

Our First Real War

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AFTER THE OUTBREAK of the Revolutionary War, American merchants lost the protection of England's Mediterranean passes and became vulnerable targets for the marauders of the Barbary states of Morocco, Algiers, Tunis, and Tripoli. In 1785, the Continental Congress authorized several foreign ministers, including Thomas Jefferson, Benjamin Franklin, and John Adams, to negotiate treaties for the "protection" of US commerce in return for "gifts" of arms and treasure. With the resumption of extensive Mediterranean commerce after the Revolution, these agreements were very expensive for the fledgling nation: ransom for captives and tribute payments totaled nearly \$10 million during the administrations of Washington and Adams.¹

During this period, the United States focused its diplomatic efforts on Algiers, the strongest of the North African nations. Faced with American hostages and with commercial insurance rates that had jumped from 3 to 50 percent,² Congress in 1794 authorized the construction of six naval vessels. But before the ships could be completed, a treaty was negotiated with Algiers, the captives were freed, and all naval construction was halted.

With their attention focused on Algiers, the US agents responsible for treaty negotiations failed to recognize a shift in the balance of power in Barbary. Tripoli had greatly strengthened its navy, led by Murat Rais, a pseudonymous Scottish renegade, and during the 1790s developed substantial economic and

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¹ See Ray W. Irwin, *THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS, 1776-1816* at 20 (1931); Louis Fisher, *PRESIDENTIAL WAR POWER* 24 (1995); and generally Michael L.S. Kitzen, *TRIPOLI AND THE UNITED STATES AT WAR: A HISTORY OF AMERICAN RELATIONS WITH THE BARBARY STATES, 1785-1805* at 1-35 (1993).

² A.B.C. Whipple, *TO THE SHORES OF TRIPOLI: THE BIRTH OF THE U.S. NAVY AND MARINES* 41 (1991).

political independence from Algiers. Feeling treated as a mere Algerian satellite, Bashaw Jusef Caramanli of Tripoli announced his dissatisfaction with his agreements with the United States and began making increasingly severe demands of the American consul. Congress in 1796 did appropriate funds to complete three frigates (primarily intended to defend against French incursions), but it generally continued to follow President Adams' shortsighted belief that it was cheapest simply to pay off the pirates when they became troublesome. As the United States fell several years behind in tribute payments to all the Barbary nations, the national honor was nearing its lowest ebb.

Several events in 1800 pushed the Barbary states to the brink of war. In February, US Consul to Tripoli James Cathcart learned of the death of George Washington, and lowered the American flag to half-mast. Thinking that this meant a change in government, the Bashaw demanded presents customary on such occasions. Cathcart's refusal outraged the Bashaw.

In August, the 24-gun frigate USS *George Washington* under Captain William Bainbridge set sail for Algiers with a portion of the overdue tribute. After receiving an extensive cargo of naval and military supplies, the Dey of Algiers demanded that Bainbridge journey to Constantinople with Algiers' annual tribute to the grand seignor. When he declined, the Dey turned hostile: "The light this regency looks on the United States is exactly this: you pay me tribute, by that you become my slaves,

and then I have a right to order as I please."³ Fearing the detention of his crew and a declaration of war, Bainbridge relented. Thus, the first US warship in the Mediterranean embarked on a forced five-month cruise, carrying the Dey's ambassador, an entourage of 100, another 100 tributary slaves, 4 horses, 150 sheep, 25 horned cattle, 4 lions, 4 tigers, 4 antelopes, 12 parrots, and funds and regalia worth nearly \$1 million. As the final insult, the Algerian Minister of Marine boarded the *George Washington*, "hailed down the American pennant," and forced her to set sail under an Algerian flag.⁴

Hearing of this incident, the jealous ruler of Tripoli suddenly found that he too needed US warships to transport various goods on his behalf. But funds were short, and friction within the Adams administration prevented any official answer from the United States. Fed up with waiting – and with Consul Cathcart's futile attempts to explain Senate advice and consent – Bashaw Jusef issued an ultimatum: establish a new treaty with tribute comparable to Algiers', or face war and the interdiction of US commerce.

