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Gregory E. Fehlings

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Lieutenant Colonel Gregory E. Fehlings,
U.S. Army Reserve

CONTROVERSY OVER THE U.S. MILITARY'S constitutional authority to wage undeclared, limited war predates the police actions, regional wars, and low-intensity conflicts of the twentieth century. America's first limited war was a controversial undeclared war with France only fifteen years after the end of the Revolutionary War. This eighteenth-century conflict was fought as a defensive war by America but as a punitive one by France—in bitterness over U.S. reconciliation and commerce with Great Britain.

America's first limited war was also its first war fought entirely at sea. The United States was so unprepared for war that it had to create a new navy to fight it, resulting in the establishment of a permanent U.S. Navy. Characteristically of a limited war, the U.S. Navy operated under stringent rules of engagement to prevent escalation of the conflict.

Because from the American viewpoint it was a solely defensive war of strictly limited objectives, scale, forces, and targets, the conflict has been known as the "Quasi-War." It engendered political and legal controversy over whether such a limited war was really a war at all, and whether such an undeclared conflict was constitutional. Confronting these controversies, the U.S. Supreme Court decided several cases of landmark significance to the law of war. The Quasi-War, through its historical and legal precedent, confirmed and defined the constitutional authority of the United States to wage undeclared, limited war.

Limited War

War is a hostile contention carried on by armed forces between nations, states, or rulers, or between political entities holding territory

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in the same nation or state.[1] In modern terminology, wars are either "general" or "limited." The nineteenth-century Prussian military theorist Carl von Clausewitz wrote, "War can be of two kinds, in the sense that either the objective is (1) to overthrow the enemy—to render him politically helpless or militarily impotent, thus forcing him to sign whatever peace we please; or (2) merely to occupy some of his frontier-districts so that we can annex them or use them for bargaining at the peace negotiations."[2] In a limited naval war, the belligerents may try to capture each other's vessels as prizes or for bargaining, as a nation's vessels are equivalent to sovereign territory.[3]

Limited war is distinguished from general war by the limited nature of its political objectives. Clausewitz's famous maxim—"War is merely the continuation of policy by other means"—emphasizes that war is characterized by its political objectives.[4] In a limited war, the belligerents do not seek to conquer each other; such a war is a form of bargaining through graduated military response so as to achieve a negotiated settlement short of either side's destruction.[5] One federal court has described a limited war as "in its nature similar to a prolonged series of reprisals."[6] In contrast, a belligerent who seeks to vanquish his foe fights a general war.[7]

These definitions of general and limited war raise complications. Some wars begin as limited wars and become general wars; other wars begin as general wars and become limited—such as the Korean War, in which the United States abandoned its objective of subduing North Korea when China intervened.[8] Still other conflicts, such as the Vietnam War, are limited on one side and general war on the other.[9] (A civil war is likely to be such a conflict—if the preexisting government tries to crush the rebellion, while the rebels seek only to dispossess the government of a portion of its territory.) These

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Lieutenant Colonel Fehlings is Deputy Staff Judge Advocate for the 104th Division (IT) in Vancouver, Washington. He is also Deputy District Counsel for the Immigration and Naturalization Service Litigation Section, U.S. Department of Justice, in Seattle. He received a bachelor's degree, magna cum laude, in 1979 from Duke University, and a J.D. in 1982 from the University of California at Los Angeles School of Law. His publications include "'Act of Piracy': The Continental Army and the Blue Mountain Valley," *New Jersey History*, vol. 115, 1997.

complications and the endless varieties and circumstances of warfare make a precise characterization problematic; the late Robert McClintock, a former U.S. ambassador and State Department advisor to the Naval War College from 1964 to 1966, describes seven categories of limited war.[10] It is perhaps for this reason that "limited war" lacks an internationally accepted definition.[11]

Some definitions of limited war are based on the degree of limitation on military effort; restrictions on targets, geographical bounds, or quantities and destructiveness of weaponry may define limited war.[12] But these limitations are generally induced by the war's political objectives. Clausewitz noted, "The political object—the original motive for the war—will determine both the military objective to be reached and the amount of effort it requires."[13] Limited wars, consequently, are likely to be more geographically confined, use less weaponry, and be less destructive than a general war, because their political objectives are more modest.[14]

However, definitions of limited war based on the intensity of military effort are inadequate. Wars that are limited geographically may nevertheless be extremely destructive. For example, France devoted a total military effort to World War I, suffering 5.6 million casualties out of 8.5 million men in uniform even though it limited its hostilities to its own borders. Wars may be geographically restricted simply because the belligerents happen neither to control nor contest a great deal of territory.[15]

Second, to define limited wars as those fought with less than all available weaponry encompasses certain conflicts commonly considered general. Even World War II might be regarded as a limited war under this definition, simply because Nazi Germany and the Allies refrained from using chemical and biological weaponry.[16] As nuclear, chemical, and biological weapons become more widely available, any war—no matter how intense, prolonged, or destructive—in which such means are not used might be regarded as limited. The Thirty Years' War, fought by small armies using now-antiquated weaponry, nevertheless reduced the population of Germany by 30 percent.[17] Limited war, therefore, cannot be distinguished from general war solely by the weaponry used.

Third, a limited war cannot be distinguished from general war solely by limitations on targets attacked, because international law limits permissible targets for both general and limited warfare.

Characterizing limited war by limitations on targets necessarily implies that in general warfare, targets must be *un*limited and that a general war therefore must violate international law. This would mean, curiously, that general war must be banned by the same international law that purports simply to mitigate the excesses of war.[18] Thus, a definition of limited war as that which limits targets of attack is too broad.

Not every potential target has strategic value; some are ignored even in general wars, simply because attacking them would be wasteful or pointless, or both. Therefore, defining limited wars by the belligerents' intensity of military effort alone is inadequate.[19] Former secretary of state Henry Kissinger has concluded, "In short, there exists no way to define a limited war in purely military terms."[20]

Some constitutional scholars have distinguished general war from limited war by the existence, or not, of a declaration of war. Eugene V. Rostow, professor emeritus of law and public affairs at Yale University and former undersecretary of state for foreign affairs, has explained, "Under international law, to which the relevant paragraphs of Article I [of the U.S. Constitution] refer, declarations of war are required only for the rare occasions when states engage in unlimited general war. As the Founding Fathers knew from intimate experience, such declarations are not required when states feel compelled to use limited force in defending themselves."[21] John C. Yoo, professor of law at Boalt Hall and former Senate Judiciary Committee general counsel, has agreed: "From a legal perspective, the declaration performed an important function in distinguishing between limited hostilities and an all-out conflict. It was clearly understood in the eighteenth century that a 'declared' war was only the ultimate state in a gradually ascending scale of hostilities between nations."[22] Congress signifies its intent to carry on a general war by declaring war—although the Civil War and the Indian wars were waged without such declarations, because these wars were domestic conflicts, not between independent nations.[23]

A civil war is by its nature undeclared.[24] William Winthrop—an authority who has been called "the Blackstone of Military Law"—stated, "A civil war . . . exists of its own force and independently of any authentication of Congress; the Constitution making no provision for the declaration either of the beginning or end of such a status."[25] A civil war is a domestic insurrection for which a

declaration of war from the preexisting government would be inappropriate; it would recognize the sovereignty, and therefore legitimacy, of the rebel government. The rebels also rarely declare war, because, seeking as they do either to take over the country or win

Congress did not need to declare war in response, because as Federalist congressman Robert Goodloe Harper of South Carolina exclaimed: "War is made upon us!"

their independence, they deny the legitimacy of the existing government. The Revolutionary War was a civil war in which the American colonies fought for their independence from Great Britain. Characteristically, neither Britain nor the Continental Congress declared war.[26]

Similarly, the American Indian wars were undeclared, even though the United States often fought them as general wars, without restriction.[27] From 1789 to 1794—before the undeclared, limited war with France that is the subject of this article—the United States fought an undeclared *general* war against the Shawnee tribe. General Anthony Wayne's decisive victory in August 1794 at the battle of Fallen Timbers all but expelled the Shawnee from the Northwest Territory.[28] Such wars have never been declared, because Indian tribes have never been regarded as foreign states. The federal courts and foreign governments viewed each Indian uprising as a rebellion of a dependent nation within the territory of the United States.[29] As described by Chief Justice John Marshall, these tribes "reside within the acknowledged boundaries of the United States" as "domestic dependent nations" in a "state of pupilage." "They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating trade with them, and managing all their affairs as [it thinks] proper." Marshall concluded, "We perceive plainly that the constitution . . . does not comprehend Indian tribes in the general term 'foreign nations'; not we presume because a tribe may not be a nation, but because it is not foreign to the United States."[30]

Civil wars and Indian wars are obviously different from wars against foreign nations. The framers had foreign wars in mind when they gave Congress the power formally to declare war.[31] A foreign war waged without a formal declaration from Congress, therefore,

may be viewed as limited, at least in the sense that Congress has declined to invoke its highest war power—that of declaring war.[32]

Limited wars, then, are typically undeclared—but the constitutionality of undeclared war as such is in dispute. Some academics argue that undeclared war is unconstitutional, and some courts have refused to recognize that the United States can lawfully wage an undeclared war.[33] For example, in determining liability for the 3 July 1988 downing by the USS *Vincennes* (CG 49) of an Iranian airliner during the Iran-Iraq War, the U.S. Court of Appeals for the Ninth Circuit cited a law review article asserting that undeclared war is unconstitutional. Because, however, the constitutionality of the naval conflict was irrelevant to the case, the court announced, "We do not express any view concerning the constitutionality of acts of war by American armed forces in the absence of a formal declaration of war."[34] Nevertheless, the very presence of the disclaimer implied that the court might otherwise have found the absence of a formal declaration to render a war unconstitutional.

One constitutional scholar has noted that "since World War II, declarations of war have essentially vanished, world-wide."[35] Every post–World War II conflict fought by the United States has been undeclared.

Some modern scholars have assumed that the first limited war fought by the United States was the Korean War, its first post–World War II conflict.[36] In fact, however—and whether one defines limited war by the belligerents' level of effort, by the scope of their military objectives, or by the absence of a formal declaration of war—America's first limited war took place in the nation's early days as a constitutional republic.[37]

The Quasi-War

The Quasi-War was the first war the United States fought with a foreign power after achieving independence.[38] The enemy, ironically, was France—without whose aid American independence in 1783 might have been unattainable.[39] But by the late 1790s much had changed. France was no longer a monarchy; it had beheaded its king in 1793 during its bloody revolution. Maximilien Robespierre and the Committee of Public Safety had come to power and executed thousands of political opponents, in a period known as "the Terror."

