JUDICIAL FOREIGN POLICY: LESSONS FROM THE 1790s

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INTRODUCTION

In his dissenting opinion in *Hamdi v. Rumsfeld*,[1] Justice Thomas cited Justice Jackson approvingly for the following proposition:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government . . . . They are decisions of a kind . . . which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[2]

Under this view, which I will call the "exclusive political control" thesis, the judiciary is barred from participating in foreign affairs decision making because the Constitution grants the political branches exclusive control over foreign policy. Several scholars have defended variants of the exclusive political control thesis.[3] This Article demonstrates that the exclusive political control thesis is incompatible with the original understanding of the Founders. The Article does not defend originalism as a method of constitutional interpretation;[4] it merely shows that the exclusive political control thesis is inconsistent with an originalist approach.

The Article examines the implementation of U.S. neutrality policy in the period from 1793 to 1797. Other scholars have analyzed the initial formulation of U.S. neutrality policy in 1793.[5] Scholars who focus narrowly on the year 1793, when the United States first articulated its neutrality policy, have concluded that "the federal courts played a relatively minor role in resolving the nation's foreign affairs problems."[6] However, if one expands the time frame of the analysis to include the years 1794 to 1797, when the United States confronted a series of issues related to implementation of its neutrality policy, a different constitutional picture emerges. This Article shows that the federal

1. 542 U.S. 507, 579 (2004) (Thomas, J., dissenting).

2. *Id.* at 582–83 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

3. *See, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 8 (2005) (claiming that the "founding generation" believed that "the bulk of the foreign affairs power was vested in the executive" and that "[c]ourts did not play a significant role"); 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.").

4. For an insightful analysis of the application of originalist methodology to constitutional foreign affairs issues, see Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5 (2008).

5. *See, e.g.*, HARRY AMMON, THE GENET MISSION (1973); WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL (2006); CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT (AMS Press, Inc. 1967) (1931).

6. CASTO, *supra* note 5, at 3.

judiciary played a very significant role in implementing U.S. neutrality policy during this period.

Between February 1794 and February 1797, the Supreme Court decided twenty-four cases arising from French privateering activities, including fourteen published decisions[7] and ten unpublished decisions.[8] These cases accounted for roughly half of the Supreme Court caseload during this period.[9] All of the cases raised issues that were directly related to the most important national security issue of the era: how best to maintain U.S. neutrality in the

7. The fourteen published decisions are: *Jennings v. The Brig Perseverance*, 3 U.S. (3 Dall.) 336 (1797); *Del Col v. Arnold*, 3 U.S. (3 Dall.) 333 (1796); *Hills v. Ross*, 3 U.S. (3 Dall.) 331 (1796); *Moodie v. The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319 (1796); *Moodie v. The Ship Alfred*, 3 U.S. (3 Dall.) 307 (1796); *Arcambal v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796); *Cotton v. Wallace*, 3 U.S. (3 Dall.) 302 (1796); *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796); *Geyer v. Michel*, 3 U.S. (3 Dall.) 285 (1796); *Moodie v. The Ship Betty Cathcart*, 3 U.S. (3 Dall.) 285 (1796) (this case was consolidated with *Geyer v. Michel* on appeal); *MacDonogh v. Dannery*, 3 U.S. (3 Dall.) 188 (1796); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795); *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795); and *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794). Technically, *United States v. Peters* and *MacDonogh v. Dannery* are not "privateer" cases because they involved French naval vessels, not privateers. Even so, they are included for the sake of completeness.

8. The ten unpublished decisions are: *Wallace v. The Brig Caesar* (No. 11), *microformed on* Appellate Case Files of the Supreme Court of the United States 1792–1831 [hereinafter Appellate Case Files] (National Archives Microfilm Publications); *Moodie v. The Ship Mermaid* (No. 17), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Eliza* (*Eliza I*) (No. 18), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Ship Phyn* (No. 19), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Tivoly* (No. 20), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Favorite* (No. 22), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Ship Britannia* (No. 23), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Snow Potowmack* (No. 24), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Eliza* (*Eliza II*) (No. 25), *microformed on* Appellate Case Files (National Archives Microfilm Publications); and *Pintado v. The Ship San Joseph* (No. 32), *microformed on* Appellate Case Files (National Archives Microfilm Publications).

During this period, one other French privateering case was also entered onto the Supreme Court docket: *Morphy v. Ship Sacra Familia*. However, there was no Supreme Court decision because the French and Spanish consuls agreed to discontinue the case. *See* 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 50 (Maeva Marcus ed., 2003) [hereinafter 7 DHSC].

9. During the 1790s, the Supreme Court convened for two terms each year, in February and August. Over the course of seven terms from February 1794 to February 1797, the Court decided approximately forty-five cases; this figure depends upon what, precisely, is counted. For present purposes, the main point is that the French privateering cases occupied a very substantial portion of the Supreme Court docket during this period. For detailed information about the Supreme Court docket, see 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 157–474, 483–535 (Maeva Marcus ed., 1985) [hereinafter 1 DHSC] (reproducing the Supreme Court Minutes and Docket for the period 1790–1800).

ongoing war that pitted France against England, Spain, and other European powers. French diplomats repeatedly lobbied the Executive Branch to remove the privateering cases from the courts and resolve them through diplomatic means. From France's perspective, the cases raised questions about sovereign prerogatives and the conduct of naval warfare, which were properly resolved through diplomatic negotiation, not private adjudication. Initially, U.S. judges and executive officials were uncertain whether the cases should be resolved diplomatically, or by means of private adjudication in U.S. courts. However, a consensus soon emerged among cabinet officers and Supreme Court Justices that the federal judiciary should decide the issues raised by the French privateering cases in the context of adjudication between the French captors and the original ship owners. Subsequently, despite repeated French diplomatic protests, the Executive Branch steadfastly refused to intervene in ongoing judicial proceedings.[10]

Four features of the French privateering cases, viewed together, demonstrate conclusively that the exclusive political control thesis is contrary to the original understanding of the Founders. First, the French privateering cases were directly related to the implementation of U.S. neutrality policy, which was the most important national security issue of the era. Second, these cases accounted for a very substantial percentage of the Supreme Court docket in the initial decade after the adoption of the Constitution. Third, executive and judicial officers reached a consensus that the cases should be resolved judicially, not diplomatically. Fourth, the cabinet officers and Supreme Court Justices who formed that consensus included many of the leading figures involved in drafting and ratifying the Constitution.[11] Given their agreement

10. Traditional accounts of the neutrality crisis have emphasized the Supreme Court's refusal to issue an advisory opinion to the Executive Branch. *See* CASTO, *supra* note 5, at 107–15; THOMAS, *supra* note 5, at 146–50. In the summer of 1793, the Executive Branch submitted a set of questions to the Supreme Court related to French privateering. *See* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 747–51 (Maeva Marcus ed., 1998) [hereinafter 6 DHSC]. The Court refused to provide an answer, stating that "[t]he Lines of Separation drawn by the Constitution between the three Departments of Government . . . afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to." *Id.* at 755. Notwithstanding this incident, though, the Supreme Court and the lower federal courts decided dozens of French privateering cases in the period from 1794 to 1797, and the Executive Branch consistently refused to intervene in judicial decision making. *See infra* Part III.

11. Three men served as Secretary of State during this period: Thomas Jefferson (Mar. 1790 to Dec. 1793), Edmund Randolph (Jan. 1794 to Aug. 1795), and Timothy Pickering (Dec. 1795 to May 1800). BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH, 1774–1989, at 199, 290, 300 (Robert Sobel ed., 1990). Jefferson's credentials as one of the key constitutional Founders are well known. Randolph played a key role at both the Constitutional Convention and the Virginia ratifying convention. *See* Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, *in* 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 204–17, 232–36, 375–93 (1971). Pickering was not a representative to the Constitutional Convention, but

that the federal judiciary should play a leading role in implementing U.S. neutrality policy, claims by contemporary jurists and scholars that the Founders granted the political branches exclusive responsibility for foreign policy decision making are simply untenable.

It bears emphasis that all of the French privateering cases involved disputes about the property rights of private parties, and that international law provided many of the key substantive rules for resolving those disputes. Thus, the government's choice to handle these cases through litigation in federal courts illustrates two points. First, the Founders were very comfortable with the idea that federal courts would invoke international law to provide rules of decision in litigation.[12] Second, the Founders recognized that international law, or the "law of nations" as it was known at that time, did not merely regulate relations between nations: it also conferred rights on private parties.[13]

Leading originalist accounts of the constitutional separation of powers in foreign affairs have tended to overlook, or give little weight to, the French privateering cases.[14] This is understandable because the cases themselves say very little about the constitutional distribution of power in foreign affairs. Ten of the twenty-four cases did not yield published decisions; in most of those

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he did participate in the Pennsylvania ratifying convention. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH, 1774–1989, *supra*, at 290.

Two men served as Attorney General during this period: Edmund Randolph (Feb. 1790 to Jan. 1794) and William Bradford (Jan. 1794 to Aug. 1795). *Id.* at 38, 300. Before becoming Attorney General, Bradford was a Justice on the Pennsylvania Supreme Court (1791–1794) and Attorney General of Pennsylvania (1780–1791). *Id.* at 38.

Alexander Hamilton served as Secretary of the Treasury (Sept. 1789 to Feb. 1795). *Id.* at 159–60. Although he had no formal responsibility for U.S. foreign policy, he was a key presidential advisor on a wide range of issues. Hamilton's credentials as one of the key constitutional Founders are well known.

Three men served as Chief Justice during this period: John Jay (Sept. 1789 to June 1795), John Rutledge (Aug. 1795 to Dec. 1795), and Oliver Ellsworth (Mar. 1796 to Dec. 1800). CONGRESSIONAL QUARTERLY INC., AMERICAN LEADERS 1789–1991: A BIOGRAPHICAL SUMMARY 68–70 (1991). John Jay, as is well known, was one of three co-authors of The Federalist Papers. He played a central role during the New York ratifying convention. *See* Goebel, *supra*, at 393–412. Rutledge and Ellsworth both served on the Committee of Detail during the Constitutional Convention. *See id.* at 232–36. They also played central roles in their state ratifying conventions. *See id.* at 337–39 (Ellsworth and Connecticut), 371–75 (Rutledge and South Carolina).

12. In contrast to some modern litigation, the courts were not utilizing international law as a guide to constitutional interpretation. They were applying international law directly as a rule of decision.

13. *See generally* MARK WESTON JANIS, THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914 (2004).

14. *See, e.g.*, MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007) (providing a very comprehensive account of the constitutional law of foreign affairs, as it was understood by the founding generation, but devoting very little attention to the French privateering cases).

cases, the Court did not produce any written rationale. In many of the fourteen published decisions, the Court's written rationale says nothing about the separation of powers issues that are the central focus of this Article. To shed light on these issues, the author analyzed a wide variety of ancillary materials related to the French privateering cases, including the Supreme Court papers in the National Archives,[15] other sources that present arguments advanced by the parties in the privateering cases,[16] the decisions of lower courts,[17] executive branch documents,[18] and diplomatic correspondence with France and England.[19]

The analysis of these ancillary materials suggests that the Founders did not envision the lines separating the three branches of the federal government as

15. The author spent two days in the National Archives conducting research for this paper. He reviewed the Supreme Court case files for ten of the twenty-four cases referenced above, including two published cases, and eight unpublished cases. The two published cases are: *Moodie v. The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319 (1796), and *Moodie v. The Ship Alfred*, 3 U.S. (3 Dall.) 307 (1796). The eight unpublished cases are: *Moodie v. The Ship Mermaid* (No. 17), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Eliza* (*Eliza I*) (No. 18), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Ship Phyn* (No. 19), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Tivoly* (No. 20), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Favorite* (No. 22), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Ship Britannia* (No. 23), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Snow Potowmack* (No. 24), *microformed on* Appellate Case Files (National Archives Microfilm Publications); and *Moodie v. The Brig Eliza* (*Eliza II*) (No. 25), *microformed on* Appellate Case Files (National Archives Microfilm Publications).

16. Many of the previously unpublished documents associated with the French privateering cases are collected in 6 DHSC, *supra* note 10, and 7 DHSC, *supra* note 8. These materials, together with the materials in the National Archives, are invaluable for understanding the arguments advanced by the parties in these cases.

17. Judge Thomas Bee, the federal district judge in South Carolina, decided fourteen of the twenty-four cases referenced above, as well as some other French privateering cases that never reached the Supreme Court. Judge Bee's decisions in admiralty cases were published in 1810 in a separate volume entitled REPORTS OF CASES ADJUDGED IN THE DISTRICT COURT OF SOUTH CAROLINA BY THE HON. THOMAS BEE (Phila., William P. Farrand & Co. 1810) [hereinafter BEE'S ADMIRALTY REPORTS]. Many of these cases were also published later in the "Federal Cases" collection.

18. Numerous executive branch documents related to the privateering cases are reproduced in 6 DHSC, *supra* note 10, and 7 DHSC, *supra* note 8, and in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1833) [hereinafter 1 ASPFR], *available at* http://memory.loc.gov/ammem/amlaw/lwsplink.html, and 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832), *available at* http://memory.loc.gov/ammem/amlaw/lwsplink.html.

19. Much of the extensive diplomatic correspondence related to the French privateering cases is preserved in volumes 1 and 2 of ASPFR, *supra* note 18.

impenetrable, immovable walls. To the contrary, the key government decision makers in the 1790s believed that they were engaged in a cooperative effort in which all three branches of the federal government worked together to promote U.S. foreign policy objectives. Responsibility for foreign policy decision making was not divided into neat, separate boxes labeled "legislative," "executive," and "judicial." The foreign policy challenges facing the young nation were too important to allow artificial "walls" separating the branches of government to impede the active cooperation of all three branches in working together to solve vital national security problems.

The remainder of this Article is divided into four parts. Part I provides background on French privateering in the 1790s. Parts II and III proceed chronologically. Part II examines the period from February 1793, when France declared war on Great Britain and Holland, until June 1794, when Congress enacted legislation to address the problems posed by French privateering activities in the United States.[20] During this period, the U.S. government worked out the basic division of responsibility between the Executive and Judicial Branches and decided that the judiciary should handle many of the issues arising from French privateering activities. Part III analyzes the period from June 1794 until February 1797, when the Supreme Court decided *Jennings v. The Brig Perseverance*,[21] the last of the French privateering cases. During this period, British consuls utilized the U.S. judicial system to harass French privateers and gain a tactical advantage in the ongoing naval war between France and Great Britain. By instigating litigation in U.S. courts, the British consuls imposed substantial economic costs on French privateers. Those costs, combined with other factors, ultimately induced the privateers to take their captured prizes elsewhere, rather than bringing the prizes to U.S. ports, where they would be subjected to protracted litigation. The Article concludes with some observations about the contemporary relevance of the French privateering cases.

I. BACKGROUND: FRENCH PRIVATEERING IN THE 1790S

In the late eighteenth century, "privateering" was a common means of warfare.[22] If a nation with a relatively weak naval force became embroiled in warfare, it could augment its naval power by commissioning privateers to fight on its behalf. The term "privateer" refers both to privately owned ships that fought on behalf of a government and to people who operated those ships. If a man wanted to fight as a privateer on behalf of a government, he would have to

20. *See* Act of June 5, 1794, ch. 50, 1 Stat. 381.

21. 3 U.S. (3 Dall.) 336 (1797).

22. The discussion of privateering in this paragraph is drawn primarily from 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, 241–43 (2004).

bear the expense of purchasing an appropriate ship, fitting it for warfare, and hiring a crew. He would also have to obtain a commission, sometimes called a "letter of marque," from a duly authorized government officer.[23] Armed with such a commission, the privateer was authorized to capture enemy merchant vessels. The privateer would bring captured vessels to a "prize court," a judicial body authorized to declare whether the captured vessel was a lawful prize. If it was a lawful prize, the captors could sell the ship and its cargo and keep the money for themselves. Thus, the privateering system utilized the profit motive as a force multiplier to enhance the naval power of a nation at war.

As of March 1793, France was at war not only with England, but also with Austria, Prussia, Spain, and the Netherlands.[24] France's naval power was no match for the combined naval forces of its enemies. Accordingly, France decided to make extensive use of privateers to supplement its naval forces. The chief mission of the privateers, from France's perspective, was to disrupt the trade of its enemies. To perform this mission effectively, the privateers had to operate near the ports that were used to conduct the enemies' trade. Hence, France deployed some privateers in the European theater and others in the Western hemisphere.

