

# THE QUASI WAR CASES—AND THEIR RELEVANCE TO WHETHER “LETTERS OF MARQUE AND REPRISAL” CONSTRAIN PRESIDENTIAL WAR POWERS

J. GREGORY SIDAK\*

## I. INTRODUCTION

Constitutional scholars cite three Supreme Court decisions arising from the undeclared Quasi War with France in 1798-1800 as support for the proposition that Congress may authorize war of any magnitude, and that, except in case of sudden or imminent attack on the United States, this congressional authority displaces any right of the President to use military force of even modest magnitude without prior congressional authorization. The textual hook claimed by these scholars for so reading *Bas v. Tingy*,<sup>1</sup> *Talbot v. Seeman*,<sup>2</sup> and *Little v. Barreme*<sup>3</sup> is the phrase in Article I, Section 8 of the Constitution that immediately follows the grant to Congress of the power “To declare War”—namely, the power to “grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>4</sup> These additional words, it is argued, are placed in the War Clause because the Framers intended that Congress, and Congress alone, have the power to authorize not only “general” or “perfect” war through a formal declaration of war, but also “limited” or “imperfect” war. It is further argued that the temporal proximity of the three Quasi War

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\* Visiting Professor of Law, Georgetown University Law Center; F.K. Weyerhaeuser Fellow in Law and Economics Emeritus, American Enterprise Institute for Public Policy Research. I thank Jack Landman Goldsmith and Michael Stokes Paulsen for helpful comments and Becky Bricken, Amanda Gregory, and Daniel Nusbaum for excellent research assistance. The views expressed here are solely those of the author and not those of AEI, which does not take institutional positions on specific legislative, regulatory, adjudicatory, or executive matters. This article is respectfully dedicated to the memory of Capt. Christopher J. Sullivan, 1st Cavalry Division, U.S. Army, killed in action in Baghdad, January 18, 2005.

1. 4 U.S. (4 Dall.) 37 (1800).
2. 5 U.S. (1 Cranch) 1 (1801).
3. 6 U.S. (2 Cranch) 170 (1804).
4. U.S. CONST. art. I, § 8, cl. 11.

decisions to the framing of the Constitution strongly implies that the Framers meant to constrain the President's ability to use military force in a manner short of full-scale war.

The list of scholars subscribing to this interpretation of the War Clause is long and imposing. In a frequently cited article published during the Vietnam War, Charles Lofgren argued that the Framers' grant to Congress of the power to issue letters of marque and reprisal created a residual category of all forms of undeclared war.<sup>5</sup> The Constitution, in his view, grants to Congress alone the power to commence war, whether by formally declaring war or by authorizing reprisals.<sup>6</sup> Abraham Sofaer, later a federal judge and legal adviser to the State Department, offered a similar interpretation of the Quasi War cases several years after Lofgren.<sup>7</sup> With the notable exception of Eugene Rostow,<sup>8</sup> other scholars writing on this topic during and shortly after the Vietnam War uniformly embraced that interpretation,<sup>9</sup> as have the scholars writing thereafter on the war powers. Dean Harold Hongju Koh of Yale Law School, for example, reads *Bas* and *Talbot* to constitute a "delineation and delimitation of the executive's authority [to commence] limited hostilities by means other than formally declared war."<sup>10</sup> Similarly, John Hart Ely read these cases to support his conclusion that the original meaning of the War Clause was that "all wars, big or small, 'declared' in so many words or not . . . had to be legislatively authorized."<sup>11</sup> The other contemporary scholars subscribing to this same interpretation are

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5. See Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 695-97 (1972).

6. *Id.*

7. See Abraham D. Sofaer, *The Presidency, War and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 27 (1976).

8. See Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850 n.28 (1972) (criticizing the view that the War Clause gives Congress alone "the complete and exclusive right to initiate all forms of hostility recognized under international law, including, e.g., reprisals").

9. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 80-82 (1972); William Van Alstyne, *Congress, The President, and The Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 18-19 (1972); Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive and Judicial Roles*, 44 S. CAL. L. REV. 461, 465 (1970).

10. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 81 (1990); see also Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

11. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3 (1993); see also John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1386 (1988).

numerous.<sup>12</sup>

Part II of this essay analyzes the original understanding of “letters of marque,” “reprisal,” and “captures on land and water.”<sup>13</sup> As used by legal scholars when the Constitution was drafted, these words had meanings that were both well understood and not dependent upon the allocation of war-making power between the legislative and executive branches.

Part III discusses the facts, holdings, and dicta of the Quasi War cases. Properly read, these cases concerning the legality of capturing ships belonging to or collaborating with France during the Quasi War do not illuminate how the war powers should be allocated between Congress and the President.

Part IV shows that the Supreme Court has never read this trio of cases, or any one of them individually, to support the proposition for which today’s scholars routinely cite them. To the contrary, in the twenty decades since the Quasi War took place, the Court has, with rare exception, cited these cases only for propositions concerning the legality of capturing ships at sea. Nonetheless, the contemporary misinterpretation by scholars of the Quasi War cases found a receptive audience in 2000 in the U.S. Court of Appeals for the D.C. Circuit in *Campbell v. Clinton*, which involved President Clinton’s use of military force in Yugoslavia.<sup>14</sup> The Quasi War cases have since been revisited by the Judiciary in the wake of the al Qaeda attacks of September 11, 2001 concerning litigation on the war on terror.<sup>15</sup>

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12. See, e.g., MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 3-8, 77-78 (1990); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWERS OF CONGRESS IN HISTORY AND LAW 53, 61-67 (2d ed. 1986); Peter Raven-Hansen, *Constitutional Constraints: The War Clause*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR 28, 43-45 (Gary M. Stern & Morton H. Halperin, eds., 1994); Louis Fisher, *Point/Counterpoint: Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1663-64 (2000); David Gray Adler, *The President’s War-Making Power*, in INVENTING THE AMERICAN PRESIDENCY 119, 140-41 (Thomas E. Cronin ed., 1989). A student note also examines the original meaning of “letters of marque and reprisal” but does not discuss the relevance of the Quasi War cases to determining that meaning. See C. Kevin Marshall, *Commentary, Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953 (1997).

13. U.S. CONST. art. I, § 8, cl. 11.

14. 203 F.3d 19 (D.C. Cir. 2000).

15. See Padilla v. Bush, 233 F. Supp. 2d 564, 589 (S.D.N.Y. 2002), *aff’d in part and rev’d in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003). For early reflections on how the September 11th terrorist attacks may change constitutional interpretation on a range of issues, including the war powers, see J. Gregory Sidak, *The Price of Experience: The Constitution after September 11, 2001*, 19 CONST. COMMENT. 37 (2002).

## II. THE ORIGINAL UNDERSTANDING

Roughly speaking, the original understandings of “letters of marque,” “reprisal,” and “captures on land and water” were the following. Letters of marque were legal authorization for private parties—privateers—to use force to harass or prey upon a nation’s enemy. Reprisal was the legally authorized act of securing redress for a debt incurred by a foreign government by forcibly taking the private property of its subjects. Captures on land and water required legal rules to determine when, for example, the ownership of property captured by a private party during war lawfully transferred to the captor, thus extinguishing any subsequent claim of ownership by its owner at the time of capture. A proper understanding of “letters of marque,” “reprisal,” and “captures on land and water” does not require a theory of the separation of the war-making powers between Congress and the President. A richer understanding of these words suggests that their placement in the Constitution by the Framers concerned the distinction between the public and private waging of war and the right of a sovereign nation to make decisions regarding that distinction. When viewed through this lens, the contemporary argument that these words in the War Clause constrain the President’s powers to use military force in undeclared wars is a non sequitur.

*A. The Law of Prize: Letters of Marque and Reprisal and Rules Concerning Captures on Water*

According to the *Oxford English Dictionary*, the first recorded use of “letters of marque and reprisal” was in an English statute in 1354 during the reign of Edward III.<sup>16</sup> The phrase referred to “a licen[s]e granted by a sovereign to a subject, authorizing him to make reprisals on the subjects of a hostile state for injuries alleged to have been done to him by the enemy’s army.”<sup>17</sup> The phrase appeared frequently in statutes throughout Europe in the fifteenth and sixteenth centuries. Eventually, letters of marque and reprisal evolved into commissions “to fit out an armed vessel and employ it in the capture of the merchant shipping belonging to the enemy’s subjects, the holder of [a letter] being called a privateer or corsair.”<sup>18</sup> In 1856, the Congress of Paris abolished the practice of issuing letters of marque and reprisal in

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16. 9 OXFORD ENGLISH DICTIONARY 394 (2d ed. 1989) (definition 1 of “marque”) [hereinafter OED].

17. *Id.* (definition 2a of “marque,” defining “letter of marque”).