A year later, Robespierre himself had been executed, and in 1795 the Directory—a ruling council of five directors—had assumed power.[40]

Emboldened by revolutionary spirit, France brashly declared war against several major European powers: Great Britain, Austria, Prussia, and the Netherlands. President George Washington resisted French efforts to draw America into the conflict. His proclamation of neutrality infuriated France, which expected America to align with it. In its Revolutionary War alliance with France, the United States had agreed to defend French possessions in the Caribbean against foreign attack. In 1793, however, Britain began to invade and capture these possessions, without American opposition;[41] the U.S. government refused to defend them, because France had begun the war. A contemporary legal authority, the acclaimed jurist James Kent, reasoned as follows:

> The treaty of alliance between France and the United States, in 1778, was declared, by the second article, to be a defensive alliance, and that declaration gave a character to the whole instrument; and, consequently, the guaranty, on the part of the United States, of the French possession in America, could only apply to future defensive wars on the part of France. Upon that ground, the government of this country, in 1793, did not consider themselves bound to depart from their neutrality, and to take part with France in the war in which she was then engaged. The war of 1793 was first actually declared and commenced by France, against all the allied powers of Europe, and the nature of the guaranty required us to look only to that fact.[42]

The French chargé d'affaires in America conceded that the 1778 alliance had been defensive but argued that France had now resorted to war only after exhausting all means of conciliation. He wanted the U.S. government to acknowledge that war had been inevitable; France did not want Washington to attempt conciliation on his own.[43]

When the United States and Britain concluded Jay's Treaty, which averted war, reconciled old grievances, and improved trade, France took offense. The Directory interpreted the treaty as a commercial alliance between America and Britain, with which France was at war.[44] Two provisions of Jay's Treaty particularly incensed the French: first, the United States agreed to refrain from shipping the property of

Britain's enemies, or war contraband, such as armaments and naval supplies; and second, the United States gave British privateers the exclusive use of U.S. ports, contravening the exclusivity previously granted French privateers.[45] The Directory angrily expelled the U.S. minister to France, Charles Cotesworth Pinckney, breaking diplomatic relations with the announcement "that it will not acknowledge nor receive another minister plenipotentiary from the United States" until the United States renounced Jay's Treaty.[46] The French navy and French-licensed privateers began attacking American merchant ships, in a campaign of commercial plunder—*guerre de course*.[47]

The French inflicted terrific losses on American shipping. Secretary of State Timothy Pickering somberly reported to Congress on 21 June 1797 that the French had captured 316 American merchant ships in the previous eleven months.[48] The hostilities caused insurance rates on American shipping to skyrocket at least 500 percent, as French marauders cruised the length of the U.S. Atlantic seaboard virtually unopposed. The administration had no warships to combat them; the last had been sold off in 1785. The United States possessed only a flotilla of revenue cutters and some neglected coastal forts.[49] By war's end in 1800, the French were to seize over two thousand American merchant vessels.[50]

Meanwhile, French armies had swept to victory against a coalition of most Western European nations, leaving only Great Britain still defiant. Flush with triumph, the Directory made plans to forge a new French colony in North America, abandoning France's Revolutionary War pledge never to do so. France sent spies into Spain's Louisiana territory to prepare for a takeover. U.S. officials feared that France intended to reverse the 1763 settlement of the French and Indian War, in which France had lost North America to Britain and Spain. French ministers now talked openly about ending America's westward expansion by seizing control of the Mississippi River.[51] The French army, which had proven so unstoppable in Europe and at eight hundred thousand men was the largest in the world, might easily overpower America's small and inferior army of three thousand, strung along the frontier. A general war with France could be catastrophic for the nascent American republic.[52]

Congress therefore reacted mildly to the French maritime depredations. In July 1797 it authorized the president to use revenue cutters "to defend the sea coast, and to repel any hostility to their

vessels and commerce, within their jurisdiction."[53] Congress resumed construction of frigates begun in 1794 but suspended in 1796;[54] it also funded improved harbor and port fortifications, authorized an enlarged militia, barred the export of munitions, and eliminated duties on their importation.[55] But Congress refused to enact any other defensive measures, even to authorize merchant vessels to arm themselves for self-defense, despite the appeals of newly elected president John Adams that it do so.[56]

In an earnest effort to bring peace with France, Adams sent an official delegation to Paris in the summer of 1797 in hopes of negotiating a French equivalent of Jay's Treaty. The delegation, which arrived at Paris in October 1797, included a future Supreme Court chief justice (John Marshall), a Founding Father (Charles Cotesworth Pinckney), and a signer of the Declaration of Independence (Elbridge Gerry). The French foreign minister—Charles Maurice de Talleyrand-Périgord, an unscrupulous diplomat and a onetime bishop who had been excommunicated by the pope—refused to deal with the delegation. Through three agents (later code named X, Y, and Z), Talleyrand arrogantly informed the three Americans that the Directory would not negotiate until the U.S. government assumed French debts to American suppliers, indemnified France against claims of American ship owners victimized by French spoliations, extended a $12.8 million unsecured loan to France, paid him personally a $250,000 bribe, and formally apologized for President Adams's complaints against France's depredations and meddling in American politics. America must aid France, or France would treat America as an enemy.[57] The American delegation could not accept these terms. Not only were they humiliating, but a loan would compromise U.S. neutrality and symbolize a political alignment with France against Great Britain.[58] Pinckney, speaking for the delegation, replied brusquely to Talleyrand's demands: "No, no; not a sixpence!" The delegation then departed Paris, except for Gerry, who remained at the insistence of Talleyrand.

Talleyrand had intimated that if the entire delegation left, France would formally declare war upon America and commence unrestricted hostilities—*guerre à outrance*. This may have been a bluff. Some historians believe that Talleyrand did not wish a wider, general war with the United States, a conflict that might force America to cement closer ties with Great Britain. Instead, he may have sought to control American foreign affairs, and enrich himself, through

diplomacy and the threat of a French invasion.[59] In 1814, breaking with Talleyrand, Napoleon was to deliver a thorough, and apparently accurate, reproach: "You are a coward, a traitor, a thief. You do not even believe in God. You have betrayed and deceived everybody. You would even sell your own father."[60]

President Adams announced on 19 March 1798 that negotiations with France had failed; he alluded to, but did not disclose, confidential diplomatic dispatches about what was to become known as the "XYZ Affair."[61] Adams again requested Congress to enact the naval defense measures he had long proposed. In a speech to Congress a year earlier he had implored, "It remains for Congress to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations; and at the same time restrain them from committing acts of hostility against the [European] powers at war."[62] Months later, when Congress failed to act, Adams had resolved to let merchant ships arm themselves if congressional inactivity continued: "We must unshackle our merchant ships. If Congress will not do it, I shall have scruples about continuing the restriction" against arming merchant vessels for self-defense.[63] President Washington had originally imposed the restriction by executive order; in March 1798, upon the failure of peace negotiations with France, President Adams used his own executive authority to lift it.[64] He could do little else on his own. The inadequacy of his navy left the task of defending American seaborne trade to the merchantmen themselves.[65]

Adams's announcement brought a furious reaction from the opposition Democratic-Republican Party, which Adams mockingly called the "French Party."[66] Led by Adams's own adversarial vice president, Thomas Jefferson, the Democratic-Republicans excoriated the Federalist president, alleging that he had contrived the international crisis. They asserted that Adams had acted unconstitutionally in permitting the arming of merchant ships; Congressman James Madison called it "a usurpation by the Executive of a legislative power." They tried to block Adams's order, pass a resolution opposing war, and force the president to disclose the confidential "XYZ" dispatches. Adams did reluctantly divulge the dispatches, and the revelation of Talleyrand's insulting demands created an uproar. The antiwar agenda in Congress vanished, and the American public clamored for war against France.[67]

President Adams had initially favored a congressional declaration of war, but he soon decided against it.[68] He now thought a declaration of war unnecessary, and also imprudent, since it would signify a general war against France.[69] Congress accordingly abstained from issuing one.[70] In fact, Congress has never declared war except at the president's request; the Quasi-War set the pattern.[71]

Adams chose to wage a defensive, undeclared, and limited naval war, an approach resembling "armed neutrality." His objectives were to protect U.S. ships and soil, and to force France to respect American autonomy. He had no territorial ambitions.[72] "The minimum object [of war] is pure self-defense," wrote Clausewitz; "in other words, fighting without a positive purpose. With such a policy our relative strength will be at its height, and thus the prospects for a favorable outcome will be greatest."[73]

To ensure a favorable outcome, Adams sought to strengthen the nation's ability to resist French depredations and incursions. "Millions for defense but not one cent for tribute!" became a national slogan, and the groundswell it symbolized overcame congressional resistance to the defense measures Adams had proposed the year before.[74] With the slogan ringing in their ears, Congress acted swiftly to oppose French aggression. It annulled America's Revolutionary War alliance with France, cut off trade, armed merchant vessels, authorized the capture of hostile French ships, authorized the deportation of subversive aliens, penalized sedition, raised taxes, and appropriated money to build a navy and enlarge America's small standing army.[75] Congress also heeded Adams's call to raise "floating batteries and wooden walls" to protect America;[76] it created the Department of the Navy on 30 April 1798 and the Marine Corps on 11 July 1798.[77] Three powerful frigates that Congress had allowed to be completed now went to sea—*Constitution* (later famous as "Old Ironsides"), *Constellation*, and *United States*.[78] Yet Congress stopped short of authorizing offensive warfare.

Congress provided for the national defense; it resolved to resist and prevent the capture of American vessels and the invasion of American soil. But, intent on avoiding a general war with France, Congress withheld authority to prey upon unarmed French commerce or to attack French territory.[79] ("The key to a successful policy of limited war," Henry Kissinger has written, "is to keep the challenge to the opponent, whether diplomatic or military, below the

threshold which would unleash an all-out war.")[80] Congress even refrained from officially using the word "war," so as to avoid inciting France and its allies, Spain and Holland. Congress contented itself with expressing outrage at French "aggressions, depredations and hostilities" and "a system of predatory violence" as its justification for the defensive measures it had taken.[81] America was now in a state of war—but strictly limited war.

The prospect of a French invasion posed the greatest threat to America, and Congress was mindful not to provoke it. The French army had unsuccessfully invaded the British Isles (at Fishguard, in Wales) in February 1797, and in early 1798 Napoleon was assembling yet another invasion force.[82] President Adams's son and U.S. ambassador to Prussia, John Quincy Adams, surmised that France intended to invade America's western frontier; the Speaker of the House speculated publicly that troops massed in French ports were destined for America. President Adams, wary of the threat, implored General George Washington to come out of retirement to assume command of the U.S. Army.[83] Only a year after quitting the presidency, George Washington reluctantly took command of an army that was, he complained, filled with "the rif-raf of the cities, convicts, and foreigners."[84] If a French army invaded the United States, Washington anticipated, it would invade the southern states, "because they will expect from the tenor of the debates in Congress, to find more friends there."[85] He knew America was both politically and militarily ill prepared for war, let alone against the world's most formidable military power.