JEFFERSON'S UNILATERAL EXECUTIVE RESPONSE

Thomas Jefferson's presidential campaign had promised peace, and he was no friend to the aggrandizement of federal power represented by a navy.⁵ Yet Jefferson had long advocated the use of force to restrain the petty tyrants of

3 Bainbridge to Secretary of the Navy (Oct 10, 1800), 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 378 (1939) ("NAVAL DOCS"). I retain the original spelling, capitalization, and punctuation in all quotations from historical documents.

4 Richard O'Brien, US Consul General, Algiers, to Bainbridge (Oct 10, 1800), 1 NAVAL DOCS 380; O'Brien to William Eaton, US Consul, Tunis (Oct 19, 1800), 1 NAVAL DOCS 385; Bainbridge to Secretary of the Navy (Oct 10, 1800), 1 NAVAL DOCS 379.

5 See Abraham D. Sofaer, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 209 (1976) ("When Jefferson took office on March 4, 1801, he had hoped to dismantle the navy, which he claimed to detest.").

Barbary.⁶ With the news starting to arrive regarding the shocking *George Washington* affair and the Bashaw's six-month ultimatum, Jefferson convened his cabinet to frame a response.

The Naval Peace Establishment

Along with installing the Federalist "midnight judges," one of the final actions of the outgoing sixth Congress was to create a "Naval Peace Establishment," enacted March 3, 1801, the day before Jefferson took office.⁷ Seeming more a *disestablishment*, the act gave the President discretion to sell all but thirteen frigates, and to mothball all but six. Although ostensibly a budget cutback, the act seems to have been passed to *require* Jefferson to retain at least a minimal navy.⁸ Even facing the possibility of Mediterranean hostilities, the economy-minded Jefferson believed that three frigates would suffice for any defensive purposes.⁹

The Naval Peace Establishment required that at least six frigates "be kept in constant service in time of peace." The act did not define "constant service," nor did it purport to limit the discretion of the President in how to employ these vessels. The act sought to maintain them in a state of preparedness should the occasion demand their use. Jefferson and his cabinet now faced the question, to what

extent may the President use such vessels as affirmative instruments of foreign policy?

Cabinet Discussion

On May 15, 1801, Jefferson held a meeting with his executive council: Secretary of State James Madison, Secretary of the Treasury Albert Gallatin, Secretary of War Henry Dearborn, Acting Secretary of the Navy Samuel Smith,¹⁰ and Attorney General Levi Lincoln. Jefferson presented an inquiry in two parts: "Shall the squadron now at Norfolk be ordered to cruise in the Mediterranean. What shall be the object of the cruise."¹¹

The members unanimously agreed that the cruise ought to be undertaken. They believed that the "constant service" required by the Naval Peace Establishment allowed the President to send a squadron to the Mediterranean to display a military presence and train the sailors. Even among this select group of Republicans, no one argued that the President should consult Congress before ordering military action, even though the maneuvers would manifest a credible threat to the Barbary rulers and shift US policy in the Mediterranean away from tribute towards war. Madison and Dearborn further argued that the President need not send forth the fleet under the guise of a training mission;

6 As minister to France, Jefferson argued against tribute as early as 1785:

Would it not be better to offer them an equal treaty; if they refuse, why not go to war with them? ... We ought to begin a naval power if we mean to carry on our own commerce. Can we begin it on a more honorable occasion, or with a weaker foe? I am of the opinion of [John Paul Jones with half a dozen frigates [we] would totally destroy their commerce.

Jefferson to Francis Eppes (Aug 30, 1785), quoted in Kitzen, *supra* note 1, at 11.

7 2 Stat 110, § 2 (1801).