18. *Id.*

Europe.<sup>19</sup>

“Reprisal” was also used in the late sixteenth century to mean “the taking of a thing as a prize.”<sup>20</sup> During that period, prize referred to “[a] ship or property captured at sea in virtue of the rights of war.”<sup>21</sup> In the early eighteenth century, reprisal also meant “the infliction of similar or severer injury or punishment on the enemy” in war.<sup>22</sup> In *The Law of Nations*, Emmerich de Vattel used “reprisals” to mean both the seizure of the property of citizens of another state and the practice of executing prisoners-of-war in retribution for the acts of the enemy.<sup>23</sup> “Reprisal,” as used as a term of art in the phrase “letters of marque and reprisal,” however, was to be distinguished from the colloquial use of “reprisals” to signify retaliatory acts during war.<sup>24</sup>

In his treatise on the law of war and peace, published in 1625, Hugo Grotius wrote that, notwithstanding the usual limitations on vicarious liability found in a nation’s domestic law, “it has been established by the law of nations that both the possessions and the acts of subjects are liable for the debt of a ruler.”<sup>25</sup> Subsequent treatises on international law published before 1787 reinforced that proposition.<sup>26</sup> Samuel von Pufendorf, writing in 1688, more precisely stated that it was “an established custom among nations that in payment for a debt incurred by the state, or in which the state has involved itself by maladministration of justice, the property of individual citizens is held, to this extent, that foreigners to whom the debt is owed, can lay hands upon such property, if found among them.”<sup>27</sup>

This rule of vicarious liability, Grotius argued, “is the outgrowth of a certain necessity, because otherwise a great licen[s]e to cause injury would arise; the reason is that in many cases the goods of rulers cannot so easily be seized as those of private persons, who are more

19. *Id.*

20. 13 OED, *supra* note 16, at 664 (definition 3a of “reprisal”) (emphasis omitted).

21. 12 OED, *supra* note 16, at 527 (definition 2b of “prize”).

22. 13 OED, *supra* note 16, at 664 (definition 4 of “reprisal”).

23. See EMMERICH DE VATTEL, *THE LAW OF NATIONS* 283-85, 348, 480-81 (Joseph Chitty ed., 1858) (1758).

24. *Id.* at 348-49.

25. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk. III, ch. 2, § 2, at 624 (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

26. See, e.g., 2 RICHARD ZOUCHÉ, *AN EXPOSITION OF FEACIAL LAW AND PROCEDURE, OR OF LAW BETWEEN NATIONS, AND QUESTIONS CONCERNING THE SAME* 33 (J.L. Brierly trans. 1911) (1650) (discussing ancient traditions of seized persons).

27. 2 SAMUEL VON PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM*, ch. 16, § 10, at 140 (Frank Gardner Moore trans., Oxford Univ. Press 1927) (1688).

numerous.”<sup>28</sup> One can imagine that, as with many legal customs and common law rules, this particular rule of vicarious liability had an efficiency justification in an era of monarchy. Grotius asserted: “[t]his [rule] then finds place among those rights which, as Justinian says, have been established by civilized nations in response to the demands of usage and human needs.”<sup>29</sup> Presumably foreign creditors would be more willing to lend to a monarch if he could pledge the personal property of each of his subjects as collateral. This security would lower the monarch’s cost of capital.

At the same time, Grotius reasoned, vicarious liability for a monarch’s debts was a rule that his subjects would be likely to accept consensually. In other words, the rule would have passed the test of a hypothetically voluntary exchange, which is the same analysis used in modern American jurisprudence to judge the ex post fairness of the compensation paid by the government for compelling a private party to enter into an involuntary exchange.<sup>30</sup> Grotius wrote:

This principle . . . is not so in conflict with nature that it could not have been introduced by custom and tacit consent, since sureties are bound without any cause, merely by their consent. It was hoped that members of the same society would be able through mutual relations to obtain justice from one another, and provide for their indemnification, more easily than foreigners, to whom in many places slight consideration is given. Hence the advantage derived from this obligation was common to all peoples, so that he who might now be burdened by it at another time might in turn be relieved.<sup>31</sup>

Similarly, Pufendorf argued that “a restitution to the citizens who have had their property taken away in this manner, should be arranged by those who contracted the debt.”<sup>32</sup> Put in terms of the economic analysis of law, the rule of international law that made subjects vicariously liable for the debts of their ruler promoted international

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28. GROTIUS, *DE JURE BELLI AC PACIS*, *supra* note 25, at 624.

29. *Id.* at 624.

30. In *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), Justice Frankfurter wrote for the Court: “The value compensable under [the Takings Clause of] the Fifth Amendment . . . is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent. But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place.” *Id.* at 5-6. *Accord*, *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

31. GROTIUS, *DE JURE BELLI AC PACIS*, *supra* note 25, at 624.

32. PUFENDORF, *supra* note 27, at 140.

flows of goods and capital by reducing the transaction costs incurred by creditors to collect delinquent foreign debts. Of course, one can imagine that this rule also imposed a certain fiscal discipline on a ruler, because he could expect that subjects who were made, upon threat of violence, to sacrifice their personal property to discharge his foreign debts might soon conspire to depose him in favor of a thriftier ruler. The implicit threats of revolution and regicide constrained the monarch.

“Reprisal” was the name given to the enforcement action taken to seize the private property of subjects to discharge their nation’s debt.<sup>33</sup> Grotius wrote that, while “the right of reprisals” was the phrase preferred “by the more modern jurists” to describe such an enforcement action, it was called “by the Saxons and Angles ‘withernam’, and by the French, among whom such seizure is ordinarily authorized by the king, ‘letters of marque’.”<sup>34</sup> Reprisals, wrote Pufendorf, “are frequently the prelude to wars.”<sup>35</sup> In this respect, the legal meaning of “reprisal” was considerably narrower than its colloquial meaning of retaliation. Reprisals could also be issued on the basis of the debts or deeds of private members of a community. The justification for this practice again rested on a theory of vicarious liability among the private citizens of a given nation. In the words of Harvard historian Albert Hindmarsh, writing in 1933, “a political community was composed of persons who were liable in person and property for the misdeeds of each other, so far as the interests of foreign individuals were affected.”<sup>36</sup>

One of the few treatises on the international law of privateering and capture extant when the Supreme Court decided the Quasi War cases was written in French by Georg Friedrich von Marten (also known as de Martens) in 1795 and translated into English by Thomas Hartwell Horne in 1801.<sup>37</sup> Horne published his own treatise in 1803, which drew extensively from de Martens’ work.<sup>38</sup> According to the

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33. *Id.*; GROTIUS, DE JURE BELLI AC PACIS, *supra* note 25, at 626.

34. GROTIUS, DE JURE BELLI AC PACIS, *supra* note 25, at 626-27.

35. PUFENDORF, *supra* note 27, at 140.

36. ALBERT E. HINDMARSH, FORCE IN PEACE: FORCE SHORT OF WAR IN INTERNATIONAL RELATIONS 46 (1933) (citations omitted).

37. GEORG FRIEDRICH DE MARTENS, AN ESSAY ON PRIVATEERS, CAPTURES, AND PARTICULARLY ON RECAPTURES, ACCORDING TO THE LAWS, TREATIES, AND USAGES OF THE MARITIME POWERS OF EUROPE (Thomas Hartwell Horne trans., London, E. and R. Brooke 1801) (1795) (in rare books collection of the Library of the Supreme Court of the United States).

38. THOMAS HARTWELL HORNE, A COMPENDIUM OF THE STATUTE LAWS, AND REGULATIONS OF THE COURT OF ADMIRALTY; RELATIVE TO SHIPS OF WAR, PRIVATEERS,

publisher of Horne's 1801 translation of de Martens,<sup>39</sup> only two other English treatises on the subject then existed: one published by Richard Lee in 1759<sup>40</sup> that was essentially a translation of Bynkershoek's 1737 treatise *Quaestionum Juris Publici*,<sup>41</sup> and another published by Charles Jenkinson in 1758.<sup>42</sup>

According to Horne's translation of de Martens, privateering consisted of "the expeditions of private individuals during war, who, being provided with a special permission from one of the belligerent powers, fit out at their own expense, one or more vessels with the principal design of *attacking the enemy*, and preventing neutral subjects or friends from carrying on with the enemy a commerce regarded as illicit."<sup>43</sup> Unlike a pirate, the privateer "is provided with a commission, or with letters of marque from a sovereign, of which the pirate is destitute."<sup>44</sup>

Unlicensed privateering developed centuries earlier as the order imposed by the Roman Empire crumbled in western Europe, and "the wars degenerated into a mere highway robbery."<sup>45</sup> Such privateering was one manifestation of the declining authority of sovereignty when the sovereign was weak. In the middle of the twelfth century, the rights and privileges of privateers were summarized in a document called the *Confolato de Mare*.<sup>46</sup> In the thirteenth and fourteenth centuries, as sovereigns began to fear that the waging of private warfare was getting out of hand, they created legal restrictions to inhibit the individual use of force at sea.<sup>47</sup> During this time, reprisals came to mean "the practice of individual self-help" in compliance with these new regulations.<sup>48</sup> Pirates preyed on maritime trade, and private associations were formed not only to defend commercial

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PRIZES, RE-CAPTURES, AND PRIZE MONEY WITH AN APPENDIX OF NOTES, PRECEDENTS, &C (London, W. Clarke and Sons 1803) (in rare books collection of the Library of the Supreme Court of the United States).

39. DE MARTENS, *supra* note 37, at v (advertisement by publisher of English translation).

40. RICHARD LEE, A TREATISE ON CAPTURES IN WAR (London, W. Sandby 1759).

41. CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI* (Lugduni Batavorum, Apud Joannem van Kerckhem 1737).

42. CHARLES JENKINSON, DISCOURSE ON THE CONDUCT OF THE GOVERNMENT OF GREAT BRITAIN IN RESPECT TO NEUTRAL NATIONS (1758).

43. DE MARTENS, *supra* note 37, at 1 (emphasis in original).

44. *Id.* at 2.

45. *Id.* at 4.