The undeclared war with France divided Americans. The war sharpened the divisions between the loosely defined Federalist and Democratic-Republican Parties. The Democratic-Republicans, sometimes called Jeffersonians, remained loyal to France—America's first ally. The Federalists, on the other hand, distrusted the French Directory and warmed to Great Britain, which they viewed as a bulwark against French militancy. The Federalists favored war against France; the Jeffersonians, whose strength was in the South, generally opposed the war and even asserted that the Federalist administration lacked constitutional authority to wage it.[86]

Constitutional War Power

At the Constitutional Convention of 1787, the framers had considered giving Congress the power to "make war." Upon reconsideration, they changed "make war" to "declare war," ostensibly to allow the president latitude to defend the nation from "sudden attack" and to "conduct" wartime operations.[87] Which branch of government has the power to make war, therefore, is not specified; that power must be inferred from, and implemented through, the powers that *are* specified.[88]

In his *Federalist* papers Alexander Hamilton maintained that the Constitution specifies the "authorities essential to the common defence."[89] The Constitution enumerates several war powers: it authorizes Congress to "declare War, grant letters of marque and reprisal, and make rules concerning captures on land and water";[90] it empowers Congress to "provide for the common defence," to "raise and support armies," to "provide and maintain a navy," to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," to suspend the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it," to decide whether a state may "engage in war," and to "make rules for the government and regulation of the land and naval forces."[91] The Constitution requires the federal government to protect each state "against invasion" and "against domestic violence."[92] Finally, it permits Congress to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."[93]

The president possesses power to conduct war and defend the country. The Constitution confers on the president the "executive power," designates him the "Commander in Chief" of the armed forces, requires that he be sworn to "preserve, protect and defend the Constitution," and imposes upon him the duty to "take care that the laws be faithfully executed."[94] Through these powers, the framers intended to give the president the authority and responsibility to repel attacks on the nation's territory, possessions, citizens, and armed forces, and on vessels flying its flag, whether or not Congress had authorized, commenced, or declared war.[95]

The Constitution implicitly allows Congress to authorize war without necessarily declaring it, because the absolute power of formally declaring a general war implies lesser war powers as well.[96] Hamilton had argued, "The circumstances that endanger the safety

> *These complications and the endless varieties and circumstances of warfare make a precise characterization problematic. . . . It is perhaps for this reason that "limited war" lacks an internationally accepted definition.*

of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances."[97] Specifically, the congressional power to declare war encompasses power to authorize limited hostilities without a declaration.[98] Congress may declare war or simply authorize it through legislation. In this way Congress has discretion as to whether to wage a general or limited war.[99]

Whether or not Congress declares war, it has a constitutional duty to defend the United States: the federal government "shall guarantee to every state in this Union a republican form of government and shall protect each of them against invasion."[100] The Constitution further specifies that "Congress shall have power to . . . provide for the common defence and general welfare of the United States."[101] The Preamble, although precatory, declares that the federal government has been created to "insure domestic tranquility, provide for the common defence, [and] promote the general welfare."[102]

The Constitution provides yet other war powers that Congress may exercise without first declaring war. One is the power to "grant letters of marque and reprisal, and make rules concerning captures on land and water."[103] Letters of marque and reprisal granted by Congress authorize privateers and merchant ships to capture enemy vessels.[104] Vessels granted such letters become part of the nation's armed forces.[105] To grant letters of marque and reprisal creates, according to the famed legal scholar William Blackstone, "an incomplete state of hostilities," one that lacks only a declaration of war.[106] But the authority to grant letters of marque and reprisal is distinguished from the power to declare war by the fact that the two powers are laid down separately—if in the same clause. Article 1, section

8, clause 11 states, "Congress shall have power . . . to declare War, grant letters of marque and reprisal, *and* make rules concerning captures on land and water" (emphasis added).

Congress, therefore, is empowered to authorize hostilities without declaring war by "grant[ing] letters of marque and reprisal, and mak[ing] rules concerning captures on land and water." This constitutional power applied especially to the Quasi-War, because that conflict was a war of maritime capture. During this undeclared war Congress freely authorized the capture of armed French vessels that threatened American shipping.[107] Today, although letters of marque and reprisal have fallen into disuse, this constitutional power still has applicability. For example, Congress has passed legislation authorizing the president to arm private vessels either in "time of war" or when hostilities are "threatened" or "imminent"; the president may exercise this authority without a declaration of war.[108]

Its power to "make rules for the government and regulation of the land and naval forces" and to "make rules concerning captures" allows Congress to direct how an undeclared war shall be waged.[109] The latter authority governs both military and private ships.[110] Congress used this authority to delineate "rules of engagement," as they would now be called, in the Quasi-War.[111] This rule-making power requires no declaration of war; indeed, it allows Congress to exercise greater control over an undeclared war than it could over a declared conflict, because in an undeclared war Congress may specify the scope of hostilities. On the other hand, if it declares war, Congress authorizes—subject to its "power of the purse"—virtually unlimited hostilities.[112]

The power to "raise and support armies" and to "provide and maintain a navy" gives Congress the financial leverage to control the magnitude of a war, whether or not Congress has declared war.[113] The framers followed the British model of separating the power to conduct war from the authority to fund it. The president has the power to conduct wartime operations, but Congress controls funding—it can specify the amount of money to be spent.[114] The Constitution specifies, "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."[115] "The executive . . . holds the sword of the community," observed Hamilton; Congress "commands the purse."[116] Congress's use of its power of the purse made the Quasi-War possible, because, as a constitutional expert

has argued, "our first war was fought when Congress agreed to create a navy to make that war feasible."[117]

Finally, to implement its various war powers, Congress may "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States."[118] This clause expressly permits Congress to infer additional authority from its specified powers.[119] "Its terms purport to enlarge, not diminish the powers vested in the government. It purports to be an additional power," wrote Chief Justice John Marshall in *McCulloch v. Maryland*. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."[120] Thus, even without declaring war Congress has constitutional authority to defend the republic against a foreign power.

The Legality of the Quasi-War

Because neither nation formally declared war or invaded the other, some denied at the time that a lawful state of war existed between France and the United States.[121] The war with France was America's first undeclared war under the Constitution.[122] Its very name, which was given to it later, reflects its peculiar nature as a strictly limited, defensive conflict.[123] Controversy has persisted as to whether the United States and France were in a state of war.[124]

After hostilities ceased, American shipowners who had lost vessels to the French had a financial interest in arguing there had been in a legal sense no war, for losses due to warfare are noncompensable.[125] For over eighty years, the spoliation claimants and their successors unsuccessfully petitioned the federal government for indemnity. Finally, in 1885, with the government uncharacteristically plagued by large budget surpluses, Congress passed and President Grover Cleveland signed a law to remedy the perceived injustice that the war with France had extinguished the very spoliation claims that had precipitated it. Congress appointed the Court of Claims to advise it as to the validity of claims "arising out of illegal captures, detentions, seizures, condemnations, and confiscations" by the French.[126]

Carrying out the implied congressional mandate, the court facilitated payment by finding that the shipping losses had resulted from "illegal" seizure rather than war.[127] The court admitted that it had adopted the legal theory "most advantageous to the claimants," despite the fact that Congress during the war had designated France as an enemy and had authorized the use of force.[128] Congress authorized partial payment but never endorsed the court's approach; Congress recognized only a moral, not a legal, obligation.[129] Congress never decided that the Quasi-War was not a real war. Even the House Judiciary Committee chairman, who recommended passage of the bill for reimbursement, declared that the claims had resulted from "a partial maritime war."[130]

The decisions of the Court of Claims did not resolve the controversy. Two federal courts and a successor Court of Claims have since concluded that the opinions in the French spoliation cases are not legal precedent—because the opinions were merely advisory, and because they conflict with Supreme Court decisions.[131] In 1886, despite a result-driven opinion that certain American shipping losses were not due to warfare, the Court of Claims concluded that the Quasi-War had been a "limited war."[132] The court stated, "Within the limits prescribed by Congress there was war; limited, imperfect war, not general war, but war complete to the vessels engaged in it to the extent only of the powers given by the Congress."[133] Yet, strangely, that court and some other officials regarded an undeclared limited war as something less than a state of war.[134] The clear weight of authority, to the contrary, is that a limited undeclared war constitutes a state of war.[135] Still, the controversy over the spoliation claims has never been settled. Congress last debated a bill to compensate spoliation claimants in 1940, voting to postpone indefinitely any consideration of the remaining unpaid claims.[136]

Even the way France and the United States ended the Quasi-War has been used to support the argument that the two countries were never actually at war. In an attempt to obtain French compensation for U.S. shipping losses, the American negotiators pretended that no war had existed. The preamble to the settlement referred to the parties' desire "to terminate the differences which have arisen," without mentioning any war. However, the U.S. negotiators' pretense failed in its object: France refused to pay damages. The Americans shelved the shipping claims and secured peace on the terms France made

available, which included cancellation of the 1778 alliance and recognition of America's right of neutral commerce. Congress ratified the peace settlement in 1801, except for the article postponing claims. Napoleon, who had been demanding recompense for an alleged U.S. failure to honor its treaties with France, then proposed that both sides simply drop their claims. Congress finally agreed. Thus, compensation claims were omitted from the final settlement, and the peace settlement never reflected the U.S. negotiating stance that no state of war had existed.[137]

The advantage of a declared war over an undeclared limited one is that a declaration constitutes an unambiguous announcement to the world of the state of war.[138] The grave disadvantage, however, is that, as noted, a declared war is necessarily an all-out, or general, war in which the hostile nations commit their full military power to each other's destruction.[139] A declaration also puts each belligerent at war with its adversary's allies, immediately escalating the conflict.[140] During the Quasi-War, a congressman predicted that "the moment war is declared with France, we shall also be at war with Spain and Holland, her allies."[141] The drawbacks to a declaration of war are forbidding.

Perhaps for these reasons, declared wars are the exception, not the rule, in modern Western history. Even before adoption of the Constitution, undeclared conflicts had become more common than declared ones.[142] Alexander Hamilton noted in a *Federalist* paper that "the ceremony of a formal denunciation of war has of late fallen into disuse."[143] A federal court observed in 1958 that "during the period between 1700 and 1900 there were nearly 150 wars [worldwide], but only about twenty formal declarations of war, [and] many of those were made after the commencement of hostilities."[144] The United States has engaged in only five declared wars—the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II.[145] In contrast, it has fought over a hundred undeclared conflicts; estimates range between 125 and 215.[146] The vast majority of them have been short or minor confrontations. Only seven undeclared, foreign conflicts have been "serious and extended engagements"—the Quasi-War, the first Barbary War (1801–1805), the Second Barbary War (1815), the American incursions in Mexico (1914–17), the Korean War (1950–53), the Vietnam War (1961–73), and the Persian Gulf War (1990–91).[147]

Both Thomas Jefferson and James Madison, despite their opposition to the Quasi-War, were to wage limited war during their presidencies without a congressional declaration. President Jefferson fought Tripoli from 1801 to 1805, obtaining congressional ratification only after unilaterally ordering an American fleet against the Barbary States.[148] Even though the pasha of Tripoli had declared war against the United States, Congress, in authorizing hostilities, declined to declare war in response.[149] President Madison, too, waged a limited naval war—against Algiers in 1815—with congressional approval but without a declaration.[150] These early nineteenth-century examples of undeclared limited war show how soon the precedent set by the Quasi-War became accepted practice.