Deployment of privateers in the Western hemisphere posed tactical problems for France. It made no sense for privateers operating in the Western hemisphere to carry their prizes back to France to be condemned by prize courts in France. The trans-Atlantic journey was time-consuming and hazardous: too many prizes would be lost en route. France established some prize courts in French colonies in the Caribbean,[25] but the British effectively blockaded key French ports in the Caribbean for at least some of the period under study, making it difficult for privateers to take their prizes to Caribbean ports.[26] Accordingly, France instructed many of its privateers in the Western hemisphere to take their prizes to U.S. ports.[27]

France's attempt to utilize U.S. ports as a base of operations for French privateers posed a significant policy dilemma for the United States. On the

23. With respect to letters of marque, see Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 84 (2007).

24. *See* Proclamation of Neutrality (Apr. 22, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 140 (noting that "a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other"); *see also* Edict of His Majesty, King of Spain (Mar. 23, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 425–26 (noting that France declared war against Spain on March 16).

25. *See, e.g.*, United States v. Peters, 3 U.S. (3 Dall.) 121 (1795) (describing situation where a French naval vessel captured a merchant ship and took it to a French port in the Caribbean, where it was condemned as a prize by a French prize court).

26. *See* MELVIN H. JACKSON, PRIVATEERS IN CHARLESTON, 1793–1796, at 19–20 (1969).

27. *See id.* at 6–8.

one hand, the United States was eager to honor its treaty commitments to France. On the other hand, President Washington declared in April 1793 that the United States would remain neutral in the war between France and its various enemies.[28] The dilemma arose because the 1778 Treaty with France seemingly obligated the United States to adopt a pro-French tilt in the war. Specifically, Article 17 granted French privateers broad rights of access to U.S. ports,[29] whereas Article 22 imposed severe restrictions on access to U.S. ports by "foreign privateers . . . who have commissions from any other Prince or State in enmity with" France.[30]

As Thomas Jefferson stated, "It is an essential character of neutrality, to furnish no aids (not stipulated by treaty) to one party, which we are not equally ready to furnish to the other."[31] Thus, to implement its neutrality policy and honor its treaty commitments to France, the United States had to decide what the treaties with France required. If the U.S. adopted an expansive view of its treaty obligations to France, the British (and others) would object that the United States was violating its duties as a neutral state; this course potentially risked war with Great Britain. If the United States adopted a narrow view of the scope of its treaty obligations, France would object that the United States was breaching its treaty commitments; this course potentially risked war with France. Hence, the United States attempted to steer a middle course between the Scylla of war with England and the Charybdis of war with France. Federal courts played a critical role in attempting to chart this middle course, in part because key officers in the Executive and Judicial Branches agreed that the judiciary should assume primary responsibility for making some of the crucial decisions.

II. U.S. NEUTRALITY POLICY: FROM FEBRUARY 1793 TO JUNE 1794

Part II analyzes developments from February 1793, when France declared war against Great Britain and Holland, until June 1794, when Congress enacted legislation to address French privateering activities. There were two main sets of foreign policy issues related to the conduct of French privateers during this period. The first set of foreign policy issues related to the substantive rules governing the conduct of French privateers. The political branches generally took the lead in framing substantive rules, and the Judicial Branch played a secondary role.

28. *See* Proclamation of Neutrality (Apr. 22, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 140.

29. *See* Treaty of Amity and Commerce, U.S.-Fr., art. XVII, Feb. 6, 1778, 8 Stat. 22 [hereinafter 1778 Treaty with France].

30. *Id.* art. XXII.

31. Letter from Thomas Jefferson to Thomas Pinckney (Sept. 7, 1793), *in* 1 ASPFR, *supra* note 18, at 239.

The second set of foreign policy issues related to jurisdictional questions: when French privateers captured privately owned vessels, and the owners sought restitution of the captured property on the grounds that their property had been seized illegally, the question arose as to which branch of government should resolve these disputes. Initially, there was some uncertainty as to whether the Executive or the Judicial Branch should handle these questions. France urged resolution of these disputes through diplomatic means because France viewed the privateering cases as contests between nations about sovereign rights. However, a consensus soon emerged among U.S. government officials that the Judicial Branch should decide these issues, because the privateering cases also involved private disputes about individual property rights. Ultimately, cabinet officials and Supreme Court Justices agreed that the judiciary had the primary constitutional responsibility for deciding individual disputes over ownership of property, even though the law of nations provided most of the governing legal rules and the disputes were intimately linked to the wartime strategy of sovereign powers.

Part II is divided into three sections. The first section addresses the historical context. The second section analyzes the substantive rules governing the conduct of French privateers. The third section analyzes the interplay between the Legislative, Executive and Judicial Branches in framing the jurisdictional rules that ultimately gave the judiciary primary responsibility for resolving disputes arising from French privateering activities.

A. Historical Context

In January 1793, French revolutionaries executed Louis XVI. Shortly thereafter, on February 1, in the midst of revolutionary fervor at home, France declared war on Great Britain and Holland.[32] At that point, France was already at war with Austria and Prussia. In March 1793, France also declared war on Spain.[33]

Although France declared war against Great Britain on February 1, 1793, news of the war did not reach the United States until late March or early April. President Washington was in Mount Vernon at the time, but he traveled to Philadelphia as quickly as possible to convene a meeting of his Cabinet.[34] The cabinet officers at the time included Thomas Jefferson as Secretary of State, Alexander Hamilton as Secretary of the Treasury, Henry Knox as Secretary of War, and Edmund Randolph as Attorney General.[35] The President circulated a list of questions to the cabinet officers on April 18, and the group convened the

32. THOMAS, *supra* note 5, at 24.

33. *See* Edict of His Majesty, King of Spain (Mar. 23, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 425–26.

34. *See* THOMAS, *supra* note 5, at 24–26.

35. *See id.* at 26–28, 66.

next day to formulate U.S. policy.[36] On April 22, the President publicly issued a formal proclamation of neutrality, declaring the U.S. policy to "pursue a conduct friendly and impartial toward the belligerent Powers."[37]

On April 8, 1793, Edmond Genet arrived in Charleston, South Carolina to assume his position as the new French Ambassador to the United States.[38] Beginning immediately after his arrival, Genet undertook a series of actions that posed substantial challenges for U.S. foreign policy. First, Genet began commissioning U.S. citizens to act as privateers in the service of the French government.[39] Second, Genet provided financial assistance to U.S. and French citizens who accepted commissions to serve as privateers for France.[40] With Genet's financial aid, the privateers purchased ships and utilized U.S. ports to arm their ships for naval warfare.[41] Additionally, Genet instructed French consuls in major U.S. ports to establish prize courts. Consequently, French privateers commissioned by Genet and outfitted in the United States began bringing their prizes into U.S. ports so that French consuls operating prize courts on U.S. territory could adjudicate the lawfulness of their prizes.[42]

In part due to the policies he pursued, and in part due to his confrontational style, Genet quickly made many enemies in the U.S. government. Hence, in August 1793, the United States decided to request the recall of Ambassador Genet.[43] The French government granted that request in October 1793, and Genet's replacement, Joseph Fauchet, arrived in the United States in February 1794.[44]

In the fourteen months after President Washington issued his neutrality proclamation, there were three key milestones in the development of the U.S. response to French privateering activities. First, on August 4, 1793, the Treasury Secretary (Alexander Hamilton) promulgated regulations for the guidance of U.S. customs collectors.[45] Second, on February 18, 1794, the Supreme Court issued its decision in *Glass v. The Sloop Betsey*.[46] Third, on

36. *See id.* at 26–41.

37. *See* Proclamation of Neutrality (Apr. 22, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 140.

38. AMMON, *supra* note 5, at vii.

39. *See* Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON 698 (John Catanzariti ed., 1995).

40. *Id.*

41. *Id.*

42. *See* Casto, *supra* note 22, at 243.

43. *See The Recall of Edmond Charles Genet*, *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 685–715.

44. *See* AMMON, *supra* note 5, at 155–59.

45. Instructions to the Collectors of the Customs (Aug. 4, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 140–41.

46. 3 U.S. (3 Dall.) 6 (1794). The precise date is recorded in The Minutes of the Supreme Court of the United States (Feb. 18, 1794), *reprinted in* 1 DHSC, *supra* note 9, at 229.

June 5, 1794, Congress enacted legislation that was designed to regulate the activities of French privateers in U.S. ports.[47] The Treasury regulations and the subsequent legislation defined the key substantive rules governing the conduct of French privateers. In contrast, the Supreme Court decision in *Sloop Betsey* addressed important jurisdictional questions, and resolved key constitutional separation of powers issues that had been percolating in the Executive Branch and in the lower federal courts for the previous year.

B. Substantive Rules Governing Privateers

This section discusses the main substantive issues related to French privateering: (1) whether French privateers could sell their prizes in U.S. ports; (2) whether France could recruit U.S. citizens to serve as privateers on behalf of France; and (3) whether French privateers could utilize U.S. ports to outfit civilian vessels for naval warfare or to augment the military capabilities of vessels that were already equipped for naval warfare.

1. Sale of Prizes

In traditional European wars, a privateer who captured a prize would bring it to a prize court in his home country to obtain a judgment confirming that it was a lawful prize.[48] Then, when he sold the prize and its cargo, he could invoke the judgment of the prize court to prove that he had a legally valid title to the property he was selling.[49] France attempted to export this model to the Western hemisphere by establishing French prize courts on U.S. territory.[50] The key strategic goal was to provide financial incentives for prospective privateers to operate in the American theater by establishing a juridical system that would ensure their ability to sell captured property for financial gain. Without the economic inducement of a solid return on investment, France would be unable to enlist sufficient numbers of privateers, and its military strategy would fail.

Accordingly, Genet instructed French consuls in the United States to establish prize courts on U.S. territory.[51] Genet believed that France had a right to do so under Article 12 of the 1788 Consular Treaty between the United States and France.[52] However, the Washington Administration did not agree

47. *See* Act of June 5, 1794, ch. 50, 1 Stat. 381.

48. *See* Casto, *supra* note 22, at 242–43.

49. *See id.* at 242.

50. *Id.* at 243.

51. THOMAS, *supra* note 5, at 206–07.

52. Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, U.S.-Fr., art. XII, Nov. 14, 1788, 8 Stat. 106. Article 12 authorized French consuls, for example, to adjudicate disputes between a French captain and his crew while they were docked at U.S. ports. *See id.* It was quite a stretch, though, for Genet to suggest that Article 12 authorized France to establish prize courts on U.S. territory.

that the Treaty granted France any such right. Moreover, the Executive Branch viewed Genet's effort to establish French prize courts on U.S. territory as a flagrant violation of U.S. sovereignty and neutrality.[53] Consequently, Jefferson wrote directly to the French consuls and vice consuls in the United States (bypassing Genet), warning them that they would be subject to prosecution and punishment if they, "within the United States, . . . assume to try the validity of prizes, and to give sentence thereon, as judges of admiralty."[54]

Importantly, although the Executive Branch determined that any judgment issued by a French prize court operating on U.S. territory was "a mere nullity,"[55] the government did not attempt to block the sale of prizes in U.S. ports by French privateers.[56] The decision not to interfere with the sale of captured prizes and their cargo was significant because it preserved a financial incentive for French privateers to bring their captured prizes to U.S. ports. If a privateer sold his prize without first obtaining a valid judgment from a prize court, the ship itself would sell at a discounted price because the buyer had to assume the risk that the original owner might file a legal action to claim title to the vessel.[57] However, privateers could sell captured cargo at full value because the buyers did not face a significant risk of subsequent legal action by the original owners. Overall, the financial incentives were sufficient to induce

53. *See, e.g.*, Letter from Thomas Jefferson to George Hammond (May 15, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 38–39.

54. Letter from Thomas Jefferson to French Consuls (Sept. 7, 1793), *in* 1 ASPFR, *supra* note 18, at 175.

55. Letter from Thomas Jefferson to George Hammond (May 15, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 38.

56. *See* Message from George Washington to Congress (Dec. 3, 1793), *as reprinted in* 1 ASPFR, *supra* note 18, at 140 ("I have not thought myself at liberty to forbid the sale of the prizes, permitted by our treaty of commerce with France to be brought into our ports . . . ."); *see also* Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 697, 705–06 (explaining and defending U.S. position on sale of prizes in U.S. ports).

57. Assume, for example, that a French privateer captured a British merchant vessel and sold the British vessel to an American merchant who wanted to use the vessel to conduct trans-Atlantic trade. If the French privateer obtained a valid judgment from a prize court before selling the captured ship to the American buyer, then the buyer would obtain a secure title protected by that judgment. But if the American buyer purchased a ship that had not been condemned by a prize court as a valid prize, and the buyer then sailed the ship to a French port, the original British owner could initiate a legal action in a French prize court to challenge the legality of the initial capture. If the British owner prevailed, the American buyer would lose possession of the vessel and would have little recourse against the French privateer who sold him the vessel.

French privateers to bring captured prizes to U.S. ports and sell them for financial gain.[58]

In sum, the Washington Administration "split the baby" by prohibiting the establishment of French prize courts on U.S. territory, but permitting the sale of French prizes. This Solomonic solution was generally consistent with France's strategic interests. As long as French privateers could sell captured prizes and cargo in U.S. ports, there would be strong economic inducements for privateering, and France would be able to recruit a sufficient number of privateers to achieve its military objectives.

2. Recruiting U.S. Citizens

As noted above, the success of France's naval warfare strategy hinged on its ability to recruit a sufficient number of individuals to serve as privateers on behalf of France. Article 21 of the 1778 Treaty with France prohibited U.S. citizens from taking "any commission or letters of marque for arming any ship or ships, to act as privateers against" France.[59] From France's perspective, though, it was entirely permissible for U.S. citizens to accept commissions from France to act as privateers against France's enemies. Hence, immediately after Genet arrived in the United States, he began recruiting U.S. citizens to aid France's war effort by serving as captains or crew on French privateers.[60]

The United States told France that it viewed Genet's recruitment of U.S. citizens as a contravention of U.S. neutrality policy and urged France to halt these activities.[61] The August 1793 Treasury regulations instructed U.S. customs collectors "to observe, and to notify . . . the case of any citizen of the United States who shall be found in the service of either of the parties at war."[62] In accordance with the President's neutrality proclamation,[63] federal

58. *See* JACKSON, *supra* note 26, at 127–53 (providing detailed information about the sale of British, Spanish, and Dutch prizes captured by French privateers and brought to the ports of Charleston, South Carolina and Savannah, Georgia between April 1793 and April 1796).

59. 1778 Treaty with France, *supra* note 29, art. XXI.

60. *See* CASTO, *supra* note 5, at 45–47.

61. *See* Letter from Thomas Jefferson to Jean Baptiste Ternant (May 15, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 42.

62. Instructions to the Collectors of the Customs (Aug. 4, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 140, 141.

63. The Proclamation expressly directed federal prosecutors to institute prosecutions "against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them." Proclamation of Neutrality (Apr. 22, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 140. As a neutral nation, the United States believed it had a duty under the law of nations to ensure that its citizens did not take up arms against either side in the war. The instruction for federal prosecutors to prosecute individuals who "violate the law of nations" was intended to fulfill this perceived duty. Whether the law of nations actually prohibited U.S. citizens from taking up arms on behalf of France is debatable. *See* CASTO, *supra* note 5, at 92–93.

prosecutors brought criminal charges against U.S. citizens who enlisted to serve on French privateers.[64]

Some critics expressed doubts about the President's constitutional authority to impose criminal penalties for violations of rules promulgated by the Executive Branch. In June 1794, Congress removed lingering doubts about the constitutionality of federal criminal prosecutions by enacting legislation that authorized criminal punishment. The legislation expressly authorized criminal penalties for U.S. citizens who "accept[ed] and exercise[d] a commission to serve a foreign prince or state in war,"[65] and for those who "enlisted or entered in the service of any foreign prince or state . . . as a marine or seaman on board of any vessel of war . . . or privateer."[66]

3. Outfitting Ships in U.S. Ports

To implement its naval warfare strategy, France needed ships equipped for naval warfare. Article 22 of the 1778 Treaty with France prohibited privateers commissioned by France's enemies from outfitting their ships in U.S. ports.[67] France interpreted this provision to mean that privateers commissioned by France were permitted to outfit their ships in U.S. ports.[68] Hence, Genet provided funding to French privateers to help them purchase civilian ships and convert them into military vessels by equipping the ships with guns and other armaments.

