at 289–90 (protesting that their circuit riding duties were "a task which considering the extent of the United States, and the small number of Judges, is too burthensome"); Letter from John Jay to Rufus King (Dec. 19, 1793), in 2 DHSC, *supra* note 2, at 434 n.1 (noting that John Jay nearly resigned as Chief Justice in 1792 due to his displeasure over circuit riding); *see generally* Holt, *supra* note 63 (noting that in the 1790s the justices repeatedly asked Congress to reduce or eliminate the burdens of circuit riding). Traveling the Southern Circuit—which included the privateering hotspots of Charleston and Savannah—was considered so onerous that the justices privately agreed to each pay a portion of their own salaries to the colleague who volunteered for that duty. Spring and Fall Circuits 1794, in 2 DHSC, *supra* note 2, at 438.

244. *See* Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 70–77 (1998) (describing the controversy over a Congressional plan to have Supreme Court justices review claims to Revolutionary War pensions).

245. *See* R.B. Bernstein, *President John Adams and Four Chief Justices: An Essay for James F. Simon*, 57 N.Y.L. SCH. L. REV. 441, 448, 456–58 (2012).

246. James Iredell's Draft of a Supreme Court Opinion in *Geyer v. Michel* (Mar. 12–14, 1796), in 7 DHSC, *supra* note 2, at 185; *see* Talbot v. Jansen, in 6 DHSC, *supra* note 2, at 656 n.33.

*Wiscart v. Dauchy*, the Court ruled that, when reviewing circuit court decrees in admiralty cases, it was obliged to accept the lower court's statement of the facts and was precluded from conducting its own inquiry.<sup>247</sup> In other words, Supreme Court review in admiralty cases was restricted to questions of law. Though such a decision seems self-evident now, it was by no means obvious at the time,<sup>248</sup> and the majority and dissenting opinions illustrate the justices' divergent views of the Court's supervisory role in the federal system.

Justice Wilson argued against the majority's rule, asserting that it was "essential to the security and the dignity of the United States" that a lower court's conclusions as to both law *and* fact in admiralty cases be ratified by the nation's highest court.<sup>249</sup> His concern was clear: As the past several years had demonstrated, the proceedings of the federal courts were closely watched by an international audience, and it was incumbent upon the Court to ensure the legitimacy of lower court decisions by subjecting them to plenary review. This, in fact, had effectively been the Court's practice to that point.<sup>250</sup>

By August 1796, however, a majority of the justices concluded that wholesale review of lower court decisions was an inappropriate function for the nation's highest tribunal. Writing for the *Wiscart*

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247. *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327–28 (1796). *Wiscart* was not actually 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 those cases the Court was considering at the time. See *Wiscart v. Dauchy*, in 7 DHSC, *supra* note 2, at 734; Karachuk, *supra* note 240, at 103; see also *Jennings v. The Brig Perseverance*, 3 U.S. (3 Dall.) 336, 337 (1797) (holding that the Court could not investigate the facts in an admiralty case even when the record did not include a statement from the court below).

248. The relevant constitutional and statutory provisions pointed in different directions. Article III provided that the Court had appellate jurisdiction "both as to Law and Fact," except where Congress prescribed otherwise. U.S. CONST. art. III, § 2. But while section 21 of the 1789 Judiciary Act specified that "appeals" from the district to circuit court were allowed in admiralty cases, section 22 provided that all "civil actions" were to be "re-examined . . . in the Supreme Court" on writ of error only. Judiciary Act of 1789, §§ 21–22, 1 Stat. 73, 83–85; see generally Karachuk, *supra* note 240, at 94–96 (discussing the confusion over which procedure was the correct one for securing Supreme Court review).

249. *Wiscart*, 3 U.S. (3 Dall.) at 327; see also *Jennings*, 3 U.S. (3 Dall.) at 337 (arguing that the majority's approach in *Wiscart* would "shut[] the door against light and truth; and . . . leav[e] the property of the country too much to the discretion and judgment of a single Judge"); *Jennings v. Brig Perseverance*, in 7 DHSC, *supra* note 2, at 817–18 (discussing the Court's decision in *Jennings*).