The governments of both France and the United States legally authorized and recognized the Quasi-War. France privately acknowledged it was at war, although it did not formally declare war against the United States. Revolutionary France had repeatedly gone to war without declaration against weaker countries.[151] But unlike those instances, France did not seek to conquer the United States. Therefore, the Directory publicly denied that France was at war, while it privately plotted to destabilize President Adams's administration. The minister of foreign relations, Charles Delacroix, maintained that France was at war with the federal government but not with the American people.[152]At a special session of Congress less than three months into his presidency, Adams warned of the Directory's "disposition to separate the people of the United States from the government."[153] The Directory hoped to inspire a popular revolution in America that would topple Adams's administration, much as the French Revolution had deposed Louis XVI. To achieve this result without alienating the American people and driving the United States into a military alliance with Britain, France conducted a war of limited scale, forces, and military objectives.[154]

As is typical in limited wars, France pursued a policy of escalating levels of hostility. On 2 July 1796, the Directory announced that France would treat Americans just as the British had treated them. The announcement was ambiguous, in that it failed to specify how Americans had been treated by the British; it was in effect an invitation to abuse and plunder. It encouraged and ostensibly legalized persistent French piracy in the Caribbean.[155] French warships and privateers, as noted, confiscated 316 American merchant ships in the

eleven months after the announcement. British captures, which the Directory cited as an excuse for its announcement, reportedly amounted in the same period to just four ships. British admiralty courts ordered two of these ships restored to their owners and ordered the other two condemned for running a British blockade of French Caribbean ports.[156] The British had no policy to impound American ships for carrying contraband. Under Jay's Treaty the British had the right to seize enemy property and war contraband, but they had to reimburse the owners, and they could not confiscate the ships themselves.[157] The British paid compensation for property they seized; the French never did.[158]

On 2 March 1797, in reaction to Adams's defeat of Jefferson for the presidency, the Directory commissioned its warships and privateers to seize U.S.-flagged vessels lacking satisfactory inventory records or containing items that the French deemed contraband. This action violated U.S. shipping rights under its 1778 treaty with France; further, it gave American ships no time to comply, making the entire U.S. merchant fleet fair game for French marauders.[159] The French confiscated one American merchant ship, the schooner *Industry*, and its entire cargo simply because its *rôle d'équipage* (list of crew and passengers) had been "signed only by one notary public, without the confirmation of witnesses."[160] The French had no right even to demand that an American ship carry such a list;[161] the requirement was a pretext for plunder. French officials encouraged that plunder by renting French warships to privateers, and they profited from it by taking payoffs from privateers whose captures they upheld in admiralty court. American seamen on captured U.S. vessels were either stranded or marched off to prison.[162] Those found on British ships faced worse treatment. The Directory announced that France would hang as pirates any Americans found serving on British warships, even those whom the British had pressed into service.[163]

After a Paris coup d'état in September 1797 put hard-liners in control, the Directory decreed on 18 January 1798 that "every vessel found at sea, having on board English provisions and merchandise as her cargo, in whole or in part, shall be declared lawful prize."[164] The decree was issued on the pretense of confiscating British contraband, but in reality the intent was to punish the American government for signing Jay's Treaty. The decree came without warning, offered no prospect of reconciliation, and far exceeded in severity the alleged

transgressions.[165] Reprisals are justified only as a last resort, after demands that the violation of international law cease have been made and have gone unsatisfied, and they must never exceed the severity of the violation.[166] The French decree, however, permitted confiscation of a U.S. ship having nothing more than a British-made compass on board. Since nearly every American ship contained some article of British manufacture, any ship stopped by a French privateer was almost certain to be condemned.[167] A French corsair confiscated the schooner *Little Pegg* solely because its captain was a naturalized U.S. citizen of Scottish birth.[168]

The decree intensified hostilities. The U.S. government viewed it as tantamount to a declaration of maritime war.[169] As Judge Kent later stated, "General reprisals on the persons and property of the subjects of another power are equivalent to open war."[170] President Adams called it "an unequivocal act of war on the commerce" of the United States.[171] Congress did not need to declare war in response, because as Federalist congressman Robert Goodloe Harper of South Carolina exclaimed: "War is made upon us!"[172]

Indeed, a declaration of war from Congress is unnecessary when the United States is attacked. Emmerich de Vattel, an influential eighteenth-century international law scholar who was generally fastidious about a nation's duty to declare war, pronounced, "He who is attacked and only wages defensive war need make no declaration of it, for the declaration on the part of the opposing sovereign, or his open hostilities, are sufficient to set up a state of war."[173] No contemporary writer on the law of nations considered a declaration necessary in a defensive war.[174] Alexander Hamilton insisted, "It belongs to Congress only, to go to war. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress is nugatory; it is at least unnecessary."[175] The federal courts agreed. Six years after the end of the Quasi-War, Supreme Court justice William Paterson remarked while deciding a circuit court case, "If, indeed, a foreign nation should invade territories of the United States, . . . a state of complete and absolute war exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side and peace on the other."[176]

The U.S. Navy's first capture of a French ship brought a verbal exchange between the ships' captains that expressed succinctly

America's undeclared and defensive state of war. On 9 July 1798 the twenty-gun sloop of war *Delaware*, a converted packet commanded by Captain Stephen Decatur, Sr., captured the twelve-gun French privateer *La Croyable*, which had been prowling for American merchant ships off the New Jersey coast. The French captain asked resentfully if the United States was at war with France. "No," Decatur reportedly answered, "but your country is with mine." "Oh, but I have a commission for what I do," avouched the privateer captain. "And so have I," replied Decatur.[177]

Congress, through various legislative acts, recognized a state of undeclared war between France and the United States. First, Congress authorized U.S. warships, merchantmen, and privateers to seize armed French ships;[178] by commissioning U.S. vessels to capture hostile French ships, Congress tacitly declared France to be a wartime enemy.[179] During the Revolutionary War, the Continental Congress had designated the British as enemies for the first time in an act of 25 November 1775 declaring armed British vessels open to capture.[180] Likewise, the act of Congress declaring armed French ships open to capture during the Quasi-War was "a declaration, by the supreme power in this country that France was not a friendly power," concluded a contemporary federal court.[181] In Paris, Talleyrand informed the Directory that the act virtually constituted a declaration of war.[182] Under the old Articles of Confederation, issuing letters of marque and reprisal to capture enemy vessels had been commensurate with making war, since either to "engage in war" or to "grant letters of marque and reprisal" in peacetime required the assent of two-thirds of the states.[183] As secretary of state under President Washington, Jefferson had explained the significance of issuing letters of marque and reprisal: "The making of a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede, and when reprisal follows, it is considered an act of war."[184] The power to grant letters of marque and reprisal, notes a modern court, "is a power to be invoked only against an enemy."[185] Thus, by authorizing U.S. vessels to fight French ships, Congress recognized France to be an enemy.

Second, Congress rescinded all treaties with France.[186] This was a drastic measure, proclaiming the end of friendly relations between the two nations. According to the custom of the time, it was tantamount to a declaration of war.[187] Judge Kent noted how in the late

eighteenth century the suspension of diplomatic relations became equivalent to a declaration of war:

> Since [the Seven Years' War, of 1756–63], declarations of war, in the ancient solemn form, have been disused. In the war [of the American Revolution], which commenced between England and France, in 1778, the first public act on the part of the English government was the withdrawing of its Minister from France, and that single act was declared by France to be the first breach of the peace. There was no other declaration of war; but each government published a manifesto to the world in vindication of its claims and conduct.[188]

Albert Gallatin, the Democratic-Republican House minority leader, remarked in the debates on suspending the treaties with France that "there seemed to be but little difference between saying the treaties are at an end, and declaring war."[189] Congress cited, as justification for the measure, France's "system of predatory violence, infracting the said treaties, and hostile to the rights of a free and independent nation."[190] Coincident with the measure, President Adams denied diplomatic status to French consuls and announced he would send no minister to France. All formal ties between the governments of America and France were severed.[191]

Third, Congress suspended commerce with France, citing French aggression against America.[192] Federalist congressman Harrison Gray Otis of Massachusetts asked rhetorically in the debates on suspending commerce, "In a state of war, [is it] not usual and proper for all nations to restrain their subjects from a direct trade with their enemies? And are we not in war? Have we not passed a variety of bills which gentlemen have declared amount to war?"[193] In its law suspending commerce, Congress had blistering words for the French. Congress rated as enemies the government of France and all persons acting under its authority, for their "aggressions, depredations and hostilities which have been, and are by them encouraged and maintained against the vessels and other property of the citizens of the United States, and against their national rights and sovereignty, in violation of the faith of treaties, and the law of nations."[194] Supreme Court justice Alfred Moore concluded that the law suspending commerce confirmed America and France were in a state of war. He reasoned, "Congress could only employ the language of the act of 13

June 1798, toward a nation when she is considered as an enemy."[195] In all these ways, Congress indicated that France and the United States were enemies, and at war.

The Federalist administration also offered its official view that, despite the absence of a declaration of war, America was in a state of war with France. One historian has argued that President Adams "held that no actual war existed because Congress, as required by the Constitution, had not declared it."[196] But Adams's own speeches and writings refute this notion. In a speech to Congress, he said that France was conducting "a predatory warfare against the unquestionable rights of neutral commerce."[197] In a letter to his secretary of state, Adams wrote, "Congress has already, in my judgment, as well as in the opinion of the [Supreme Court] judges at Philadelphia, declared war within the meaning of the Constitution against that republic, under certain restrictions and limitations."[198] President Adams firmly concluded that America was in a state of war, despite the absence of a formal declaration.

The attorney general, Charles Lee, agreed that America was legally at war with France. In a written opinion of 21 August 1798, he concluded that both nations had authorized war and that a French alien who assisted his country against the United States was subject to the law of war as an alien enemy: "Having taken into consideration the acts of the French republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations. Consequently, France is our enemy."[199]

The Supreme Court unanimously agreed that the conflict with France was a lawful war and that France was our enemy, despite the absence of a declaration of war. In *Bas v. Tingy*, the commander of a U.S. warship sued (on behalf of his ship's company as well as himself) for half the value of an American merchant ship, *Eliza*, that he had recaptured from a French privateer.[200] The officer relied upon an act of 2 March 1799 that allowed salvage of half the value of an American-owned vessel taken from "the enemy."[201] The owner of the *Eliza*, who did not wish to pay the naval commander and his crew half the value of the ship, argued that this act was inapplicable, that France was not an "enemy," because Congress had not declared war. The Supreme Court, with justices writing separately in the common-

law custom, sided with the naval officer and held that the act applied. The word "enemy" pertained to France, the Court found, for two fundamental reasons: the United States and France were engaged in actual hostilities by armed forces; and Congress had intended the word "enemy" to describe France. War could exist without a declaration from Congress, wrote Justice Bushrod Washington, nephew of George Washington and former delegate to the Virginia convention that had ratified the Constitution. "Every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war."[202]

There are two types of war, wrote Justice Washington—"perfect," or general, and "imperfect," or limited—and Congress may authorize either one through its war powers. A declared war is a "perfect" war "because one whole nation is at war with another whole nation; and all members of the nation declaring war are authorized to commit hostilities against all members of the other, in every place, and under every circumstance." On the other hand, Congress may make hostilities "more confined" and "limited as to places, persons, and things; and this is more properly termed imperfect war . . . because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission." An imperfect war interrupts the peace only to a limited extent. The hostilities with France constituted an imperfect war, because they were limited and "authorized by the legitimate authority of the two governments." After France had commissioned warships and privateers to plunder American shipping, Congress had passed legislation to combat French depredations. The French, therefore, were our enemies. "If they were not our enemies," confessed Justice Washington, "I know not what constitutes an enemy."[203]

Justice Alfred Moore, inspired to write his only opinion in his five years on the Court, eloquently concurred: "It is for the honor and dignity of both nations . . . that they should be called enemies; for, it is by that description alone, that either could justify or excuse, the scene of bloodshed, depredation and confiscation, which has unhappily occurred." Justice Samuel Chase, a signer of the Declaration of Independence and coauthor of the Articles of Confederation, reported that the justices agreed unanimously that the United States was in a lawful state of war with France, despite the absence of a declaration of war. "Congress is empowered to declare a general war,"

he wrote, "or Congress may wage a limited war; limited in place, in object, in time." Speaking now of the Quasi-War, he continued, "In my judgment it is a limited, partial war. Congress has not declared war in general terms; but Congress has authorized hostilities on the high seas by certain persons in certain cases." Justice Paterson, a framer of the Constitution, added, "An imperfect war, or a war as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorized by the constitutional authority of our country."[204]

Democratic-Republicans widely condemned the Court's decision. Partisan resentment grew so strong that some Jeffersonians urged impeachment of the justices who had rendered the decision.[205] Philadelphia's leading Democratic-Republican newspaper, the *Aurora*, fumed that the decision was the "most important and momentous to the country, and in our opinion every Judge who asserted we were in a state of war, contrary to the rights of Congress to declare it, ought to be impeached."[206] But the decision stood.