46. HORNE, *supra* note 38, at 1-2.

47. HINDMARSH, *supra* note 36, at 44.

48. *Id.*

vessels, but also to attack the enemy.<sup>49</sup> Without the protection of a strong sovereign, individual merchants who ventured beyond their local territory were forced to resort to self-help against maritime marauders.<sup>50</sup> “In the state of anarchy into which Europe saw herself plunged,” wrote de Martens in 1795, “the principle, that war is a right belonging to a sovereign alone, was forgotten.”<sup>51</sup>

The early rules of capture attempted to restrict the use of individual self-help, but when those restrictions proved ineffective, later rules established the practice of individual self-help as an institution.<sup>52</sup> During the middle of the fourteenth century, local authorities began issuing letters of marque and reprisal, or *chartae*, to Italian merchants against foreign debtors.<sup>53</sup> By the end of the century, the practice had spread throughout Western Europe.<sup>54</sup> Originally, letters of reprisal allowed only seizures within the local jurisdiction of a sovereign, whereas letters of marque allowed seizures beyond that jurisdiction, but over time the two terms became linked as claimants consistently applied for both.<sup>55</sup> These letters, wrote Hindmarsh, “authorized the holder to secure redress in a prescribed manner, usually by the seizure of goods or property of a stated value owned by any of the subjects of the offending community.”<sup>56</sup> The letters were frequently issued for a specific amount and contained an expiration date after which any seizure would be treated as piracy.<sup>57</sup> Property that was seized was brought into court to be condemned, with captors receiving the amount specified by the letter of marque and reprisal, and the remainder going to cover other costs.<sup>58</sup>

### *B. Privateering During the American Revolution*

Over time, as the growth of empire restored the power of sovereigns, the responsibility for reprisals moved from individuals to the state. In effect, wrote Hindmarsh, reprisals were nationalized in Europe:

With the rise of strong national states necessity for recourse to

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49. HORNE, *supra* note 38, at 1-2.

50. See HINDMARSH, *supra* note 36, at 43.

51. DE MARTENS, *supra* note 37, at 4.

52. HINDMARSH, *supra* note 36, at 48.

53. *See id.* at 49.

54. *Id.*

55. *Id.* at 51.

56. *Id.* at 49.

57. *Id.* at 50.

58. *Id.*

individual self-help was removed, for such states readily assumed immediate responsibility for the protection of their subjects' rights at home and abroad . . . . Individuals gradually abandoned private warfare and the issuance of letters of marque and reprisal in time of peace was thus rendered superfluous.<sup>59</sup>

During the eighteenth century, letters of marque and reprisal were issued with decreasing frequency. In 1778, as the emphasis shifted to public reprisals, the last private letters were granted in France.<sup>60</sup> According to Hindmarsh, during this time in Europe reprisals came to mean "coercive measures *taken by one state against another*, without belligerent intent, in order to secure redress for, or to prevent recurrence of, acts or omissions which under international law constitute international delinquency."<sup>61</sup>

During and immediately after the American Revolution, however, the situation in North America was entirely different. Letters of marque and reprisal, and the individuals who carried them, played an important role in securing the colonies' independence. The loosely united colonial government did not possess the military strength or the financial resources of its European counterparts. Consequently, the colonies relied upon privateers to supplement their weak navy. Rather than being used in combat, the ships of most American privateers were "armed and fitted out at private expense for the purpose of preying on the enemy's commerce to the profit of her owners."<sup>62</sup> Government vessels sometimes engaged in the same activity, but they were rewarded at different rates, with the owner and crew of a private ship receiving a larger portion of the proceeds from the sale of the captured ship than those of a government vessel.<sup>63</sup> The private ships proved to be an invaluable asset in the war for independence. There were only sixty-four government ships during the Revolution, but there were nearly eight hundred privately armed ships sailing under letters of marque and reprisal.<sup>64</sup> Government war vessels captured almost two hundred vessels, but privateers captured approximately six hundred vessels.<sup>65</sup>

The first European merchants sailing under letters of marque and

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59. *Id.* at 53.

60. *Id.*

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

62. EDGAR STANTON MACLAY, A HISTORY OF AMERICAN PRIVATEERS 7 (D. Appleton and Co. 1899).

63. *See id.* at 8-9.

64. *Id.* at viii.

65. *Id.*

reprisal had done so in self-defense or in search of restitution. The American privateers sailed for profit. Private ships received governmental authorization but no governmental funding, and thus were outfitted at their owners' expense.<sup>66</sup> Not surprisingly, private armed ships displayed an aversion to battle and usually avoided enemy warships, which "rarely carried the goods privateers sought."<sup>67</sup> During the Revolutionary War, ships sailing under American letters of marque and reprisal captured over \$10 million in British property (equivalent to roughly \$100 million to \$200 million in 2003 dollars).<sup>68</sup> The harm to British commerce was one of the most significant sources of internal dissent in Britain concerning continuation of the war. British merchants affected by the privateers opposed the war and carried their protests to Parliament.<sup>69</sup>

In his student commentary, Kevin Marshall emphasizes profit as the primary motivation of privateers.<sup>70</sup> Privateering was a business, with governmental supervision or regulation coming into play only through adjudication in the prize courts.<sup>71</sup> Privateers never served the same function of a private navy. Marshall therefore concludes that, at the time of the American Revolution, "letter[s] of marque and reprisal" meant "the governmentally sanctioned seizure of foreign property by private parties who received no government funding."<sup>72</sup> Marshall argues that the financial independence of privateers necessitated congressional regulation through the issuance of letters of marque and reprisal, for Congress's appropriations power could not control privateers, as it could a public navy.<sup>73</sup> He thus concludes that the purpose of the clause in Article I empowering Congress to issue letters of marque and reprisal was to "plug a hole in Congress's power of the purse."<sup>74</sup> In this respect, Marshall's argument is consistent with the proposition that Congress's exercise of its power to issue letters of

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66. Marshall, *supra* note 12, at 972 (citing J. CONTINENTAL CONG. 1774-89, at 229, 230 (Mar. 23, 1776)).

67. *Id.* at 968 (citation omitted).

68. MACLAY, *supra* note 62, at ix. To calculate the value in 2003 dollars of \$10 million in 1800, see <http://www.westegg.com/inflation/> (inflation calculator using data from U.S. GOV'T PRINTING OFFICE, HISTORICAL STATISTICS OF THE UNITED STATES (1975) and *Statistical Abstract of the United States*). To estimate the value in 2003 of \$10 million in 1776, see ROBERT SAHR, INFLATION CONVERSION FACTORS FOR DOLLARS 1665 TO ESTIMATED 2014, available at [http://oregonstate.edu/Dept/pol\\_sci/fac/sahr/sahr.htm](http://oregonstate.edu/Dept/pol_sci/fac/sahr/sahr.htm).

69. MACLAY, *supra* note 62, at xiii.

70. Marshall, *supra* note 12, at 963-66.

71. *Id.* at 963-66, 974-77.

72. *Id.* at 977.

73. *See id.* at 979-81.

74. *Id.* at 979.

marque and reprisal is an act of national sovereignty that need not create a tension, under the separation of powers, with the President's exercise of his powers as Commander-in-Chief.

C. *Letters of Marque and Reprisal under the Articles of Confederation and at the Constitutional Convention*

After America won the Revolutionary War, the former colonies established letters of marque and reprisal as an institution of the Republic. Article IX of the Articles of Confederation granted the Continental Congress not only the power to declare war, but more generally the "sole and exclusive right and power of determining on peace and war."<sup>75</sup> Article IX also gave the Continental Congress the power to "grant[] letters of marque and reprisal in times of peace."<sup>76</sup> Unlike the Constitution, the Articles of Confederation did not place the clause regarding letters of marque and reprisal in immediate textual proximity to the clause granting the power to determine peace and war.<sup>77</sup> This structure of drafting could indicate that, ten years before the drafting of the Constitution, the Republic's leaders did not closely associate letters of marque and reprisal with war powers. The inclusion of the phrase "in times of peace" also could indicate that "letters of marque and reprisal" had a peacetime meaning in 1777 that excluded them from being covered by "the sole and exclusive right and power of determining on peace and war." If that understanding is correct, it would seem to preclude the interpretation that the phrase "letters of marque and reprisal" encompassed any form of hostility short of a declared war.

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75. ARTS. OF CONFED. art. IX.

76. *Id.*

77. The relevant portion of, Article IX reads:

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

*Id.*

A corollary of the power to issue letters of marque and reprisal was the power to regulate how letters of marque and reprisal could be used. A well-developed body of law existed on the law of “prize,” which concerned the property rights associated with enemy and neutral ships carrying contraband captured at sea during war.<sup>78</sup> The Articles of Confederation gave the Continental Congress the power to establish “rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.”<sup>79</sup>

During the Constitutional Convention, the Framers made little mention of letters of marque and reprisal. Elbridge Gerry of Massachusetts proposed that Congress be given the power to grant letters of marque and reprisal, as he did not believe that this power was included in the power of war.<sup>80</sup> Gerry’s proposed addition passed unanimously in committee.<sup>81</sup> Jules Lobel has argued that “Gerry’s amendment indicated that he and others probably believed that any possible narrowness implied by the authority to ‘declare war’ [relative to the authority to “make war,” from which the language had been amended] made it necessary to include the use of force in time of peace among the enumerated congressional powers.”<sup>82</sup> Essentially, Lobel makes the argument that the Framers removed substantial war powers in changing the clause from “make war” to “declare war,” then immediately restored them by adding the power to grant letters of marque and reprisal. His argument is supported by the temporal proximity of Gerry’s proposal to the change from “make war” to “declare war.”