250. In several of the 1796 privateering cases prior to *Wiscart*, there were problems with the lower court's statement of facts, but the parties agreed to waive their objections in order to ensure the high court's full consideration of the weighty issues involved. See Karachuk, *supra* note 240, at 96–101.

majority, Chief Justice Ellsworth argued that such an approach produced “great private and public inconveniency” and little additional benefit.<sup>251</sup> Addressing Wilson’s contention that diplomatic considerations demanded careful scrutiny of lower court decisions, Ellsworth saw no reason why the justices would be better able to identify the relevant facts in a case when sitting together in Philadelphia than they would individually while riding circuit; in either case, the parties’ claims would be fully considered by “an impartial and enlightened tribunal” in which they could have full confidence.<sup>252</sup>

The Court’s effort to narrow the scope of its review was not simply an expedient solution to the specific docket-management problem the privateering cases presented. By the time *Wiscart* was decided, there was good reason for the justices to anticipate an incipient end to the litigation.<sup>253</sup> But the unprecedented crush of cases produced by the French privateering controversy had offered the justices a glimpse at how plenary review of all cases subsumed under the federal judiciary’s expansive admiralty jurisdiction might impact the Court’s role at the apex of the judicial pyramid. Accordingly, the justices took the opportunity to establish that their role was not to ensure a correct outcome in every case that landed on American shores, but instead, in Ellsworth’s words, “to preserve unity of principle[] in the administration of justice throughout the *United States*.”<sup>254</sup>

#### D. *Privateering’s End*

In the end, the Court’s cautious approach to the privateering litigation was a boon for France. The privateers prevailed in nearly every case that came before the high tribunal.<sup>255</sup> But if the justices thought that French officials would be mollified, they were wrong: prevailing on appeal did nothing to change the fact that British-sponsored litigation had seriously damaged the French war effort by depriving privateers of their due profits.<sup>256</sup> To make matters worse, the

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251. *Wiscart*, 3 U.S. (3 Dall.) at 329–30.

252. *Id.*

253. *See infra* Section III.D.

254. *Wiscart*, 3 U.S. (3 Dall.) at 330.

255. *See* Sloss, *Judicial Foreign Policy*, *supra* note 12, at 182.

256. *See id.* at 182–83 (noting that in thirteen privateering cases the time lag between the filing of the initial libel and final disposition by the Supreme Court ranged from eleven to twenty-nine months, and this time lag effectively denied privateers financial gains from their prizes);

treaty John Jay had recently negotiated with Great Britain (commonly known as the Jay Treaty) outlawed the sale in the United States of British vessels captured at sea.<sup>257</sup> Though the treaty helped stabilize relations with the British, the French viewed it as a decisive repudiation of the bonds of friendship that had bound France and the United States together for two decades and retaliated by seizing American vessels in the Caribbean.<sup>258</sup> Within a year of the final Supreme Court privateering decision in 1797, the two nations were engaged in an undeclared maritime war.<sup>259</sup>

As the United States became more deeply enmeshed in the maritime conflict roiling the Atlantic, the courts' role receded (if only temporarily<sup>260</sup>). With French prizes no longer arriving in United States ports, there were no more cases for the courts to adjudicate.<sup>261</sup>

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Letter from Charleston Privateers to National Convention (Apr. 14, 1795), AMAE-MD, 39:8 (complaining of significant financial losses incurred as a result of British litigation).

257. Treaty of Amity, Commerce, and Navigation, Gr. Brit.-U.S., Nov. 19, 1894, art. 24, 2 Stat. 463 (1795). The treaty was concluded in 1794, but was kept secret by the Washington administration and not approved by the Senate until July 1795. Fierce opposition to the treaty among Republicans in the House and the general public delayed implementation for almost a year. *See generally* ELKINS & MCKITRICK, *supra* note 5, at 415–31; Golove & Hulsebosch, *supra* note 6, at 1039–61.

258. *See* Letter from Charles Delacroix to James Monroe (Mar. 11, 1796), *in* 1 ASPFR, *supra* note 19, at 732–33 (listing alleged United States treaty violations); Letter from Duhalil to Ministère des Relations Extérieures (Aug. 29, 1796), AMAE-CCC, Baltimore, 1:164 (“[T]oday our privileges are so imperceptible that it becomes ridiculous to even use the term.”); *see generally* ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801* (1966).

259. The issue that most directly led to the Quasi-War between the two nations was the United States' supposed acquiescence in British restrictions on neutral trade, which allegedly violated the principle of “free ships make free goods” enshrined in the Treaty of Amity. In retaliation, France declared that it would treat American ships the same way they allowed themselves to be treated by the British; as a result, French privateers began seizing American merchant vessels on suspicion of trading with the enemy, and carried them to French-controlled ports in the Caribbean for condemnation by admiralty courts. DECONDE, *supra* note 258, at 9–10.

260. *See generally* Arlyck, *supra* note 9 (describing the central role the federal courts played in U.S. foreign relations in the first four decades after ratification of the Constitution).