One year later, after the war had ended, Chief Justice John Marshall, writing for a unanimous Court, reaffirmed the conclusion of *Bas v. Tingy* that America and France had been in a state of war. In *Talbot v. Seeman*, Marshall explained, "Congress may authorize general hostilities, in which cases 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."[207] The limited "direct and declared object of the war" authorized by Congress, noted Marshall, "was the protection of American commerce."[208] In another opinion the chief justice, again writing for a unanimous Court, restored a captured French vessel to its owners pursuant to the Môrtefontaine Convention that ended the war; the Court had concluded that the convention superseded the U.S. captor's "individual rights acquired by war."[209] The Court stressed, however, in another case that the president could not order hostilities in a limited war that exceeded the specific authority granted by Congress. In *Little v. Barreme*, the Court invalidated an executive order authorizing the interception of vessels sailing *to or from* French ports, when Congress had authorized the interception of vessels sailing only *to* the ports. Nevertheless, the Court recognized that France and the United States had been enemies at war.[210]

"It is clear that there can be an 'enemy,' even though our country is not in a declared war," concluded a twentieth-century federal court in retrospect, citing *Bas v. Tingy* while dismissing a lawsuit challenging the constitutionality of the undeclared Vietnam War. "The hostilities against France in 1799 were obviously not confined to repelling attack. This was an authorized but undeclared state of warfare."[211]

The scholarly Justice Joseph Story alluded two decades after the fact to the Quasi-War as an example of the lawful exercise of congressional power to wage limited war:

> The power to declare war may be exercised by Congress, not only by authorizing general hostilities, in which case the general laws of war apply to our situation; [but] by partial hostilities, in which case the laws of war, so far as they actually apply to our situation, are to be observed. . . . The latter course was pursued in the qualified war of 1798 with France, which was regulated by divers acts of Congress, and of course was confined to the limits prescribed by those acts.[212]

The operation of U.S. prize courts during the conflict further demonstrated that America and France were legally in a state of war. A prize court is a type of admiralty court that adjudicates wartime captures made at sea and "condemns" lawfully captured enemy vessels, awarding them as prizes to their captors.[213] If the United States was not legally in a state of war, its prize courts could not condemn captured French ships;[214] only a nation in a state of war can do so.[215] The lone exception is when a neutral nation's "sovereign or territorial rights are violated" by the parties at war.[216] The fact that U.S. prize courts condemned French ships taken by U.S. captors verified the legal existence and constitutionality of the war.[217]

Some have held that no war existed on the grounds that U.S. prize courts allowed French aliens to seek recovery of their captured vessels. The argument is that since alien enemies are allegedly barred from appearing in court, the Frenchmen must not have been enemies, and there must have been no war. A law review author has adopted this argument, citing as authorities a Massachusetts senator who sought federal indemnity for his constituents' shipping losses, as well as a Massachusetts court decision that the Supreme Court had reversed.[218] Contrary to that view, however, U.S. prize courts

generally have allowed alien enemies in the United States to defend their vessels against condemnation.[219] During the Revolutionary War, the courts allowed British enemy aliens to seek recovery of their captured vessels.[220] An authority on prize jurisprudence has noted that the law has "consistently confirmed the right of foreign nationals to appear before an admiralty tribunal and challenge the lawfulness of a capture."[221]

Almost two hundred years later, the Supreme Court confirmed the Quasi-War's constitutionality. In *United States v. Verdugo-Urquidez*, the Court cited the war as historical precedent supporting its holding that the Fourth Amendment did not apply to a search of an alien's foreign residence.[222] Writing for the majority, Chief Justice William Rehnquist noted that only seven years after ratification of the amendment, during the Quasi-War, Congress enacted a law authorizing naval commanders to seize armed French vessels on the high seas. At the time, "it was never suggested that the Fourth Amendment restrained the authority of Congress or of United States agents to conduct operations such as this."[223] The Court was implicitly relying upon the constitutionality of the Quasi-War in support of a ruling; no one questioned the legality of the Quasi-War, even though the majority and two dissenting justices referred to it as an "'undeclared war' with France."[224] Even the dissenters did not challenge the constitutionality of the war but simply characterized the historical precedent as applying only to enemies in wartime.[225] All the justices seemed implicitly to accept Justice Oliver Wendell Holmes's familiar aphorism that in interpreting the Constitution, "a page of history is worth a volume of logic."[226]

Judicial reliance on the precedent of the Quasi-War continues. The military courts, as recently as 1998, have cited the case of *Bas v. Tingy* in support of the proposition that a "time of war" under the Uniform Code of Military Justice exists when it is recognized by the executive and legislative branches; a declaration is unnecessary.[227] Other courts generally find that to be the case.[228]

Thus, all three branches of government agreed that during the Quasi-War the French were in fact our enemies and America was legally in a state of war. Although Congress made no declaration of war, Congress authorized it through other constitutional powers and, during the course of the conflict, enacted strong legislation in its pursuit.

End of the Quasi-War

The U.S. government's determined and forceful response surprised the Directory, which soon sought to extricate France from the hostilities it had commenced. But ending the hostilities proved far more difficult than commencing them. Greedy privateers and corrupt administrators disregarded the Directory's efforts to ameliorate and rescind its harsh decrees. French raiders continued to plunder American shipping, and the governor of Guadeloupe, on his own authority, declared war on the United States on 14 March 1799.[229]

The Directory, however, suffered military setbacks in Europe, the Middle East, and the Caribbean, and itself was wracked by political upheaval. A second coup d'état on 18 June 1799 replaced all but one member of the Directory; another on 9 November 1799 ousted the Directory entirely and brought Napoleon Bonaparte to power. He anxiously sought peace with the United States, in view of the success of America's new navy against a French navy already crippled by its losses to the British at the August 1798 battle of the Nile.[230] During the Quasi-War, the U.S. Navy captured eighty-six French privateers and a warship, *l'Insurgente*, while losing only a single vessel.[231] Napoleon was about to acquire Louisiana clandestinely from Spain, and he wished to avoid hazarding that prize by war with America while France remained at war with Britain as well.[232]

In Washington, however, certain cabinet members, influenced by Alexander Hamilton, wanted a wider war with France and Spain, whereby they expected to annex Louisiana and liberate Latin America from Spanish rule. Adams steadfastly opposed widening the war. Seeing themselves deprived of a potent political issue and an opportunity to seize territory from France and its allies, the Federalist Party's hawks turned against the president when he entered peace negotiations with France. Hamilton was convinced that "France will . . . grant us fair terms and not keep them. Meantime our election will occur and bring her friends into power." Adams, determined to end the war amicably, dismissed almost half of his cabinet.[233] He was later to request that his tombstone bear the sole epitaph: "Here lies John Adams, who took upon himself the responsibility of peace with France in the year 1800."[234]

According to a naval historian, "in [Adams's] astute handling of the Quasi-War with France he proved to be one of the greatest

wartime presidents in American history"; nonetheless, he lost favor with the electorate as well as his own party in the election of 1800.[235] The electorate thought the war was lasting too long and costing too much, while many Federalists, conversely, wanted to widen the war. Professor Yoo has remarked, "Although vilified by both the Federalists and Jeffersonians for his middle ground, Adams surely acted in the best interests of the nation by countering French attacks on American shipping without embroiling the nation more deeply in the European wars. Adams's tale serves as a powerful example of the duty of the President, and the political price he can pay for pursuing the national interest."[236]

The American public came to perceive the high taxes the government had imposed to strengthen the nation's defenses as unnecessary because of Adams's peace negotiations. The taxes were widely resented, and there had been revolts.[237] As Jefferson had wisely foreseen in 1798, "At this moment all the passions are boiling over. . . . However, the fever will not last. War, land tax and stamp tax, are sedatives which must cool its ardor."[238]

Limited wars of long duration have been generally unpopular with the American public. The late Robert Endicott Osgood, dean of the Johns Hopkins School of Advanced International Studies (and sometime National Security Council staff member under Henry Kissinger, as well as lecturer at the Naval War College), has described the public's concept of war in these terms:

> War as something to abolish, war as something to get over as quickly as possible, war as a means of punishing the enemy who dared to disturb the peace, war as a crusade—these conceptions are all compatible with the American outlook. But war as an instrument for attaining concrete, limited political objectives, springing from the continuing stream of international politics and flowing toward specific configurations of international power—somehow this conception seems unworthy to a proud and idealistic nation.[239]

News of a peace settlement between the United States and France—the Môrtefontaine Convention of 30 September 1800—arrived too late to benefit either Adams or the Federalists.[240] The Democratic-Republicans gained control of Congress in the fall elections, and their presidential candidates, Thomas Jefferson and Aaron Burr,

received equal numbers of votes in the electoral college, narrowly defeating Adams and his running mate, Charles Cotesworth Pinckney. The tie between Jefferson and Burr sent the presidential election to the lame-duck House of Representatives, where congressional Federalists reluctantly allowed Jefferson the necessary majority on the thirty-sixth ballot, resulting in his election as the nation's third president.

The Federalists never regained control of either the presidency or Congress. Nonetheless, Adams and the Federalists left a legacy. In his last speech to Congress, President Adams praised the U.S. Navy and urged its continuation.[241] The lame-duck Federalist Congress acted on his recommendation, sending him two bills to assure the preservation of the Navy. He signed them, establishing the first peacetime navy in U.S. history, on his last full day in office, 3 March 1801.[242]

Meanwhile, France had secretly acquired Louisiana from Spain on 1 October 1800—the day after France had signed its peace treaty with the United States.[243] A year later France signed an armistice with Britain, preserving French possessions;[244] Napoleon and Talleyrand intended to build a new French colonial empire in North America, with Louisiana as the foundation.[245] Upon learning of France's duplicity, President Jefferson angrily threatened war.[246] Napoleon (who had already sent in 1802 an army to Haiti, to put down the Toussaint-Louverture rebellion) methodically assembled a force to implement French dominion in North America, but the fleet could not sail because of the onset of bad weather in February 1803.[247]

In May, as renewed hostilities between Britain and France grew imminent, Napoleon decided to sell the entire Louisiana territory—against the wishes of several of his political partners—to America for sixty million francs (approximately fifteen million dollars) rather than risk fighting a war on two continents.[248] Napoleon declared:

> I will not keep a possession which will not be safe in our hands, that may perhaps embroil me with the Americans or may place me in a state of coolness with them. I shall make it serve me, on the contrary, to attach them to me, to get them into differences with the English, and I shall create for them enemies who will one day avenge us, if we do not succeed in avenging ourselves. My resolution is fixed; I will give Louisiana to the United States. But as they have no territory to

> cede to me in exchange, I shall demand of them a sum of money to pay the expenses of the extraordinary armament I am projecting against Great Britain.[249]

As fate would have it, a dozen years later the United States and Britain would fight over Louisiana at the battle of New Orleans. The United States would win the battle decisively, in one of its few land victories in the congressionally declared War of 1812. Congress had declared war at the insistence of President Madison, because of British violations of neutral American shipping—even though both France and Britain had done the same during the Napoleonic wars.[250]

* * *

Since the early days of the American republic, a distinction has been recognized between a general, or "perfect," war, customarily begun with a formal declaration of war, and a limited, or "imperfect," war, authorized by Congress without a declaration. The Quasi-War was America's first limited war: limited in its objectives, scale, forces, and targets. This undeclared war was divisive and controversial, with distinguished statesmen on both sides of the constitutional debate. But the fact that on this occasion the United States engaged in war with the approval of all three branches of government and when several who had written the Constitution were still alive and serving in government strongly implies that the United States pursued the war in compliance with the intent of the framers. The Quasi-War proved that the United States may lawfully wage war against a foreign power without a declaration of war.