This proximity, however, does not explain the lack of debate over Gerry’s amendment. The Convention was divided into those who supported increased war powers for the executive and those who supported increased war powers for the legislature. The choice

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78. For treatises on the law of prize, see FRANCIS H. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR: WITH A REVIEW OF THE JURISDICTION, PRACTICE, AND PROCEEDINGS OF PRIZE COURTS* (F.B. Rothman 1988) (New York, J.S. Voorhies 1861); T. CLARK EDINBURGH, *CONTROVERSY CONCERNING THE LAW OF NATIONS* (1837); HENRY WHEATON, *A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES* (1815); JAMES MARRIOTT, *THE CASE OF THE DUTCH SHIPS, CONSIDERED* (London 1758).

79. ARTS. OF CONFED. art. IX.

80. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 326 (rev. ed. 1966).

81. *Id.* at 328.

82. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1060 (1986).

between granting the legislature the power “to make war” or the power “to declare war” generated much debate.<sup>83</sup> If the Framers had understood “letters of marque and reprisal” in accordance with Lobel’s interpretation, then Gerry’s proposal surely would have generated more debate than it did. To the contrary, the proposal passed unanimously, and the addition of the clause “to make rules as to captures on land and water” also passed unanimously.<sup>84</sup> Presumably, the Framers understood the phrases “Letters of Marque and Reprisal” and “Rules concerning Captures on Land and Water” in section 8 of Article I to embody the meanings imputed to “reprisal,” “letter of marque,” and “prize” in American legal usage and international law circa 1787, colored especially by the Framers’ own experiences with letters of marque and reprisal during the American Revolution and immediately afterwards under the Articles of Confederation.

Letters of marque and reprisal were mentioned twice in both the Articles of Confederation and the Constitution. In addition to clause 11 in section 8 of Article I granting Congress the power to issue letters of marque and reprisal, clause 1 in section 10 of Article I prohibits the states from granting letters of marque and reprisal.<sup>85</sup> The prohibition is another element taken from the Articles of Confederation, which included the same provision in its Article VI.<sup>86</sup> These two clauses in the Constitution illustrate that the Framers were able, when they so desired, to construct language that explicitly gave power to one governmental institution and denied power to another. Consequently, had the Framers understood the “letters of marque and reprisal” clause to allocate powers between the President and the Congress concerning undeclared war, their choice of wording to effect that delegation would have been clear.

Instead, the structure of the Articles of Confederation and the Constitution indicates that the Framers viewed the issuance of letters of marque and reprisal as a supremacy issue rather than a separation of powers issue. Letters of marque and reprisal were a state sanction of a private use of force. They represented a public denunciation of the actions of the target state. The decision about when to authorize the private use of force against a foreign sovereign or its citizens was one that the Framers did not assign to individual citizens or even

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83. See 2 FARRAND, *supra* note 80, at 318-19.

84. *Id.* at 315, 328.

85. U.S. CONST. art. I, § 10, cl. 1.

86. ARTS. OF CONFED. art. VI.

individual states. To have done otherwise might have complicated American relations with other nations or lead the nation into war.<sup>87</sup> In as many words, Vattel wrote that letters of marque and reprisal were an incident of national sovereignty and could only be issued by the national sovereign:

It is only between state and state that all the property of the individuals is considered as belonging to the nation. Sovereigns transact their affairs between themselves; they carry on business with each other directly, and can only consider a foreign nation as a society of men who have but one common interest. It belongs therefore to sovereigns alone to make and order reprisals on the footing we have just described. Besides, this violent measure approaches very near to an open rupture, and is frequently followed by one. It is, therefore, an affair of too serious a nature to be left to the discretion of private individuals. And accordingly we see, that in every civilized state, a subject who thinks himself injured by a foreign nation, has recourse to his sovereign, in order to obtain permission to make reprisals.<sup>88</sup>

It is reasonable to believe that this view of letters of marque and reprisal from 1758 informed the understanding of the Framers of both the Articles of Confederation and the Constitution.

Finding scant textual or historical support for the proposition that the phrase “letters of marque and reprisal” defines a residual category of all forms of hostility short of declared war, some contemporary scholars have turned to Blackstone and Story.<sup>89</sup> Jules Lobel, for example, quoted Story as saying that “the power to issue letters of marque and reprisal was ‘plainly derived from that of making war’” and cited Blackstone for a similar proposition.<sup>90</sup> These commentaries, he argued, support the notion that letters of marque and reprisal included all “warfare that either took the place of or led to a declared war.”<sup>91</sup> This claim is implausible, however, because it is inconsistent with the Constitution’s explicit grant of emergency war powers to the states to engage in self-defense or preemptive action without prior congressional authorization.<sup>92</sup> Moreover, writing in England in 1765,

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87. *Cf.* *Perpich v. Dep’t of Defense*, 496 U.S. 334 (1990) (prohibiting the governor of Massachusetts from placing limits on federal deployment of his state’s national guard).

88. VATTEL, *supra* note 23, at 284-85.

89. *E.g.*, Lobel, *supra* note 82, at 1090.

90. *Id.* (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 63 (Boston, 1833)); *id.* at 1090 n.253 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 250 (1765)).

91. *Id.* at 1090.

92. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of

Blackstone could not have predicted the extraordinary role that privateers would play in the American Revolution, more than a decade later. Conversely, it is not clear why Story, writing in 1833, should be regarded as more authoritative on the original understanding of “letters of marque and reprisal” than statements made (or conspicuously *not* made) 46 years earlier by the actual Framers of the Constitution.

Even if one assumes for the sake of argument that “making” war under the Articles of Confederation is identical to “declaring” war under the Constitution, it is not apparent that the Constitution’s grant to Congress of the power to issue letters of marque and reprisal is equivalent to the grant of all residual war powers. Although letters of marque and reprisal may be one type of activity that is evidence of hostility between nations, it is not the only form of activity, and there is no evidence that the Framers intended for the phrase “letters of marque and reprisal” to serve as a shorthand for all conceivable forms of hostility that were not predicated on a prior declaration of war. Indeed, the precision of the language used in other places in the Constitution, and the explicit phrasing used in the Articles of Confederation to grant more expansive war powers, undermine that proposition.

### III. THE PRIZE CASES FROM THE QUASI WAR OF 1798-1800

*Bas v. Tingy*, *Talbot v. Seeman*, and *Little v. Barreme* were prize cases that arose during the Quasi War between France and the United States. Contrary to the meaning that the D.C. Circuit and contemporary scholars may impute to these cases, this trio of early Supreme Court decisions did not implicate the constitutional separation of powers between Congress and the President on the question of waging undeclared war.

#### A. *The Undeclared Quasi War with France*

In consideration for the aid that France was providing the colonies during the American Revolution, the United States entered into two treaties with France in 1778.<sup>93</sup> After the French Revolution began and King Louis XVI was executed, the rest of Europe, led by England, waged war on France. France sought aid from the United States, pursuant to the treaty of 1778. Torn between ties to Great Britain and

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*delay.”* (emphasis added).

93. See *Gray v. United States*, 21 Ct. Cl. 340, 350-51 (1886).

promises to France, President Washington issued a proclamation of neutrality in 1793, promising friendship to all belligerent powers. This neutrality, however, became untenable when France began capturing American vessels in the course of waging war against the other European powers.

In the Quasi War of 1798 to 1800, President John Adams did not seek and Congress did not issue a formal declaration of war against France in response to her seizure of American ships. Instead, Congress authorized reprisals against French vessels. On June 13, 1798, Congress passed An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof<sup>94</sup> and An Act in Addition to the Act More Effectually to Protect the Commerce and Coasts of the United States.<sup>95</sup> On June 25, 1798, Congress enacted a statute authorizing the President to defend American merchant ships against French depredations.<sup>96</sup> On July 7, 1798, Congress abrogated the American treaties with France<sup>97</sup> and, on July 9, authorized the President “to subdue, seize and take any armed French vessel.”<sup>98</sup> The same month, the United States had its first naval victory in the Quasi War when the *Delaware* captured the French schooner *Croyable* off the coast of New Jersey.<sup>99</sup> On February 9, 1799, Congress passed An Act Further to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof—legislation which permitted the President to order the seizure of any vessel (including American vessels) that participated in illicit commerce with France.<sup>100</sup> The same day, the American warship *Constellation* defeated the

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94. Act of June 13, 1798, ch. 53, 1 Stat. 565.

95. Act of June 28, 1798, ch. 62, 1 Stat. 574.

96. Act of June 25, 1798, ch. 60, 1 Stat. 572. See also ALEXANDER DECONDE, THE QUASI WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-1801, at 124-130 (1966) (discussing the course of U.S. naval involvement in the Quasi War); Simeon E. Baldwin, *The Share of the President of the United States in a Declaration of War*, 12 AM. J. INT’L L. 1, 2 (1918) (discussing the limited nature of the Quasi War, the first international war in which the United States was engaged following the adoption of the Constitution).

97. Act of July 7, 1798, ch. 67, 1 Stat. 578.

98. Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578. Shortly thereafter, Congress passed An Act to Amend the Act Entitled “An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof.” Act of July 16, 1798, ch. 88, 1 Stat. 611.

99. The Navy’s First Fights and Heroes, at <http://www.mariner.org/usnavy/05/05f.htm> (2000).

100. Act of Feb. 9, 1799, ch. 2, § 5, 1 Stat. 613. The statute passed by a vote of 55 to 37. 9 ANNALS OF CONG. 2791 (1799).

French ship *L'Insurgente* in the Caribbean.<sup>101</sup> On March 2, 1799, Congress passed An Act for the Government of the Navy of the United States, which in no way constrained the President's authority to wage war on French ships.<sup>102</sup> On February 27, 1800, Congress passed yet another Act Further to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof.<sup>103</sup> Finally, when France and the United States negotiated peace, Congress passed a Convention with France on September 30, 1800.<sup>104</sup> President Adams did not veto any of the bills creating these statutes.