The United States objected to France's use of U.S. ports for this purpose, arguing that it would be contrary to the United States' duties as a neutral nation to allow France to outfit privateers in U.S. ports without also granting equivalent privileges to France's enemies.[69] Accordingly, the August 1793 Treasury regulations declared: "The original arming and equipping of vessels in the ports of the United States, by any of the belligerent parties, for military service . . . is deemed unlawful."[70] The regulations instructed U.S. customs collectors to keep "a vigilant eye upon whatever may be passing within the ports," and to notify the relevant governor and U.S. Attorney if they observed activities inconsistent with U.S. neutrality.[71]

64. *See, e.g.*, Henfield's Case, 11 F. Cas. 1099 (C.C.D. Penn. 1793) (No. 6360).

65. Act of June 5, 1794, ch. 50, § 1, 1 Stat. 381, 381–82.

66. *Id.* § 2.

67. 1778 Treaty with France, *supra* note 29, art. XXII.

68. *See* THOMAS, *supra* note 5, at 126–28.

69. *See* Letter from Thomas Jefferson to Thomas Pinckney (Sept. 7, 1793), *in* 1 ASPFR, *supra* note 18, at 239 ("In the case where we found ourselves obliged, by treaty, to withhold from the enemies of France the right of arming in our ports, we thought ourselves in justice bound to withhold the same right from France also, and we did it.").

70. Instructions to the Collectors of the Customs (Aug. 4, 1793), *reprinted in* 1 ASPFR, *supra* note 18, at 140, 141.

71. *See id.* at 140.

Finally, the June 1794 legislation included three provisions to address the problem of illegal outfitting in U.S. ports. First, the statute made it a crime for any person within U.S. territory to "fit out and arm . . . any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace."[72] The statute also imposed similar penalties for anyone who augmented or increased "the force of any ship of war, cruiser or other armed vessel" in the service of a foreign state that was at war with a state "with whom the United States are at peace, by adding to the number or size of the guns of such vessel."[73] Additionally, the statute authorized the President to detain any vessel that had been illegally outfitted, or whose force had been illegally augmented, in a U.S. port.[74]

In sum, during the period from February 1793 to June 1794, the Executive Branch played the lead role in framing the substantive rules governing the conduct of French privateers in the United States. Congress later ratified key executive branch decisions by enacting legislation in June 1794 that gave the force of law to policies adopted by the Executive Branch the previous year. The Supreme Court did not make a significant contribution to the substantive rules governing the conduct of French privateers. However, in February 1794, the Supreme Court reaffirmed the Executive's earlier decision concerning French prize courts by declaring "that the admiralty jurisdiction, which has been exercised in the United States by the Consuls of France . . . is not of right."[75]

C. Jurisdictional Issues Involving French Privateers

There were several cases in which owners of vessels captured by French privateers alleged that the capture was unlawful because the privateer seized the alleged prize within U.S. territorial waters or because the alleged prize was actually a neutral ship, not an enemy ship. France conceded that the law of nations prohibited captures of neutral vessels and captures in U.S. territorial waters. Cases in which ship owners alleged violations of these agreed rules

72. Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, 383.

73. *Id.* § 4.

74. *Id.* § 7.

75. Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 16 (1794) (emphasis omitted). By holding that French consuls lacked jurisdiction to operate prize courts on U.S. territory, the Supreme Court effectively denied res judicata effect to the prior judgments of French prize courts, thereby creating an opportunity for the owners of captured vessels to challenge the validity of (French) judgments condemning the vessels as prizes. *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 86 (1995).

raised factual disputes about the ownership of ostensibly neutral vessels and the location where captures occurred.

More fundamentally, though, these cases raised jurisdictional questions about who should decide the factual disputes. The ship owners who complained about unlawful captures of their vessels pursued two different avenues of relief. Some took their claims to federal admiralty courts. Others sought relief from the federal Executive Branch. From France's perspective, the disputes between ship owners and French privateers were properly viewed as disputes between sovereign nations about the conduct of naval warfare. Hence, France urged resolution through diplomatic channels. Initially, the lower federal courts accepted France's arguments and dismissed several cases for lack of jurisdiction.

However, the Supreme Court ruled in *Glass v. The Sloop Betsey* that the federal courts had jurisdiction to adjudicate claims by ship owners who alleged that their vessels had been seized unlawfully by French privateers.[76] The Court's decision reflected a very different conception of the privateering cases: the Court viewed these cases as disputes between private parties about individual property rights. Viewed from that perspective, it made sense for the Judicial Branch to resolve these disputes. After the Court's decision in *Sloop Betsey*, the Executive Branch consistently refused to intervene in judicial proceedings, maintaining that the judiciary should handle all disputes about seizures of particular vessels by particular French privateers. Although France protested vehemently against the exercise of jurisdiction by U.S. courts, the Executive Branch rebuffed French protests and told French diplomats to direct their arguments to the Judicial Branch. Executive officers trusted the courts to resolve disputed cases in accordance with settled rules of international law, and they assumed that the judicial application of international legal rules would help promote the U.S. goal of avoiding war with Great Britain and France.

This section examines the evolution of jurisdictional rules related to the French privateering cases in the period from April 1793 to June 1794. The first subsection discusses the role of the Executive Branch. The next subsection examines decisions by lower federal courts before the Supreme Court decision in *Sloop Betsey*. The third subsection reviews the Supreme Court decision in *Sloop Betsey*. The final subsection briefly considers the role of Congress.

1. The Role of the Executive Branch

76. *Sloop Betsey*, 3 U.S. at 16.

In late April 1793, the French naval vessel *L'Embuscade* captured a British vessel, *The Grange*, within the Bay of Delaware.[77] Under accepted principles of the law of nations, there was no question "that to attack an enemy in a neutral territory is absolutely unlawful."[78] Hence, the capture of *The Grange* raised two questions. As a factual matter, where did the capture occur? And as a legal matter, what were the boundaries of U.S. territorial waters? After investigating and analyzing these issues, Attorney General Randolph concluded that the capture occurred in U.S. territorial waters (i.e., neutral territory), and that "the duty arising from the illegal act[] is restitution."[79] In deference to that judgment, Genet agreed that *The Grange* would be returned to its British owners.[80]

The Grange was one of the few cases, though, where the Executive Branch performed the adjudicative function of deciding that the capture of a specific vessel was unlawful. After the United States resolved the case of *The Grange*, it soon became apparent that there would be many such cases to resolve, and the Executive grew uncomfortable with repeated demands from the French and British Ambassadors, asking the Executive to perform what it believed was an adjudicative function. Within a period of a few days in June 1793, Secretary of State Jefferson received formal protests from the British concerning *The Catharine* and from the French concerning *The William*. These protests forced the Cabinet to reconsider the respective roles of the Executive and Judicial Branches in handling these disputes.

First, on June 11, 1793, George Hammond, Great Britain's Ambassador to the United States, wrote to Thomas Jefferson to protest the seizure by French captors of the British brigantine *Catharine* within the territorial waters of the United States.[81] Hammond requested "immediate restitution of this vessel" on the grounds that the seizure was "an aggression on the territory and jurisdiction of the United States."[82] The Cabinet met the next day to formulate a U.S. response. They reached a unanimous agreement that the matter should be resolved by judicial means.[83] Jefferson wrote to Hammond to convey the U.S. views. Jefferson asked Hammond "to have the parties interested apprised

77. *See* Edmund Randolph's Opinion on the *Grange* (May 14, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 31–35; Letter from Edmond Charles Genet to Thomas Jefferson (May 27, 1793), *in* 1 ASPFR, *supra* note 18, at 149, 150.

78. *See* Edmund Randolph's Opinion on the *Grange* (May 14, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 32.

79. *Id.* at 35.

80. *See* Letter from Edmond Charles Genet to Thomas Jefferson (May 27, 1793), *in* 1 ASPFR, *supra* note 18, at 149, 150.

81. Memorial from George Hammond (June 11, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 253.

82. *Id.*

83. Cabinet Opinions on the *Republican* and the *Catharine* (June 12, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 259–60.

without delay that they are to take measures as in ordinary civil cases for the support of their rights judicially."[84] The letter continued:

> Should the decision be in favor of the jurisdiction of the court, it will follow that all future similar cases will devolve at once on the individuals interested to be taken care of by themselves, as in other questions of private property provided for by the laws. . . . This train of things is much more desireable for the Executive, whose functions are not analogous to the questions of law and fact produced by these cases . . . .[85]

Two points are noteworthy. First, the Executive Branch preferred for the courts to resolve these cases because the cases involved private property rights and the application of law to fact. Second, it was the judiciary's responsibility to decide whether these were matters within the jurisdiction of federal admiralty courts.[86]

Jefferson sent this letter to Hammond on June 13. Then, on June 14, Ambassador Genet wrote to Jefferson to protest the seizure of *The William* by U.S. judicial officers: "You will see by the papers hereto annexed, that, in contempt of the treaties which unite the French and Americans; that in contempt of the law of nations; civil and judiciary officers of the United States have permitted themselves" to seize prizes captured by French privateers.[87] Genet added: "I hope to obtain immediately . . . restitution, with damages and interest, of the French prizes arrested and seized at Philadelphia, by an incompetent judge . . . ."[88] Genet also made clear that France believed these types of disputes should be resolved through diplomatic means, not through private adjudication. He wrote: "It is through the intervention of the public

84. Letter from Thomas Jefferson to George Hammond (June 13, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 270.

85. *Id.* at 270–71.

86. *See* Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 697, 704.

87. Letter from Edmond Charles Genet to Thomas Jefferson (June 14, 1793), *in* 1 ASPFR, *supra* note 18, at 152.

88. *Id.* The events preceding Genet's letter to Jefferson merit brief comment. In the spring of 1793, the French privateer *Citizen Genet* captured a British ship, *The William*, and brought it to Philadelphia. The British owners filed an in rem action in federal court, alleging that the capture was illegal because the ship was seized in U.S. territorial waters. Findlay v. The William, 9 F. Cas. 57 (D. Pa. 1793) (No. 4790). Meanwhile, on June 7, 1793, an agent for the French captors proceeded to sell the cargo at a wharf in Philadelphia. Statement of Francis Dupont (June 7, 1793), *in* 1 ASPFR, *supra* note 18, at 152. In an effort to establish the court's jurisdiction over the ship and its cargo, "a deputy marshal of the court of admiralty" attempted to halt the sale of the cargo. *Id.* The agent for the French captors believed "that the admiralty could not . . . meddle in this business, agreeably to the 17th article of the treaty of commerce between France and the United States." *Id.* The agent proceeded to sell the cargo, but it allegedly sold below market value because the deputy marshal "discouraged the bidders, and even suspended their bidding." *Id.*

ministers, that affairs of the nature which produce my present complaints and reclamations, ought to be treated."[89] This was consistent with France's litigating position in these cases, which emphasized that disputes related to French privateers were, first and foremost, disputes involving sovereign rights.[90]

Jefferson drafted a letter in response to Genet's protest, which included the following passage:

> The functions of the Executive are not competent to the decision of Questions of property between Individuals. These are ascribed to the Judiciary alone . . . . You will therefore be sensible, Sir, that though the President is not the Organ for doing what is just in the present case, it will be effectually done by those to whom the constitution has ascribed that duty; and be assured that the interests, the rights and the dignity of the French nation will receive within the Bosom of the United States all the support which a friendly nation could desire, and a neutral one yield.[91]

Jefferson did not send the letter in this form,[92] but his draft identifies an important element of the consensus position that later emerged. Even though the French privateering cases implicated "the interests, the rights and the dignity of the French nation," the judiciary had the constitutional responsibility for vindicating France's interests, because the cases also involved "Questions of property between Individuals."

On June 21, one week after Genet wrote to Jefferson, Judge Richard Peters, the federal district judge in Philadelphia, ruled that the district court lacked jurisdiction in the case of *The William*.[93] Jefferson sent his reply to Genet after the district court issued its ruling. In that letter, Jefferson told Genet:

> The persons who reclaimed the ship *William* as taken within the limits of the protection of the United States, having thought proper to carry their claim first into the courts of admiralty, there was no power in this country which could take the vessel out of the custody of that court, till it should decide, itself, whether it had jurisdiction or not of the cause . . . .[94]

Jefferson's reply is noteworthy for two reasons. First, if an individual files an in rem action in an admiralty court, and the court seizes a vessel on that basis, the Executive has no power to order the court to release the vessel,

89. Letter from Edmond Charles Genet to Thomas Jefferson (June 14, 1793), *in* 1 ASPFR, *supra* note 18, at 152.

90. *See infra* notes 146–55 and accompanying text.

91. Draft Letter from Thomas Jefferson to Edmond Charles Genet (June 17, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 301–02.

92. *See id.* at 302.

93. *The William*, 9 F. Cas. at 61–62.

94. Letter from Thomas Jefferson to Edmond Charles Genet (June 29, 1793), *in* 1 ASPFR, *supra* note 18, at 161.

notwithstanding French protests that the seizure violates U.S. treaty obligations owed to France. Second, questions about the jurisdiction of U.S. courts were matters to be decided by the Judicial Branch, without interference from the Executive Branch.[95]

2. Early Decisions by Lower Courts

Before the Supreme Court's decision in *Sloop Betsey*, the lower courts generally held that they lacked jurisdiction to entertain claims by ship owners who alleged that their vessels had been seized unlawfully by French privateers. In contrast, the Supreme Court held in *Sloop Betsey* that the lower courts did have jurisdiction to adjudicate such claims. However, the Supreme Court provided virtually no rationale for its decision. Hence, to understand the Supreme Court decision in *Sloop Betsey*, it is helpful first to examine the prior lower court decisions. Published documents contain fairly detailed information about four district court cases decided before the Supreme Court decision in *Sloop Betsey*. The federal district court in Pennsylvania decided *Findlay v. The William*[96] and *Moxon v. The Fanny*,[97] both of which are published in the "federal cases" collection. The district court in New York decided *Meade v. The Brigantine Catharine*, which was published contemporaneously as a stand-alone volume.[98] Finally, the Maryland District Court's opinion in *Sloop Betsey* is reproduced in *The Documentary History of the Supreme Court of the United States*.[99] This section analyzes these four district court opinions.

All four cases originated when French privateers captured merchant vessels and brought them into U.S. ports. *The William*, *The Fanny*, and *The Catharine* were British vessels, and were thus enemy property. The libellants in those cases alleged, inter alia, that the captures were unlawful because the ships were seized in neutral territory, specifically, in U.S. territorial waters. *The Betsey* was a Swedish vessel.[100] The libellants in that case alleged that the capture was unlawful because Sweden was a neutral country. The substantive

95. This, of course, assumes that Congress has not exercised its legislative power to clarify the scope of federal court jurisdiction.

96. 9 F. Cas. at 57.

97. 17 F. Cas. 942 (D. Pa. 1793) (No. 9895).

98. DECREE ON THE ADMIRALTY SIDE OF THE DISTRICT COURT OF NEW YORK, IN WHICH THE RIGHTS OF SOVEREIGNTY AND NEUTRALITY CONCERNING CAPTURES WITHIN NEUTRAL BOUNDS; AND THE TREATY OF AMITY AND COMMERCE BETWEEN FRANCE AND THE UNITED STATES, AND THE JURISDICTION OF THE NEUTRAL COURTS, AS FAR AS THEY ARE RESPECTIVELY CONNECTED WITH THAT SUBJECT ARE CONSIDERED (1794) [hereinafter *The Catharine*] (copy on file with author) (publishing the decision in *Meade v. The Brigantine Catharine*). All page references for *The Catharine* refer to the author's copy.

99. *See* 6 DHSC, *supra* note 10, at 324–32.

100. The French captors alleged that *The Betsey* was British property, and hence subject to seizure as enemy property. *See* Plea to the Jurisdiction, *in* 6 DHSC, *supra* note 10, at 320–21.

law governing these claims was undisputed: it was clearly illegal under the law of nations to capture a neutral vessel or to capture an enemy vessel in neutral territory. The main dispute in all four cases revolved around the question whether U.S. admiralty courts had jurisdiction to entertain the claims. In all four cases, the district courts concluded that they lacked jurisdiction.