Notes

1. See *Montoya v. United States*, 180 U.S. 261, 264–267 (1900); *The Prize Cases (The Amy Warwick)*, 67 U.S. (2 Black) [hereafter *The Prize Cases*], 635, 652–668 (1862); *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing, 1990), p. 1583; and U.S. Army Dept., *International Law*, DA Pam 27-161-2, vol. 2 (Washington, D.C.: 1962), pp. 2–4, 27–8.

2. Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, N.J.: Princeton Univ. Press, 1984), p. 69.

3. *United States v. Flores*, 289 U.S. 137, 155–156 (1933); *United States v. Rodgers*, 150 U.S. 249, 264 (1893); *Wilson v. McNamee*, 102 U.S. 572, 574 (1880).

4. Clausewitz, p. 87.

5. See Henry Kissinger, *Nuclear Weapons and Foreign Policy*, abridged ed. (New York: W. W. Norton, 1969), pp. 130–1, 189–90; and Robert McClintock, *The Meaning of Limited War* (Boston: Houghton Mifflin, 1967), p. 199.

6. *Gray v. United States*, 21 Ct. Cl. 340, 375 (1886).

7. See *Black's Law Dictionary*, p. 1583; and Robert E. Osgood, *Limited War: The Challenge to American Strategy* (Chicago: Univ. of Chicago Press, 1957), pp. 88–119.

8. Larry H. Addington, *The Patterns of War since the Eighteenth Century*, 2d ed. (Bloomington: Indiana Univ. Press, 1994), pp. 270–7.

9. For example, Thomas R. Stauch, "The United States and Vietnam: Overcoming the Past and Investing in the Future," *International Law*, vol. 28, p. 995 n. 1.

10. McClintock, p. 10.

11. DA Pam 27-161-2, p. 23; and James T. Johnson, *Just War Tradition and the Restraint of War* (Princeton, N.J.: Princeton Univ. Press, 1981), p. 190.

12. Johnson, pp. 191–6.

13. Clausewitz, p. 81.

14. Kissinger, p. 120.

15. See Johnson, p. 193; Kissinger, p. 120; and R. Ernest Dupuy and Trevor N. Dupuy, *The Harper Encyclopedia of Military History: From 3500 B.C. to the Present*, 4th ed. (New York: HarperCollins, 1993), p. 1083.

16. See Jeffrey W. Legro, *Cooperation under Fire: Anglo-German Restraint during World War II* (Ithaca, N.Y.: Cornell Univ. Press, 1995), pp. 144–216.

17. Kissinger, p. 120.

18. See "Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 18 October 1907, Preamble," 36 Stat. 2277; and U.S. Army Dept., *The Law of Land Warfare*, Field Manual [hereafter FM] 27-10 (Washington, D.C.: 1956), p. 3.

19. Johnson, pp. 191–6.

20. Kissinger, p. 120.

21. Eugene V. Rostow, "President, Prime Minister, or Constitutional Monarch," *American Journal of International Law*, vol. 83, 1989, p. 744.

22. John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," *California Law Review*, vol. 84, 1996, p. 205.

23. See Joseph W. Bishop, Jr., "Declaration of War," in *Encyclopedia of the American Constitution*, vol. 2, ed. Leonard W. Levy (New York: Macmillan, 1986), p. 549.

24. See *The Prize Cases*, p. 668.

25. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington, D.C.: U.S. Govt. Print. Off., 1920), p. 668. For the "Blackstone" reference, *Reid v. Covert*, 354 U.S. 1 (1954) (Black, J.).

26. See *United States v. Keehler*, 76 U.S. (9 Wall.) 83, 86–87 (1869); *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54 (1795); William B. Clark, ed., *Naval Documents of the American Revolution*, vol. 4 (Washington, D.C.: U.S. Govt. Print. Off., 1969), p. 454 n. 3 (Continental Congress draft law authorizing privateering and recounting British depredations against the American colonies "previous to any war declared against us").

27. See *Montoya v. United States*, 180 U.S. 261, 267 (1900); Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* (Urbana: Univ. of Illinois Press, 1989), pp. 127–33.

28. John W. Ragsdale, "The Dispossession of the Kansas Shawnee," *University of Missouri at Kansas City Law Review*, vol. 58, 1990, pp. 218–20.

29. See Wormuth and Firmage, p. 29; Clyde Eagleton, "The Form and Function of the Declaration of War," *American Journal of International Law*, vol. 32, 1938, p. 26.

30. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 19 (1831).

31. Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (University Park: Pennsylvania State Univ. Press, 1982), pp. 31–3.

32. Joseph Story, *Commentaries on the Constitution of the United States*, vol. 3 (Boston: Little, Brown, 1833), § 1166. For what constitutes a declaration of war, see Eagleton.

33. For examples of academics' views, *Velvel v. Johnson*, 287 F.Supp. 846 (D. Kan. 1968) (dismissing a University of Kansas law professor's lawsuit alleging that the Vietnam War was unconstitutional because it was undeclared), aff'd, 415 F.2d 246 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970); and J. Gregory Sidak, "To Declare War," *Duke Law Journal*, vol. 41, 1991, p. 27. For courts' views see, for example, *Massachusetts v. Laird*, 400 U.S. 886, 900 (1970) (Douglas, J., dissenting).

34. *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992) (citing Sidak).

35. John H. Ely, "The American War in Indochina, Part I: The Unconstitutionality of the War They Didn't Tell Us About," *Stanford Law Review*, vol. 42, 1990, p. 888.

36. For example, Frank B. Cross and Stephen M. Griffin, "A Right of Press Access to the United States Military Operations," *Suffolk University Law Review*, vol. 21, 1987, p. 1000.

37. See Leonard W. Levy and Louis Fisher, eds., *Encyclopedia of the American Presidency*, vol. 3 (New York: Simon and Schuster, 1994), p. 1267; Alexander DeConde, *The Quasi-War: The Politics and Diplomacy of the Undeclared War with France 1797–1801* (New York: Scribner's, 1966), p. vii; Harold Hongju Koh, "Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law," *International Lawyer*, vol. 26, 1992, p. 720; and Sidak, p. 56.

38. Dean Alfange, Jr., "The Quasi-War and Presidential Warmaking," in *The Constitution and the Conduct of American Foreign Policy*, ed. David G. Adler and Larry N. George (Lawrence: Univ. Press of Kansas, 1996), p. 274; "New Rules and Institutions for the Peaceful Settlement of International Disputes" (symposium), *American Society of International Law Proceedings*, vol. 76, 1984, p. 139 n. 1; and DeConde, *The Quasi-War*, p. vii.

39. See "Treaty of Alliance with France, 6 February 1778," 8 Stat. 6; "Secret Treaty with France, February 6, 1778," 17 Stat. 795; and Barbara Tuchman, *The First Salute* (New York: Knopf, 1988) pp. 212–5, 241.

40. Jean Favier et al., eds. *Chronicle of the French Revolution* (New York: Chronicle Publications, 1989), pp. 415–6, 426, 437; and Christopher Hibbert, *The Days of the French Revolution* (New York: William Morrow, 1980), pp. 69–188, 221–88, 332–4.

41. See "Neutrality Proclamation (April 22, 1793)," in Walter Lowrie and Matthew St. Clair Clarke, eds., *U.S. Congress, American State Papers: Foreign Relations*, vol. 1 (Washington, D.C.: Gales and Seaton, 1833), p. 140; and James W. Gerard, "French Spoliations before 1801," *Magazine of American History*, July 1884, pp. 31–2.

42. James Kent, *Commentaries on American Law*, ed. Oliver W. Holmes, vol. 1, 12th ed. (Boston: Little, Brown, 1873), pp. 50–1.

43. Alexander DeConde, *Entangling Alliance: Politics and Diplomacy under George Washington* (Durham, N.C.: Duke Univ. Press, 1958), pp. 193, 227–228, 306.

44. Ralph Adams Brown, *The Presidency of John Adams* (Lawrence: Univ. Press of Kansas, 1975), pp. 36–7; and DeConde, *The Quasi-War*, pp. 94, 360–80.

45. See "Jay's Treaty, 19 November 1794," arts. 17–18, 23–25, 8 Stat. 116, 125–126; "Treaty of Amity and Commerce with France, 6 February 1778," art. 19, 8 Stat. 12, 22–24.

46. Charles Cotesworth Pinckney, *Dictionary of American Biography*, ed. Dumas Malone (New York: Scribner's, 1934), p. 615; and U.S. Congress, *American State Papers: Foreign Relations*, vol. 2 (Washington, D.C.: Gales and Seaton, 1832), pp. 6–8.

47. Addington, pp. 8–9; and DeConde, *The Quasi-War*, pp. 498–9.

48. Lowrie and Clarke, eds., vol. 2, pp. 28–63.

49. Brown, p. 71; and DeConde, *The Quasi-War*, pp. 124–5.

50. Michael T. Palmer, *Stoddert's War: Naval Operations during the Quasi-War with France 1798–1801* (Columbia: Univ. of South Carolina Press, 1987), p. 6 (calculating the total at 2,309); and S. Rep. 10, 41st Cong., 2d Sess. (1870), reprinted in 46 *Cong. Rec.* 366, 377 (1910) (calculating the total at 2,290). Some sources give 1801 as the ending date of the Quasi-War, because it was in February 1801 that Congress ratified the Môrtefontaine Convention, which terminated the war. However, the fourth article of the convention specified that all captured ships not condemned as of its signing on 30 September 1800 were to be restored to their owners. The article became effective immediately. "Convention between the French Republic and the United States (Môrtefontaine Convention), 30 September 1800," 8 Stat.178. Therefore, the date of the convention marked the end of the naval war between France and the United States.

51. See "Treaty of Alliance with France," art. 6; "Definitive Treaty of Peace between France, Great Britain, and Spain, 10 February 1763," in Clive Parry, ed., *The Consolidated Treaty Series*, vol. 42 (Dobbs Ferry, N.Y.: Oceana, 1969), p. 279; John Keats, *Eminent Domain: The Louisiana Purchase and the Making of America* (New York: Charterhouse, 1973), pp. 269–70; and DeConde, *The Quasi-War*, pp. 114–6, 414 n. 12.

52. See John R. Elting, *Swords around the Throne: Napoleon's Grand Armée* (New York: Free Press, 1988), p. 55; and Brown, pp. 37, 150.

53. "Act Providing Naval Armament, 1 July 1797," § 12, ch. 7, 1 Stat. 350.