Even from these bare facts, it is clear that, unlike much of the debate over the constitutionality of the Vietnam War, the Quasi War cases were preceded by many rounds of legislation over a two-year period manifesting a clear agreement of purpose between Congress and the President. The existence of such agreement can tell us nothing about whether the President could have commanded similar military action in the absence of legislation or in the face of legislation purporting to forbid, constrain, or disapprove of such military action. From Charles Warren's 1926 account of the history of the Supreme Court, it would appear that the only separation of powers overtones in *Bas* and *Talbot* arose from the political friction between President Jefferson's Republican lawyers and President Adams's Federalist appointees to the judiciary—and not from any dispute between the President and Congress.<sup>105</sup> Warren described *Bas* as a case “of slight historical importance.”<sup>106</sup> David Currie ignored the cases in his treatise on significant decisions of the Supreme Court during the nation's first hundred years,<sup>107</sup> and Laurence Tribe's treatise on constitutional law made no mention of the three cases.<sup>108</sup>

### B. *The Facts, Holding, and Dicta of the Quasi War Cases*

A simple reading of the Quasi War cases confirms that they

101. Birth of the American Navy Timeline, at <http://www.mariner.org/usnavy/11.htm> (2000).

102. Act of Mar. 2, 1799, ch. 24, 1 Stat. 709.

103. Act of Feb. 27, 1800, ch. 10, 2 Stat. 7.

104. Convention of Peace, Commerce, and Navigation, Sept. 30, 1800, U.S.-Fr., 18 Stat. 224.

105. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 156-57, 198-200 (rev. ed. 1926).

106. *Id.* at 156.

107. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 (1985).

108. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

established no significant interpretation of the constitutional allocation of the war powers among Congress and the President.

1. *Bas v. Tingy*

John Bas was the master of the cargo ship *Eliza*, belonging to American citizens, and Tingy was the commander of the American public armed ship *Ganges*. On March 31, 1799, a French privateer captured the *Eliza* on the high seas. On April 21, 1799, the *Ganges* recaptured the *Eliza* from the privateer, and under the law of capture Tingy accrued rights of salvage against the *Eliza*. At issue in *Bas v. Tingy* was whether Tingy was entitled to one-half the value of the *Eliza* and its cargo, or merely one-eighth.<sup>109</sup> The district court decreed that Tingy was entitled to one-half, and the circuit court affirmed after the parties waived oral argument to expedite review in the Supreme Court.<sup>110</sup>

*Bas* was a case of statutory construction, not constitutional interpretation. The precise legal question was whether one prize statute repealed another by implication. The earlier statute, enacted by Congress on June 28, 1798, provided:

That whenever any vessel the property of, or employed by any citizen of the United States, or person resident therein, or any goods or effects belonging to any such citizen or resident shall be re-captured by any public armed vessel of the United States, the same shall be restored to the former owner or owners, upon due proof, he or they paying and allowing, as and for salvage to the recaptors, one eighth part of the value of such vessel, goods and effects, free of all deductions and expenses.<sup>111</sup>

The newer statute, enacted by Congress on March 2, 1799, was more generous to those effecting recapture:

That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation, in amity with the United States, if retaken from the enemy within twenty-four hours, the owners are to allow one eighth part of the whole value for salvage . . . and if above [ninety-six hours], one half, all of which is to be paid without any deduction whatsoever.<sup>112</sup>

In addition, in a provision that would assume unexpected interpretative significance, this newer statute further provided: "That

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109. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 37 (1800).

110. *Id.*

111. Act of June 28, 1798, ch. 62, §2, 1 Stat. 574.

112. Act of Mar. 2, 1799, ch. 24, § 7, 1 Stat. 716.

all the money accruing, or which has already accrued from the sale of prizes, shall be and remain for ever a fund for the payment of the half pay to the officers and seamen, who may be entitled to receive the same.”<sup>113</sup>

The *Ganges* recaptured the *Eliza* more than 96 hours after its capture by French privateers. Bas therefore stood to lose half the value of the *Eliza* and its cargo. Not surprisingly, he argued that the later statute did not apply. Tingy, on the other hand, stood to quadruple the size of his prize for recapturing the *Eliza* if the later statute applied rather than the earlier one. So, also not surprisingly, Tingy argued that the later statute repealed by implication any provisions to the contrary in the earlier statute.

Bas’s main legal argument rested on construing the words “the enemy” in the Act of March 2, 1799. As summarized by *Cranch’s Reports*, Bas’s argument was: “That the word ‘enemy,’ must be construed according to its legal import; and that according to legal interpretation, the differences between the United States and France, do not constitute war, nor render the citizens of France enemies of the United States.”<sup>114</sup> Tingy’s main legal argument consisted of showing that the Act of March 2, 1799 could only be addressed to enemies, because it specifically mentioned, in section 9, the right of prize, which only accrues during war.<sup>115</sup>

On August 15, 1800, the Supreme Court decided *Bas v. Tingy*.<sup>116</sup> It held that the right of prize existed because the hostilities between the two countries constituted “war” despite the absence of a formal declaration of war by the United States against France (or vice versa).<sup>117</sup> Although the decision was unanimous, Justices Moore, Washington, Chase, and Paterson each filed opinions. Justice Washington distinguished “perfect and general war” from “imperfect and limited war,”<sup>118</sup> a dichotomy commonly (though somewhat mysteriously) attributed to the writings of Grotius and Vattel.<sup>119</sup>

113. *Id.* § 9.

114. *Bas*, 4 U.S. (4 Dall.) at 38 (citation and emphasis omitted) (summarizing arguments of counsel).

115. *See id.* at 38.

116. *Id.* at 37.

117. *Id.* at 45-46; *see also* Clyde Eagleton, *The Attempt to Define War*, INT’L CONCILIATION, June 1933, at 9, 46 (stating that although France did not view the situation with the United States as war, the Supreme Court in *Bas* did); Lofgren, *supra* note 5, at 701 (discussing that the distinction in types of war are no less war as stressed in *Bas*).

118. *Bas*, 4 U.S. (4 Dall.) at 40-41.

119. The principal discussions by Grotius and Vattel of the categories of war do not

According to Vattel, a lawful war, or a war in form, required a declaration of war on the part of the attacking party and a demand for satisfaction.<sup>120</sup> In contrast, an unlawful war was one that was “undertaken either without lawful authority or without apparent cause, as likewise without the usual formalities, and solely with a view to plunder.”<sup>121</sup> Justice Washington adopted this distinction, stating that a war “declared in form” was of the perfect kind and allowed all members of one hostile nation “to commit hostilities against all the members of the other, in every place, and under every circumstance.”<sup>122</sup> He differed from Vattel in his description of an imperfect war, which he depicted as “confined in its nature and extent; being limited as to places, persons, and thing . . . because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.”<sup>123</sup> Justice Chase said that “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and, in time.”<sup>124</sup> In dicta, Justice Paterson found that the type of “modified warfare” to which Justices Washington and Chase referred had constitutional origins and that so long as “congress tolerated and authorised [it, the nation could] . . . proceed in hostile operations.”<sup>125</sup>

Saying that Congress has the power to authorize limited war does not necessarily imply that it holds that power exclusively. The President might share the power to wage limited war, although Lofgren has asserted that this implication should be rejected by virtue of the dichotomy in *Bas* between general war and limited war.<sup>126</sup> The historical practice—that Congress has rarely declared war despite numerous deployments of force—is made more explicable as a matter of constitutional law if one reads *Bas* as a case about national sovereignty rather than a case about the separation of powers. *Bas* might simply have anticipated the kind of reasoning that Justice

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contain this precise dichotomy. See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 314-22 (Archibald H. Campbell ed., 1901) (1625); VATTEL, *supra* note 23, at 291-93. Vattel distinguishes between public wars and private wars, a distinction not relevant to Justice Washington’s analysis.

120. VATTEL, *supra* note 23, at 318-19.

121. *Id.* at 319.

122. *Bas*, 4 U.S. (4 Dall.) at 40.

123. *Id.*

124. *Id.* at 43. Justice Chase misspoke. Congress does not wage war. The Commander in Chief does.

125. *Id.* at 45.

126. See Lofgren, *supra* note 5, at 701-02.

Sutherland expounded more than a century later in *United States v. Curtiss-Wright Export Corp.*,<sup>127</sup> that the power to use limited military force belongs to the federal government as an incident to the sovereignty of the United States, regardless of whether the Constitution expressly lists a power (in either Article I or Article II) to use such force:

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America . . . . A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense . . . . The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.<sup>128</sup>

Thus, *Bas* may simply acknowledge that there exists a form of undeclared war, which although “authorized” by Congress, can nonetheless be directly waged by the President as Commander-in-Chief without formal, prior congressional authorization. Any subsequent “authorization” by Congress of such warfare would be merely hortatory.<sup>129</sup>

The Court’s finding in *Bas* that a state of war existed led to a decision in *Tingy*’s favor. The Court held that, at the time of the *Eliza*’s capture, France constituted an enemy of the United States, and thus the Act of March 2, 1799 was found to be applicable.<sup>130</sup> Consequently, *Tingy* was awarded salvage in the amount of one-half the value of the *Eliza* and its cargo. Even in determining that the United States was in a state of war for the purposes of invoking a salvage statute, the Court in *Bas* did not address whether a presidential action amounts to an unconstitutional usurpation of congressional war power. *Bas* dealt with conflicting acts of Congress. *Bas* did *not* concern an act of the President that conflicts with an act of Congress. Consequently, *Bas* is more significant for what the Court did not decide—how the Constitution divides between Congress and the President the power to commit the nation to waging limited war.