8 See Sofaer, *supra* note 5, at 210.

9 See Dumas Malone, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805* at 102-03 (1970).

10 General Smith was a hero of the Revolution and an influential Baltimore merchant who owned a variety of shipping interests. He was also, while serving in Jefferson's cabinet, a member of Congress. In fact, Smith served on the committee that created the Naval Peace Establishment during the previous Congress, and would later introduce the very statute that recognized the state of war with Tripoli and granted broad discretion to the President – not to mention retroactively approving the actions he had ordered as Acting Secretary. See *infra* notes 26 & 28. Bill Lann Lee, step aside.

11 Franklin B. Sawvel, ed, *THE COMPLETE ANAS OF THOMAS JEFFERSON* 213 (1903).

rather, its object, “to protect our commerce against the threatened hostilities of Tripoli,” should be “openly declared to every nation.”

All but Lincoln agreed that “the Captains may be authorized, if war exists, to search for and destroy the enemy’s vessels, wherever they can find them.” Gallatin expressly rejected the need for congressional sanction:

The Executive can not put us in a state of war, but if we be put into that state either by the decree of Congress or of the other nation, the command and direction of the public force then belongs to the Executive.

Twenty-five years later, writing to James Monroe, Madison similarly explained this decision:

The only case in which the Executive can enter on a war, undeclared by Congress, is when a state of war has “been actually” produced by the conduct of another power Such a case was the war with Tripoli during the administration of Mr. Jefferson.¹²

Jefferson and his cabinet thus decided that the President could *prepare* for war, taking liberty with the Naval Peace Establishment to send vessels to the Mediterranean, even though this would alter the nation’s policy, and could provoke hostilities, without congressional advice or consent. The executive could also *engage* in war, should a foreign nation first declare war or commence hostilities.

Orders to the Fleet

After this discussion, Samuel Smith began issuing orders to assemble the fleet for its Mediterranean expedition. For its commander, he selected Captain Richard Dale, who had been lieutenant to John Paul Jones aboard the *Bonhomme Richard* during the

Revolution. Smith’s orders to Dale began by stating the statutory basis for the President’s authority:

The United States being at peace with all the world, Congress passed a Law, during their last session, providing for a Naval Peace Establishment, by which the President is authorized to keep in constant service, a proportion of the Navy of the United States. Under this authority, he has directed that a squadron . . . should be fitted, prepared & manned for a cruise¹³

Ostensibly, a Mediterranean training mission:

One great object expected from this Squadron is, the instruction of our young men: so that when their more active service shall hereafter be required, they may be capable of defending the honor of their Country. It is particularly requisite, that they should be made acquainted with the coasts & Harbours of the Mediterranean, where their services in all probability will frequently be required.

Although the President did not authorize preemptive offensive action against any of the Barbary states – after all, he purported to act under the aegis of the Peace Establishment – Smith’s detailed orders provided the ground rules for military engagement, instructing Dale to *chastise* any Barbary state that commenced hostilities:

[S]hould you find on your arrival at Gibraltar that all the Barbary Powers, have declared War against the United States, you will then distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce & chastise their insolence – by sinking, burning or destroying their ships & Vessels wherever you shall find them.

If only one nation had declared war, Dale was also to blockade its ports “so as to effectually prevent any thing from going in or coming

12 Madison to Monroe (Nov 16, 1827), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 600 (1867).

13 Smith to Dale (May 20, 1801), 1 NAVAL DOCS 465. Smith annexed a copy of the statute to each captain’s orders.

FIGURE 1: SLOOP [sic] USS ENTERPRISE CAPTURING A TRIPOLITAN CORSAIR, BY WILLIAM BAINBRIDGE HOFF. COURTESY US NAVAL HISTORICAL CENTER.

out,” and to take measures to disguise his fleet to preserve the element of surprise.