54. See "Act to Provide Naval Armament, 27 March 1794," ch. 12, 1 Stat. 350, superseded by Act of 20 April 1796, ch. 14, 1 Stat. 453, superseded by Act of March 3, 1797, ch. 57, 1 Stat. 508, superseded by Act of 1 July 1797, ch. 7, 1 Stat. 350; and Marshall Smelser, *The Congress Founds the Navy, 1787–1798* (South Bend, Ind.: Notre Dame Univ. Press, 1959), pp. 56–8, 72–100, 116–8.

55. "Act Prohibiting Exportation and Encouraging Importation of Arms and Ammunition," ch. 2, 1 Stat. 520; "Act for Defense of Ports and Harbors," ch. 3, 1 Stat. 521; "Act Authorizing a Detachment of Militia," ch. 4, 1 Stat. 522.

56. "John Adams's Speech to Congress (16 May 1797)," in Charles F. Adams, ed., *The Works of John Adams, Second President of the United States: With a Life of the Author*, vol. 9 (Boston: Little, Brown, 1854), pp. 115–7; "John Adams's Speech to Congress (23 November 1797)," in ibid., pp. 121–5; "Letter of John Adams to Secretary of the Treasury Oliver Wolcott, Jr. (27 October 1797)," in ibid., vol. 8, pp. 558–9; "Letter of John Adams to Secretary of State Timothy Pickering (14 October 1797)," in ibid., vol. 8, p. 554; and Smelser, pp. 102–20.

57. Stanley Elkins and Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788–1800* (New York: Oxford Univ. Press, 1993), pp. 555–73; DeConde, *The Quasi-War*, pp. 10–2, 28, 41, 46–9.

58. DeConde, *The Quasi-War*, p. 394 n. 20; and Kent, p. 116.

59. See Elkins and McKitrick, pp. 573–9; Brown, pp. 31, 60; and DeConde, *The Quasi-War*, pp. 46–59, 140–7.

60. Médéric-Louis-Elie Moreau de Saint-Méry, *Moreau de St. Méry's American Journey, 1793–1798*, ed. and trans. Kenneth Roberts and Anna M. Roberts (Garden City, N.Y.: Doubleday, 1947), pp. 91–2 n. 3.

61. "John Adams's Message to Congress (19 March 1798)," in Charles F. Adams, ed., vol. 9, p. 157.

62. "John Adams's Speech to Congress (16 May 1797)," in ibid., p. 116.

63. "Letter of John Adams to Secretary of the Treasury Oliver Wolcott, Jr. (27 October 1797)," in ibid., vol. 8, pp. 558–9.

64. See "John Adams's Message to Congress (19 March 1798)," in ibid., vol. 9, p. 157; and DeConde, *The Quasi-War*, pp. 69–70.

65. John D. Pelzer, "Armed Merchantmen and Privateers: Another Perspective on America's Quasi-War," *American Neptune*, vol. 50, 1990, p. 270.

66. See Jacob K. Javits, *Who Makes War: The President versus Congress* (New York: William Morrow, 1973), p. 29.

67. "Thomas Jefferson to James Monroe (21 March 1798)," in Paul L. Ford, ed., *The Writings of Thomas Jefferson*, vol. 7 (New York: G. P. Putnam, 1896), p. 221; letter from James Madison to Thomas Jefferson, 2 April 1798, reprinted in Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (Cambridge, Mass.: Ballinger, 1976), p. 143 n; Brown, pp. 51–4; and DeConde, *The Quasi-War*, pp. 70–7.

68. See "Letter from John Adams to the Printers of the *Boston Patriot* (10 June 1809)," in Charles F. Adams, ed., vol. 9, p. 304; Elkins and McKitrick, pp. 582–97, 610–2; John Ferling, *John Adams: A Life* (New York: Henry Holt, 1992), pp. 356–7, 369; and Page Smith, *John Adams, 1784–1826* (Garden City, N.Y.: Doubleday, 1962), pp. 952–5. But see DeConde, *The Quasi-War*, pp. 106–7 (imputing Abigail Adams's continuing wish for a declaration of war to her husband).

69. See Philip Bobbitt, "War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath," *Michigan Law Review*, vol. 92, 1994, p. 1364.

70. Smith, p. 979; and Smelser, pp. 197–8.

71. DeConde, *The Quasi-War*, p. 334.

72. Robert W. Love, Jr., *History of the U.S. Navy 1775–1941*, vol. 1 (Harrisburg, Penna.: Stackpole Books, 1992), pp. 59–60, 69–70; and Brown, pp. 88–90, 103–8.

73. Clausewitz, p. 93.

74. The slogan originated as a toast for John Marshall at a banquet in his honor, upon his return to America from France. DeConde, *The Quasi-War*, p. 93. Another toast lauded Adams while lampooning Jefferson: "To Adams: may he, like Samson, slay thousands of Frenchmen with the *jawbone* of Jefferson." Fawn M. Brodie, *Thomas Jefferson: An Intimate History* (New York: Norton, 1974), p. 407.

75. "Act to Declare the Treaties with France No Longer Obligatory, 7 July 1798," ch. 67, 1 Stat. 578; "Act to Suspend the Commercial Intercourse between the United States and France, 13 June 1798," ch. 53, 1 Stat. 565, amended by "Act of 16 July 1798," ch. 86, 1 Stat. 611; "Act to Authorize the Defense of Merchant Vessels, 25 June 1798," ch. 60, 1 Stat. 572; "Act to Protect the Commerce and Coasts, 28 May 1798," ch. 48, 1 Stat. 561, amended by "Act of 28 June 1798," ch. 62, 1 Stat. 574, amended by "Act of 9 July 1798," ch. 68, 1 Stat. 578; "Act Concerning Aliens (Alien Act), 25 June 1798," ch. 58, 1 Stat. 570; "Sedition Act, 14 July 1798," ch. 74, 1 Stat. 596; "Act to Provide for the Valuation of Lands and Dwelling Houses and the Enumeration of Slaves within the United States, 9 July 1798," ch. 70, 1 Stat. 580; "Act to Collect a Direct Tax within the United States, 14 July 1798," ch. 75, 1 Stat. 597; "Act to Provide Armament for the Protection of Trade, 27 April 1798," ch. 35, 1 Stat. 552, amended by "Act of 30 June 1798," ch. 64, 1 Stat. 575; "Act to Augment the U.S. Army, 27 April 1798," ch. 36, 1 Stat. 552, amended by "Act of 16 July 1798," ch. 76, 1 Stat. 604, repealed by "Act of 14 May 1800," ch. 69, 2 Stat. 85; "Act for the Defense of Ports and Harbors, 3 May 1798," ch. 40, 1 Stat. 554; "Act Authorizing the President to Procure Arms and Ammunition, 4 May 1798," ch. 41, 1 Stat. 555; "Act to Purchase Galleys, 4 May 1798," ch. 42, 1 Stat. 556, amended by Act of 22 June 1798, ch. 55, 1 Stat. 569; "Act Authorizing the President to Raise a Provisional Army, 28 May 1798," ch. 47, 1 Stat. 558, amended by "Act of 22 June 1798," ch. 55, Stat. 569; and "Act for Naval Armament, 16 July 1798," ch. 82, 1 Stat. 608.

76. See "Letter from John Adams to the Boston Marine Society (7 September 1798)," in Charles F. Adams, ed., vol. 9, p. 221.

77. "Act to Establish an Executive Department of the Navy, 30 April 1798," ch. 38, 1 Stat. 553; and "Act for Establishing a Marine Corps, 11 July 1798," ch. 72, 1 Stat. 594.

78. Elkins and McKitrick, pp. 644–5; and DeConde, *The Quasi-War*, pp. 125–6.

79. See *Clinch v. United States (Schooner Endeavor)*, 44 Ct.Cl. 242 (1909); and Smelser, pp. 188–90.

80. Kissinger, p. 141.

81. "Act to Suspend the Commercial Intercourse between the United States and France, 13 June 1798," § 5, ch. 53, 2 Stat. 565; and "Act to Declare the Treaties with France No Longer Obligatory, 7 July 1798."

82. Alan Schom, *Napoleon Bonaparte* (New York: HarperCollins, 1997), pp. 71–132; DeConde, *The Quasi-War*, pp. 84–5; and Jon Latimer, "French Farce at Fishguard," *Military History*, March 1997, p. 38.

83. "Act Authorizing the President to Raise a Provisional Army, 28 May 1798," § 5, ch. 47, 1 Stat. 558 (commissioning General Washington as commander of the U.S. Army); Ferling, pp. 355–60; and DeConde, *The Quasi-War*, at pp. 84, 96–7.

84. Letter from George Washington to Secretary of War James McHenry, 25 March 1799, in John C. Fitzpatrick, ed., *The Writings of George Washington from the Original Manuscript Sources, 1745–1799*, vol. 37 (Washington, D.C.: U.S. Govt. Print. Off., 1940), p. 160.

85. "Letter from George Washington to Timothy Pickering (11 July 1798)," in Fitzpatrick, ed., vol. 36, p. 324; "Letter from George Washington to Alexander Hamilton (14 July 1798)," in ibid., pp. 331–4.

86. DeConde, *The Quasi-War*, pp. 80–98, 329–30.

87. "Debates in the Federal Convention of 1787 as Reported by James Madison (1787)," in *Documents Illustrative of the Formation of the Union of the American States*, H.R. Doc. 398, 69th Cong., 1st Sess., 1927, pp. 475, 561–2; and Sofaer, *War, Foreign Affairs and Constitutional Power*, pp. 31, 57.

88. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324, 407 (1819) (Marshall, C. J., unanimous opinion).

89. Alexander Hamilton, "Federalist 23," in *The Federalist Papers*, ed. Clinton L. Rossiter (New York: Penguin, 1961), p. 153.

90. U.S. Constitution, art. 1, sec. 8, cl. 11.

91. Respectively clauses 1, 12 (both army and navy), and 15 of section 8; section 9, clause 2; section 10, clause 3; and section 8, clause 14.

92. U.S. Constitution, art. 4, sec. 5.

93. Ibid., art. 1, sec. 8, cl. 18.

94. Respectively, art. 2, sec. 1, cl. 1; art. 2, sec. 3; art. 2, sec. 1 (last two powers). For faithful execution, see *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946).

95. See "War Powers Resolution," 7 November 1973, 50 U.S.C. § 1541(c) (West 1997); *In re Neagle*, 135 US. 1, 63–70 (1890); *The Prize Cases*, 635, 666 (1862); *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973); *Massachusetts v. Laird*, 451 F.2d 26, 33 (1st Cir. 1971); *Durand v. Hollins*, 8 F.Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186); and *United States v. Smith*, 27 F.Cas. 1192, 1230 (C.C.S.D.N.Y. 1806) (No. 16,342).

96. See "War Powers Resolution"; *Mitchell v. Laird*, 615; *United States v. Kroncke*, 459 F.2d 697, 702 (8th Cir. 1972); *Massachusetts v. Laird*, 33; and *Ali v. United States*, 289 F.Supp. 530 (C.D. Cal. 1968).

97. Hamilton.

98. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring); and *Atlee v. Laird*, 347 F.Supp. 689, 706 (E.D. Pa. 1972) (three-judge panel), aff'd without opinion, 411 U.S. 911 (1973).

99. For example, *Talbot v. Seeman (The Amelia)*, 4 U.S. (4 Dall.) 1, 28 (1801); *Berk v. Laird*, 317 F.Supp. 715, 721–723 (E.D.N.Y. 1970), aff'd sub nom. *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1970), cert. denied, 404 U.S. 869 (1971).