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127. 299 U.S. 304, 319-20 (1936).

128. *Id.* at 316-18.

129. See J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 33, 61, 120 (1991).

130. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40, 43, 45-6. (1800).

2. *Talbot v. Seeman*

On September 15, 1799, the American warship *Constitution* recaptured the foreign ship *Amelia* from the French while it sailed from Calcutta to Hamburg,<sup>131</sup> and brought the *Amelia* into port in New York. Captain Silas Talbot then filed suit on behalf of the crew of the *Constitution* for salvage. Hans Frederic Seeman answered the suit for the owners of the *Amelia*, Messrs. Chapeau Rouge & Co. of Hamburg.

The French corvette *La Diligente* under the command of L.J. Dubois captured the *Amelia* two weeks before its recapture by the *Constitution*. Dubois had replaced the *Amelia*'s crew with French mariners and placed the ship under the command of a prize master, sending her to St. Domingo for adjudication under the laws of war. At the time of both captures, Hamburg was at peace with both the United States and France.

Congress had passed no statute addressing neutral armed ships under the command of the enemy. Consequently, questions arose in the case over whether the recapture was legal; if legal, whether a meritorious service was performed that would justify salvage; and, if salvage were justified, how the amount to be paid would be determined. The district court restored the *Amelia* to her owners and ordered them to pay Talbot salvage in the amount of one-half of the value of the ship and cargo.<sup>132</sup> The circuit court reversed and ordered restoration of the ship to her owners without payment of salvage.<sup>133</sup>

Talbot argued to the Supreme Court that the capture was lawfully undertaken pursuant to several acts of Congress authorizing the capture of armed French ships.<sup>134</sup> As the *Amelia* was armed and under French control at the time of its recapture by the *Constitution*, Talbot reasoned that the *Amelia* was as much a threat as any armed ship that the French rightfully owned. Talbot believed that he had performed a service for the owners of the *Amelia*, as he had saved their ship from condemnation under the laws of war.<sup>135</sup> Seeman argued in opposition that the capture was unlawful on the ground that the *Amelia* was neutral.<sup>136</sup> Even if the capture had been lawful, it provided no service

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131. Hamburg, or Hamburg, was a province before unification of Germany. For additional background on *Talbot*, see MACLAY, *supra* note 62, at 91.

132. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 27 (1801).

133. *Id.*

134. *Id.* at 6.

135. *Id.*

136. *Id.* at 11.

to the *Amelia*'s owner that would justify an award of salvage. The French had captured the vessel for a lawful detention; and, as the *Amelia* was neutral, Seeman reasoned that the French would have restored the ship and its cargo.<sup>137</sup>

Writing for the Court in a decision delivered August 11, 1801, Chief Justice Marshall acknowledged that no statute specifically addressed the issue of "a neutral armed vessel which has been captured, and which . . . is commanded and manned by Frenchmen."<sup>138</sup> Nonetheless, the particular circumstances of the case provided probable cause for Talbot to capture the ship and bring her to port for adjudication under the laws pertaining to the capture of French vessels. Chief Justice Marshall found that a state of partial war, like a state of general war, justified the seizure of a "vessel met with at sea . . . in the condition of one liable to capture."<sup>139</sup> The *Amelia* was armed and manned by the French; it was almost impossible for Talbot to determine the vessel's neutral character. Therefore, the Court held that the recapture was lawful.<sup>140</sup>

Chief Justice Marshall then determined whether the recapture was sufficiently meritorious to warrant salvage. The general rule was that "neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from recapture; and ought not therefore to pay salvage."<sup>141</sup> Chief Justice Marshall reasoned that the relevance of the rule depended on whether the laws of the belligerent nation manifested a policy of promptly releasing neutral vessels.<sup>142</sup> The Court allowed several decrees of the French government to be read and noticed, as they were the public laws of a foreign nation, rather than private laws that would have had to have been proven as facts. Chief Justice Marshall applied a French law stating that the character of a ship, whether it be neutral or belligerent, would be determined by the cargo of the ship. He concluded that the *Amelia* may have been in danger in a French court, as it contained cargo from Bengal that may have been considered a possession of England.<sup>143</sup> As the fate of the *Amelia* was uncertain so long as she was under French control, the Court held that Talbot had performed a meritorious service worthy of

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137. *Id.*

138. *Id.* at 31.

139. *Id.* at 31-32.

140. *Id.* at 32.

141. *Id.* at 37.

142. *Id.*

143. *Id.* at 38-39.

salvage, the amount of which should be calculated according to the risk that Talbot incurred in effecting recapture and the benefit that the *Amelia*'s owners received.<sup>144</sup> Taking these factors into consideration, the Court awarded salvage in the amount of one-sixth of the value of the *Amelia* and her cargo.

The Court in *Talbot* reaffirmed the dichotomy in *Bas* between general and limited war, but it did so with no explanation of the legal significance of that distinction.<sup>145</sup> Chief Justice Marshall noted that "congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."<sup>146</sup> Consequently, in directing the Court's analysis of the relations between France and the United States at the time of the *Amelia*'s recapture, Marshall limited his analysis to acts of Congress on the subject. In dictum, he justified this limitation of inquiry by saying that "the whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry [as to whether a state of war existed]."<sup>147</sup> Scholars have frequently quoted this passage as evidence that the Framers saw a limited role for the executive with respect to war powers.<sup>148</sup> However, it is debatable whether Marshall even intended the broad view of congressional powers concerning undeclared war that a simple reading of the passage might imply. Marshall was capable of making equally sweeping, yet inaccurate, statements concerning the expanse of executive powers. Only a year before writing the decision in *Talbot*, before his appointment to the Supreme Court, Marshall gave a speech in the House of Representatives in which he famously called the President "the sole organ of the nation in its external relations."<sup>149</sup> It is likely that in both instances Marshall meant to limit the scope of the statements to the

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144. *Id.* at 44-45.

145. *See id.* at 8-9.

146. *Id.* at 28.

147. *Id.*

148. *See, e.g.,* Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers*, 157 MIL. L. REV. 180, 208 (1998) (stating that the focus in *Talbot* on the acts of Congress, rather than the President's orders, demonstrates that Congress is the exclusive authority on the scope of hostilities); H. Lee Halterman, et al., *Commentary, The Fog of War [Powers]*, 37 STAN. J. INT'L L. 197, 198 (2001) (citing *Talbot* to demonstrate that the Framers intended that all war powers are vested in Congress); William M. Treanor, *Fame, Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 725 (1997) (using *Talbot* to support the notion that Congress alone has the power to declare war).

149. John Marshall, Speech in the House of Representatives (Mar. 7, 1800), *cited in* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

particular powers that were being discussed, thus speaking only of the power to declare war in saying “the powers of war” and only intending to discuss the President’s role as America’s spokesman to foreign nations in saying that the President has ultimate authority over the “external relations” of the United States.

If one interprets this most familiar passage in *Talbot* as saying that the Constitution vests all powers related to war in Congress, then the passage is erroneous on its face. The President is the Commander-in-Chief<sup>150</sup> and exercises the power to negotiate treaties, which are then subject to Senate ratification.<sup>151</sup> It would be a non sequitur for a broad definition of the “whole powers of war” to exclude from the bundle of war powers such important specifics as the power to wage war through command of the armed forces and the power to end war through the negotiation of treaties. In short, it is implausible to interpret *Talbot*, based on one sentence of dicta, as a case delimiting presidential powers concerning undeclared war, when the President was not even involved in the suit and no tension was evident between the legislative and executive branches.

### 3. *Little v. Barreme*

Unlike *Talbot* and *Bas*, the third Quasi War case concerned the damages owed the owner of an erroneously captured ship, rather than the salvage owed the lawful captors of a ship. Captain George Little commanded the U.S. frigate *Boston*. On December 2, 1799, the *Boston* captured *The Flying-Fish*, a Danish ship carrying Danish and neutral cargo, as it sailed from Jeremie to the Danish port of St. Thomas in the Virgin Islands. Little was acting under executive orders in enforcing the non-intercourse law that prohibited American vessels from journeying to French ports, a statute that Little suspected *The Flying-Fish* of violating.<sup>152</sup> The district court ordered restoration of the ship and cargo, but declined to award damages for capture and detention.<sup>153</sup> The circuit court reversed and awarded damages, on the rationale that the capture would have been unlawful even if *The Flying-Fish* had been an American vessel.<sup>154</sup>

At issue was whether Little should be held personally liable for actions he took as a result of a conflict between an act of Congress

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150. U.S. CONST. art. II, § 2, cl. 1.

151. *Id.* cl. 2.

152. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170-71 (1804).

153. *Id.* at 172.

154. *Id.* at 175.

delegating power to the President and the executive interpretation of that act. The statute, passed by Congress on February 9, 1799, read:

That it shall be lawful for the President of the United States, to give instructions to the commanders of the public armed ships of the United States, to stop and examine any ship or vessel of the United States on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French Republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel to seize every [such] ship . . . .<sup>155</sup>

To implement the act, the Secretary of the Navy issued orders to the commanders of armed vessels that contained a copy of the act and these instructions:

You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States, and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.<sup>156</sup>

Writing again for the Court, in a decision rendered on February 27, 1804, Chief Justice Marshall acknowledged that the statute would be difficult to enforce if the navy could seize only vessels sailing to French ports. He suggested that the executive orders might have been a more effective means of achieving the objectives of the act.<sup>157</sup> Nonetheless, Congress had “prescribed . . . the manner in which [the] law [should] be carried into execution,” and the executive orders misconstrued the unambiguous language of the act.<sup>158</sup> The question remained whether the captor, Captain Little, acting pursuant to the executive orders, could be excused for an otherwise unlawful act on the grounds of official immunity.<sup>159</sup>

Chief Justice Marshall noted the argument that, because the military hierarchy requires obedience to superiors, members of the military acting under orders should be immune from tort liability.