261. The federal courts did handle prize cases stemming from captures made by United States naval vessels during the Quasi-War, *e.g.*, *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), but the caseload was limited by the fact that Congress only authorized the seizure of armed French ships, not merchant vessels, An Act Further to Protect the Commerce of the United States, ch. 68, §§ 1–2, 1 Stat. 578, 578–79 (1798); *see also* George Lee Haskins & Herbert A. Johnson, 2 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15*, 407, 409 (1981) (noting that no prize cases from the Quasi-War reached the Supreme Court).

Moreover, because the nation's "neutral" status effectively ended with the onset of hostilities with France, the institutional role the judiciary had assumed during the Neutrality Crisis—as the arbiter of sensitive disputes implicating foreign relations—effectively ended.

Sorting out the Neutrality Crisis' doctrinal legacy would take longer,<sup>262</sup> and at a fundamental level the difficult questions that animated debate in the Neutrality Crisis are still with us today. To be sure, the gradual abandonment of privateering in the nineteenth century has largely obviated the federal courts' role in regulating the conduct of maritime warfare.<sup>263</sup> But the basic conundrum with which judges and elected officials grappled in the 1790s—the proper scope of judicial involvement in matters implicating foreign affairs—continues to pose challenges over two centuries later.

#### IV. A JUDICIAL ROLE IN FOREIGN AFFAIRS?

In offering a new account of the Washington administration's attempt to recruit the courts into management of the Neutrality Crisis, this Article seeks first to sharpen our understanding of how the first generation of federal officials struggled to work out difficult questions of national governance in the crucible of international political controversy. The Article demonstrates that standard presidentialist accounts of early foreign affairs—ones that fail to recognize the extent to which significant decisionmaking responsibility was shared between the executive and judiciary—are incomplete at best and misleading at worst, and that full appreciation of the complex political and institutional dynamics that pushed the privateering controversy into the courts offers a different picture of early inter-branch relations than the one to which we are accustomed.

The account offered here of the complex relationship between the two branches in the 1790s also points towards a different way of thinking about that relationship in the present day. While debate on the role of the courts in foreign affairs generally understands presidential policymaking and judicial decisionmaking in this area to

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262. *See, e.g.*, *L'Invincible*, 14 U.S. (1 Wheat.) 238, 258 (1816) (attempting to reconcile contradictory precedents from the Neutrality Crisis respecting when the courts of a neutral nation "may interfere" in case of maritime capture between belligerent nations); *see also* Arlyck, *supra* note 182 (describing Spanish diplomats' use of federal court litigation in the period after the War of 1812 to reclaim merchant vessels seized by American privateers working for South American revolutionary governments).

263. *See generally* Parrillo, *supra* note 226 (discussing abandonment of privateering in the United States and Europe).

be in opposition, the example of the Neutrality Crisis reminds us that, under certain circumstances, they might instead interact in complementary ways.

Modern discussions of the judicial role in foreign affairs—especially those that have emerged in the last decade in the context of the global effort to combat terrorism—have largely been structured around questions of deference. That is: To what extent should a court confronting a question with implications for United States foreign relations defer to the views of the executive branch or even abstain from deciding altogether?<sup>264</sup> At the risk of oversimplification, scholarship on this question can be roughly divided into two camps.<sup>265</sup> One view holds that the executive branch is (and should be) the primary institution of government through which the nation's foreign relations are conducted and that the courts' role in foreign affairs is appropriately structured by a norm of judicial deference to executive branch decisionmaking.<sup>266</sup> This scholarship explains—and often justifies—executive primacy by invoking the notion of judicial incompetence in foreign relations, wherein courts have neither the expertise nor the institutional capabilities necessary to decide difficult

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264. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2069 (2007) (“Modern notions of deference to administrative decisionmakers, developed primarily in other contexts, are in considerable tension with the historic office of [habeas corpus.]”); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 50 (advancing “a minimalist [judicial] approach to intrusions on freedom amidst war”).

265. Scholars in this area have in fact staked out a range of positions on the deference continuum, and several have sought to calibrate the level of judicial deference according to the substantive matter in question. See Bradley, *supra* note 13, at 679 (2000) (arguing that *Chevron*-style deference to the executive branch legal interpretation is appropriate in many, though not all, areas); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1771–74 (2007) (presenting an “integrated model of calibrated deference” in treaty interpretation); Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1942–44 (2005) (arguing that courts should defer “according to the degree to which an issue affects foreign affairs and whether the continuing administration of the treaty at issue is expressly entrusted to a specific executive branch agency”).