The squadron was not limited to actions against the Barbary corsairs – the blockade of Tripoli was to prevent *any* ships from entering or leaving that harbor, and records indicate that Dale searched neutral vessels for Tripolitan cargo and passengers.¹⁴ It is not clear whether Dale deemed permissible the capture of Tripolitan *merchant* vessels, but the term “ships and Vessels” did not on its surface narrow Dale’s available targets to armed corsairs. And Dale apparently considered coastal bombardment to be within the scope of his orders.¹⁵

Thus, if a foreign nation declared war, the President ordered much more than mere protection of US shipping against attack. While perhaps not a complete commitment to war, it is difficult to find substantial

restrictions in Dale’s orders. Jefferson’s orders to the fleet extended to the full range of arguable executive discretion, even into the gray area of reprisals against the enemy’s commerce.

The *Enterprise* and the *Tripoli*

On May 16, 1801, the Bashaw of Tripoli, his patience exhausted, sent his men to chop down the flagstaff at the US consulate, the Barbary ceremony for declaration of war.¹⁶ Dale arrived in Gibraltar on July 2, finding that a state of war did in fact exist, and made immediate preparations to carry out his orders to blockade Tripoli harbor.¹⁷

Later that month, lying off Tripoli, Dale ordered Lieutenant Andrew Sterett to take the 12-gun schooner USS *Enterprise* to Malta for water and supplies. Dale specified Sterett’s rules for engagement:

14 See Dale to Bashaw of Tripoli (July 25, 1801), 1 NAVAL DOCS 531. Such a search was justified under international law during a state of war. See *Bas v Tingy*, 4 US (4 Dall) 37, 43-44 (1800).

15 See Dale to Cathcart (Aug 25, 1801), 1 NAVAL DOCS 561

16 Cathcart to Secretary of State (May 16, 1801), 1 NAVAL DOCS 459.

17 Dale to Acting Secretary of the Navy (July 2, 1801), 1 NAVAL DOCS 497-98.

[S]hould you fall in with any of the Tripolitan Corsairs that you are confident, you can Manage, on your Passage to Malta you will heave all his Guns Over board Cut away his Masts, & leave him In a situation, that he can Just make out to get into some Port, but if coming back you will bring her with you if you think you can doe it with safety but on no account run any risque of your vessel or the health of your Crew.¹⁸

These limited combat orders reflected nothing more than the Commodore's circumspection in sending out his smallest vessel, under his most junior commanding officer, on a mission to resupply the blockading frigates. His orders also allowed Sterett to sail under any colors as a deception, but to fire only when flying the American flag.

En route to Malta, the *Enterprise* encountered the 14-gun Tripolitan corsair *Tripoli*. Flying British colors, Sterett hailed the *Tripoli* and asked the object of her cruise. The Tripolitan captain responded that he was searching for Americans, and lamented that he had not come across any. At this, Sterett hoisted the American flag and had the contingent of US Marines discharge a volley of musketry. After three hours of furious combat, the *Tripoli* lay nearly demolished, with over half its crew dead or wounded. The *Enterprise* sustained no material damage, and not a single man was wounded. Pursuant to his orders, Sterett dismantled the *Tripoli*, casting its guns and masts overboard and leaving it with only the barest means to make the shore.¹⁹

The news of Sterett's victory produced great acclamation back home, including a joint resolution in Congress to commend Sterett and his crew.²⁰ But Jefferson's characterization of the constitutional limitations on the executive in his report of this incident to Congress

engendered a hot debate with his old rival, Alexander Hamilton.

CONGRESSIONAL AUTHORIZATION OF WAR

Jefferson's Message to Congress

Shortly after he received report of Sterett's actions, and the day after the seventh Congress was convened, President Jefferson submitted an official message to the legislature. He explained:

Tripoli ... had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war, on our failure to comply before a given day. The style of the demands admitted but one answer. I sent a small squadron of frigates into the Mediterranean with assurances to that Power of our sincere desire to remain in peace; but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded, and that of the Atlantic in peril. The arrival of our squadron dispelled the danger.²¹

Jefferson here misrepresented the latitude for offensive response that he had given his captains. He instead described a purely defensive force, nothing more than a deterrent. He described the encounter between the USS *Enterprise* and the *Tripoli* as if the Tripolitan had taken the first shot:

One of the Tripolitan cruisers, having fallen in with and engaged the small schooner *Enterprise* ... was captured, after a heavy slaughter of her men, without the loss of a single one on our part.