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155. Act of Feb. 9, 1799, ch. 2, § 5, 1 Stat. 613.

156. Instructions Issued by the Secretary of the Navy (Mar. 12, 1799), *cited in* Little v. Barreme, 6 U.S. (2 Cranch) 170, 178 (1804) (emphasis omitted).

157. *Little*, 6 U.S. (2 Cranch) at 178.

158. *Id.* at 177-78.

159. *Id.* at 178.

Despite those reservations, “the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”<sup>160</sup> Instead, he said that claims for damages should be brought against the government. Thus, the Court affirmed the circuit court’s decision holding Little liable for damages to the owner of *The Flying-Fish*.<sup>161</sup>

Although the finding that the order issued by the Secretary of the Navy was unlawful was integral to the holding of *Little*, the Court offered little explanation as to why the order was unlawful. Rather, the Court merely asserted the order’s illegality and mentioned the discrepancy between the order and the statute. John Yoo has insightfully argued that the case never reaches the issue of “the President’s inherent authority to order captures going beyond Congress’ commands,” because the Court was not asked to enjoin the President’s order, but only to hold Little liable.<sup>162</sup> Indeed, in one passage, Chief Justice Marshall went out of his way to leave the issue undecided when he indicated that the order might not have been illegal had the statute not been so explicit as to its nature and purpose. He explained:

It is by no means clear that the president of the United States whose high duty it is to “take care that the laws be faithfully executed,” and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.<sup>163</sup>

He then said that when the legislature has prescribed the exact manner in which a law should be executed, the executive should be given no leeway for a different construction of the statute.<sup>164</sup> Chief Justice Marshall’s statements indicate that, when Congress has spoken, the President must abide by congressional will. His negative implication, however, was that congressional silence leaves the President free to act.

Absent from the majority opinion is any explicit discussion of the

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160. *Id.* at 179.

161. *Id.*

162. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 294-95 n.584 (1996).

163. *Little*, 6 U.S. (2 Cranch) at 177.

164. *See id.* at 178.

maritime war between France and the United States or the division of war powers between the Congress and the President. Unlike the circuit court decision, the majority opinion for the Supreme Court does not use the word “war” at all. Instead, the Court treated the case as an example of the President improperly executing the law, rather than overstepping his power to wage war. This omission seems significant in light of the fact that *Little* is frequently cited as a case limiting presidential war powers. The statute at issue in *Little* authorized the seizure of only *American* vessels. The act prohibited American vessels from docking at French ports, but it did not endorse the use of public armed ships against French vessels. Thus, although the impetus for the non-intercourse act was clearly the hostile relations between France and the United States, the lopsidedness in the authorization to use seizure may indicate that the Court instead viewed the provisions of the act as primarily pertaining to Congress’s power to regulate commerce with other nations. The Court may have reasoned that, regardless of motivation, in proscribing commerce with France, Congress was acting within its rights, and in overstepping Congress’s mandate, the President was acting outside of his. If this were the rationale, it still would not affect the President’s power to wage war.

#### IV. THE D.C. CIRCUIT’S READING OF THE QUASI WAR CASES

In the two centuries following the Quasi War cases, the Supreme Court rarely cited them as precedent in cases dealing with presidential powers. The early opinions using the cases dealt with rules in maritime law<sup>165</sup> ranging from how the belligerent nature of a ship would be determined<sup>166</sup> to whether salvage would be allowed for neutral property.<sup>167</sup> *Talbot* was cited numerous times for the rule that private laws of a foreign nation had to be proven as fact, while public laws could be read as law.<sup>168</sup> The Supreme Court repeatedly cited

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165. See *The Paquete Habana*, 189 U.S. 453, 465 (1902) (distinguishing *Little* in holding that the federal government could be liable for damages for an illegally seized ship); *The Connemara*, 108 U.S. 352, 357 (1883) (citing *Talbot* in holding that salvage could be awarded even if the vessel were able to escape by other means).

166. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 94-95 (1804) (citing *Talbot* for the rule that a ship that is not substantially armed is not a threat to commerce); *The Panama*, 176 U.S. 535, 546 (1900) (citing *Talbot* for the rule that the initial defensive armament of a ship did not determine its neutrality).

167. See, e.g., *The London Packet*, 15 U.S. (2 Wheat.) 371 (1817); *The Eleanor*, 15 U.S. (2 Wheat.) 345 (1817).

168. See, e.g., *Ennis v. Smith*, 55 U.S. (14 How.) 400, 401 (1853); *Hanley v. Donoghue*, 116 U.S. 1, 4 (1885); *Eastern Bldg. & Loan Ass’n v. Williamson*, 189 U.S.

*Little* for the proposition that although the United States is exempt from suit, individual officers of the government could be sued.<sup>169</sup> From the middle of the Nineteenth Century until the end of the Twentieth Century, all three of the Quasi War cases were cited by the Court for varying propositions unrelated to the constitutional interpretation found by scholars defending expansive congressional war powers.<sup>170</sup>

*Youngstown Sheet & Tube Co. v. Sawyer*<sup>171</sup> and *In re Cooper*<sup>172</sup> include the two Supreme Court citations of *Little* that could best be used to support a restrictive view of presidential powers. Neither citation, however, is binding precedent. In *Youngstown*, *Little* is cited in Justice Clark's concurrence as evidence of statutory limitations on presidential powers in finding that President Truman lacked the authority to seize privately owned steel mills in the absence of congressional authorization.<sup>173</sup> In *Cooper*, *Little* was cited by counsel, in a statement that was then qualified by the Court, as supporting the proposition that "without the clear authority of the law of Congress, the executive can never . . . conclude the rights of persons or property under the protection of the Constitution and laws of the United States."<sup>174</sup> Both citations support an interpretation of *Little* that is not relevant to the allocation of *war* powers between Congress and the President, as neither mentions the state of hostilities between France and the United States as being relevant to the *Little* decision.

122, 125 (1902).

169. See, e.g., *Garland v. Davis*, 45 U.S. (4 How.) 131, 149 (1846); *Belknap v. Schild*, 161 U.S. 10, 18 (1896). *But cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 289 (1990) (citing *Talbot* and *Little* as examples of individual officers being held liable for exceeding congressional orders in order to illustrate that the congressional orders were not invalid).

170. See *United States v. King*, 48 U.S. 833, 865 (1849) (citing *Talbot* to support the rule that findings of fact are made by the district court and followed as part of the record); *Stacey v. Emery*, 97 U.S. 642, 646 (1878) (citing *Talbot* as an example of an opinion in which "reasonable cause of seizure" and "probable cause" meant the same thing); *Montoya v. United States*, 180 U.S. 261, 267 (1901) (citing *Bas* to support a ruling that no compensation would be given for property taken from citizens by Indian bands "at war" with the United States); *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (citing *Talbot* for the proposition that the law of war used in the United States includes the law of nations); *United States v. Wise*, 370 U.S. 405, 414 (1962) (citing *Talbot* for the proposition that how a law is interpreted by a Congress after the one that passed the law is not relevant to construing the law); *Hunter v. Erickson*, 393 U.S. 385, 388 (1969) (citing *Talbot* for the proposition that a law should be read together with later laws on the same subject); *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) (citing *Little* as an example of how changes in legal rules may make a warrant necessary for reasonableness).

171. 343 U.S. 579 (1952).

172. 143 U.S. 472 (1892).

173. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 660-61 (Clark, J., concurring).

174. *Cooper*, 143 U.S. at 499-500.

The only instance in which it could be said that a member of the Supreme Court issued a decision that was in harmony with the constitutional interpretation of the Quasi War cases put forth by Lofgren and his followers is the 1973 decision in *Holtzman v. Schlesinger*.<sup>175</sup> A member of the House of Representatives and several Air Force officers brought suit for an injunction against the government to stop military air operations over Cambodia during the Vietnam War. The district court held for the plaintiffs and permanently enjoined the defendants from further participation in military operations in Cambodia.<sup>176</sup> The court of appeals granted the defendants a stay of the injunction pending further review.<sup>177</sup> The case was heard by Justice Thurgood Marshall, acting as Circuit Justice, when the plaintiffs applied to vacate the stay. Justice Marshall denied the application to vacate the stay because of the complexity of the issues involved as well as a lack of authoritative precedent, which required a hearing before a full court.<sup>178</sup> Despite the manner in which he disposed of the case, Justice Marshall indicated his agreement with appellant counsel's contention, supported by citations of *Bas* and *Talbot*, that "the President is constitutionally disabled in nonemergency situations from exercising the warmaking power in the absence of some affirmative action by Congress."<sup>179</sup> He then proceeded to quote the passage from Chief Justice John Marshall's opinion in *Talbot* asserting that all war powers are vested in Congress<sup>180</sup> and to say that, in his personal opinion, the military actions in Cambodia were unconstitutional.<sup>181</sup>

In late 2000 in *Campbell v. Clinton*,<sup>182</sup> the D.C. Circuit breathed new life into the view that the Quasi War cases delimit the war powers of the President. In 1999, President Clinton deployed U.S. forces in NATO air strikes against Yugoslavia in response to Yugoslav (Serbian) actions in Kosovo.<sup>183</sup> Two days after the attacks began, he submitted a report to Congress "consistent with the War Powers Resolution" that set forth his reasons for using armed

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175. 414 U.S. 1304 (1973).