266. See, e.g., Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007) (“[C]ourts should generally defer to the executive on the ground that resolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments.”); Yoo, *supra* note 13, at 864–82 (arguing in favor of deference to presidential treaty interpretation).

foreign affairs questions in ways that adequately protect or promote national interests.<sup>267</sup>

In contrast, a number of commentators have argued against what they perceive to be excessive judicial deference in foreign affairs, on the grounds that judicial resolution of certain questions is not only appropriate as a constitutional matter but also justified on functional grounds.<sup>268</sup> On these accounts, judicial decisionmaking can serve national interests in a variety of ways: by protecting civil liberties,<sup>269</sup> by ensuring inter-branch balance in the face of executive

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267. See, e.g., THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 45–60 (1992) (discussing four standard arguments in favor of judicial abstention in foreign affairs); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1398 (1999) (“[Federal courts] lack the information, expertise, unity, and national political accountability to make foreign relations judgments for the nation.”); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 195–98 (concluding that courts are ill-equipped to resolve foreign affairs cases); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 944 (2004) (“[C]ompared to the political branches, the courts suffer from peculiar institutional disadvantages that often warrant absolute deference to the decision of the political branches in most foreign affairs controversies.”); John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT’L & COMP. L. REV. 747, 772 (1997) (“Compared to the Presidency, the federal judicial system is decentralized, slow, and at times irrational (from a national security perspective).”); see generally Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 199–202 (2006) (reviewing functional arguments in favor of the executive).

To be sure, those who favor judicial deference to the executive also marshal arguments grounded in constitutional text and structure, see, e.g., John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1315–28 (2002), but for the purposes of the present analysis I leave those to one side and focus on the functional considerations that often form the core of such views.

268. See, e.g., FRANCK, *supra* note 267 (critiquing judicial abdication under the political question doctrine); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999) (arguing that there is reason to be concerned about excessive judicial deference in the area of foreign affairs); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT’L L. 805, 813 (1989) (“[T]here is no basis for a broad rule permitting [judicial] deference or abstention in cases touching on international law and policy.”); Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT’L L. 814, 819 (1989) (“The purported merits of judicial abstention in foreign affairs . . . shrink under scrutiny, while the drawbacks . . . are substantial.”); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1235–49 (2007) (identifying several areas where substantial judicial deference to the executive is “plainly inappropriate”); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998) (arguing that certain treaties delegate to the federal courts the law-making power to fill in gaps in treaties).

269. See, e.g., David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 515–16 (1945).



encroachment,<sup>270</sup> by signaling compliance with international norms,<sup>271</sup> and even by shaping such norms in ways beneficial to the United States.<sup>272</sup> There is a general consensus, however, that the central question to be answered is whether (or when) judicial deference in foreign affairs is appropriate.<sup>273</sup> In other words, the question is largely whether executive or judicial authority should prevail. Judicial deference is also understood by scholars across the spectrum to have an extensive historical pedigree.<sup>274</sup>

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270. See Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 27 (2005) (arguing that judicial deference in treaty interpretation is inconsistent with the judiciary's critical role as a check on the power of the executive branch); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 790 (2011) (proposing an "equilibrium theory" model of limited judicial deference, in which "part of the judicial role in statutory and treaty interpretation is to aid in maintaining a structural balance of power" between the branches of government).

271. See Burley, *supra* note 9, at 476.

272. See Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117 (2011).

273. See Charney, *supra* note 268, at 808–13 (reviewing the merits of eight different justifications given for judicial deference and abstention).

274. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 132 (2d ed. 1996) (noting that in foreign affairs "the courts are less willing than elsewhere to curb the federal political branches, are even more disposed to presume the constitutional validity of their actions and to accept their interpretations of statutes, and have even developed doctrines of special deference to them"); Bederman, *supra* note 268, at 1462–66 (1999) (arguing that judicial deference in treaty interpretation increased during the twentieth century); see generally *supra* note 13. However, some scholars who view judicial intervention in foreign affairs more favorably question the strength of a deferential tradition. See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1395 (1989) (contending that, in the early nation period, "review by the courts of executive responses to foreign threats played an important role in the maintenance of a boundary between constitutional order and emergency power"); Pearlstein, *supra* note 270, at 786 (contending that "descriptive claims that the Court invariably defers to the President in foreign relations law interpretation have always been subject to challenge"); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 505–22 (2007) (contending that the early Supreme Court took a non-deferential approach to executive branch treaty interpretation); see also G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999) (arguing that prior to the New Deal era the executive branch played an important but, by no means exclusive, role in foreign affairs). In addition, several commentators have argued that over the last decade the Supreme Court has been markedly non-deferential towards the executive in national security cases. Cf., e.g., Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y. L. SCH. L. REV. 119, 122 (2011) ("[I]n every major case arising out of 9/11, the Court has rejected the position staked out by the executive branch."). This reading of the Court's jurisprudence is disputed by others. See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY* 135 (2007) (noting that Court decisions regarding Guantanamo Bay detainees "did not at that time require the President to alter many of his actions").