18 Dale to Sterett (July 30, 1801), 1 NAVAL DOCS 535.

19 Sterett to Dale (Aug 6, 1801), 1 NAVAL DOCS 537; *Capture of Ship of War Tripoli by U.S. Schooner Enterprise*, NATIONAL INTELLIGENCER (Nov 18, 1801), 1 NAVAL DOCS 538-39.

20 2 Stat 198 (Feb 3, 1802).

21 11 ANNALS OF CONGRESS at 12 (Dec 8, 1803) ("ANNALS").

FIGURE 2: LIEUTENANT STERETT LEAVING USS ENTERPRISE TO BOARD THE TRIPOLI, BY RODOLFO CLAUDUS. COURTESY US NAVAL HISTORICAL CENTER.

Finally, in a statement often cited to support a restrictive view of executive war powers,²² Jefferson claimed that the *Constitution* mandated the release of the captured corsair:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that, in the exercise of this important function confided by the Constitution to the Legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight.

This position was truly novel. Nowhere in the chain of command, from Jefferson's discussion with his cabinet, to Smith's orders to Dale, to Dale's orders to Sterett, had anyone raised a constitutional limitation of this nature. Further, although the administration undoubtedly knew the details of Sterett's orders,²³ they were conspicuously absent from the "material information" that Jefferson submitted to Congress.²⁴

We can do little more than speculate as to why Jefferson advocated such limitations on executive authority, contrary to the position he adopted with his cabinet earlier that year. Perhaps he was attempting to conform his actions, retroactively, to the Supreme Court's

22 Among others, Jefferson's biographer Malone appears to have uncritically accepted Jefferson's own characterization of the scope of executive power. See Malone, *supra* note 9, at 98-99.

23 On November 18, 1801, the *National Intelligencer* reported that Sterett had arrived the day before, "with dispatches for the Secretary of the Navy." 1 NAVAL DOCS 538.

24 Among the documents accompanying Jefferson's message were his orders to Commodore Dale, the letter from Sterett to Dale informing the Commodore of the victory, and the communique from Dale to the Secretary of the Navy regarding the incident. See 2 AMERICAN STATE PAPERS: FOREIGN

August 17, 1801 opinion stating that “The whole powers of war [are], by the constitution of the United States, vested in congress.”²⁵ Jefferson knew that the executive naturally tends to act when, in his view, circumstances compel action, even if he exceeds his theoretical constitutional authority in doing so. By publicly asserting that the executive is limited to self-defense *even* when facing a foreign declaration of war, Jefferson created a precedential stumbling block for future Presidents who might be less chary of usurping the war powers of the legislature.

Reappearing as a Baltimore congressman, Samuel Smith shortly thereafter introduced a resolution, “That it is expedient that the President be authorized by law, further and more effectually to protect the commerce of the United States against the Barbary Powers.”²⁶ Mr. Nicholson objected to the “further and more effectually” language, on the grounds that the documents promised by Jefferson had not yet been received by the House, and that he thought it promised an increase in the naval force already under Jefferson’s command. Smith responded that the intent of the resolution was not an increase in the navy, but to allow the President to freely respond to aggression by Tunis or Algiers, should they become hostile during a congressional recess. Nicholson then raised a telling point: Congress had already put six frigates into the hands of the President, and these had been dispatched for hostilities in

the Mediterranean. On the propriety of such executive action, “he would have no hesitation to say the President had done right.” Mr. Eustis echoed Jefferson’s characterization of the squadron’s orders, describing the question as “whether [Jefferson] shall be empowered to take offensive steps.” Mr. Giles, also relying on Jefferson’s explanation of the *Enterprise-Tripoli* encounter, thought that Smith’s resolution would do no more than “empower the President to authorize, not merely a dismantlement of a vessel, but her capture.” Smith’s resolution passed, and a committee was formed to draft a bill.