176. *Id.* at 1304.

177. *Id.*

178. *Id.* at 1305.

179. *Id.* at 1308, 1311.

180. *Id.* at 1312.

181. *Id.* at 1313.

182. 203 F.3d 19 (D.C. Cir. 2000).

183. *Id.* at 20.

forces.<sup>184</sup> Congress then voted on four resolutions concerning Yugoslavia. Congress voted down a declaration of war and an official authorization of the conflict, but voted in favor of funding the operation and against requiring an immediate end to the conflict.<sup>185</sup> The conflict lasted for more than sixty days before Yugoslavia agreed to withdraw forces from Kosovo.<sup>186</sup>

Before the withdrawal of Yugoslav forces, thirty-one members of Congress—led by Representative Tom Campbell, a Republican from California and a former Stanford law professor—sued for a declaratory judgment that President Clinton's use of armed forces was unlawful under the War Powers Resolution and unconstitutional under the War Powers Clause.<sup>187</sup> Professor Jules Lobel represented these members of Congress and argued that since the President did not receive congressional authorization, the War Powers Resolution obligated Clinton to terminate the use of armed forces within sixty days of submitting his report.<sup>188</sup> In response, President Clinton's lawyers argued that these members of Congress lacked standing and that the case was both moot and non-justiciable.<sup>189</sup> The district court dismissed the case for lack of standing, and the D.C. Circuit affirmed in an opinion by Judge Laurence Silberman.<sup>190</sup>

Judge Raymond Randolph agreed that members of Congress lacked standing, but he also wrote in his concurrence that the case should have been dismissed for mootness.<sup>191</sup> He made a passing citation of

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184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* (citing 50 U.S.C. §§ 1541-48; U.S. CONST. art I, § 8, cl. 11).

188. *Id.*

189. *Id.*

190. *Id.* at 20-22. For guidance on congressional standing, the D.C. Circuit relied on *Coleman v. Miller*, 307 U.S. 433 (1939), and *Raines v. Byrd*, 521 U.S. 811 (1997). In *Coleman*, the Court held that legislators who have sufficient votes to control the success or failure of a resolution have a legal interest in keeping their votes effective. 307 U.S. at 338, 346. In *Raines*, individual congressmen had challenged the Line Item Veto Act on the grounds that it unconstitutionally reduced the institutional power of Congress. The Supreme Court held that there was no legislative standing because the congressmen had other political remedies. *Raines*, 521 U.S. at 829. The Court distinguished *Raines* from *Coleman* because *Raines* did not involve a vote on a specific bill or motion and they could in the future vote to repeal the act. *Id.* at 824. In *Campbell*, the D.C. Circuit reasoned that, although Congress did vote against issuing a declaration of war and authorizing the attacks, President Clinton did not nullify the votes as he "did not claim to be acting pursuant to the defeated declaration of war or a statutory authorization." 203 F.3d at 22.

191. *Campbell*, 203 F.3d at 28 (Randolph, J., concurring). Judge Randolph reasoned that members of Congress lacked standing because their "real complaint [was] not that the President ignored their votes; it [was] that he ignored the War Powers Resolution, and hence the votes of an earlier Congress." *Id.* at 31. He believed that the majority opinion

*Bas* in offering a definition of “war.”<sup>192</sup> He then cited *Little* as having established that “the power of the executive in time of war was constrained by an absence of legislation.”<sup>193</sup> Subsumed within “the power of the executive in time of war” is obviously the President’s power as Commander-in-Chief. Presumably, Judge Randolph’s citation of *Little* connoted something broader in sweep than the proposition that congressional silence constrains lesser executive functions that the President happens to perform during wartime, such as making recess appointments or delivering his State of the Union report to Congress. In this respect, Judge Randolph evidently accepted the view that *Little* was a constitutional decision constraining presidential war powers.

Judge Silberman also filed a separate concurring opinion. He believed that the claims were not justiciable—both because the court lacked coherent standards for addressing the claims and because the War Powers Clause claim was a political question.<sup>194</sup> In his view, the threshold standard for triggering the War Powers Resolution “too obviously call[ed] for a political judgment to be one suitable for judicial determinations.”<sup>195</sup> He dismissed as irrelevant earlier decisions addressing whether the nation was at war, because none specifically addressed whether presidential actions amounted to an unconstitutional declaration of war.<sup>196</sup> Further, he believed that no judicial standard could be available for defining “war” for purposes of constitutional interpretation.<sup>197</sup> “Even if this court knows all there is to know about the Kosovo conflict,” Judge Silberman observed, “we still do not know what standards to apply to those facts.”<sup>198</sup>

Judge Silberman cited *Bas* as a case in which the Supreme Court determined whether the country was at war, but only so far as was

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effectively abolished legislative standing by confusing, in his view, “the right to vote in the future with the nullification of a vote in the past.” *Id.* at 32.

Judge Randolph also considered the case moot because the military conflict ended before oral argument. He rejected the notion that the case was one “capable of repetition, yet evading review” and thus an exception to the normal rules of mootness. *Id.* at 33-34. Specifically, he took issue with the argument that offensive wars were the type of activity that would begin and end so quickly as to escape judicial review. He noted that if this were granted as true, then the plaintiffs’ notion regarding repetition of the offense would be “doom[ed],” since “the likelihood of this President, or some other, violating the 60-day provision of the War Powers Resolution [would thus be] remote.” *Id.*

192. *Id.* at 28 n.3 (citing *Bas*, 4 U.S. (14 Dall.) at 37).

193. *Id.* at 30 n.7 (citing *Little*, 6 U.S. (2 Cranch) at 170).

194. *Id.* at 24-25 (Silberman, J., concurring).

195. *Id.* at 25.

196. *Id.* at 26.

197. *Id.*

198. *Id.*

necessary to decide the applicability of the *statute* in question.<sup>199</sup> In other words, he rejected the view that *Bas* was a constitutional decision delineating the powers of the President and of Congress with respect to undeclared war. On the other hand, he accepted that *Talbot* stood for the sweeping proposition—an inescapably constitutional proposition, one would think—“that only acts of Congress are evidence of the existence of a war.”<sup>200</sup> Although Judge Silberman thought that *Talbot* reified that proposition, he also considered the proposition incorrect on the grounds that the Supreme Court rejected it in 1862 in the *Prize Cases*.<sup>201</sup>

Judge David Tatel’s concurrence responded to Judge Silberman’s proposition that the court lacked standards to determine whether a war existed.<sup>202</sup> He did not address Judge Silberman’s thesis that previous decisions that ascertained whether or not a war existed did not specifically address whether the President was unconstitutionally engaging in acts that required a declaration of war. Instead, Judge Tatel offered examples of courts’ ability to determine the existence of war in cases concerning “insurance policies and other contracts” or in “provisions of military law.”<sup>203</sup> Additionally, he cited both *Bas* and *Talbot* for their discussion of the existence of a war.<sup>204</sup> Most importantly, he quoted *Talbot* as support for the proposition that Congress possessed “the whole powers of war.”<sup>205</sup>

Although the D.C. Circuit ultimately dismissed *Campbell v. Clinton* for lack of standing, the citations of the Quasi War cases in the three concurring opinions issued by Judges Silberman, Randolph, and Tatel each assumed that one or more of the Quasi War cases were constitutional decisions. The judges did so even while issuing a judgment that had the effect of sustaining the President’s exercise of

199. *Id.* A similar reading of *Bas* appears in the 2002 district court ruling on the habeas corpus petition of Jose Padilla, whom President Bush had designated as an enemy combatant associated with the al Qaeda terrorist network. See *Padilla v. Bush*, 233 F. Supp. 2d 564, 589 (S.D.N.Y. 2002), *aff’d in part and rev’d in part sub nom.* *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). Judge Mukasey of the Southern District of New York described *Bas* as “determining whether France, with which the United States had engaged in an undeclared naval war, was an ‘enemy’ within the meaning of a prize statute, but noting that *whether there was a war in a constitutional sense was irrelevant . . .*” *Id.* (emphasis added).

200. *Campbell*, 203 F.3d at 27 n.2 (Silberman, J., concurring) (citing *Talbot*, 5 U.S. (1 Cranch) at 28).

201. *Id.* (citing *Prize Cases*, 67 U.S. 635 (1862)).

202. *Id.* at 37 (Tatel, J., concurring).

203. *Id.* at 39.

204. *Id.* at 37-38 (citing *Bas*, 4 U.S. (4 Dall.) at 39-42; *Talbot*, 5 U.S. (1 Cranch) at 28).

205. *Id.* at 38 (citing *Talbot*, 5 U.S. (1 Cranch) at 28).

war powers.

#### V. CONCLUSION

The claim that the Quasi War cases illuminate the boundary between the powers assigned to Congress and those assigned to the President with respect to undeclared war did not emerge in either scholarly writing or court decisions until the Vietnam War. The conventional wisdom about the Quasi War cases, and of the now-archaic words in the War Clause concerning letters of marque and reprisal, is incorrect. The Quasi War cases concern national sovereignty and supremacy, not the separation of powers. The prevailing misinterpretation of the Quasi War cases assumes more than academic significance in light of the D.C. Circuit's flirtation with it in *Campbell v. Clinton* and the possibility of further war powers litigation arising from the war on terror.