The story of the Neutrality Crisis suggests that judicial deference might not always be the best lens through which to examine relations between the two branches in foreign affairs. As the preceding narrative makes clear, the Washington administration deliberately sought to give the courts primary responsibility for addressing foreign claims of sovereign right that the executive branch was unable and unwilling to resolve. From the perspective of the executive branch, judicial decisionmaking was not opposed to presidential authority in foreign affairs—it was complementary to it.

The considerations that animated the Washington administration's attempt to recruit the courts into management of the Neutrality Crisis still obtain today. As explained in Part II, the administration turned to the courts for two primary reasons: its desire to deflect responsibility for resolving sensitive foreign relations problems away from the executive branch; and its inability, from an administrative perspective, to handle all of the disputes that cropped up. As to the first, scholars in law and political science have long recognized that elected officials in both the executive and legislative branches will often defer to the judiciary to avoid making decisions that risk displeasing important constituencies.<sup>275</sup> And, as demonstrated in the Neutrality Crisis, in many cases, elected officials may be concerned less with the substantive outcome than with the fact that the courts assume responsibility for deciding difficult questions,<sup>276</sup> even if the political benefits prove to be time-limited.<sup>277</sup>

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275. See E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 73 (1960) (“[T]he displacement of conflicts is a prime instrument of political strategy.”); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 143 (2007) (“An active and independent court can assume the blame for advancing constitutional commitments that might have electoral costs.”); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 41 (1993) (“Courts offer . . . opportunities for pushing unwanted political fights off the political agenda.”). *But see* WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION* 57–60 (4th ed. 2007) (noting that, under public choice theory, legislatures will delegate regulation to agencies or courts so as to avoid choosing between the policy preferences of opposing interest groups).

276. See Graber, *supra* note 275, at 42 (“[P]oliticians who facilitate judicial policymaking are frequently more interested in having the justices bear the public responsibility for making *some* policy decision than in the particular policy decision that the justices might make.”).

277. See *id.* at 68 (“Diverting issues to the courtroom may prove to be only a temporary balm in most cases, but to desperate politicians transitory measures are better than no relief at all.”).

These insights have yet to be meaningfully applied in the foreign relations context, even though other nations can easily be understood to be a “constituency” that elected officials would prefer not to antagonize. Critics of judicial involvement in foreign affairs have ignored the courts’ accountability-diffusing potential,<sup>278</sup> and even supporters of an expanded judicial role have not seriously taken up the possibility.<sup>279</sup> Along the same lines, while institutional studies of the executive branch make clear that, even in the era of the modern administrative state, presidential capacity to effectuate policy goals are not infinite,<sup>280</sup> the salience of resource limitations for questions about the distribution of foreign affairs decisionmaking responsibility has been largely overlooked.<sup>281</sup>

To be sure, the tremendous changes in both executive power and the United States’ position in the world might reasonably raise doubts about the relevance of a historical example over two hundred years old.<sup>282</sup> Perhaps the leader of the world’s sole remaining superpower simply has no need to share responsibility for decisionmaking in foreign affairs. And indeed, the massive diplomatic, military, and

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278. See Nzelibe, *supra* note 267, at 989 (“Unlike legal controversies in the domestic realm, the political branches do not seem to have any need for an impartial tribunal to dispense judgments regarding the scope of their foreign affairs activities.”). *But see* JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 188–201 (2012) (asserting that judicial review of executive branch counter-terrorism policies has bolstered their legitimacy); Thomas P. Crocker, *Torture, with Apologies*, 86 *TEX. L. REV.* 569, 598 (2008) (arguing that executive detention at Guantanamo Bay has “greater legitimacy because of the presence of judicial review”).

279. See *supra* notes 268–272 and accompanying text. *But see* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *AM. J. INT’L L.* 241, 245 (2008) (noting that national governments can strategically benefit from judicial application of international law by asserting that it is legally constrained from pursuing actions requested by foreigners).

280. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93, 107 (2005) (“The budget and manpower of federal regulatory agencies are generally quite limited, and many agencies simply lack the capacity to enforce the law adequately.”).

281. See, e.g., Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 *VA. J. INT’L L.* 915, 952 (2011) (failing to include executive branch resource limitations among functional arguments in favor of judicial determination of foreign sovereign immunity).