The French captors raised four main objections to the exercise of jurisdiction by U.S. courts.[101] First, they argued "[t]hat, by the laws of nations . . . a neutral nation has no right to be the judge, either of the lawfulness of the war between belligerent powers, or of their conduct towards each other in the prosecution of hostilities."[102] Accordingly, under the law of nations, "the courts of the nation to which the captor belongs" have exclusive jurisdiction to decide whether a captured vessel is a lawful prize.[103] The district courts in *The William*, *The Fanny*, and *Sloop Betsey* all accepted this argument, and agreed that the law of nations precluded the exercise of jurisdiction by U.S. courts.[104]

Second, the French captors invoked Article 17 of the 1778 Treaty between the United States and France as a bar to jurisdiction. The Treaty stipulates:

> It shall be lawful for the ships of war of either party, and privateers, freely to carry whithersoever they please, the ships and goods taken from their enemies . . . nor shall such prizes be arrested or seized when they come to and enter the ports of either party; nor shall the . . . officers of those places . . . make examination concerning the lawfulness of such prizes . . . .[105]

The Treaty appears to bar in rem jurisdiction over the prizes ("nor shall such prizes be arrested or seized"), as well as subject matter jurisdiction over the dispute (precluding officers from making "examination concerning the lawfulness of such prizes"). Hence, the French captors relied heavily on Article 17 to support their arguments against the jurisdiction of U.S. courts.[106] However, of the four district court decisions under review here, *The Fanny* was the only case in which the court gave much weight to the treaty argument to

101. The French refused to participate in judicial proceedings in *The Catharine*. *See The Catharine*, *supra* note 98, at 4. Hence, the summary of arguments adduced by French captors is based on the other three cases.

102. Findlay v. The William, 9 F. Cas. 57, 58 (D. Pa. 1793) (No. 4790).

103. *Id.*

104. *See id.* at 61 ("[A]ffairs of prizes are only cognizable in the courts of the power making the capture . . . ."); Moxon v. The Fanny, 17 F. Cas. 942, 946 (D. Pa. 1793) (No. 9895) ("Neutral courts . . . are not clothed with authority to vindicate or carry on national contests . . . ."); *Sloop Betsey*, *in* 6 DHSC, *supra* note 10, at 325 ("[Q]uestions relative to such captures, as prize, can only be determined by the admiralty-courts belonging to that power, whose subjects make the capture.").

105. 1778 Treaty with France, *supra* note 29, art. XVII.

106. *See The William*, 9 F. Cas. at 58; *The Fanny*, 17 F. Cas. at 944 (contending "that the treaty forbids the courts from interfering"); *Sloop Betsey*, *in* 6 DHSC, *supra* note 10, at 321 (quoting the Treaty and arguing "that the said prize ought not to be arrested or seized or the lawfulness of the said prize enquired into by the United States or any of its Courts of Justice").

support its conclusion that it lacked jurisdiction.[107] In contrast, the district court in *The Catharine* expressly rejected the French interpretation of the Treaty, concluding that the word "prizes" in Article 17 refers only "to captures on the high seas, according to the rights of war," and not to captures in neutral territory.[108]

In addition to arguments based on the law of nations and the Treaty with France, the French captors also argued, in effect, that the ship owners were not the proper plaintiffs to bring these claims. In their view, the allegation that a seizure occurred in neutral territory, if true, "did not give rights to [private] parties at war, but merely affected the neutral nation."[109] Therefore, "the parties libellants . . . had no power to sue and recover on the point of violation of territory."[110] The district courts in *The Fanny* and *The Catharine* agreed with this argument: "I can find no sufficient reason for reducing the violation of a territory to the level of a private injury against an individual who has incidentally suffered a wrong. The offence consists in the affront to the state, by an attack upon its sovereignty . . . ."[111]

Finally, the French captors argued that separation of powers considerations precluded the exercise of jurisdiction by U.S. courts. For example, in *The William*, the French captors contended that any infringement of the territorial sovereignty of a neutral party "must be canvassed by the diplomatic body, and finally settled by the sovereigns," but it could not be the subject of a "judiciary enquiry."[112] In *The William*, *The Fanny*, *The Catharine*, and *Sloop Betsey*, the district judges all agreed that "complaints of this kind . . . must be preferred to the executive power of the United States, and not to the admiralty-courts."[113] However, in *Glass v. The Sloop Betsey*, the Supreme Court rejected this conclusion.

3. The Supreme Court

In *Glass v. The Sloop Betsey*, the French appellees raised many of the same objections to the jurisdiction of U.S. courts that had been raised in the district

107. *See The Fanny*, 17 F. Cas. at 947 ("The treaty with France . . . insisted on by the captors . . . has its due weight with me; but only in cases evidently comprehended in it. And it appears to me that this case is one of them . . . .").

108. *See The Catharine*, *supra* note 98, at 13–19.

109. *The Fanny*, 17 F. Cas. at 944.

110. *Id.*

111. *The Catharine*, *supra* note 98, at 30; *accord The Fanny*, 17 F. Cas. at 946.

112. *The William*, 9 F. Cas. at 58; *see also The Fanny*, 17 F. Cas. at 944 (acknowledging "that a capture in a neutral territory was an offense to the neutral . . . [b]ut this is a matter of state policy, not of judicial proceeding").

113. *Sloop Betsey*, *in* 6 DHSC, *supra* note 10, at 332; *accord The William*, 9 F. Cas. at 61 ("[W]hen two powers have any difference between them, the affair must be treated by negotiation, and not through the instrumentality of their courts of justice."); *The Fanny*, 17 F. Cas. at 946–47; *The Catharine*, *supra* note 98, at 19–35.

courts in *The William*, *The Fanny*, *The Catharine*, and *Sloop Betsey*.[114] They also raised one other objection: they argued that there was no federal statute that conferred jurisdiction on the federal district court. Section 9 of the 1789 Judiciary Act granted federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction."[115] The appellees argued that a prize case is not a "civil cause" within the meaning of the statute because prize cases arise in wartime, not peace time.[116] The appellants replied that the term "civil" in the statute "is used . . . in contra-distinction to criminal," and that maritime captures during wartime are "civil causes" within the meaning of the statute because they are not criminal cases.[117] The Supreme Court agreed with the appellants on this point, holding expressly that "every District Court in the United States, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court."[118]

Like the French captors in the courts below, the French appellees in *Sloop Betsey* contended: (1) that the libellants' allegations should be addressed through diplomatic channels, not by adjudication in U.S. courts;[119] (2) "[t]hat by the law of nations, the courts of the captor can alone determine the question of prize, or no prize";[120] and (3) that "[t]he interference of the American courts will be a manifest violation of the 17th article of the treaty with France."[121] The Supreme Court did not rule expressly on any of these arguments. Even so, the Court did hold expressly "that the District Court of Maryland . . . has jurisdiction competent to enquire, and to decide, whether, in the present case, restitution ought to be made to the claimants."[122] In so holding, the Court implicitly rejected all three of the aforementioned arguments against jurisdiction. Thus, to understand the reasoning behind the Court's decision, it is helpful to consider the appellants' reply to each of these three points.

First, the appellants noted that Article 17 of the Treaty, by its terms, applies only to "the ships and goods taken from their enemies."[123] Therefore, they argued, "being in the affirmative, as to enemies, it affords a strong

114. *See* Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 7–12 (1794).

115. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

116. *Sloop Betsey*, 3 U.S. at 7–8.

117. *See id.* at 12–13 (emphasis omitted).

118. *Id.* at 16 (emphasis omitted).

119. *Id.* at 8–9.

120. *Id.* at 9.

121. *Sloop Betsey*, 3 U.S. at 11. The French appellees added: "To decide in opposition to a compact, so unequivocal and unambiguous, would endanger the national tranquility, by giving a just and honorable cause of war to the French Republic." *Id.* at 11–12 (emphasis omitted). This statement proved to be prophetic, because French allegations that the United States repeatedly violated Article 17 ultimately became a key factor that led to the so-called "quasi-war" between the United States and France. *See infra* note 138 and accompanying text.

122. *Sloop Betsey*, 3 U.S. at 16 (emphasis omitted).

123. 1778 Treaty with France, *supra* note 29, art. XVII.

implication of a negative as to neutrals."[124] In other words, assuming that Article 17 limits the jurisdiction of U.S. courts, the limitation does not apply to cases, like *Sloop Betsey*, where the libellants claim that the captured vessel is neutral property. In such cases, the district court can exercise jurisdiction at least for the limited purpose of determining whether the captured vessel belongs to a neutral country or a nation at war with France. By holding that the district court had jurisdiction in *Sloop Betsey*, the Supreme Court implicitly accepted this argument. Strictly speaking, though, the Court's decision in *Sloop Betsey* did not address the treaty-based objection to jurisdiction in cases like *The William*, *The Fanny*, and *The Catharine*, where the libellants alleged that the privateers seized enemy property in U.S. territorial waters.[125]

Second, the appellants effectively conceded that, under the law of nations, the prize courts of the captor's nation have exclusive jurisdiction to condemn a captured vessel as a lawful prize. Nevertheless, the libellants had argued in the district court that although "the power to condemn belongs properly to the nation of the captor . . . the case before the court is not of a libel to condemn, but of a libel for acquittal and restitution; and . . . the courts of a neutral nation may sustain such a libel."[126] In other words, under the law of nations, the courts of a neutral nation cannot exercise jurisdiction over a prize case filed by a privateer who seeks a judgment that the captured vessel is a lawful prize, but they can exercise jurisdiction over a marine trespass case filed by the owner of a captured vessel who seeks restitution of the captured property.[127] By holding that the district court had jurisdiction in *Sloop Betsey*, the Supreme Court implicitly accepted this argument.[128] In contrast to the treaty argument

124. *Sloop Betsey*, 3 U.S. at 12.

125. In a letter to Gouverneur Morris, then the U.S. Ambassador to France, Jefferson contended that Article 17 applied only to captures of *enemy vessels on the high seas*. *See* Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 697, 702–04. If Jefferson was right, then enemy vessels in U.S. territorial waters, like neutral vessels, would be outside the scope of Article 17.

126. *Sloop Betsey*, *in* 6 DHSC, *supra* note 10, at 328 (emphasis omitted).

127. The presentation of appellants' argument on this point by the Supreme Court reporter, Alexander Dallas, is not as lucid as it might have been, but Dallas' report of the case does show that they made this argument. *See Sloop Betsey*, 3 U.S. at 15.

128. The Court's opinion states "that every District Court in the United States, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court." *Id*. at 16 (emphasis omitted). In adjudicating a marine trespass case, like *Sloop Betsey*, the district court was sitting as an instance court to decide, as the appellants stated, the question of "[r]estitution or no restitution." *Id.* at 6. However, the implication of the Supreme Court's statement is that, once convened as an instance court, the district court also has the jurisdiction "to try every incidental question," *id.* at 6, including the question of whether the seizure of the vessel was legal under the law of nations (which would ordinarily be tried in a prize court).

discussed above, this argument applies equally to cases in which a libellant alleges that a privateer captured enemy property in neutral territory.[129]

Finally, the appellants devoted most of their argument to showing that, under the U.S. Constitution, the Judicial Branch, not the Executive Branch, is responsible for adjudicating cases like *Sloop Betsey*. The appellees argued that the alleged injury "is an attack upon the sovereignty of Sweden," and that therefore the individual libellants must seek redress from the sovereign.[130] The appellants replied as follows:

> [T]he Legislative, Judicial, and Executive powers . . . in the contemplation of our Constitution, are each a branch of the sovereignty. . . . The Constitution designates the portion of sovereignty to be exercised by the Judicial department; and . . . renders it sovereign, as to determinations upon property, whenever the property is within its reach. . . . To the Judicial, and not to the Executive, department, the citizen, or subject, naturally looks for determinations upon his property . . . .[131]

By holding that the district court had jurisdiction in *Sloop Betsey*, the Supreme Court endorsed the view that the wartime capture of private property implicated not only sovereign rights, but also private rights, and that disputes about private rights were properly directed to the judiciary, not the Executive Branch.[132]

The Court's decision in *Sloop Betsey* could be interpreted narrowly to mean only that federal district courts have jurisdiction to adjudicate cases in which libellants allege the capture of a neutral vessel. However, as discussed

129. Professor Casto contends that the Supreme Court's resolution of this issue was inconsistent with "settled legal doctrine." *See* CASTO, *supra* note 75, at 85. Granted, there was an established rule under the law of nations that the question of "prize or no prize" was to be decided by the courts of the captor's nation. However, as Jefferson noted six months before the Court decided *Sloop Betsey*, the law of nations also obligated the United States to extend its protection to foreign vessels in U.S. waters. *See* Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 39, at 697, 703–04. In effect, the Court decided in *Sloop Betsey* that the U.S. obligation under the law of nations to protect neutral shipping took precedence over the rule that would otherwise have barred the exercise of U.S. jurisdiction. This decision was consistent with the position adopted by the U.S. Executive Branch. In this author's view, the Court's decision was a reasonable way to reconcile two conflicting rules of international law, although it would have been preferable if the Court had explained its rationale.

130. *Sloop Betsey*, 3 U.S. at 8–9 (emphasis omitted).

131. *Id.* at 13–14.

132. In several of the French privateer cases, the privateers detained the captain and crew of the captured vessels as prisoners. The appellants in *Sloop Betsey* argued that the necessity to decide on the detention of prisoners was another reason why the case should be resolved by the judiciary, not the Executive Branch. *See id.* at 14 ("And shall even American citizens be detained prisoners in our own harbours, depending for their liberty upon the will of a secretary of state?"). It is unclear whether, and to what extent, the Supreme Court may have been swayed by this argument.

below, the courts subsequently interpreted *Sloop Betsey* to mean that federal district courts had jurisdiction to entertain all claims of illegal seizures by French privateers. Hence, *Sloop Betsey* was significant because it enabled France's enemies to utilize the U.S. judicial system to file in rem actions alleging unlawful captures by French privateers. When ship owners filed in rem actions, the courts would seize the captured vessels and force the privateers to defend their property claims in court, thereby disrupting the privateers' naval warfare activities. In sum, when the French attempted to gain a tactical military advantage by extending the battlefield to U.S. ports, their enemies responded by forcing France to fight the war in U.S. courts. By holding that the Judicial Branch, not the Executive Branch, was the proper forum for the resolution of these disputes, the Supreme Court facilitated the implementation of this strategy by France's enemies.

4. The Role of Congress

The Court held explicitly in *Sloop Betsey* that federal district courts had jurisdiction over claims involving captures of neutral vessels. The decision also implied that courts had jurisdiction over claims involving captures in U.S. territorial waters. To remove any possible ambiguity on that point, Congress enacted legislation in June 1794 stipulating "[t]hat the district courts shall take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof."[133] With this legislation, Congress endorsed the view, already adopted by the Supreme Court and the Executive Branch, that the federal courts were a proper forum for resolving claims by individual ship owners that their ships had been captured unlawfully by French privateers.

III. EIGHTEENTH CENTURY LAWFARE: FROM JUNE 1794 TO FEBRUARY 1797

After Congress enacted the June 1794 legislation, there was a distinct change in the nature of the claims raised by ship owners who challenged the legality of captures made by French privateers. Before June 1794, the ship owners generally alleged that the privateers had violated the law of nations by capturing a neutral vessel or by making a capture in U.S. territorial waters. After June 1794, the ship owners generally alleged that the privateers had violated federal statutes by outfitting their vessels in U.S. ports or by recruiting U.S. citizens as crew members. Although the June 1794 legislation prohibited outfitting of privateers in U.S. ports and recruitment of U.S. citizens,[134] it did not authorize private lawsuits to enforce those rules, nor did it explicitly authorize federal courts to exercise jurisdiction over such claims. Moreover, it

133. Act of June 5, 1794, ch. 50, § 6, 1 Stat. 381, 384.

134. *Id.*

is debatable whether the French privateers were violating the law of nations by recruiting U.S. citizens or by outfitting their ships in U.S. ports.[135]

Part III examines the U.S. response to this second wave of French privateering cases in the period from June 1794 to February 1797, when the Supreme Court decided the last French privateering case.[136] During this period, the Supreme Court decided twenty-three cases related to French privateering activities in the United States.[137] To appreciate fully the significance of those cases, it is necessary to view them simultaneously from three different angles. First, the privateering cases involved disputes between private parties over ownership of private property. Second, the cases involved an ongoing diplomatic dispute between the United States and France over the proper interpretation and application of Article 17 of the 1778 Treaty with France. Third, the cases involved a tactical ploy by Great Britain and other enemies of France to utilize the U.S. judicial system to harass French privateers and to undermine France's naval warfare strategy (which relied heavily on the use of privateers).