Hamilton’s Examination of the Message

Not one to let this executive abdication pass unnoticed, Alexander Hamilton published a scathing response, writing in the *New-York Evening Post* as Lucius Crassus. Hamilton found Jefferson’s position “extraordinary”:

[T]hough *Tripoli had declared war in form* against the United States, and had enforced it by actual hostility, yet ... there was not power, for want of *the sanction of Congress*, to capture and detain her cruisers with their crews. ... We are presented with one of the most singular paradoxes, ever advanced by a man claiming the character of a statesman. When analyzed, it amounts to nothing less than this, that *between two nations there may exist a state of complete war on the one side – of peace on the other.*²⁷

Hamilton forcefully argued for a position not dissimilar to that advocated in the executive

RELATIONS 347-61 (1832). In response to a subsequent request for additional documentation, on January 13, 1802, the Secretary of the Navy submitted to Congressman Benjamin Tallmadge an additional copy of Sterett’s letter to Dale. Sterett’s original orders from Dale were never presented to Congress.

25 *Talbot v Seeman*, 5 US (1 Cranch) 1, 28 (1801). Congressman James A. Bayard (who appears in this tale at *infra* note 29) argued that the partial state of war (the Quasi-War with France) legitimated Captain Talbot’s taking as a prize a neutral vessel that the French had captured. On circuit, Talbot had been represented by Alexander Hamilton, who was opposed by Aaron Burr. See Jean Edward Smith, *JOHN MARSHALL: DEFINER OF A NATION* 291-95 (1996).

26 The exchange appears at 11 *ANNALS* at 325-29 (Dec 14-15, 1801).

27 *The Examination No. 1* (Dec 17, 1801), in Harold C. Syrett, ed, 25 *THE PAPERS OF ALEXANDER HAMILTON* 444, 454-56 (1977).

council by Gallatin, Smith, and Madison. He held that although there is a distinction between an aggressing and defending nation, “the rights of both, as to the measure of hostility, are equal.” Absent express *limiting* language in the Constitution, the executive’s discretion should not be circumscribed:

[T]he Constitution of a particular country may limit the Organ charged with the direction of the public force, in the use or application of that force, even in time of actual war: but nothing short of the strongest negative words, of the most express prohibitions, can be admitted to restrain that Organ from so employing it, as to derive the fruits of actual victory, by making prisoners of the persons and detaining the property of a vanquished enemy. Our Constitution happily is not chargeable with so great an absurdity. The framers of it would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and inconvenience [*sic*].

Hamilton argued that the plain language of the Constitution supported no such prohibition. Instead, he held a different view of the meaning of “to declare War”:

That instrument has only provided affirmatively, that, “The Congress shall have power to declare War;” the plain meaning of which is that, it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already *at war*, and any declaration on the part of Congress is nugatory: it is at least unnecessary.

He pointed out the absurdity of Jefferson’s position, if taken seriously: without a declaration of war, our forces could kill, but not capture, the enemy. Instead, Hamilton argued, the greater power to kill the enemy includes the lesser power to capture. Jefferson’s view was not only impractical, but compromised national security. Without broad executive

discretion to retaliate against an actively hostile foreign power, the delays inherent in requiring Congress to first declare war would unduly prejudice the nation’s interest.

Hamilton’s logic was unassailable, and aligned exactly with the position of Jefferson’s cabinet and the orders Jefferson issued. Jefferson made no effort to recall Congress, but on his own authority ordered Dale to blockade Tripoli, and to “sink[], burn[] or destroy[] their ships & Vessels wherever you shall find them.” Jefferson himself apparently could not reconcile his public position on the question with the practical requirements of governing a nation facing foreign aggression.