282. See Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 *ST. LOUIS U. L.J.* 5, 6 (2008) (“[P]ragmatic or consequentialist justifications for originalism are potentially weak in the area of foreign affairs, particularly given the profound changes over time in the Presidency as an office, the military and economic strength of the United States, the conduct of war, and the content of international law.”).

national security apparatus at the president's disposal may render any relief the judiciary might provide with respect to administrative burdens wholly negligible.

Such arguments have merit, but they do not win the day. Modern executive branch resources are *not* infinite, and the executive branch *will* often want to tread carefully when the sovereign rights of other nations are at issue. To take one example, the Foreign Sovereign Immunities Act of 1976 (FSIA) transferred responsibility for sovereign immunity determinations from the executive branch to the federal judiciary.<sup>283</sup> Prior to FSIA's passage, the State Department had effective authority to decide whether a defendant warranted immunity from suit.<sup>284</sup> But by the 1970s, individualized determinations by the executive branch had proven to be both administratively unmanageable and politically unpalatable.<sup>285</sup> By judicializing the process for determining immunity, the State Department—much like the Washington administration nearly two centuries earlier—sought to reassure foreign sovereigns that such decisions would be made impartially<sup>286</sup> while relieving the executive branch of a significant diplomatic and administrative burden.<sup>287</sup> It is not difficult to imagine other modern contexts in which judicial resolution of sensitive

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283. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602–11 (2006)).

284. See THEODORE R. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION* 268 (1970).

285. See H.R. REP. NO. 94-1487, at 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6607 (noting that the Department “does not have the machinery to take evidence, to hear witnesses, or to afford appellate review” in making sovereign immunity decisions); H.R. REP. NO. 94-1487, at 7 (stating that the FSIA was intended to “reduc[e] the foreign policy implications of immunity determinations”); see generally Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 891–95 (2008) (reviewing WHITTINGTON, *supra* note 275) (discussing the political branches' reasons for empowering courts to make immunity decisions under the FSIA).

286. See H.R. REP. NO. 94-1487, at 7 (stating that the FISA was intended to “assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process”).

287. See *To Define the Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 34 (1976) (statement of Monroe Leigh, Legal Adviser, Department of State) (“[T]he State Department becomes involved in a great many cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something.”).

questions implicating foreign affairs might have similar salutary potential.<sup>288</sup>

A different objection to the complementary view of executive-judicial relations in foreign affairs might be drawn from the Neutrality Crisis itself: that judicial intervention may undermine national interests, a concern that echoes many of the critiques advanced by modern scholars.<sup>289</sup> After all, French resentment over the federal courts' involvement figured prominently in complaints from France that the United States was reneging on its treaty commitments,<sup>290</sup> and shortly after the Supreme Court heard its last privateering case the two nations were effectively at war. These facts suggest that, unlike domestic constituents, foreign interlocutors will attribute unfavorable court outcomes to the government as a whole and that kicking difficult questions to the courts does nothing to diffuse blame.<sup>291</sup>

It is not clear, however, that French resentment over the courts' involvement in the Crisis is evidence of political failure. In truth, French officials understood the importance of judicial independence to American constitutionalism,<sup>292</sup> extolled it as a "sacred maxim"

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288. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964) (noting the State Department's desire to avoid taking a position respecting a dispute involving the Cuban government's sovereign rights); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 173 (2004) (noting that both the Carter and Clinton administrations viewed early Alien Tort Statute cases as generally supporting U.S. foreign policy).

289. See *supra* note 267.

290. See Letter from Charles Delacroix to James Monroe (Mar. 11, 1796), in 1 ASPFR, *supra* note 19, at 732 (listing the federal courts' assumption of jurisdiction over prizes first among alleged United States infractions of the treaties); Letter from Pierre-Auguste Adet to Timothy Pickering (Nov. 15, 1796), in 1 ASPFR, *supra* note 19, at 579 (same).

291. See Letter from Pierre-Auguste Adet to Timothy Pickering (Nov. 15, 1796), in 1 ASPFR, *supra* note 19, at 579–83 (accusing the Washington Administration of having "abandoned French privateers to [the] courts of justice"); Knowles, *supra* note 272, at 1151–54 (discussing Chinese government diplomatic complaints over the filing of ATS suits against Chinese officials in federal courts).