100. U.S. Constitution, art. 4, sec. 4.

101. Ibid., art. 8, sec. 1.

102. Ibid., preamble; and *Jacobsen v. Massachusetts*, 197 U.S. 11, 22 (1905).

103. U.S. Constitution, art. 1, sec. 8, cl. 11; and *Baron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) (Marshall, C.J.).

104. See *Gibbons v. Livingston*, 6 N.J.L. (1 Halst.) 236, 255 (N.J. Sup.Ct. 1822).

105. See *Chacon v. 98 Bales of Cochineal*, 5 F.Cas. 390, 397 (C.C.D.Va. 1821) (No. 2,568) (Marshall, C.J.), aff'd sub nom. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822); and *The Wilson v. United States*, 30 F.Cas. 239, 242 (C.C.D.Va. 1820) (Marshall, C.J.).

106. William Blackstone, *Commentaries on the Laws of England*, vol. 1 (1765; repr. Birmingham, Ala.: Legal Classics Library, 1983), p. 250.

107. See "Act to Protect the Commerce and Coasts, 28 May 1798"; 1 Stat. 578; "Act to Authorize the Defense of Merchant Vessels, 25 June 1798"; "Act Concerning French Citizens That Have Been or May Be Captured and Brought into the United States, 28 February 1799," ch. 18, 1 Stat. 624; and "Act for the Government of the Navy of the United States, 2 March 1799," sec. 6, ch. 24, 1 Stat. 709.

108. 10 U.S.C. § 351 (West 1997).

109. See U.S. Constitution, art. 1, sec, 8, cl. 11, 14.

110. Keynes, p. 37.

111. "Act to Protect the Commerce and Coasts, 28 May 1798," ch. 48, 1 Stat. 561, amended by "Act of 28 June 1798," ch. 62, 1 Stat. 574, amended by "Act of 9 July 1798," ch. 68, 1 Stat. 578; "Act to Authorize the Defense of Merchant Vessels, 25 June 1798"; and "Act for the Government of the Navy of the United States."

112. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804); and *Bas v. Tingy (The Eliza)*, 4 U.S. (4 Dall.) 37, 43 (1800).

113. U.S. Constitution, art. 1, sec. 8, cl. 12–3; *Massachusetts v. Laird*, 26, 32 (1st Cir. 1971); and *Orlando v. Laird*, 317 F.Supp. 1013, 1018 (E.D.N.Y. 1970), aff'd, 443 F.2d 1039, 1042 (2d Cir. 1970), cert. denied, 404 U.S. 869 (1971). See *United States v. O'Brien*, 391 U.S. 367 (1968); and *United States v. Cornell*, 36 F.Supp. 81, 84 (D. Idaho 1940).

114. See William C. Banks and Peter Raven-Hansen, *National Security Law and the Power of the Purse*, vol. 3 (New York: Oxford Univ. Press, 1994), pp. 11–7; Richard D. Rosen, "Funding 'Non-Traditional' Military Operations: The Alluring Myth of a Presidential Power of the Purse," *Military Law Review*, vol. 155, 1998, p. 1.

115. U.S. Constitution, art. 1, sec. 9, cl. 7.

116. Alexander Hamilton, "Federalist 78," in Rossiter, ed., p. 465.

117. See Bobbitt, p. 1389.

118. U.S. Constitution, art. 1, sec. 8, cl. 18.

119. For example, *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Lichter v. United States*, 334 U.S. 742 (1948); and *Woods v. Miller*, 333 U.S. 138 (1948).

120. 17 U.S. (4 Wheat.) 316, 420 (1819).

121. See Thomas M. Franco and Michael J. Glennon, *Foreign Relations and National Security Law*, 2d ed. (St. Paul, Minn.: West Publishing, 1993), p. 523.

122. See endnote 37. Harold H. Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven, Conn.: Yale Univ. Press, 1990), p. 80; and Keynes, p. 91.

123. See 16 *Cong. Rec.* 701 (14 January 1885) (Rep. Burr W. Jones of Wisconsin); Elkins and McKitrick, p. 647; DeConde, *The Quasi-War*, pp. vii, 126; and Yoo, p. 167.

124. See S. Rep. 10, 41st Cong., 2d Sess., 1870, reprinted in 46 *Cong. Rec.* 366, 373–374 (1910); George A. King, "The French Spoliation Claims," *American Journal of International Law*, April 1912, p. 370; and Gerard, pp. 29, 39.

125. See *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); and *Pacific R.R. v. United States*, 120 U.S. 227, 234 (1887).

126. See "Act of 20 January 1885," ch. 25, 23 Stat. 283.

127. *Gray v. United States*, 21 Ct. Cl. 340 (1886).

128. *Clinch v. United States (The Schooner Endeavor)*, 44 Ct. Cl. 242, 273 (1909).

129. See *Blagge v. Balch*, 162 U.S. 439, 457 (1896).

130. 16 *Cong. Rec.* 706 (14 January 1885) (Rep. James O. Broadhead of Missouri).

131. See *Abrahim-Youri v. United States*, 139 F.3d 1462, 1467 (Fed. Cir. 1997); and *Security Pacific National Bank v. Iran*, 513 F.Supp. 864, 882 (C.D. Cal. 1981). *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1395-1396, 190 Ct.Cl. 267 (1970).

132. See *Gray v. United States*, 21 Ct. Cl. 340, 375 (1886); and *Hooper v. United States*, 22 Ct. Cl. 408, 429 (1887).

133. *Hooper v. United States*, 429.

134. See *Gray v. United States*, 374–375; King, pp. 374–6 (quoting the court and others).

135. See *Hamilton v. McClaughry*, 136 F. 445, 449 (C.C.D. Kan. 1905); *Navios Corp. v. The Ulysses II*, 161 F.Supp. 932, 938 (D.Md. 1958) (Thomsen, C.J.), aff'd *per curiam*, 260 F.2d 959 (4th Cir. 1958); and *United States v. Anderson*, 38 C.M.R. 386, 390, 17 USCMA 588, 592 (1968) (Kilday, J., concurring).

136. 86 *Cong. Rec.* 8913 (1940) (Sen. Prentiss Brown of Michigan).

137. "Convention between the French Republic and the United States (Môrtefontaine Convention), 30 September 1800," 8 Stat. 178. See "Final Ratification of the Convention between the French Republic and the United States, 19 December 1801," 8 Stat. 194; Elkins and McKitrick, pp. 662–90; and DeConde, *The Quasi-War*, pp. 223–58, 292–3, 311–25.

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141. See *Abridgement of the Debates of Congress* (New York: AMS Press, 1970), vol. 2, p. 298 (8 June 1798, Rep. William Claiborne of Tennessee).

142. See *Griswold v. Waddington*, 16 Johns. 436, 449 (N.Y. Ct. Err. 1819); Sofaer, *War, Foreign Affairs and Constitutional Power*, p. 56 n; and Charles A. Lofgren, "War-Making under the Constitution: The Original Understanding," *Yale Law Journal*, vol. 81, 1972, p. 693.

143. Alexander Hamilton, "Federalist 25," in Rossiter, ed., p. 165.

144. *Navios Corp. v. Compania Fletera Cajotamil S.A.*, 161 F.Supp. 932, 939 (D.Md. 1958).

145. Levy, ed., *Encyclopedia of the American Constitution*, vol. 3, pp. 1743, 2009.

146. Yoo, p. 177 n. 36.

147. See *Thomas v. Metropolitan Life Ins. Co.*, 388 Pa. 499, 507, 131 A.2d 600, 604 (1957); Dupuy and Dupuy, pp. 1354–67, 1415–6, 1477–83. The American incursions comprised the occupation of Veracruz (21 April–14 November 1914) and General John J. Pershing's "punitive expedition" to capture Francisco "Pancho" Villa (15 March 1916 through 5 February 1917).

148. Abraham D. Sofaer, "The Power over War," *University of Miami Law Review* , vol. 50, 1995, p. 43; Gerhard Casper, "Executive-Congressional Separation of Power during the Presidency of Thomas Jefferson," *Stanford Law Review*, vol. 47, 1995, pp. 480–2.

149. "Act for the Protection of the Commerce and Seamen of the United States against the Tripolitan Cruisers, 6 February 1802," ch. 4, 2 Stat. 129, 130; and *Berk v. Laird*, 317 F.Supp. 715, 722 (E.D.N.Y. 1970), aff'd *sub nom. Orlando v. Laird*, 443 F.2d 1039, cert. denied, 404 U.S. 869.

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151. "Letter from John Adams to Timothy Pickering (2 November 1798)," in Charles F. Adams, ed., vol. 8, p. 615.

152. DeConde, *The Quasi-War*, p. 457.

153. Ibid., p. 18; and "Speech of President John Adams to Congress (16 May 1797)," in Charles F. Adams, ed., vol. 9, p. 114.

154. DeConde, *The Quasi-War*, pp. 428–9, 456–7.

155. Elkins and McKitrick, pp. 537–8, 648–52; and Palmer, pp. 4–5.

156. Lowrie and Clarke, eds., vol. 2, pp. 29–30 (Secretary of State Timothy Pickering's report to Congress).

157. See "Jay's Treaty, 19 November 1794," art. 17–18; and Elkins and McKitrick, pp. 537–8.

158. King, p. 365.

159. See "Treaty of Amity and Commerce with France, 6 February 1778"; Elkins and McKitrick, p. 552; and Palmer, pp. 4–5.

160. *Cushing v. United States*, 22 Ct. Cl. 1, 3–4 (1886).

161. *McCobb v. United States*, 42 Ct. Cl. 134, 141 (1907); *Gray v. United States*, 21 Ct. Cl. 340, 400–404 (1886); and Elkins and McKitrick, p. 552.

162. Gerard, pp. 36–8.

163. Ibid., p. 38; and "John Adams's Message to the House of Representatives (15 February 1799)," in Charles F. Adams, ed., vol. 9, p. 161.

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168. *Cushing v. United States*, 1, 8.

169. DeConde, *The Quasi-War*, p. 499; and Gardner W. Allen, *Our Naval War with France* (Boston and New York: Houghton Mifflin, 1909), pp. 298–9.

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174. Lofgren, p. 690.

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177. See Palmer, pp. 30–1; and Smith, p. 979.

178. "Act to Authorize the Defense of Merchant Vessels, 25 June 1798"; "Act to Provide Armament for the Protection of Trade, 27 April 1798," amended; and "Act to Protect the Commerce and Coasts, 28 May 1798," amended.

179. See *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 19, 20 (C.C.D. Pa. 1782); "New Rules and Institutions for the Peaceful Settlement of International Disputes," pp. 130, 139 n. 1; and Lofgren, p. 692.

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181. *Kennedy v. Ricker*, 14 F.Cas. 318, 320 (D.C.N.H. 1801) (No. 7,705).

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183. U.S. Articles of Confederation, art. 9.

184. "Opinion of Secretary of State Thomas Jefferson on 'The Little Sarah' (16 May 1793)," in Ford, ed., vol. 6, p. 259.

185. *Massachusetts v. Laird*, 26, 33.

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190. "Act of 7 July 1798," ch. 67, 1 Stat. 561.

191. "Presidential Proclamation Revoking the Exequaturs of the French Consuls (13 July 1798)," in Charles F. Adams, ed., vol. 9, pp. 170–2; and "John Adams's Message to Congress (21 June 1798)," in ibid., p. 159.

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