The distribution of decision-making responsibility during this period can be summarized briefly as follows. The federal judiciary was the primary decision maker with respect to the major issues raised by the French privateering cases. The Executive Branch performed two main functions during this period: it listened to French grievances when French diplomats complained that U.S. courts were violating Article 17; and it explained U.S. judicial decisions to French diplomats in an attempt to justify those decisions. Meanwhile, Congress did not enact any significant legislation related to French privateering between June 1794 and February 1797. This division of decision-making responsibility stemmed, in part, from a failure to view the cases from all three angles mentioned above. The U.S. government viewed the cases primarily as disputes about private property; that is why the judiciary took the lead role in resolving the cases. The Executive Branch was well aware of French grievances about violations of Article 17, but the Executive trusted the judiciary to address those grievances in the ordinary course of litigation.

The analysis suggests that judicial decision making in the privateering cases was a key factor that contributed to the deterioration of U.S. diplomatic relations with France. France became increasingly agitated by judicial decisions that, in its view, not only violated Article 17, but also interfered with France's naval strategy by disrupting the activities of French privateers. Moreover, France was exasperated by the Executive's refusal to intervene in ongoing judicial proceedings. By the end of 1796, France had initiated a series of measures—intended partly to retaliate against the United States for alleged

135. *See infra* notes 215–26 and accompanying text.

136. Jennings v. The Brig Perseverance, 3 U.S. (3 Dall.) 336 (1797).

137. *See infra* Part III.B (presenting an overview of the cases).

violations of Article 17—that ultimately led to the outbreak of the so-called "quasi-war" between the United States and France.[138]

The analysis in Part III is divided into four sections. The first section explains how France's enemies utilized the U.S. judicial system to thwart France's naval warfare strategy. The second section provides an overview of the privateering cases decided by the Supreme Court during this period. The third section provides case studies of two cases to show how judicial decisions in the privateering cases became a primary focus of U.S. diplomacy with France. The final section contends that judicial decision making by U.S. courts was one of three key factors that ultimately persuaded French privateers to stop bringing their prizes to U.S. ports.

A. Litigation as a Means of Warfare

In March 2003, the Council on Foreign Relations defined "lawfare" as "a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives."[139] The report described lawfare as a "new phenomenon" and warned of associated dangers.[140] In fact, lawfare is not a new phenomenon. In the period from 1794 to 1797, Great Britain (and to a lesser extent France's other enemies) successfully utilized a lawfare strategy to counter the military maneuvers of French privateers who were using American ports as a base of operations for naval warfare.

Between June 1794 and February 1797, the Supreme Court decided thirteen cases in which British consuls filed in rem suits seeking restitution of British merchant vessels captured by French privateers.[141] The British consuls

138. It is clear from the diplomatic correspondence of the era that France's allegation that the United States repeatedly violated Article 17 was one of the key French grievances that led to the quasi-war. *See, e.g.*, Letter from Pierre Auguste Adet to Timothy Pickering (Nov. 15, 1796), *in* 1 ASPFR, *supra* note 18, at 579–83; Letter from Charles De la Croix to James Monroe (Dec. 11, 1796), *in* 1 ASPFR, *supra* note 18, at 746–47. However, the leading history of the quasi-war, in providing a summary of French grievances, curiously omits any reference to the alleged U.S. treaty violations. *See* ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801, at 9–10 (1966).

139. Council on Foreign Relations, *Lawfare: The Latest in Asymmetries* (Mar. 18, 2003), *available at* http://www.cfr.org/publication.html?id=5772.

140. *Id.*

141. These thirteen cases include four published decisions and nine unpublished decisions. The published decisions are: *Moodie v. The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319 (1796); *Moodie v. The Ship Alfred*, 3 U.S. (3 Dall.) 307 (1796); *Cotton v. Wallace*, 3 U.S. (3 Dall.) 302 (1796); and *Moodie v. The Ship Betty Cathcart*, 3 U.S. (3 Dall.) 285 (1796). The unpublished decisions are: *Wallace v. The Brig Caesar* (No. 11), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Ship Mermaid* (No. 17), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Eliza* (*Eliza I*) (No. 18), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Ship Phyn* (No. 19), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Tivoly* (No. 20), *microformed on* Appellate

lost twelve of those thirteen cases.[142] Even so, Benjamin Moodie, the British consul in South Carolina who filed eleven of the thirteen cases, was quite satisfied with the results. Since these were in rem actions, the courts typically retained custody of the captured property (or the funds from the sale of the property) for twelve to eighteen months while judicial proceedings were pending.[143] Thus, by filing in rem actions in U.S. district courts, and then filing appeals in the circuit courts and the Supreme Court, the libellants successfully detained the privateers' property for extended periods of time and made it difficult for the privateers to initiate additional attacks on enemy merchant vessels.[144] Hence, in April 1796, when most of these cases were pending before the Supreme Court, Moodie wrote that he was "fully convinced that the detention of such 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."[145]

French diplomats understood the British lawfare strategy and its consequences for French privateering. They protested vehemently that the United States was undermining France's war effort by allowing U.S. courts to seize the assets of French privateers. Thus, for example, the French Ambassador, Pierre Adet, wrote a lengthy diatribe to the U.S. Secretary of State, Timothy Pickering, which included the following statement:

> [W]hen the Powers at war with the republic had the privilege . . . of causing to be arrested the privateers and their prizes, of detaining them in the ports of the United States, of ruining them by considerable costs, by the excessive expenses which they occasioned them, they drew from that privilege an immense advantage to the detriment of France[.] Doubtless, it was of little

Case Files (National Archives Microfilm Publications); *Moodie v. The Brig Favorite* (No. 22), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Ship Britannia* (No. 23), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *Moodie v. The Snow Potowmack* (No. 24), *microformed on* Appellate Case Files (National Archives Microfilm Publications); and *Moodie v. The Brig Eliza* (*Eliza II*) (No. 25), *microformed on* Appellate Case Files (National Archives Microfilm Publications). For further discussion, see *infra* notes 162–79 and accompanying text.

142. The one exception was *Cotton v. Wallace*, 3 U.S. 302 (1796).

143. *See infra* notes 185–86 and accompanying text.

144. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), Justice Jackson wrote: "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.* at 779. This is effectively what the British consuls accomplished by forcing French privateers to defend admiralty actions in U.S. courts. The commanders of French privateering vessels were forced to remain on land to handle legal proceedings. Moreover, since the courts typically detained the proceeds from the sale of prizes while the suits were pending, the commanders may not have had adequate funds to pay their crews until the courts agreed to release the funds.

145. Letter from Benjamin Moodie to Phineas Bond (Apr. 23, 1796), *in* 7 DHSC, *supra* note 8, at 128–29.

> import to them that sometimes the privateers obtained justice, in the last resort, if they detained the privateer for a length of time, and if they, by that means, sheltered from their pursuit the commerce of the enemy of France.[146]

It is noteworthy that Ambassador Adet wrote this letter in November 1796. During the February and August sessions in 1796, the Supreme Court decided sixteen cases in which ship owners or their agents filed in rem suits seeking restitution of enemy merchant vessels captured by French privateers.[147] The French privateers won fifteen of the sixteen cases on the grounds that Article 17 of the 1778 Treaty with France barred the exercise of jurisdiction by U.S. courts.[148] Thus, Adet's protest came on the heels of what could be viewed as a remarkably pro-French set of decisions by the Supreme Court. Even so, France alleged that U.S. courts were violating Article 17 by exercising jurisdiction, even temporarily, before they ultimately dismissed the libels for lack of jurisdiction.[149] Thus, for example, in the same November 1796 letter, Adet wrote "[t]hat the 17th article of the treaty of 1778, has been violated; that, in contempt of this article, the American tribunals have been permitted to take cognizance of the validity of prizes made by French ships of war and privateers."[150] In sum, from France's perspective, U.S. courts were violating treaty obligations owed to France and thwarting France's military strategy by disrupting the naval warfare activities of French privateers.

When French diplomats lodged their complaints with senior U.S. executive officials, seeking diplomatic solutions for foreign affairs controversies, U.S. executive officials told the French diplomats that the federal judiciary was the branch of government responsible for deciding these issues. For example, in June 1795, French Ambassador Fauchet (Adet's predecessor) wrote to Secretary of State Randolph (Pickering's predecessor), presenting a litany of complaints related to French privateers.[151] In particular, Fauchet complained that U.S. courts detained valid French prizes based on the mere allegation that that they had been captured illegally.[152] To address this problem, he suggested that, before judicial proceedings could commence, there should be prior

146. Letter from Pierre Auguste Adet to Timothy Pickering (Nov. 15, 1796), *in* 1 ASPFR, *supra* note 18, at 579, 580.

147. This figure of sixteen cases includes the thirteen cases cited *supra* note 141. Additionally, this figure includes two published decisions—*Arcambal v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), and *Geyer v. Michel*, 3 U.S. (3 Dall.) 285 (1796)—as well as one unpublished decision: *Pintado v. The Ship San Joseph* (No. 32), *microformed on* Appellate Case Files (National Archives Microfilm Publications).

148. The one exception was *Cotton v. Wallace*, 3 U.S. (3 Dall.) 302 (1796).

149. For a legal analysis of Article 17, as applied to these cases, see *infra* Part III.C.1.

150. Letter from Pierre Auguste Adet to Timothy Pickering (Nov. 15, 1796), *in* 1 ASPFR, *supra* note 18, at 579, 582.

151. *See* Letter from Joseph Fauchet to Edmund Randolph (June 8, 1795), *in* 1 ASPFR, *supra* note 18, at 614–17.

152. *Id.* at 614–15.

"intervention of the Executive upon the simple question—is there ground for prosecution or not?"[153] Secretary Randolph replied as follows:

> The courts of justice exercise the sovereignty of this country in judiciary matters, are supreme in these, and liable neither to control nor opposition from any other branch of the Government. . . .
>
> . . . .
>
> The previous inquiry by the Executive, which you have suggested, could only contribute to delay. For, if the President were even to decide that a prize ought not to be prosecuted in our courts, the decision would be treated as an intrusion by those courts, and the judicial proceedings would go on notwithstanding. So speak the constitution and the law.[154]

This exchange between Fauchet and Randolph was characteristic of the diplomatic dialogue between France and the United States in the period under study. From France's perspective, issues related to French privateering were foreign policy issues to be resolved diplomatically between the executives of the two countries. The United States recognized the foreign affairs significance of the privateering cases, but it also recognized that the cases could legitimately be seen as disputes between private parties involving competing claims to ownership of property. Viewed in this light, cabinet officers thought it proper to defer to the judiciary and to allow U.S. courts to resolve the disputes without intervention by the Executive Branch.[155]

B. An Overview of Supreme Court Cases

Between June 1794 and February 1797, the Supreme Court decided a total of twenty-three cases that are relevant to this study. The total of twenty-three cases includes eighteen cases in which ship owners or their agents filed in rem suits seeking restitution of enemy merchant vessels captured by French privateers.[156] The five cases that do not fit this description are: *Del Col v. Arnold*,[157] *Hills v. Ross*,[158] *United States v. La Vengeance*,[159] *MacDonogh v.*

153. *Id.* at 615.

154. Letter from Edmund Randolph to Joseph Fauchet (June 13, 1795), *in* 1 ASPFR, *supra* note 18, at 617, 618. Before this letter could be delivered to Fauchet, Adet replaced him as the French Ambassador. Hence, the letter was addressed to Fauchet, but delivered to Adet. *See id.* at 617.

155. *See, e.g.*, Letter from William Bradford, Jr. to Edmund Randolph (May 9, 1795), *in* 7 DHSC, *supra* note 8, at 53 ("Being therefore of opinion that the proceedings in these causes have been regular, I presume they must wait the usual course of Judicial decision; & that any previous interference on the part of the Executive would be improper & unavailing.").

156. *See infra* notes 162–79. The term "enemy merchant vessels" refers to vessels belonging to France's enemies: Britain, Spain, and Holland.

157. 3 U.S. (3 Dall.) 333 (1796). *Del Col* involved the capture by a French privateer of an American ship, not an enemy ship. Additionally, the suit was filed as an in personam action, not

Dannery,[160] and *United States v. Peters*.[161] *Peters* is significant because it established an important limitation on the jurisdiction of U.S. courts: they could not exercise jurisdiction over private suits alleging unlawful captures unless the French captors brought their prizes into U.S. ports. The other four cases are noted for the sake of completeness, but they do not add anything significant to our story.

The eighteen cases in which ship owners or their agents filed in rem suits seeking restitution of enemy merchant vessels captured by French privateers include eight published decisions and ten unpublished decisions. The eight published decisions are: *Jennings v. The Brig Perseverance*,[162] *Moodie v. The*

an in rem action, because the prize crew sank the captured vessel. *See* 7 DHSC, *supra* note 8, at 625–33.

158. 3 U.S. (3 Dall.) 331 (1796); 3 U.S. (3 Dall.) 184 (1796) (continuing the case to the next term). *Hills* was an in personam action, not an in rem action, because the French captors sold the prize before the ship owners filed suit for damages. *See* 7 DHSC, *supra* note 8, at 683–93.

159. 3 U.S. (3 Dall.) 297 (1796). *La Vengeance* was an enforcement action against a French privateer filed by a U.S. Attorney. The U.S. Attorney sought forfeiture of the vessel, based on allegations that the privateer had been illegally outfitted in U.S. territorial waters and had been used to export arms and ammunition in violation of a federal statute. *See* 7 DHSC, *supra* note 8, at 526–29.

160. 3 U.S. (3 Dall.) 188 (1796). *MacDonogh* involved a British merchant ship captured by a French naval vessel, not a French privateer. The litigation involved a three-way contest between the French captors, the original British owners, and the crew of an American vessel that saved the British ship, the *Mary Ford*, after she had been abandoned by her French captors. *See* 7 DHSC, *supra* note 8, at 11–17.

161. 3 U.S. (3 Dall.) 121 (1795). In *Peters*, the commander of a French warship filed a writ of prohibition in the Supreme Court to prevent Richard Peters, the district judge for the District of Pennsylvania, from exercising jurisdiction over a libel filed in that court by James Yard. *See id.* at 121–25. Yard was a U.S. citizen. In his libel in the district court, Yard alleged that he was the owner of the schooner *William Lindsey*, an American vessel, which had been captured illegally by a French warship, the *Cassius*. *Id.* at 121–22. If the *Cassius* had brought the *William Lindsey* to Philadelphia, the Pennsylvania district court could have exercised jurisdiction under the principle announced in *Sloop Betsey*. However, the *Cassius* took the *William Lindsey* to Port de Paix, a French port in the Caribbean. When the *Cassius* subsequently returned to Philadelphia without the *William Lindsey*, Yard filed a libel and moved to attach the *Cassius* in an effort to secure compensation for the damages he sustained as a result of the allegedly illegal capture of his schooner. *Id.* Samuel Davis, the commander of the *Cassius*, responded by filing a writ of prohibition in the Supreme Court. The Supreme Court granted the writ, holding that the law of nations and the Treaty with France precluded the district court from exercising jurisdiction in a case where a French warship had captured an American vessel and taken the captured vessel to a French port. *Id.* at 129–32. For more details on the case, see 6 DHSC, *supra* note 10, at 719–42.

162. 3 U.S. (3 Dall.) 336 (1797). This was an in rem action against a British vessel, the *Perseverance*, captured by the French privateer the *Sans Pareil* in July 1794. The libellant, Thomas Jennings, was the British ship owner. He filed the libel in the U.S. district court in Rhode Island in September 1794. The district court ruled in favor of the French captors in August 1795. That decree was affirmed by the circuit court in June 1796, and by the Supreme

Ship Phoebe Anne,[163] *Moodie v. The Ship Alfred*,[164] *Arcambal v. Wiseman*,[165] *Cotton v. Wallace*,[166] *Geyer v. Michel*,[167] *Moodie v. The Ship Betty*

Court in February 1797. Information about the case is derived from 7 DHSC, *supra* note 8, at 811–28. *See also infra* Part III.C.2.

163. 3 U.S. (3 Dall.) 319 (1796). This was an in rem action against a British vessel, the *Phoebe Anne*, captured by the French privateer *La Mere Michel* in April 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in May 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in June 1795. That decree was affirmed by the circuit court in November 1795, and by the Supreme Court in August 1796. Information about the case is derived from 7 DHSC, *supra* note 8, at 189–200; JACKSON, *supra* note 26, at 142–43; and from the author's research in the Supreme Court archives.