292. See, e.g., Letter from Michel-Ange-Bernard Mangourit to Ministère des Affaires Étrangères (Feb. 21, 1794), AMAE-CCC, Charleston, 2:204 (recognizing that Americans were "extremely jealous of the independence of their courts" and would refuse any suggestion of political interference in judicial proceedings). Furthermore, there is little reason to think that foreign officials today have a less sophisticated understanding of the extent to which the federal government is a "we," not an "it." See also Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 545–46, 546 n.211 (2002) (discussing Chinese government recognition of the separation of powers in the United States). For a classic statement of the importance of disaggregating governmental institutions in the domestic context, see generally

common to all “liberal governments,”<sup>293</sup> and were more than willing to go to court themselves when it served their own interests.<sup>294</sup> In other words, French officials recognized that separation of powers meaningfully constrained the executive’s ability to shape litigation outcomes.<sup>295</sup> In the bigger picture, French complaints about judicial interference in matters of state were points for debate, not a cause for war.

More importantly, the referral of privateering disputes to the courts fulfilled what was evidently its primary function: satisfying British demands that the federal government provide redress to the victims of French maritime predations. If nothing else, by pushing the controversy into the courts, the Washington administration was able to buy time while a diplomatic solution to the problem of strained Anglo-American relations—i.e., the Jay Treaty—could be reached. If the price for that approach was a rupture with France, it was one that the Washington administration was willing to pay in the long run.

To be clear, the point here is not to suggest that standard critiques of a judicial role in foreign affairs are categorically misguided. But the example of the Neutrality Crisis suggests that such arguments may go too far and fail to recognize the ways in which judicial resolution of disputes related to foreign affairs can support—rather than undermine—executive branch diplomacy. If nothing else, the fact that presidents ancient and modern have at times understood a meaningful judicial role in foreign affairs to be in the national interest suggests

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Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239 (1992).

293. Letter from Joseph Fauchet to Edmund Randolph (Sept. 18, 1794) (2 Sans-Culotide An 2), AMAE-CCC, Philadelphia, 3:84–87.

294. See *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 48–49 (1795) (rejecting a French request for a writ of mandamus compelling a federal district court to issue an arrest warrant for a deserter from a French warship); *United States v. Peters*, 3 U.S. (3 Dall.) 121, 129–32 (1795) (granting a writ of prohibition ordering a federal district court to dismiss a lawsuit against a French ship of war); Letter from Peter S. DuPonceau to Pierre-Auguste Adet (Aug. 19, 1795), in 1 DUPONCEAU LETTERBOOKS, *supra* note 165, at 129–30, 132 (detailing the French role in *Peters* in securing the writ from the Supreme Court); Letter from Peter S. DuPonceau to Pierre-Auguste Adet (Aug. 16, 1795), in 1 DUPONCEAU LETTERBOOKS, *supra* note 165, at 129–30, 132 (same); see generally Arlyck, *supra* note 219 (detailing the extensive involvement of French officials in war-related federal court litigation during the Neutrality Crisis).

295. See, e.g., Letter from Joseph Fauchet to Edmund Randolph (Sept. 13, 1794), in 1 ASPFR, *supra* note 19, at 591 (acknowledging that the executive could not “officially interfere” in a court case in Charleston); Letter from Joseph Fauchet to Edmund Randolph (June 8, 1795), in 1 ASPFR, *supra* note 19, at 614–15 (generally acknowledging legitimacy of jurisdiction over prizes made by privateers armed in the United States).

that efforts to cabin that role through formal barriers to judicial decisionmaking may be counterproductive.<sup>296</sup>

That said, whatever benefits that might accrue from the courts' intervention in foreign affairs depend on judicial willingness to accept that role. As this Article demonstrates, judges in the 1790s were deeply skeptical about the prospect of becoming enmeshed in disputes over French privateering. As both a matter of comity and of self-interest, judicial recalcitrance, especially in the Crisis's early stages, lessened the potential for significant judicial decisionmaking.

Accordingly, this Article reminds us that even in the realm of foreign affairs the judicial role will be structured, at least in part, by judicial motivations and interests. Again, this point is well recognized in the legal and political science literature studying inter-branch relations in the domestic context,<sup>297</sup> but is often overlooked in scholarship addressing the courts' role in foreign affairs,<sup>298</sup> though it is not obvious why the courts would weigh their institutional interests differently in foreign affairs. As commentators have pointed out, federal courts are equipped with a number of different doctrinal tools to avoid hearing cases that implicate sensitive and difficult foreign relations questions.<sup>299</sup> Moreover, the concerns that motivated judicial

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296. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (advancing a territorially-bounded view of the federal courts' jurisdiction under the Alien Tort Statute); Brief for the Respondents at 10–13, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739, at \*11–12 (arguing that United States courts lack jurisdiction over challenges to the legality of the detention by the military at Guantanamo Bay, Cuba); Bellia & Clark, *supra* note 9 (arguing that suits between aliens are categorically not cognizable under the original understanding of the Alien Tort Statute); Goldsmith, *supra* note 267, at 1400 (advocating for a formalist jurisprudence in foreign affairs cases reliant on “well-defined rules that [do] not leave much room for judicial discretion”).