The Congressional Response

On February 6, 1802, in response to Jefferson’s request, Congress passed *An Act for the protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers*, which provided in pertinent part:

Whereas the regency of Tripoli, on the coast of Barbary, has commenced a predatory warfare against the United States:

Be it enacted . . . That it shall be lawful fully to equip, officer, man, and employ such of the armed vessels of the United States as may be judged requisite by the President of the United States, for protecting effectually the commerce and seamen thereof on the Atlantic ocean, the Mediterranean and adjoining seas.

And be it further enacted, That it shall be lawful for the President of the United States to instruct the commanders of the respective public vessels aforesaid, to subdue, seize and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, or to his subjects, and to bring or send the same into port, to be proceeded against, and distributed according to law; and also to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.²⁸

28 2 Stat 129-30 (Feb 6, 1802) (emphasis added). The bill was introduced by our old friend Congressman Smith. See 11 ANNALS at 405-06 (Jan 7, 1802).

This statute, echoing Hamilton, responded with nearly as much deference to the executive as Jefferson had shown toward Congress in his earlier message. Congress did not speak as if the Act created the state of war; rather, it merely recognized a state of war already existing.


Every member of Congress who spoke up agreed more with Hamilton than with Jefferson on the propriety of the President's hostile response to Tripoli without congressional authorization. Although Representative Bayard mentioned "doubts that have been expressed, by some, of the constitutionality of his measures the last Spring and Summer,"²⁹ Jefferson himself was the principal person to seriously question the executive's authority. The lack of serious constitutional debate in Congress may also reflect the unanimity in approval for the objectives of the war.³⁰

The Act, which authorized "all such other acts of precaution or hostility as the state of war will justify," granted Jefferson's request: license to conduct Mediterranean operations however he saw fit. Unlike Jefferson's message, the language of the Act strongly suggests that the President's "acts of precaution or hostility" were justified not by the sanction of Congress, but by the "state of war" created when "the regency of Tripoli ... commenced a predatory warfare against the United States."

Congress thus removed all doubts as to

Jefferson's authority to order blockades, attacks on Tripolitan commerce, taking of prizes and prisoners, commission of private armed vessels, coastal bombardment, and invasion.³¹ The Act created a moral commitment by Congress to support the war effort through appropriations;³² it also removed the Peace Establishment's limitations on the crews to be employed. And because it did no more than recognize the existence of a state of war, the Act left open the possibility that the state of war could be unilaterally terminated by the Bashaw of Tripoli – the President's authorization would cease when the state of war no longer existed.



The Framers generally recognized the need for executive power to engage in military actions to repel foreign invasion or for other emergency purposes. Although Jefferson usually spoke in terms of strict interpretation of the Constitution and a restricted view of executive power, his actions demonstrated that in matters of war and foreign affairs, the niceties of formalism must sometimes be trumped by the necessities of governing – even when the situation might not rise to the level of an emergency. As Jefferson himself said, "What is practicable must often controul what is pure theory."³³ 

29 *Id.* at 432-33 (Jan 21, 1802).

30 See, e.g., 13 ANNALS at 1210-25 (Mar 22, 1804).

31 Jefferson went so far as to authorize a covert operation to overthrow Bashaw Jusef and replace him with his brother Hamet, the "rightful Bashaw." See Montgomery N. Kosma, *Thomas Jefferson's 'Saddam'*, WALL STREET JOURNAL A19 (Mar 17, 1998).

32 See Madison to Jefferson (Apr 2, 1798), in 3 Kurland & Lerner, eds, THE FOUNDERS' CONSTITUTION 96 (1987) ("[A] law declaring war, imposes a like moral obligation, to grant the requisite supplies ...").

33 Jefferson to duPont de Nemours (Jan 18, 1802), quoted in Sofaer, *supra* note 5, at 169 n 7.