164. 3 U.S. (3 Dall.) 307 (1796). This was an in rem action against a British vessel, the *Alfred*, captured by the French privateer *Le Brutus* in March 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in April 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in May 1795. That decree was affirmed by the circuit court in October 1795, and by the Supreme Court in August 1796. Information about the case is derived from JACKSON, *supra* note 26, at 128–29, and from the author's research in the Supreme Court archives.

165. 3 U.S. (3 Dall.) 306 (1796). *Arcambal v. Wiseman* was an in rem action against a Spanish vessel, *Nuestra Senora del Carmen*, captured by the French privateer *Le Brutus* in the summer of 1795. The libellant, Joseph Wiseman, was the Spanish vice-consul in Rhode Island. He filed the action, initially captioned *Wiseman v. Nuestra Senora del Carmen*, in the U.S. district court in Rhode Island in August 1795 on behalf of the Spanish ship owners. Two claimants contested the libel. Jean Gariscan, commander of *Le Brutus*, claimed ownership by capture, and Louis Arcambal, the French vice-consul, sought recovery for France. The district court ruled against the Spanish owners in May 1796. Since the vessel and cargo had been sold at auction, the court ordered the proceeds from the sale (held in the court's custody) to be divided between Gariscan and Arcambal. Wiseman appealed the dismissal of his libel, and Arcambal appealed the order concerning distribution of funds to Gariscan. The circuit court decided both appeals in June 1796, and the Supreme Court reached its own decision in August 1796. Both courts affirmed the district court order dismissing the Spanish libel, but they reached inconsistent rulings regarding the distribution of funds between Gariscan and Arcambal. Information about the case is derived from 7 DHSC, *supra* note 8, at 750–60.

166. 3 U.S. (3 Dall.) 302 (1796). *Cotton v. Wallace* was an in rem action against a British vessel, the *Brig Everton*, captured by the French privateer the *Egalite* in December 1794. The libellant, John Wallace, was the British consul in Georgia. He filed the action, initially captioned *Wallace v. Brig Everton*, in the U.S. district court in Georgia in January 1795 on behalf of the British ship owners. The district court ruled in favor of the British owners in March 1795 on the grounds that the *Egalite* had been illegally outfitted in the United States, in violation of U.S. neutrality. John Cotton, one of the officers on the *Egalite*, appealed that decision to the circuit court. The circuit court affirmed the district court decree in May 1795, and the Supreme Court affirmed in March 1796. However, the Court postponed a decision on damages until the August 1796 term. Information about the case is derived from 7 DHSC, *supra* note 8, at 119–32.

167. 3 U.S. (3 Dall.) 285 (1796). This was an in rem action against a Dutch vessel, *Den Onzekeren*, captured by the French privateer *Le Citoyen de Marseille* in November 1794. The libellant, John Geyer, was acting as an agent for the Dutch ship owners. He filed the action, initially captioned *Geyer v. Den Onzekeren*, in the U.S. district court in South Carolina in

Cathcart,[168] and *Talbot v. Jansen*.[169] The French privateers lost only two of these eight cases: *Talbot v. Jansen* and *Cotton v. Wallace*.

February 1795. The district court ruled in favor of the Dutch owners in April 1795 on the grounds that the French privateer had illegally augmented its force in a U.S. port in violation of U.S. neutrality. After hearing additional evidence, the circuit court reversed that decree in November 1795, ruling in favor of the French captors. The Supreme Court affirmed the Circuit Court decree in March 1796. Information about the case is derived from 7 DHSC, *supra* note 8, at 133–88. *See also* Moodie v. The Betty Cathcart, 17 F. Cas. 651 (D.S.C. 1795) (No. 9742).

168. 3 U.S. (3 Dall.) 285 (1796). This was an in rem action against a British vessel, the *Betty Cathcart*, captured by the French privateer *Le Citoyen de Marseille* in November 1794. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action on behalf of the British ship owners in the U.S. district court in South Carolina in January 1795. The district court ruled in favor of the British owners in April 1795 on the grounds that the French privateer had illegally augmented its force in a U.S. port in violation of U.S. neutrality. On appeal to the circuit court, the case was consolidated with *Geyer v. Michel* because both cases involved the same French privateer. *See supra* note 167. After hearing additional evidence, the circuit court reversed the district court decree, ruling in favor of the French captors. The Supreme Court affirmed the circuit court decree in March 1796. Information about the case is derived from 7 DHSC, *supra* note 8, at 133–88.

169. 3 U.S. (3 Dall.) 133 (1795). This was an in rem action against a Dutch vessel, the *Vrow Christina Magdalena*, captured in May 1794. Two privateers flying French flags were jointly responsible for the capture: the *L'Ami de la Liberte*, commanded by Captain Edward Ballard, and the *L'Ami de la Point-a-Petre*, commanded by Captain William Talbot. *See* Jansen v. The Vrow Christina Magdalena, 13 F. Cas. 356 (D.S.C. 1794) (No. 7216). When the captors brought the *Magdalena* into Charleston, Joost Jansen, the Dutch master of the *Magdalena*, filed a libel on behalf of the Dutch ship owners seeking restitution of the captured vessel and its cargo. Jansen alleged that the two ships claiming to be French privateers were owned by U.S. citizens, and that Ballard and Talbot were both U.S. citizens. *See id.* at 356–58. Talbot invoked the law of nations and Article 17 of the 1778 Treaty with France as a bar to the jurisdiction of U.S. courts. The district court ruled in favor of the Dutch owners in August 1794. The circuit court affirmed that decree in November 1794, and the Supreme Court affirmed in August 1795.

Four Supreme Court Justices wrote separate opinions in *Talbot*: Justice Iredell's opinion provides the clearest statement of the Court's rationale for rejecting Talbot's objection to the jurisdiction of U.S. courts. In his view, although Article 17 precludes U.S. courts from making "examination concerning the lawfulness of such prizes," 1778 Treaty with France, *supra* note 29, art. XVII, the courts must still examine the facts to ascertain whether a case fits within the scope of the exemption granted by the Treaty. *Talbot*, 3 U.S. at 159. Moreover, the treaty term "privateers" refers only to lawfully commissioned privateers. *Id.* Therefore, the district courts must first decide whether a privateer is lawfully commissioned before concluding that Article 17 precludes them from exercising jurisdiction. *See id.* Information about the case is derived from 6 DHSC, *supra* note 10, at 650–718.

The ten unpublished decisions are: *Moodie v. The Brig Favorite*,[170] *Wallace v. The Brig Caesar*,[171] *Moodie v. The Ship Mermaid*,[172] *Moodie v. The Ship Phyn*,[173] *Moodie v. The Ship Britannia*,[174] *Moodie v. The Brig Eliza*

170. Moodie v. The Brig Favorite (No. 22), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Feb. 29, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 265. This was an in rem action against a British vessel, the *Favorite*, captured by the French privateer *La Parisienne* in March 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in March 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in April 1795. That decree was affirmed by the circuit court in November 1795, and by the Supreme Court in February 1796. Information about the case is derived from BEE'S ADMIRALTY REPORTS, *supra* note 17, at 39; JACKSON, *supra* note 26, at 136–37; and from the author's research in the Supreme Court archives.

171. Wallace v. The Brig Caesar (No. 11), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Feb. 29, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 265. This was an in rem action against a British vessel, the *Caesar*, captured by the French privateer *La Parisienne* in December 1794. The libellant, John Wallace, was the British consul in Georgia. He filed the action in the U.S. district court in Georgia in January 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in February 1795. That decree was affirmed by the circuit court in May 1795, and by the Supreme Court in February 1796. Information about the case is derived from 7 DHSC, *supra* note 8 , at 53–75.

172. Moodie v. The Ship Mermaid (No. 17), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Mar. 1, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 265–66. This was an in rem action against a British vessel, the *Mermaid*, captured by the French privateer *General Laveaux* in January 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in February 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in April 1795. That decree was affirmed by the circuit court in October 1795, and by the Supreme Court in March 1796. Information about the case is derived from 7 DHSC, *supra* note 8, at 76–118; JACKSON, *supra* note 26, at 140–41; and from the author's research in the Supreme Court archives. *See also* British Consul v. The Mermaid, 4 F. Cas. 169 (D.S.C. 1795) (No. 1897).

173. Moodie v. The Ship Phyn (No. 19), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Mar. 14, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 272. This was an in rem action against a British vessel, the *Phyn*, captured by the French privateer *General Laveaux* in January 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in February 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in April 1795. That decree was affirmed by the circuit court in October 1795, and by the Supreme Court in March 1796. Information about the case is derived from JACKSON, *supra* note 26, at 142–43, and from the author's research in the Supreme Court archives.

174. Moodie v. The Ship Britannia (No. 23), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Aug. 9, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 278. This was an in rem action against a British vessel, the *Britannia*, captured by the French privateer *Le Vengeur* in June 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in July 1795 on behalf of the British ship owners. The district court ruled in favor of the

(*Eliza I*),[175] *Moodie v. The Brig Tivoly*,[176] *Moodie v. The Brig Eliza* (*Eliza II*),[177] *Moodie v. The Snow Potowmack*,[178] and *Pintado v. The Ship San Joseph*.[179] In all ten cases, the French privateers scored consistent victories in the district court, the circuit court, and the Supreme Court.

French captors in September 1795. That decree was affirmed by the circuit court in November 1795, and by the Supreme Court in August 1796. Information about the case is derived from the author's research in the Supreme Court archives.

175. Moodie v. The Brig Eliza (*Eliza I*) (No. 18), *microformed on* Appellate Case Files (National Archives Microfilm Publications); s*ee also* Supreme Court Minutes (Aug. 9, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 278. This was an in rem action against a British vessel, the *Eliza*, captured by the French privateers *General Laveaux* and *La Mere Michel* in January 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in February 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in April 1795. That decree was affirmed by the circuit court in November 1795, and by the Supreme Court in August 1796. Information about the case is derived from the author's research in the Supreme Court archives.

176. Moodie v. The Brig Tivoly (No. 20), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Aug. 9, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 278. This was an in rem action against a British vessel, the *Tivoly*, captured by the French privateers *General Laveaux* and *La Mere Michel* in January 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in April 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in April 1795. That decree was affirmed by the circuit court in October 1795, and by the Supreme Court in August 1796. Information about the case is derived from the author's research in the Supreme Court archives.

177. Moodie v. The Brig Eliza (*Eliza II*) (No. 25), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Aug. 9, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 278. This was an in rem action against a British vessel, the *Eliza*, captured by the French privateer *Le Vengeur* in September 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in September or October 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in October 1795. That decree was affirmed by the circuit court in November 1795, and by the Supreme Court in August 1796. Information about the case is derived from the author's research in the Supreme Court archives.

178. Moodie v. The Snow Potowmack (No. 24), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Aug. 9, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 278. This was an in rem action against a British vessel, the *Potowmack*, captured by the French privateer *Le Vengeur* in June 1795. The libellant, Benjamin Moodie, was the British consul in South Carolina. He filed the action in the U.S. district court in South Carolina in July 1795 on behalf of the British ship owners. The district court ruled in favor of the French captors in September 1795. That decree was affirmed by the circuit court in November 1795, and by the Supreme Court in August 1796. Information about the case is derived from the author's research in the Supreme Court archives.

179. Pintado v. The Ship San Joseph (No. 32), *microformed on* Appellate Case Files (National Archives Microfilm Publications); *see also* Supreme Court Minutes (Aug. 10, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 280. This was an in rem action against a Spanish vessel, the *San Joseph*, captured by the French privateer *La Vengeance* in May 1795. The libellant, Don Diego Pintado, was the ship owner. He filed the action in the U.S. district court in New York in

Overall, the French privateers prevailed in sixteen of the eighteen cases where ship owners or their agents filed in rem suits seeking restitution of enemy merchant vessels captured by French privateers.[180] In fourteen of those cases, the courts at all three levels—district courts, circuit courts, and Supreme Court—ruled in favor of the French privateers.[181] This point is significant because it lends credence to the French allegation that these were frivolous lawsuits filed for the purpose of harassing the privateers and thwarting the accomplishment of their military objectives. British consuls were the named plaintiffs in thirteen of the eighteen cases,[182] and a Spanish vice-consul was the named plaintiff in one other case.[183] As a formal matter, the consuls were merely representing the private interests of merchant ship owners. However, as a practical matter, the active participation of the British consuls also lends credence to the French allegation that the British government was pursuing a conscious "lawfare" strategy to disrupt the military activities of French privateers.

It is also noteworthy that fourteen of the eighteen cases involved British merchant vessels, and the French privateers won thirteen of those fourteen cases.[184] Assuming that the British strategy was to deny the privateers any financial gain from their lawful prizes while the litigation was pending, that strategy was quite effective. The courts retained control of the captured property, or the money obtained from the sale of that property, until there was a final disposition of the cases by the Supreme Court.[185] In descending order, the time lag between the initial libel and final disposition by the Supreme Court in the thirteen British cases where the privateers prevailed was as follows: *Perseverance* (29 months), *Eliza I* (18 months), *Tivoly* (16 months), *Alfred* (16 months), *Phoebe Anne* (15 months), *Betty Cathcart* (14 months),

July 1795. The district court ruled in favor of the French captors in December 1795. That decree was affirmed by the circuit court in April 1796, and by the Supreme Court in August 1796. Information about the case is derived from 7 DHSC, *supra* note 8, at 524–54. *See also* United States v. La Vengeance, 3 U.S. (3 Dall.) 297 (1796). The private action initiated by Don Diego Pintado and the government enforcement action against *La Vengeance* were litigated in tandem.

180. *See supra* notes 162–79.

181. In both *Geyer v. Michel* and *Moodie v. The Ship Betty Cathcart*, the district court ruled against the French privateers, but the circuit court reversed that ruling, and the Supreme Court affirmed a judgment in favor of the privateers. *See supra* notes 167–68; *see also* Geyer v. Michel, 3 U.S. (3 Dall.) 285 (1796).

182. These thirteen cases include the eleven "*Moodie*" cases cited in the preceding paragraphs, as well as *Wallace v. Brig Caesar* and *Cotton v. Wallace*.

183. *See supra* note 165; *see also* Arcambal v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

184. The British won *Cotton v. Wallace*. *See supra* note 166.

185. In suits initiated by private parties, the courts seized captured prizes, but they never asserted control over the French privateering vessels. However, in enforcement actions initiated by the government, the courts would seize French privateering vessels. *See, e.g.*, United States v. La Vengeance, 3 U.S. (3 Dall.) 297 (1796).

Britannia (13 months), *Potowmack (*13 months), *Phyn* (13 months), *Mermaid* (13 months), *Caesar* (13 months), *Eliza II* (11 months), and *Favorite* (11 months).[186]

Finally, the attentive reader may have noted that thirteen of the eighteen cases were filed in the U.S. district court in South Carolina.[187] In the 1790s, the exclusive venue for an in rem admiralty action was the place where the ship was located. French privateers routinely brought their prizes to Charleston, South Carolina, in part because Charleston "in the 1790s was a bastion of Francophilia."[188] Once a privateer brought his prize to Charleston, a ship owner who wanted to file an in rem action to obtain restitution of the captured prize had no choice but to file his claim in the South Carolina district court. In those days, there was a single judge assigned to each federal district court. Thomas Bee was the federal district judge for the district of South Carolina. As discussed more fully in the next section, Judge Bee's decisions were very influential in shaping the law related to French privateers because he decided most of the French privateering cases at the district court level,[189] and the Supreme Court affirmed most of those decisions without any written opinion.

C. Two Case Studies

Recall that the Supreme Court held in *Sloop Betsey* that federal district courts have jurisdiction over claims for restitution by ship owners who allege that a privateer captured a neutral ship.[190] Additionally, Congress enacted legislation granting district courts jurisdiction over claims for restitution in cases where privateers captured enemy ships in U.S. territorial waters.[191] However, the eighteen cases where ship owners or their agents filed in rem suits seeking restitution of enemy merchant vessels did not fit within either of these jurisdictional principles because all eighteen cases involved captures of enemy ships on the high seas. In these eighteen cases, the libellants generally raised two types of allegations. First, they alleged that the privateers had been illegally outfitted in U.S. ports or had augmented their forces in U.S. ports. Second, they alleged that the privateers were owned by Americans,

186. For the dates of the libels and the Supreme Court decisions see *supra* notes 162–78.

187. *See supra* notes 163–78.