297. See David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 132 (1993) (“[E]very decision by the Court involves the Court’s institutional interests to some degree.”); see generally Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263 (1990); Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191 (2012); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

298. See, e.g., Bradley, *supra* note 13, at 659–63 (2000) (listing reasons for judicial branch deference to the executive branch in foreign affairs, but not including considerations of judicial self-interest); Charney, *supra* note 268, at 808–13 (similar).

299. See *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring) (noting that exhaustion, *forum non conveniens*, and comity can be used to remove cases implicating foreign relations from judicial purview); *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151 (2009) (noting that comity, *forum non conveniens*, and the political question doctrine can all serve as means by which federal courts can decline jurisdiction over cases implicating foreign affairs).

skepticism in the 1790s—that judicial resolution of privateering-related disputes was in tension with international legal norms, undermined international comity, and threatened the courts’ institutional well-being—are no less salient today.<sup>300</sup> In short, a central lesson of the Neutrality Crisis might be that the most significant obstacle to a more robust judicial role in foreign affairs may in fact be the courts themselves.

#### CONCLUSION

Though the Neutrality Crisis effectively came to a close in 1797, its effects continued to be felt for years afterward. In 1799, Chief Justice Ellsworth presided over a criminal trial in federal circuit court in Hartford. The defendant, Isaac Williams, was an American accused of violating the Jay Treaty between the United States and Great Britain by commanding a French privateer that attacked British merchant vessels in the Caribbean in 1797.<sup>301</sup> In denying the validity of Williams’s defense that he was in fact a French citizen, Ellsworth reminded his audience of the difficult position the nation had been in during the Crisis: “We wished to have nothing to do with the war,” he recalled, “but the war would have something to do with us.”<sup>302</sup>

In seeking to “have nothing to do with the war” between France and Great Britain, the Washington administration turned to the courts, promoting judicial resolution of disputes arising from French privateering as the proper means by which foreign claims to government intervention were to be addressed. Federal court adjudication of such cases served as a means of deflecting executive

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300. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring) (asserting that courts adjudicating ATS cases should consider “whether the exercise of jurisdiction . . . is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations”); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 144–45 (2d Cir. 2010) (holding that corporate liability for human rights violations was insufficiently established in customary international law to serve as a basis for federal court jurisdiction under the Alien Tort Statute); Louis Henkin, *Lexical Priority or “Political Question”: A Response*, 101 HARV. L. REV. 524, 530 (1987) (criticizing judicial abstention under the political question doctrine as “a means of escape for fearful judges unwilling to address challenges to governmental usurpation of authority in foreign affairs”); Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1007 (2013) (discussing the Supreme Court’s increasing receptivity to arguments that it should avoid deciding cases in ways that “open the floodgates of litigation”); McGinnis, *supra* note 13, at 306 (positing that, under rational choice theory, the Supreme Court will likely defer to the executive on questions relating to the conduct of war, out of concern that “[a]ny inept decision . . . may erode the Court’s prestige and endanger its public respect”).

301. *Williams’ Case*, 29 F. Cas. 1330, 1331 (C.C.D. Conn. 1799) (No. 17,708).

302. *Id.*



responsibility for responding directly to diplomatic complaints, while at the same time providing the representatives of foreign powers an ostensibly impartial forum for the resolution of wartime legal disputes. In so doing, the courts played a central role in translating United States neutrality from abstract policy into a practice of governance.

Ellsworth's characterization of the recalcitrant national attitude towards the Neutrality Crisis applied equally to the judiciary he supervised during that period. Federal judges exhibited a marked ambivalence about the central role they were asked to assume in resolving claims arising from the conduct of maritime war between belligerent empires. Though in certain respects judges—and the justices of the Supreme Court in particular—sought to assist the administration in its attempts to maintain neutrality, their decisions made clear that the executive branch's policy priorities would need to be balanced against judicial concerns over international legitimacy and the negative effects an expansive role in foreign affairs could have on the courts themselves. Accordingly, the Washington administration's turn to the courts was not mandated by a preexisting constitutional consensus regarding the salutary role the judiciary would play in foreign affairs. It was instead a pragmatic—and only partially successful—response to challenging domestic and international political circumstances. The particulars of the judicial role in foreign affairs would therefore continue to be contested.