188. 6 DHSC, *supra* note 10, at 651; *see also* JACKSON, *supra* note 26, at 3–6, 21–25.

189. Judge Bee's decisions in admiralty cases are published in BEE'S ADMIRALTY REPORTS, *supra* note 17. Many of these cases were also published later in the "Federal Cases" collection, first published in 1894. That collection was intended to be "a comprehensive compilation of the decisions of the United States Circuit and District Courts" from 1789 to 1880. *Preface* to 1 THE FEDERAL CASES COMPRISING CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, at iii (St. Paul, West Publishing Co. 1894).

190. *See supra* Part II.C.3.

191. *See supra* note 133 and accompanying text.

commanded by U.S. citizens, or manned by U.S. citizens. The legislation enacted by Congress in June 1794 created criminal penalties for individuals who accepted a commission from a foreign state,[192] enlisted to serve on a foreign privateer,[193] outfitted a foreign privateer in a U.S. port,[194] or augmented the force of a privateer in a U.S. port.[195] However, Congress did not explicitly authorize private claims for restitution to enforce these laws, nor did Congress explicitly authorize federal courts to exercise jurisdiction over these types of claims.[196]

When libellants filed claims seeking restitution of vessels captured by French privateers, the French captors routinely invoked Article 17 of the 1778 Treaty with France as a bar to the jurisdiction of U.S. courts. In *Sloop Betsey*, the libellants persuaded the Supreme Court to sidestep Article 17 by noting that the Article, by its terms, applies only to "ships and goods taken from their enemies."[197] Therefore, they argued, the courts must undertake a factual inquiry to determine whether the vessel is an enemy vessel before they can conclude that Article 17 bars jurisdiction. In the eighteen cases referenced above, the federal district courts effectively extended this logic to all allegations of unlawful captures. Although the district courts eventually dismissed most of the cases on the grounds that Article 17 barred jurisdiction, they first undertook a factual inquiry to determine whether the capture was lawful.

France thought this approach violated Article 17 for two reasons. First, the district courts exercised in rem jurisdiction over French prizes while the claims were being adjudicated, thereby preventing French privateers from exercising their right under Article 17 "to carry whithersoever they please the ships and goods taken from their enemies."[198] Second, even though Article 17 prohibited U.S. courts from making "examination concerning the lawfulness of such prizes,"[199] the district courts examined the merits of factual allegations supporting claims of unlawful captures before they dismissed the claims for lack of jurisdiction. This section presents two case studies to illustrate, first,

192. Act of June 5, 1794, ch. 50, §1, 1 Stat. 381, 381–82.

193. *Id.* § 2.

194. *Id.* § 3.

195. *Id.* § 4.

196. Claims alleging illegal recruitment of U.S. citizens and illegal outfitting in U.S. ports fell within the general grant of admiralty jurisdiction in Section 9 of the 1789 Judiciary Act. *See* Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–77. When Congress enacted new legislation in 1794, it expressly authorized jurisdiction over claims involving captures in U.S. territorial waters, Act of June 5, 1794, § 6, but said nothing about jurisdiction over claims alleging illegal recruitment or outfitting. Thus, French litigants made an "expresio unius" argument that the 1794 legislation precluded jurisdiction over these types of claims.

197. *See supra* notes 123–25 and accompanying text.

198. 1778 Treaty with France, *supra* note 29, art. XVII.

199. *Id.*

judicial decision making in the privateering cases, and second, U.S.-French diplomacy related to those cases.

1. *The Mermaid*: A Case Study of Judicial Decision Making

On January 12, 1795, the French privateer *General Laveaux* captured a British merchant vessel, *The Mermaid*, and brought her to Charleston, South Carolina.[200] The British Consul in South Carolina, Benjamin Moodie, filed a libel seeking restitution of *The Mermaid* to its British owners.[201] The libel alleged three grounds for restitution: (1) that the *General Laveaux* was owned by U.S. citizens; (2) that the *General Laveaux* had been illegally outfitted in Charleston; and (3) that "the greatest part of the crew . . . consisted of citizens of the United States."[202]

John Gaillard, the captain of *General Laveaux*, and Nicholas Gautier, the prize master of *The Mermaid*, filed an answer to Moodie's libel.[203] In their answer, they contested the factual allegations of the libel and pled Article 17 of the Treaty with France in bar to the libel.[204] By invoking Article 17 as a "plea in bar" to the libel, the French were making a procedural move analogous to what would now be called a motion to dismiss for lack of jurisdiction. Judge Thomas Bee ruled "that the plea in bar of the Seventeenth Article of the Treaty with France filed in this cause is relevant and that the libel be dismissed with costs."[205] In other words, Judge Bee dismissed the libel on the grounds that Article 17 barred the exercise of jurisdiction.

However, Judge Bee reached this conclusion *only after* he addressed the merits of each of the three claims raised in the libel. After hearing evidence on those claims, Judge Bee concluded that the *General Laveaux* was not an American vessel, that she was not illegally outfitted in the United States, and that there was no evidence to support the charge that her crew consisted mostly of American citizens.[206] In short, Judge Bee first addressed the merits of the claims raised in the libel and then dismissed the libel for lack of jurisdiction after concluding that those claims were without merit.

200. *See* 7 DHSC, *supra* note 8, at 44–45.

201. *See id.* at 45.

202. British Consul v. The Mermaid, 4 F. Cas. 169, 170 (D.S.C. 1795) (No. 1897).

203. *See* 7 DHSC, *supra* note 8, at 44–45.

204. *See id.* at 45.

205. British Consul v. The Mermaid, decree of federal district court (Apr. 3, 1795), *as reprinted in* Moodie v. The Ship Mermaid (No. 17), *microformed on* Appellate Case Files (National Archives Microfilm Publications). For reasons unknown to the author, the language quoted in the text is not reproduced in the district court opinion published in Federal Cases. However, Judge Bee used virtually identical language in dismissing all of the cases that the author reviewed in the Supreme Court archives.

206. *See The Mermaid*, 4 F. Cas. at 170–71.

The district court decided *The Mermaid* fairly expeditiously. Moodie filed his libel on February 26, 1795, and Judge Bee issued his decree on April 3, 1795.[207] However, the circuit court did not affirm Moodie's decree until November 1795,[208] and the Supreme Court did not issue its final decision until March 1796.[209] Since it was an in rem proceeding, the district court retained custody over the prize while the case was pending in the circuit court and the Supreme Court. France viewed this lengthy detention of the prize as a violation of Article 17, because judicial custody prevented the privateers from carrying their prize "whithersoever they please."[210] Moreover, from France's perspective, insofar as the appellate courts affirmed a lower court ruling that addressed the merits of the claim that *The Mermaid* was captured illegally, the courts violated Article 17 by making "examination concerning the lawfulness of such prizes."[211]

The Supreme Court never published an opinion in *The Mermaid*. However, Justice Iredell produced a draft opinion that provides some support for French allegations that the courts were violating Article 17.[212] To understand Justice Iredell's analysis, it is necessary to elaborate on the underlying facts.[213] The *General Laveaux* was originally an American vessel, the *Cygnet*. The ship was docked in Charleston, South Carolina, for some time during the year 1794. While in Charleston, work was done on the ship. According to the British libellants, this work constituted illegal outfitting. According to the French claimants, the ship underwent repairs, which were entirely legal.[214] The ship sailed to Saint-Domingue, a French territory in the Caribbean, where it was purchased by Mathew Moreau, a French citizen. (The British libellants alleged that the sale to Moreau was fraudulent; hence, the ship was still American.) By the end of the year, the *Cygnet* had been renamed the *General Laveaux*. The *General Laveaux* sailed as a privateer from Saint-Domingue in late 1794 with a French commission. It captured *The Mermaid* in January 1795.

207. *See* 7 DHSC, *supra* note 8, at 45.

208. *See id.* at 47–48.

209. *See* Supreme Court Minutes (Mar. 1, 1796), *reprinted in* 1 DHSC, *supra* note 9, at 265–66.

210. 1778 Treaty with France, *supra* note 29, art. XVII.

211. *Id.*

212. *See* James Iredell's Notes for a Supreme Court Opinion (Mar. 1, 1796), *in* 7 DHSC, *supra* note 8, at 112–15.

213. This summary of the facts is drawn from three sources: British Consul v. The Mermaid, 4 F. Cas. 169 (D.S.C. 1795) (No. 1897); 7 DHSC, *supra* note 8, at 44–46; and JACKSON, *supra* note 26, at 69–72. Although the three sources differ in certain details, the account presented here is generally consistent with all three.

214. Article 19 of the 1778 Treaty with France expressly grants French ships a right to carry out repairs in U.S. ports. *See* 1778 Treaty with France, *supra* note 29, art. XIX.

Justice Iredell's analysis is divided into three parts.[215] First, he considered the allegation that the privateer had been "fitted out & equipped in America."[216] Justice Iredell wrote:

> Admitting the fact, this only a local offence against the Neutral Nation . . . [d]oes not in itself divest the property. . . . If therefore truly & bona fide alienated, she became French property, & as such the owners under a real French Commission had a right to cruize, & bringing her prizes into American Ports entitled to the protection of the 17 Art.[217]

The implication of this statement is clear. If a British libellant seeks restitution of a captured prize on the grounds that the French privateer was illegally outfitted in U.S. ports, the court should dismiss the claim without addressing the merits, because illegal outfitting, even if proven, would not invalidate the legality of a subsequent capture made by a French privateer with a valid commission. Moreover, Article 17 precludes U.S. courts from inquiring into the lawfulness of the capture. If this analysis is correct, Judge Bee violated Article 17 by examining the merits of the illegal outfitting claim, even though he eventually relied on Article 17 as a basis for dismissing the libel.[218]

Second, Justice Iredell considered the argument that the June 1794 legislation provided for forfeiture of a vessel that was illegally outfitted in U.S. ports.[219] Consistent with the preceding analysis, he wrote: "Admitting a Forfeiture had incurred by a special Law of the U.S., this would not invalidate a prize taken by her after a bona fide alienation to a real French Citizen in another Country."[220] Iredell agreed that the United States could institute a forfeiture action against the privateer, but forfeiture of the privateer "does not necessarily infer a forfeiture of all the Prizes which such Vessel might take."[221] Moreover, "a fair capture under a real French Commission by real French Citizens would be exempt from any enquiry of . . . ours,"[222] because such enquiry is prohibited by Article 17 and the law of nations. In short, the U.S. statute authorizing forfeiture of privateers that were illegally outfitted in U.S.

215. *See* James Iredell's Notes for a Supreme Court Opinion (Mar. 1, 1796), *in* 7 DHSC, *supra* note 8, at 112–15.

216. *Id.* at 112.

217. *Id.* The quotes are taken from Justice Iredell's notes, which did not contain complete sentences. The author has chosen to use the actual text of the original, rather than trying to correct the grammar.

218. The same logic would apply to the allegation in the libel that most of the crew of the *General Laveaux* were Americans. Dismissal of this claim was not appealed because the libellants failed to adduce any evidence in support of this claim in the district court.

219. *See* James Iredell's Notes for a Supreme Court Opinion (Mar. 1, 1796), *in* 7 DHSC, *supra* note 8, at 112–14; *see also* Act of June 5, 1794, ch.50, § 3, 1 Stat. 381, 383.

220. James Iredell's Notes for a Supreme Court Opinion (Mar. 1, 1796), *in* 7 DHSC, *supra* note 8, at 112 (footnote omitted).

221. *Id.* at 114.

222. *Id.*

ports did not authorize U.S. courts to adjudicate the merits of claims for restitution of vessels captured by those privateers.

Third, Justice Iredell addressed the allegation that the *General Laveaux* was actually American property, not French property. "If this appeared clearly to [the] Court," he wrote, then the captured prize "ought to be restored."[223] Although Justice Iredell did not fully articulate his rationale, he was probably drawing a distinction between actions that violated U.S. law, such as illegal outfitting, and actions that violated the law of nations. If an American-owned vessel purported to act as a French privateer, any capture made by that vessel would be invalid under the law of nations,[224] and the illegality of the capture would require restitution of the captured prize. Justice Iredell emphasized the "[i]mportance of the 17 Article," and warned that restitution based on alleged American ownership of the privateer should not be awarded "upon light or doubtful grounds."[225] If U.S. courts accepted allegations of American ownership too easily, then Article 17 would be "of no value," and the owners of captured prizes would raise "a Claim in every case."[226]

By the time Justice Iredell wrote his draft opinion, in March 1796, the French privateers had already abandoned American ports in favor of French ports in the Caribbean.[227] Thus, even if Iredell's opinion had been published, it would not have had any effect on the decisions of lower courts, because those courts were adjudicating the French privateer cases in 1794 and 1795, when the privateers were still bringing their prizes into U.S. ports. As illustrated by Judge Bee's decision in *The Mermaid*, the lower courts generally addressed the merits of illegal outfitting claims before they dismissed the claims for lack of jurisdiction (contrary to Justice Iredell's preferred approach). By manifesting their willingness to adjudicate the merits of those claims, the courts, perhaps unwittingly, encouraged British, Spanish and Dutch libellants to file "a claim in every case," as Justice Iredell warned.

2. The *Sans Pareil*: A Case Study of U.S.-French Diplomacy

On July 27, 1794, the French privateer *Sans Pareil* captured the British merchant vessel *Perseverance*.[228] The privateer put on board a prize crew led by Jean Bernard. Bernard sailed *Perseverance* to Newport, Rhode Island,

223. *Id.* (alteration in original).

224. *See* Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795) (affirming decree by Judge Thomas Bee, which ordered restitution of a Dutch vessel captured by individuals claiming to be French privateers, in part because one of the self-styled privateers was a U.S. citizen who had never received a valid commission from the French government).

225. James Iredell's Notes for a Supreme Court Opinion (Mar. 1, 1796), *in* 7 DHSC, *supra* note 8, at 114.

226. *Id.*

227. *See infra* Part III.D.

228. The summary of facts in this paragraph is taken from 7 DHSC, *supra* note 8, at 811–13.

arriving there on August 13. The next day, Thomas Moore, the British vice-consul in Rhode Island, wrote to the Governor alleging that the *Perseverance* had been captured illegally and seeking restoration of the captured vessel to its British owner. The Governor, Arthur Fenner, seized the vessel pending resolution of the dispute. Joseph Fauchet, the French Ambassador in Philadelphia, soon learned about the case.

On August 26, 1794, Fauchet wrote to Secretary of State Randolph to protest. Fauchet's letter began by noting that he had received "a great number of complaints" regarding the "vexations which our privateers are made to experience at the instigation of English agents."[229] Fauchet clearly believed that France's enemies were initiating frivolous legal proceedings to harass French privateers. His letter referred to "those unjust and odious proceedings," and to "those miserable chicaneries, shamefully employed to damp the courage of the mariners."[230] Then, he specifically addressed the *Sans Pareil*:

> I pray you to cause orders to be given to the officers of the customs at Newport, to restore to the agent of the republic, the prize made by the privateer *Sans Pareil*. . . . [T]his prize has been seized, and under the pretext that the privateer *Sans Pareil* had been armed in the ports of the United States. If this pretext had been really alleged, a more glaring injustice and more palpable falsehood could not have been disguised . . . but, perhaps, as has frequently happened, they have only wished to discourage and fatigue the captors, by injuring the prize, from the length of time required for obtaining the decision, which they will retard by a thousand unfair expedients. In this case, sir, it is at length time to take a determination which will secure the interests of the captors, who, without this precaution, will be always injured, whatever may be the determination of the courts; they will be affected, first by the loss of time; secondly, by the expenses in prosecuting this business; and, lastly, by waste in the merchandises and vessels which they shall have taken.[231]

Thus, from France's perspective, even when French privateers ultimately prevailed in legal proceedings, they were still the losers, because the legal proceedings cost them valuable time and money. Moreover, the loss of time and money adversely affected France's strategic interests by providing economic disincentives to privateering, thereby making it harder to recruit additional privateers.[232]

229. Letter from Joseph Fauchet to Edmund Randolph (Aug. 26, 1794), *in* 1 ASPFR, *supra* note 18, at 588.

230. *Id.*

231. *Id.*

232. It bears emphasis that the economic disincentive to privateering was not an ordinary incident of naval warfare during this era. In the "typical" naval conflict, a privateer could obtain a speedy judgment by bringing a captured vessel to a prize court in his home country; this process rarely led to protracted litigation. However, in the American theater of the war between France and Great Britain, the British were able to exploit the geographic distance between the United

On September 3, 1794, Secretary Randolph wrote to Fauchet to inform him that he had "urged the Governor of Rhode Island to report, without delay, the case of the prize taken by the privateer Sans Pareil."[233] Randolph added: "Be assured, sir . . . that the Government of the United States will not suffer the acquisitions of the French privateers to be wrested from them, without adequate cause; nor yet, that they should be wantonly vexed by unjust detentions."[234] Two days later, on September 5, Governor Fenner ruled in favor of the French privateers and "ordered the *Perseverance* delivered to" the French captors.[235] On September 27, Randolph wrote to Fauchet to report the good news.[236] However, the communication from Governor Fenner to Secretary Randolph to Ambassador Fauchet lagged far behind the pace of actual events.

The French captors sold the *Perseverance* and its cargo on September 8, 1794.[237] However, before they could escape with the funds, the British owner, Thomas Jennings, "secured a monition requiring the United States marshal to retain the funds" and filed a libel in the federal district court.[238] In the libel, Jennings alleged two violations of the June 1794 legislation enacted by Congress. He claimed "that the *Sans Pareil* had been augmented in force" in Charleston, South Carolina,[239] in violation of Section 4 of the statute, and that the *Sans Pareil* was "to an extent manned with Americans,"[240] in violation of Section 2. He also alleged that none of the Frenchmen on board the *Sans Pareil* had a valid commission.[241] For all of these reasons, he claimed that the capture of the *Perseverance* was illegal, and he sought damages to compensate him for the loss of the ship and its cargo.

States and the nearest French prize courts by subjecting French privateers to protracted litigation when they brought their captured prizes to U.S. ports.

233. Letter from Edmund Randolph to Joseph Fauchet (Sept. 3, 1794), *in* 1 ASPFR, *supra* note 18, at 588; *see also* Letter from Edmund Randolph to Arthur Fenner (Sept. 3, 1794), *in* 1 ASPFR, *supra* note 18, at 589 (discussing the *Sans Pareil* and noting that the French Ambassador is concerned that "the ardor of French privateers [may] be damped by the vexations which a seizure of their prizes may produce").

234. Letter from Edmund Randolph to Joseph Fauchet (Sept. 3, 1794) *in* 1 ASPFR, *supra* note 18, at 588.

235. 7 DHSC, *supra* note 8, at 812–13. In August 1793—after several district courts had dismissed French privateering cases for lack of jurisdiction and before the Supreme Court issued its decision in *Glass v. The Sloop Betsey*—the Secretary of War had written to state governors to encourage them to adjudicate these cases. *See id.* at 812. That is why the British sought relief from Governor Fenner and why he agreed to perform a judicial function in this case.

236. Letter from Edmund Randolph to Joseph Fauchet (Sept. 27, 1794), *in* 1 ASPFR, *supra* note 18, at 588.

237. *See* 7 DHSC, *supra* note 8, at 812–13.

238. *Id.* at 813.

239. *Id.*

240. *Id.*

241. *Id.*

When Fauchet learned that the British owner had initiated judicial proceedings, after the Governor of Rhode Island had already ruled in favor of the French captors, he was furious. On October 17, 1794, Fauchet wrote to Randolph as follows:

> You announce to me that La Perseverance, prize to the Sans Pareil, had been delivered to the captors by order of the Governor of Rhode Island; in contempt of that decision the English agents have just created new difficulties . . . . It is impossible, sir, for this state of things to continue much longer. You are sensible how necessary it will be to retrench from our treaty the article which reciprocally permits the ships of war of the two nations to conduct to, and sell their prizes in, their respective ports, should this right become illusory and void by the difficulty thrown in the way of its execution. I proposed a method as simple as it is just, for putting an end to this tyrannical chicanery: this method was, to require security from those who prosecuted prizes as illegal. Were this measure adopted, it would render our enemies less ingenious in their proceedings, and prevent them from bringing so many actions . . . .
>
> . . . I expect, sir, that the Federal Government will put an end to these persecutions by the mode I have proposed, or by any other which its wisdom may suggest.[242]

Randolph was evidently sympathetic to Fauchet's plea.[243] Nevertheless, he told Fauchet pointedly that the Executive Branch could not intervene in ongoing judicial proceedings and that the judiciary was the proper branch of government to resolve disputes between French privateers and British ship owners:

> If, however, individuals conceive that they have a legal claim upon her, and draw her before a court of law, the Executive of the United States cannot forbid them. The plea, under [Article 17 of] the treaty, that the court has no cognizance of French prizes, will be admitted if it applies, and the person by whom the process is instituted will be liable to a judgment for costs and damages, if he fails in his proof.
>
> The bond, which you propose as a security against vexation, we have no power to demand, because the Executive do not mean to interfere, without presumptive proof of title; and this presumption, when established, would seem to be a sufficient protection against being harassed. The courts have their forms . . . . I am not authorized to make the arrangement proposed.[244]

242. Letter from Joseph Fauchet to Edmund Randolph (Oct. 17, 1794), *in* 1 ASPFR, *supra* note 18, at 589.

243. *See* Letter from Edmund Randolph to Joseph Fauchet (Oct. 22, 1794), *in* 1 ASPFR, *supra* note 18, at 589 (expressing his wish "that we were always able to administer immediate relief").

244. *Id.*

Thus, Randolph tacitly acknowledged that Article 17 barred the exercise of jurisdiction by U.S. courts in certain cases. However, the courts had to exercise jurisdiction for the limited purpose of deciding whether Article 17 applied. Moreover, in Randolph's view, if Fauchet wanted to offer suggestions about procedural innovations to minimize vexatious lawsuits, he should direct those suggestions to the judiciary, because there was no basis for the Executive to intervene in the affairs of an independent branch of government.

Despite Ambassador Fauchet's best efforts to assist the privateers who had a legitimate claim to the funds from the sale of *The Perseverance*, the judicial process consumed almost two-and-a-half years. The French captors could not obtain access to the funds until February 1797, when the Supreme Court issued its final decision in *Jennings v. The Brig Perseverance*.[245]

D. The End of French Privateering in the United States

"By early November 1795," French privateering activities in U.S. ports "had all but ceased."[246] There were three key factors that contributed to the decline of French privateering in the United States: the Jay Treaty,[247] lawfare in U.S. courts, and geo-political developments in the Caribbean.

In the spring of 1794, "the British had a stranglehold on French possessions in the Caribbean."[248] Since the British denied French privateers access to French ports in the Caribbean, and the privateers did not want to carry their prizes across the Atlantic to sell them in France, the best economic choice was to sell their prizes in U.S. ports. However, the strategic situation in the Caribbean changed dramatically between June 1794 and late 1795. France launched a successful attack against the British in Guadeloupe in June 1794.[249] Having reestablished a foothold in the Caribbean, France bided its time over the next several months. Then, between March and June of 1795, France launched a major offensive that led to a string of French victories in the Caribbean.[250] In July 1795, the Treaty of Basel terminated hostilities between France and Spain.[251] By the end of 1795, France and Spain had become allies in a war against Great Britain.[252] As a result of these developments, French privateers were able to take their prizes to French prize courts in the

245. 3 U.S. (3 Dall.) 336 (1797).

246. JACKSON, *supra* note 26, at 104.

247. Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty].

248. 6 DHSC, *supra* note 10, at 651.

249. JACKSON, *supra* note 26, at 63–64.

250. *See id.* at 88–90.

251. *See* 7 DHSC, *supra* note 8, at 752.

252. *See* JACKSON, *supra* note 26, at 104–05.

Caribbean. These "new privateering opportunities" in the Caribbean operated as a "magnet that drew the French privateers away from" the United States.[253]

The economic magnet of privateering opportunities in the Caribbean combined with the financial drain imposed by British lawfare in U.S. courts to lure French privateers away from U.S. ports toward French ports in the Caribbean. The privateers did not need to be financial wizards to calculate the costs and benefits of the two options. Since the French could not operate prize courts in the United States, prizes sold in the United States without prior condemnation by a prize court invariably sold at a reduced price.[254] Moreover, if a commander brought his captured prize to a U.S. port, he could expect the gains from his business venture to be tied up in U.S. courts for twelve to eighteen months.[255] Unless he had a cushion of cash reserves on hand, he would be unable to pay his crew, making it difficult, if not impossible, to hire crew for the next voyage. In contrast, if he took his prize to a French port in the Caribbean, he could obtain a judgment from a French prize court, sell the prize quickly at full value, and use the profits to finance additional privateering ventures.

The United States and Great Britain signed the Jay Treaty in November 1794, and the Treaty entered into force in October 1795.[256] By October 1795, many of the French privateers had already abandoned U.S. ports in favor of Caribbean ports. For those who continued bringing prizes to U.S. ports, however, the Jay Treaty was the final nail in the coffin. Article 24 expressly prohibited privateers commissioned by France from selling their prizes in U.S. ports as long as France was at war with Great Britain.[257] The French Ambassador protested vehemently that "the stipulations of the treaty concluded with England . . . destroy the effect of [France's] treaty with the United States."[258] Article 25 of the Jay Treaty preserved French rights under the 1778 Treaty between the United States and France.[259] However, Secretary of State Pickering maintained that Article 17 of the 1778 Treaty never actually gave

253. *Id.* at 87–88, 103–06.

254. *See supra* note 57 and accompanying text.

255. *See supra* notes 185–86 and accompanying text.

256. Jay Treaty, *supra* note 247.

257. *Id.* art. XXIV.

258. Letter from Pierre Auguste Adet to Edmund Randolph (June 30, 1795), *in* 1 ASPFR, *supra* note 18, at 594.

259. Jay Treaty, *supra* note 247, art. XXV ("Nothing in this treaty contained shall, however, be construed or operate contrary to former and existing public treaties with other sovereigns or states. But the two parties agree, that while they continue in amity, neither of them will in future make any treaty that shall be inconsistent with this or the preceding article."). Secretary of State Randolph explained to Ambassador Adet that, under Article 25, "You shall continue to enjoy your rights under the seventeenth article of our treaty with France. . . . The prohibition, on which you lay so much stress, is not against *past* but *future* treaties." Letter from Edmund Randolph to Pierre Auguste Adet (July 6, 1795), *in* 1 ASPFR, *supra* note 18, at 595, 596.

French privateers a right to sell their prizes in U.S. ports: the United States had simply permitted French privateers to sell their prizes in U.S. ports as a matter of policy.[260] Thus, although Article 25 of the Jay Treaty preserved France's preexisting legal rights under Article 17 of the 1778 Treaty, Article 24 of the Jay Treaty provided the controlling rule because it expressly prohibited sales of French prizes in U.S. ports, and this prohibition was not contrary to any legal right granted under the 1778 Treaty.[261]

In sum, the British lawfare strategy was undoubtedly a success in the sense that it was one of three key factors that helped induce French privateers to abandon the use of U.S. ports as a base of operations. However, the broader military consequences of the strategy are difficult to assess. It is likely that Great Britain gained some strategic advantage because British merchant vessels had easier access to U.S. ports after the French privateers moved south to the Caribbean. On the other hand, the advantage to France of greater access to French ports in the Caribbean may have offset the disadvantages for France associated with the exodus of French privateers from U.S. ports.

CONCLUSION

The preceding analysis of the French privateering cases demonstrates that the exclusive political control thesis is inconsistent with the Founders' understanding of the constitutional separation of powers in foreign affairs. This concluding section briefly highlights two important historical points and discusses the contemporary relevance of the privateering cases.

The first key historical point relates to Great Britain's use of lawfare tactics. As noted above, the Council on Foreign Relations wrote in 2003 that lawfare was a "new phenomenon."[262] Part III showed that lawfare is not a new phenomenon; Great Britain used lawfare tactics successfully in the 1790s to help induce French privateers to stop bringing their prizes into U.S. ports.

Second, although the privateering cases raised significant national security and foreign policy issues that were intimately connected to U.S. neutrality policy, the Washington Administration chose to defer to the Judicial Branch and allow judicial decision making in the privateering cases to guide the implementation of U.S. neutrality policy. Four factors help explain the government's decision to handle these cases by means of private adjudication in the courts, rather than diplomatic negotiation conducted by the Executive Branch. First, many of the cases required someone to scrutinize large amounts of conflicting evidence, and the Executive Branch did not have the personnel

260. Letter from Timothy Pickering to Pierre Auguste Adet (July 19, 1796), *in* 1 ASPFR, *supra* note 18, at 653–54.

261. *See id.*

262. Council on Foreign Relations, *supra* note 139.

to handle that task.[263] Second, the main goal of U.S. policy was to preserve U.S. neutrality; since the British and French were adversaries in most of the cases, it helped promote an appearance of neutrality to let the judiciary serve as a neutral decision maker, rather than having the Executive Branch resolve legal disputes between the British and the French. Third, given the natural law viewpoint that was prevalent among the Founders, many of the Founders probably believed that the ship owners had a natural right to present their claims in court to defend their property rights. Finally, resolution of the privateering cases required a decision maker to apply general legal rules in specific factual situations that involved disputes over the property rights of private parties. Some members of the founding generation probably believed that the Constitution granted the Judicial Branch primary (but not exclusive) responsibility for deciding cases involving the rights of private parties that required the application of law to fact.

The French privateering cases are similar to modern war on terror cases in one key respect—in both sets of cases, questions of private rights are inextricably linked to questions of international law and U.S. foreign policy. Of course, there are also key differences between the two sets of cases. The United States was a party in only two of the twenty-four privateering cases that are the focus of this study.[264] In contrast, the U.S. government is a party to most of the modern war on terror cases.[265] Moreover, both the Legislative and Executive Branches encouraged active judicial involvement in the privateering cases in the 1790s. In contrast, the Legislative and Executive Branches have worked together in the past few years to minimize judicial involvement in cases arising from the war on terror.[266]

Despite these differences, the privateering cases do offer an important pragmatic lesson that is still relevant today. According to the New York Times, "people in Britain and France told pollsters last spring that they had

263. During the period under study, there was no "Department of Justice," and the Attorney General did not have any staff to support him. The Secretary of State had a total domestic staff (not counting overseas Ambassadors and consuls) of about six to eight clerks. *See* List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending Oct. 1, 1792 (Feb. 27, 1793), *in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 57–59 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834), *available at* http://memory.loc.gov/ammem/amlaw/lwsplink.html; *see also* Roll of the Officers, Civil, Military, and Naval, of the United States (Feb. 17, 1802), *in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra*, at 260, 302, 304.

264. United States v. La Vengeance, 3 U.S. (3 Dall.) 297 (1796); United States v. Peters, 3 U.S. (3 Dall.) 121 (1795).

265. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

266. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631 (codified at 28 U.S.C. § 2241 (note)); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741–43 (codified at 10 U.S.C. § 801 (note)).

even less confidence in [President Bush] to do the right thing in world affairs than they had in President Vladimir V. Putin of Russia."[267] U.S. foreign policy cannot succeed if our key allies do not trust us to comply with our international legal obligations. The Founders understood this: they wanted to convey a message to the world that the United States was committed to the rule of law in international affairs. In the 1790s, the Executive Branch reinforced this message by deferring to the judiciary and allowing federal courts to decide key issues related to French privateering activities. In the current geopolitical situation, if the government wants to persuade U.S. allies that the United States is committed to complying with its international legal obligations, it can promote that objective by inviting judicial scrutiny of U.S. policies in the war on terror, at least in cases where those policies are intimately bound up with questions of international law and individual rights. In contrast, continued resistance to judicial oversight reinforces the belief, which is widely shared among the citizens of some of our closest allies, that the United States views international law with a mixture of contempt and indifference.

Political realists might explain the differences between the 1790s and today as a function of political power. Weak states are receptive to international law because it has the potential to constrain their stronger adversaries. Strong states are less receptive because international law tends to equalize power imbalances among states, thereby reducing the comparative advantage of stronger states. The United States embraced international law in the 1790s because it was a weak state; the United States is suspicious of international law today because it is a strong state. This explanation is fairly persuasive, as far as it goes. But it does not answer the key normative question: Is it generally in the national interest of the United States to comply with its international legal obligations, and to be perceived as complying with those obligations? There is ample room for disagreement on this question, but a President who wants to persuade the world that the United States takes its international legal obligations seriously could advance that goal by encouraging a more active role for the federal judiciary in the implementation of U.S. foreign policy.

267. Michael Cooper, *McCain Offers Soothing Tones in Trip Abroad*, N.Y. TIMES, Mar. 23, 2008, at A1.